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Rethinking *Chevron*

HON. JAMES P. ROONEY*

Must a Question Have an Answer?
Can't There Be Another Way?[1]

INTRODUCTION

Statutory interpretation can be hard. The now thirty-eight-year-old *Chevron* doctrine offered the promise of relieving federal courts of some of this burden if an agency, tasked with enforcing a statute, had already done the work of interpreting a vague statutory provision. Then, instead of having to start from scratch, a court need simply defer to the agency's interpretation so long as it is reasonable. The court would not only have saved itself from a potentially difficult task, but also would have helped burnish the reputation of a branch of government often criticized for legislating from the bench by making this show of respect for Congress's role in drafting legislation and the executive branch's role in implementing it.

Although *Chevron U.S.A. v. Natural Resources Defense Council, Inc.*[2] is one of the most cited Supreme Court decisions,[3] reflecting how heavily the lower courts rely on it, there is a real possibility that its days are numbered. That became clear recently when a long-serving Supreme Court justice opened an oral argument by asking the petitioner whether he was asking the Court to overrule *Chevron*.[4]

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* James P. Rooney is the Acting Chief Administrative Magistrate of the Massachusetts Division of Administrative Law Appeals. He was formerly an administrative law judge with the Massachusetts Department of Environmental Protection. He is a lecturer on law at New England Law | Boston.

1 DAVID BYRNE, *It's Not Dark Up Here, on* AMERICAN UTOPIA (Nonesuch 2018).

2 Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

3 *Id.* (citing Westlaw on May 11, 2023, its website noted that *Chevron* had been cited 98,483 times in all sources, including 18,248 times in case reports, 3,533 times in administrative decisions and guidance documents, and 39,746 times in appellate court documents).

4 Transcript of Oral Argument at 5, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022) (No. 20-1114), https://perma.cc/6TNV-JH2F. Justice Thomas previously expressed reservations about the constitutionality of the Chevron doctrine. *See* Michigan v. EPA, 576 U.S. 743, 761–62 (2015) (Thomas, J., concurring). As it happens, when the decision was issued, it examined the statutory

This has been a long time coming since *Chevron* has been controversial from the start. The case appears to conflict with the Administrative Procedure Act's provision tasking the courts with deciding whether an agency's action conflicts with the law.[5] Two of the latest Supreme Court appointees have criticized it for this reason, worrying that it grants too much authority to administrative agencies.[6] It has engendered a host of special rules that are inconsistent with the usual approach to administrative law, and the Supreme Court has not always applied its own approach with consistency.[7] Consequently, *Chevron* is a decision that has launched a thousand law review articles trying to explain, critique, or fix it.[8]

It is time to take a fresh look. The problem with *Chevron* is that it suffers from being half right. It recognizes that not every statutory interpretation question presented to a court must necessarily lead to one, and only one, way an agency can implement a statute. Had the Court stopped there and simply stated that the agency before it had discretion to fill in necessary details in a statutory scheme it was implementing, that would have been commonplace. But instead, the Court adopted a novel legal fiction that if a statute is vague or silent on a particular point, it can be assumed Congress meant that the agency implementing the statute was free to adopt any minimally credible reading it wanted.

This unnecessary and misleading assumption is what is wrong with *Chevron*. What should it be replaced with? Literally, nothing. Instead of

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interpretation question before it in the manner proposed in this article. It directly addressed whether the statute in question gave the agency the discretion to act as it did and answered the question without the need for any presumptions.

[5] *See* 5 U.S.C. § 706(2)(A)–(D).

[6] Gutierrez-Brizuela v. Lynch, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring) ("There's an elephant in the room with us today. We have studiously attempted to work our way around it and even left it unremarked. But the fact is *Chevron* and *Brand X* permit executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design."); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (book review) (writing while on the D.C. Circuit, "Chevron has been criticized for many reasons. To begin with, it has no basis in the Administrative Procedure Act. . . . In many ways, Chevron is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.").

[7] *See* William N. Eskridge, Jr. & Lauren E. Baer, *The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from Chevron to Hamdan*, 96 GEO. L.J. 1083, 1098–99 (2008) (noting that one study reviewing 1014 agency interpretation cases heard by the Supreme Court between 1984 and 2006 came to the surprising conclusion that the Court relied on *Chevron* in only 8.3% of those cases, while in a whopping 53.6% of them it relied on ad hoc judicial reasoning with no deference given to the agency's view).

[8] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984) (citing Westlaw on May 11,2023, which noted that *Chevron* had been cited 21,652 times in secondary sources); *see, e.g.*, Kristin E. Hickman & Aaron L. Nielson, *Symposium: The Future of Chevron Deference*, 70 DUKE L.J. 931, 1016 (2021).

assuming that statutory ambiguity or silence equals agency discretion, the courts should directly examine whether the agency really has discretion.

The assumption conflates an agency's role in interpreting a statute with its role in implementing the statute. An agency must interpret a statute before implementing it, but not every implementation is an interpretation. If an agency concludes that Congress meant it to act in only one way, then the manner in which the agency implements the statute is driven by its interpretation of the statute. If the agency concludes that the statute gives it discretion to choose between various means of implementation, then it has interpreted the statute only to the extent that it claims authority to act under the statute and its chosen method is within the limits of its discretion. The particular approach it takes to implement the statute is a policy choice, not an interpretation of the statute.

Chevron's assumption that ambiguity or silence necessarily means that an agency has discretion to interpret—and therefore implement—a statute simply muddies the water by failing to distinguish between agency statutory interpretations and agency implementation decisions.[9] The corollary, that if a statute is clear an agency lacks interpretive and implementation discretion, has led to an excessive focus on whether a statute is clear or ambiguous, not on whether Congress meant to give the agency a range of options when implementing a statute.

Asking the wrong question is unlikely to lead to the right answer. Courts should ask not simply whether a statute is vague or silent on a point, but whether it appears plausible that the agency has discretion to adopt more than one approach consistent with the basic meaning of the statute. If the statute admits only one correct interpretation that must be implemented in only one way, the agency does not have any discretion to interpret it otherwise. If discretion is inconsistent with the statutory scheme, then the courts must determine what path the agency is to follow even if it is not immediately evident. On the other hand, if the statute grants the agency discretion in the way it should be implemented, then the agency lacks the power to interpret that discretion more narrowly or broadly than the statute provides. Not until it has been determined that the agency has some discretion in implementing a statutory phrase should a court decide whether the agency adopted an approach within the allowable range of discretion.

I will look first at the *Chevron* decision itself and endeavor to show that the distinction made between statutory clarity and ambiguity does not demonstrate that an ambiguous or silent statute necessarily means the agency tasked with implementing it has discretion to interpret the statute as

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[9] *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515–16 (1989). There have been other purported rationales for Chevron, such as that the separation of powers requires it. Justice Scalia, a long-time proponent of Chevron, dismissed that justification by noting there could be no constitutional objection to Congress passing a statute forbidding the courts from giving deference to an agency's views.

it chooses. Moreover, an examination of the facts of *Chevron* will show that the statutory term involved was not in fact ambiguous; it was reasonably straightforward in providing the agency with options to adopt a more detailed approach than described in the statute itself. Thus, the case was not an appropriate vehicle to adopt a broad rule on how to handle the interpretation of statutory ambiguity or silence.

I will then examine, in some detail, ten post-*Chevron* Supreme Court decisions. I will look at how *Chevron* has influenced and distorted the way statutory interpretation is conducted, particularly the way in which the distinction *Chevron* makes between clear statutes (in which the agency does not have discretion), and ambiguous or silent ones (in which it does). This has pushed the parties and ultimately the justices into trying to pigeonhole a statute into one of these two possibilities. I begin with a case in which the interpretation issue should have been easy to resolve but was made more difficult by trying to make the statute fit one of these categories. I then consider a case in which the statute seemed quite clear, but a purported ambiguity led to a questionable result. I turn next to a case that presented the opposite situation: a statute that was remarkably obscure but was viewed as clear by a majority. The fourth case shows how forceful the pull of *Chevron* has become when any hint of statutory interpretation is involved and ends up being used in situations where it is unnecessary to the decision. Following that, I will discuss some of the ancillary rules derived from *Chevro*n: a rule that would allow agencies' views of their jurisdiction to prevail when a statute is ambiguous or silent; an exception to the application of *Chevron* if the interpretation is particularly important; and the distinction between the types of agency actions that the Supreme Court has determined would warrant *Chevron* deference. None of these rules, which further distort statutory interpretation, would be necessary but for *Chevron*.

A close examination of these cases will also show the folly of basing discretion on a determination that a statute is ambiguous without a clear notion of what ambiguity is. In only two of the cases I examine does the agency involved clearly have some discretion to adopt different approaches to a statutory phrase. Six of the remaining cases are instances in which the agency did not have discretion either because: the purported ambiguity or silence could not sensibly be read in more than one way, or because the only two plausible interpretations were polar opposites that could not both be correct interpretations of Congressional intent.

I. The Chevron Decision

I begin with the *Chevron* decision itself and start with the adopted rule before turning to the situation that called this rule into being. A close look will demonstrate that the Court's rationale, that statutory ambiguity or silence equals agency interpretive and implementation discretion, does not hold up and this assumption is unnecessary to resolve the interpretation

question at issue in the case itself.

A. *The* Chevron *Rule*

Justice John Paul Stevens, who wrote the *Chevron* opinion, divided the analysis into two steps that he explained as follows:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[10]

In these steps, Justice Stevens mentioned only two possible types of statutes: a clear one that directed an agency to implement it in a specific way or an ambiguous or silent one that an agency could interpret and implement in multiple ways. But there are obviously more possible options, including a statute that clearly gave an agency discretion, and an ambiguous or silent one that was meant, if inarticulately, to limit an agency to only one method of implementation.[11] By focusing on only the two options he mentioned,

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[10] 467 U.S. at 842–43.

[11] *See id.* at 843. Justice Stevens acknowledged one way that Congress could clearly give an agency broad discretion, saying that when "Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation." He does not say exactly how a statutory gap can be explicit, but Justice Stevens sets up an analogy that he hopes will convince the reader that his assumption of agency discretion is valid when the agency is faced with an ambiguous or silent statute. If, in the "explicit gap" situation, Congress expressly delegates an agency to provide detailed enforcement of a very general statute, then the agency must have the authority to decide how to fill the gap. So too, according to Justice Stevens, if Congress has left a statute ambiguous or silent, the agency that implements it must also have interpretive authority. The problem with the analogy is that the premise is flawed. This is shown by looking at a few examples of explicit delegation. *See, e.g.*, 42 U.S.C. § 7408(a)(1)(A) (1990). For example, a provision of the Clean Air Act gives the EPA Administrator the authority to publish a list of air pollutant "emissions of which, in his judgment, cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." A direction to an agency head to use his or her judgment is as clear a grant of discretion as there can be. Congress frequently uses this method to grant an agency discretion to broadly describe a topic and give an agency the authority to regulate it. Examples like this abound. 29 U.S.C. § 651(b)(3) (1970). In the Occupational Safety and Health Act, Congress has authorized "the Secretary of Labor to set

Justice Stevens was using the two-step approach as proof that agencies can be assumed to have broad discretion to interpret statutory silence or ambiguity. His proof starts with the dichotomy he set forth in step one. Congress has either given clear direction to an agency or it has not. In the first instance, the agency must do as Congress has instructed; by contrast, in the latter instance, Congress must have meant the opposite. Thus, it can be assumed that the ambiguous or silent statute can have multiple plausible meanings, and the agency will have some discretion in interpreting and implementing the statute.

The assumption that agencies always have interpretive discretion if a statute is ambiguous or silent is true only if the proof holds up. Justice Stevens' proof seems to state a logical proposition, but in application, it does not. Try it the other way around. Look at the occasions in which Congress has explicitly given agencies discretion. Could anyone reasonably conclude from those occasions that the opposite must be true of ambiguity or silence, meaning they must be instances in which Congress meant to limit agency options?

The truth is that there is no contrast between clarity and ambiguity when it comes to determining whether a statute has given an agency specific marching orders or discretion. That Congress sometimes clearly tells agencies exactly what to do has no bearing on whether an ambiguity or silence in a statute means that an agency has discretion. Justice Stevens's supposition that statutory ambiguity or silence equals discretion cannot hold up without this crutch.

1. Ambiguity

Ambiguity and silence are quite different things. An ambiguous word or phrase may be subject to multiple meanings. Congress may sometimes leave a term deliberately vague in order to ease a bill's passage, with the understanding that the agency charged with implementing the bill will sort it out later. That is a circumstance in which the deference proposed by *Chevron* would apply, but it is hardly the only reason a statute might be ambiguous. It is just as likely that Congress failed to see a purported ambiguity that a litigant assert. A more neutral examination of the statute might show that it is not that ambiguous, or that deference to an agency's interpretation is not appropriate. But because of the different ways that *Chevron* treats clear statutes, there will always be at least one party to

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mandatory occupational safety and health standards applicable to businesses affecting interstate commerce." *Id.* In these two instances, the agencies would not be filling a gap. Instead, they would be following an explicit Congressional direction to act. Nor would they be elucidating the meaning of the statute when they act. The listing of an air pollutant or the setting of a safety standard would be actions allowed by the statute, not ones that further define the meaning of the underlying statutes. Thus, instances of explicit delegation shed no light on the interpretive authority of agencies faced with an ambiguous or silent statute.

litigation—generally the government—that has an incentive to view a statute as ambiguous.

The claim that ambiguity implies discretion does not always hold up. Take the dispute in *U.S. v. Mead Corporation*, a good example of a purported ambiguity that did not lead to the conclusion that the agency had interpretive discretion.[12] The issue was whether "day planners" were subject to a 4% tariff on "diaries" or no tariff at all because they were not diaries.[13] The United States Customs Service ("Customs") thought day planners were diaries because one of the dictionary definitions of "diary" was "a book including 'printed dates for daily memoranda and jottings.'"[14] Mead argued, and the Federal Circuit agreed, that "diary" referred only to the alternative dictionary definition, namely a personal journal.[15] If the fact that a word may have more than one meaning is enough to create ambiguity, then virtually every statutory interpretation problem post-*Chevron* will involve ambiguity. But there is no real reason to believe that the word "diary" was ambiguous, or that any difficulty in figuring out whether it applied to day planners gave Customs discretion to decide which types of diaries should be subject to a tariff. Customs had only two diametrically opposed options to deal with, which was both an interpretation and an implementation issue: whether or not to impose a tariff on day planners. This is not a situation with multiple possible options along a continuum that might suggest discretion. Congress meant to subject diaries to a tariff. It did not further define the word or say which type of diary it meant. But this does not obscure the meaning of "diary." To the contrary, the answer is discernible, and Customs got it right. Congress meant to impose a tariff on anything that could be called a diary. Therefore, consistent with Custom's position, both day planners and personal journals are diaries for tariff purposes.[16]

It is hard to conceive that Congress intended to give Customs discretion to impose a tariff on day planners one day and changed its mind the next, declining to impose a tariff at all. Either a day planner is a diary, or it is not. Even if it is difficult to discern Congress's intent as to whether day planners are diaries, there must be a single, definitive answer. It is the obligation of the agency and then the courts, when asked, to figure it out. The purportedly ambiguous term at issue in *Mead* was not one that the agency had discretion to resolve from time to time. Hence, *Chevron* ought to play no role—and, as shall be seen, Customs recognized this. Other examples of purported

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[12] *E.g.*, U.S. v. Mead Corp., 533 U.S. 218, 221 (2001).

[13] *Id.* at 224.

[14] *Id.* at 225.

[15] *Id.* at 226; Mead Corp. v. U.S., 185 F.3d 1304, 1305–06 (Fed. Cir. 1999). The Federal Circuit thought it significant that Customs had not defined Mead's planner as a diary in a regulation to which *Chevron* deference was owed but in an administrative ruling that could differ from one customs port to another.

[16] *See Mead Corp.*, 533 U.S. at 225.

ambiguity will be offered later, but *Mead* demonstrates that claims of ambiguity must be scrutinized carefully to see if they are accurate at all—let alone whether they have anything to do with discretion.

2. Silence

It is much harder to tell what, if anything, silence means. As with ambiguity, Congress may have deliberately chosen not to address what would seem an obvious topic if the proponents of a bill wished to avoid controversy that would interfere with its passage; they may have chosen not to say anything so that the agency tasked with implementing a statute would not have the authority to address it. But silence in a statute could just as well mean that Congress had not thought to address a question. Though silence may prove more confusing, it may not necessarily involve agency discretion. There are even some circumstances in which silence ought not interfere with a definitive resolution of an issue.

Such was the case in *Barnhart v. Walton*, which involved an interpretation of a Social Security statute addressing disability claims.[17] The contested provision defined "disability" as an "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months."[18] Under this provision, an applicant for disability benefits would have to show two things: an inability to work, and a physical or mental impairment that caused the inability. There was no dispute that the statute required a physical or mental impairment lasting for at least twelve months, but there was also no dispute that the statute was silent as to the duration of the inability to work. This mattered in *Barnhart* because the disability applicant was a school teacher who lost his job after developing schizophrenia. He claimed eligibility for benefits because his schizophrenia was going to last for more than twelve months and prevent him from being able to work. However, he obtained a new job as a cashier within eleven months.[19]

So, what meaning could be found in the statute's silence as to how long an applicant must be disabled from work? The Fourth Circuit held that, because the statute did not require an inability to work to last twelve months, the teacher was entitled to the benefits he sought. The Court's view was that silence was an unambiguous sign that no duration requirements applied to the inability to work, and thus, there was no need to defer to a regulatory interpretation contrary to the text of the statute.[20] But the Supreme Court found a different meaning in the statutory silence. Because the statute also

[17] Barnhart v. Walton, 535 U.S. 212 (2002).

[18] 42 U.S.C. § 423(d)(1)(A) (2021).

[19] *Barnhart*, 535 U.S. at 215.

[20] Walton v. Apfel, 235 F.3d 184, 188–89 (4th Cir. 2000).

provided that an "individual shall be determined to be under a disability only if his . . . impairment . . . [is] of such severity that he is not only unable to do his previous work but cannot . . . engage in any other kind of substantial gainful work which exists in the national economy," then, by implication, the statute also required that an individual be unable to work gainfully for some length of time.[21] Thus, even silence can be pierced to come to a definitive answer.

A closer reading of *Barnhart* highlights two issues for the Social Security Administration (SSA) to address: does an applicant have to be unable to work for a certain length of time to qualify for disability benefits and, if so, how long? The first question presents only two divergent options on how the statute should be interpreted: there was no requirement that an applicant had to be unable to work for any particular period of time (the Fourth Circuit's opinion) or there must be some requirement of lengthy incapacity (the agency's view). Although the Supreme Court treated the SSA's construction of the statute as "permissible,"[22] it must be more than that. It is hard to read the Court's opinion and come to the conclusion that it could also have thought the Fourth Circuit's approach, though inferior, would have been an option the agency could have adopted. Either the statute's silence meant there is no length of incapacity requirement or, despite the silence, there is such a requirement. There was no room for the SSA to have the discretion to adopt one approach, shift gears, and adopt the exact opposite approach. The practical consequences of these divergent approaches would have led to an eighty-billion-dollar difference in Social Security disability payouts over a ten year period, according to the Court.[23] Could Congress really have intended for the SSA to decide on its own whether to impose a length of incapacity requirement and potentially incur such a huge debt? There was simply no reason to believe this when the statute was otherwise geared to provide disability benefits only to those who were permanently disabled from all gainful employment. The Court's opinion that the statute imposed a length of incapacity requirement should be read as definitive—despite its insistence that it was simply deferring to a reasonable agency interpretation—because the Court reasoned that there is no discretion for the SSA to do otherwise.

But having decided that an SSA disability applicant must be incapacitated from work for at least some period of time, how long should that period be? Unsurprisingly, the statute is silent on this implementation issue. The SSA picked twelve months—the same as the time period set forth in the statute that a physical or mental impairment must exist, or be expected to exist, for benefit eligibility—to which the Court then deferred. In theory, if the agency really had discretion, it could have decided on six months,

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[21] *Barnhart*, 535 U.S. at 218–19 (discussing 42 U.S.C. § 423(d)(2)(A)).

[22] *Id.* at 219.

[23] *Id.* at 217.

fourteen months, or some other length of time; this is just the sort of continuum of options one might expect if an agency had discretion.

In reality, however, the SSA had little choice, for it is hard to see how any other length of time would be defensible. The purpose of Social Security Disability Insurance (SSDI) is to provide benefits to those who are permanently disabled from all gainful employment. Some may have suffered an injury so severe that it was immediately obvious that the individual could never work again. As the Court pointed out, one provision of the statute allows for such individuals to apply for disability insurance payments five months after a disabling injury.[24] In many instances, the permanence of a physical or mental impairment, and how long a person could not work, may not be so obvious. The injured person may go through various medical treatments—or physical or mental therapy— and simply need some time to recover.

The twelve-month impairment requirement is a legislative judgment that such a length of time will be sufficient to decide whether the impairment is permanent, potentially qualifying a person for disability benefits. This length of time may not accurately reflect how long it takes to make every such decision, but is, in effect, a legislative compromise between the desire to provide benefits to a disabled person quickly and the urge to hold off until it can be definitively determined that an individual is permanently disabled from work. Assuming that this was Congress's considered judgment on impairment, it is hard to justify any different length of time when it comes to work incapacity. Why should a person who is physically or mentally impaired for twelve months have to show work incapacity that has lasted fourteen months? Or, why should that same person be eligible for disability benefits after only six months of work incapacity? Although the Social Security statute is silent as to whether there is a length of time required for work incapacity, once it was recognized that such a requirement must be established, the only plausible choice was the same twelve-month requirement that Congress adopted in connection with impairment. Hence, the agency had no discretion on this question, and thus, the Court's deference to the agency's decision was unnecessary to decide the issue.

Statutory ambiguity or silence does not indicate whether an agency has discretion to implement a statute in more than one way, and this ought to affect how a court analyzes an agency's approach. Thus, when faced with a question about the meaning of a contested statutory provision, the question should not be simply whether the provision is clear, ambiguous, or silent; but rather, whether the provision appears to allow for only one answer (even though what that answer is may not be readily apparent) or allows the agency some discretion in implementation. To the extent only one answer is plausible, the agency's role in litigation over the meaning of a statute would

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[24] *See id.* at 220–21.

be limited to arguing that the position it proposes is correct.[25] A court should be willing to listen intently to the views of an agency that is responsible for implementing a statute and presumably some expertise in doing so, but only to the extent the agency is persuasive. If a definitive answer must be found, then agency discretion plays no role and the court must strive to find the correct answer—one that may agree with the agency's approach but need not. If, on the other hand, a proper interpretation of statutory ambiguity or silence shows that the agency has discretion, and its approach is within the limits of that discretion, then the agency should prevail, absent a substantive reason to the contrary. For questions that allow only one definitive answer, an agency's views of the existence of discretion and its breadth should be adopted only to the extent they are persuasive. These are interpretive issues in which agency expertise can prove useful to a court examining the nature and limits of agency discretion. The agency's policy choice to pick one allowable option is not an interpretive act and should play no role in determining the meaning of a statute.

B. *The* Chevron *Facts*

These examples show that an agency does not necessarily have discretion to pick from multiple options when tasked with implementing a statute that is ambiguous or silent. How is it that the *Chevron* case led Justice Stevens and a unanimous Court to a far different conclusion? The likely answer is that the facts fit Justice Stevens's proposition because it was clear that the agency had discretion and the only question was its limit.

Fundamentally, the statute needed to contain an ambiguity for the Court to state a rule as to how the ambiguity should be addressed. The law is replete with vague provisions, such as "due process." The phrase "stationary source" in the Clean Air Act was supposedly vague enough to require a rule to address it.[26] On its face, the phrase does not seem vague at all. "Stationary" means fixed and unmoving. There is no obvious need to resort to a dictionary or any other source to figure that out. "Source," in the context of the Clean Air Act, means a pollution source. So, a stationary source is a pollution source that does not move.

Where was the confusion, then? It was in the implementation. Congress amended the Clean Air Act in 1977, in part to address those areas of the country that had not yet achieved national air quality standards within the time Congress had set. It required that states in nonattainment areas establish a new permit program regulating "new or modified major stationary sources."[27] The amendment that added this new permit program

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[25] *See* Skidmore v. Swift & Co., 323 U.S. 134 (1944) (describing the specific type of deference).

[26] *See* 42 U.S.C. § 7502(c)(4) (1990).

[27] Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 850 (1984) (citing Fair Debt Collection Practices Act, Pub. L. No. 95–109, 91 Stat. 747 (1977)).

did not define stationary source.[28] In regulating a stationary source, the Environmental Protection Agency ("the EPA") had to determine whether to focus on an individual pollution-emitting apparatus, a factory building containing a series of pollution-emitting machines, or a group of buildings that made up an entire plant. With the advent of the Reagan administration in 1981, the agency changed its regulatory definition to allow states to adopt a plant-wide definition of "stationary source."[29] This "bubble concept" was previously applied to another provision of the Act called the New Source Performance Standards, which was favored by the industry because the provision allowed a plant modification to proceed without needing to adopt the best available anti-pollution technology otherwise required if the change would not increase total emissions from the plant.[30] The D.C. Circuit already held that a plantwide approach was inconsistent with the definition of "stationary source" in the New Source Performance Standards.[31] When a challenge was brought using this same approach under the 1977 amendment, then-D.C. Circuit Judge Ruth Bader Ginsburg, while guided by the earlier decision, ruled that the bubble concept could not be the governing principle in nonattainment areas because it would fail to ameliorate air quality in those states as quickly as Congress intended. Thus, the statute could not be read to allow it.[32]

This case came before the Supreme Court as *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* Although the Circuit had ruled on both the proper interpretation of "stationary source" and on the substantive merits of the bubble concept, Justice Stevens turned the focus of the case away from the substantive merit of the EPA's regulation to the question of what "stationary source" meant. He treated this issue as a primarily legal one involving statutory construction. To this question, he developed and applied the two-step process and concluded that the EPA's approach to "stationary source" was both allowable and reasonable.[33]

Starting with step one, where does "stationary source" fit? Is the statute clear, ambiguous, or silent as to whether the source to be regulated is an

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[28] *Id.* at 851.

[29] *Id.* at 857–58.

[30] *See* ASARCO Inc. v. EPA, 578 F.2d 319, 323 (D.C. Cir. 1978).

[31] *See* 42 U.S.C. § 1857c-6(a)(2) (1970) (defining statutory source in 1970 amendment to the Clean Air Act as it applied to New York Performance Standards to mean "any building, structure, facility, or installation which emits or may emit any air pollution"); *see also ASARCO Inc.*, 578 F.2d at 326–29 (rejecting use of bubble concept in connection with these standards, focusing on use of the singular in the statutory source, and concluding that treating a whole plant with multiple buildings as a stationary source conflicted with the plain language of the Clean Air Act; also concluding that the bubble concept was inconsistent with the purpose of the statute to enhance air quality because it postponed the time when the best pollution control technology would be employed).

[32] Nat. Res. Def. Council, Inc. v. Gorsuch, 685 F.2d 718, 726 (D.C. Cir. 1982).

[33] *Chevron U.S.A., Inc.*, 467 U.S. at 860–66.

apparatus, a factory building, or an entire plant? The *Chevron* opinion, for all its emphasis on distinguishing clarity and ambiguity, offers little in the way of a precise answer as to where Justice Stevens thought the regulatory take on "stationary source" fell within the rubric he set forth. This was hardly a situation in which Congress had spoken to the precise question, as the 1977 amendment did not define the meaning of "stationary source" in any more detail. Indeed, if the statute clearly told the agency what to do, there would have been no need to devise the approach Justice Stevens adopted, as it was already beyond doubt that agencies had to follow explicit Congressional commands. Justice Stevens mentioned only three possible choices, and one was eliminated, therefore, he must have concluded as to the meaning of stationary source that the statute was either ambiguous or silent.

Which one was it? Justice Stevens did not quite say, but he emphasized that the EPA had tried a number of different approaches to defining a "stationary source," suggesting that the phrase was ambiguous enough to accommodate multiple interpretations.[34] Yet, read plainly, "stationary source" is quite clear; it refers, as stated at the outset of this section, to pollution sources that are fixed. Congress's use of this phrase serves to distinguish this section of the Clean Air Act from another section that regulates mobile sources. Beyond that, the use of "stationary source" does nothing more. So, what we have here is not vagueness, but the limit of meaning. The phrase "stationary source" describes clearly the meaning Congress intended because it distinguished between fixed and mobile sources, but after that, it is silent as to which aspect of a fixed air pollution source should be the focus of EPA regulation. This mix of clarity and silence does not make the phrase ambiguous at all. Congress explicitly commanded the EPA to regulate "stationary sources." The statute's silence on what specific devices or buildings could be considered "stationary sources" meant that, in this instance, the EPA ought to have the discretion to choose to regulate any pollution source that does not move, whether it be an apparatus, a factory building, or an entire plant. Each of the options mentioned fits the definition of "stationary source": each emits air pollution, and each is fixed.

The Reagan Administration EPA thus had the discretion to adopt a plant-wide approach to "stationary sources." The statutory phrase "stationary source" gave the agency multiple viable options to choose from, and the plant-wide approach was one of the plausible ways. Although the D.C. Circuit had treated the EPA's plant-wide definition of "stationary source" as intrinsically tied to its policy merits,[35] the definition and the policy issues can be shown to be separable. The Circuit objected to the particular manner in which the EPA used a plant-wide definition and the bubble concept. By allowing a polluter to modify an existing plant without reducing

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[34] *Id.* at 863–64.

[35] Nat. Res. Def. Council, Inc., 685 F.2d at 726–27.

the plant's total emissions, the Circuit believed the EPA would not achieve the congressional goal of reducing pollution in nonattainment states, and therefore, "stationary source" could not mean an entire plant in a nonattainment area.[36] But there is no inherent reason why an approach that looks at pollution totals from an entire plant must be conditioned this way. In a nonattainment area, such modification could be allowed only if the net result was pollution reduction commensurate with a goal that would bring the state into attainment. It is this substantive objection that one might have expected the Court to turn to next.

But in *Chevron*, Justice Stevens, having determined that the EPA's decision to take a plant-wide approach to "stationary sources" was within its discretion, did not move on to examine the substantive legitimacy of the Agency's approach. Although the Supreme Court had already accepted that one of its roles was to evaluate the substantive merit of regulations,[37] Justice Stevens backed away from reviewing a regulation if it would have been intrinsically tied to a statutory interpretation made by an agency. He explained that:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail. In such a case, federal judges —who have no constituency— have a duty to respect legitimate policy choices made by those who do.[38]

Although he explicitly declined to engage in a substantive analysis of the EPA's approach, his analysis of the second step pulled in elements of what one would expect in such an analysis. His reasoning is most likely in response to the manner in which the D.C. Circuit had bound its analysis of the definition of "stationary source" with a substantive analysis of the EPA's approach. Justice Stevens initially described step two as inquiring into whether an agency's interpretation was "permissible."[39] But later in the opinion, he examined whether the EPA's approach was "reasonable."[40] After reviewing the twists and turns of the EPA's approach to the Clean Air Act over the years and the legislative history of the 1977 amendment, he concluded that "the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the agency considered the matter in a detailed and reasoned fashion, and the decision

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[36] *Id.* at 727.

[37] *See* Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–49 (1983).

[38] *Chevron, U.S.A., Inc.*, 467 U.S. at 866.

[39] *Id.* at 843.

[40] *Id.* at 866.

involves reconciling conflicting policies."[41]

All that shows is that the EPA thought before deciding to take a plantwide approach to "stationary sources," but does not address the substantive problem that caused the D.C. Circuit to conclude that the EPA's approach made no sense for nonattainment areas. In areas that needed to reduce pollution overall to meet air quality standards, how could that goal be achieved if a polluter was allowed to introduce new equipment, but on a plantwide basis could still emit just as much pollution as before? The EPA's explanation was that by making it easier for plant owners to install new equipment, more plants would be modernized, and presumably more modern equipment would produce less pollution, thereby achieving the law's pollution reduction goals.[42] This is essentially an empirical claim about how factory owners will behave. On substantive grounds, it could be rejected as unproven, as the D.C. Circuit did,[43] or the agency could have been allowed to proceed to see if this prediction proved true, with the caveat that the matter could be revisited if the prediction proved inaccurate. But because the Court thought the attack on the wisdom of treating an entire plant as a "stationary source" was just a backdoor challenge to the EPA's decision to read the statute this way—a decision it thought allowable—it declined to weigh the merits of the substantive challenge to the regulation.

By engaging in what amounted to substantive review light, the Court suggested that the reasonableness of an agency's regulation has some bearing on the validity of the agency's interpretation of statutory ambiguity or silence. Yet, no matter how reasonable the agency contended its approach was, it could hardly expand beyond whatever limits Congress had imposed in the statute. This will be seen later on in the discussion of *MCI Telecommunications Corp. v. American Telephone and Telegraph Co*.[44]

Furthermore, by compressing the definitional issue and the substantive issue together and giving priority to the definitional issue, the *Chevron* decision made future arguments over regulations focus, first and foremost, on an agency's interpretation of a statute rather than on the merits of the particular approach the agency took.[45]

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[41] *Id.* at 865.

[42] *Id.* at 858 (citing Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (proposed Mar. 12, 1981) (amending 40 C.F.R. § 51.18, 40 C.F.R. § 52.24).

[43] Nat. Res. Def. Council, Inc., 685 F.2d at 725–27.

[44] *See infra* Part II(E).

[45] There is a certain irony in this. Although the EPA noted when it proposed a regulation adopting the bubble concept that what the statute meant by "stationary source" was not clear, it did not adopt a plant-wide approach because it thought this was what Congress wanted it to do; it did so because it thought the approach was a good idea that was substantively defensible. *See* Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. at 16, 280.

Ultimately, although *Chevron* purports to stand for courts deferring completely to an agency's reasonable interpretation of statutory ambiguity or silence, that is not really an accurate description of what the *Chevron* Court did. More accurately, the Court determined that the agency had discretion on how to approach what a "stationary source" was and acted within the limits of that authority. That is, in this instance there was no question that Congress had given the EPA jurisdiction to regulate "stationary sources" and the discretion to choose how to do this, leaving the only question of whether the choice the EPA made—to adopt a plant-wide regulatory definition of "stationary source"—fits within the limits of the statutory framework.

The EPA's regulatory approach involved two separate decisions. The Court cannot be said to have deferred to the agency on either of these decisions. First, the EPA thought that "stationary source" could be read broadly enough to include an entire plant. Second, of the various ways available to define "stationary source" in a regulation, the Agency chose to focus on an entire plant. The latter decision, so long as it involved an allowable option, was the EPA's policy choice to make, absent a substantive reason to reject it. The Court might have agreed or disagreed with the EPA's choice, but it cannot be said to have deferred to the Agency by allowing it to proceed with an available regulatory option. But to find in the EPA's favor on the initial question of whether a "stationary source" could be an entire plant, the Court had to interpret the Clean Air Act definitively to allow the EPA to take this approach. It may have couched its decision as merely deferential to the agency, but it was more than this. It had to agree that the phrase "stationary source" was broad enough to allow the EPA to treat an entire plant as a "stationary source." The Court, having held this, made a plant-wide approach a continuing option available to the EPA. The Agency might later choose a different option, but it could not validly reject the plant-wide approach on the grounds that the Clean Air Act did not allow it. Thus, it simply cannot be said that the Court deferred to the EPA's interpretation at all. Instead, it determined that the Agency had a number of options when it came to regulating "stationary sources," and treating an entire plant as a "stationary source" was one of them.

It is the availability of those options that explains how the *Chevron* decision came to stand for deference. Instead of first approaching the legal question of how broadly the phrase "stationary source" could be interpreted, and then determining whether the EPA's decision to adopt a plantlike approach was allowable—neither of which would have required deferring to the Agency—Justice Stevens took the various approaches the EPA had used toward "stationary sources" and determined that, because the Agency had been picking from these optional approaches, then the Agency must have been exercising interpretive discretion.[46] Thus, an agency's

[46] *See Chevron, U.S.A., Inc.*, 467 U.S. at 863–64.

discretionary policy authority was now seen as encompassing discretionary authority to interpret an ambiguous statute.

This case should have held that, when figuring out whether a purportedly ambiguous or silent statutory phrase required some agency discretion, the Court would first need to determine whether there was more than one option available to the agency consistent with the general meaning of the statute. Then, if it appeared that the agency did have discretion, the Court would ask whether the agency's action was within the limit of that discretion.

Instead, the *Chevron* decision simply assumed that when a statute was ambiguous, an agency had the discretion to interpret it in any way that was reasonable. The assumption worked in *Chevron* because, under the Clean Air Act, the EPA had the jurisdiction to regulate stationary sources, had the discretion to approach stationary sources in a variety of ways, and picked an option that was consistent with the statutory language. But the Court made an unwarranted leap from this one example in which the agency obviously had both jurisdiction and discretion to choose from multiple available options consistent with the basic meaning of the statute. The leap was to say that every instance of ambiguity gave an agency similar discretion even when the agency's jurisdiction, the ambiguity of the statute, or the presence of discretion were at issue.

II. Post-Chevron Decisions

A. Zuni: *The Clarity/Ambiguity Battle Line*

One of the striking features of *Chevron* is that it was a unanimous decision. It was not a 9-0 decision because three justices did not participate,[47] but it was unanimous nonetheless. This might have suggested that the Court was solidly behind the innovation wrought by *Chevron* and that there would be clear sailing ahead when the Court examined statutory interpretation by an agency in the future. But unanimity has not been the hallmark of the post-*Chevron* decisions. The Court routinely divides. One major reason is that *Chevron*, by making every issue of agency statutory interpretation turn on whether the statute is clear or ambiguous, has inspired litigants to have the same focus on this issue as well. That has pushed the Justices into one camp or another when faced with a statutory interpretation problem.[48]

Although precise direction by Congress, ambiguity or silence (which equals discretion) are not the only possible classifications of a statutory phrase, the impact of finding that one of these classifications applies has a

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[47] *Id.* at 866.

[48] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2137 (2016) ("Determining the level of ambiguity in a given piece of statutory language is often not possible in any rational way. One judge's clarity is another judge's ambiguity. It is difficult for judges (or anyone else) to perform that kind of task in a neutral, impartial, and predictable fashion.").

profound effect on whether an agency will have interpretive discretion. As a result, litigants first focus on pigeonholing a statute as clear, ambiguous, or silent. This plays into one of the worst tendencies of practicing attorneys: excessive cleverness in finding ways to misunderstand the written word to the benefit of one's client. Each side will endeavor to force a statutory term to fit into its own Procrustean bed. A party challenging agency enforcement of a statute will try to claim that a statutory term, no matter how obscure, if looked at in the right way, is perfectly clear and commands the agency to implement the statute in a way the client would prefer. The government has an equal incentive to argue that a statutory term, no matter how obvious its meaning, is really ambiguous, and therefore deference is owed to the agency's interpretation.[49] It is aided by the lack of any clear definition of ambiguity. The stakes are particularly high because if a statutory phrase is determined to be ambiguous or silent, the assumption that the agency has discretion to interpret it is unassailable and cannot be defeated by evidence to the contrary, unlike most other legal assumptions.

A good example of the way *Chevron* has shaped arguments over agency actions can be found in *Zuni Public School District No. 89 v. Department of Education*.[50] *Zuni* bears some similarity to *Chevron*. The agency clearly had jurisdiction over the statutory terms in both cases, but the statute went only so far in describing what the agency should do. *Zuni*, as well as *Chevron*, involved the limit of the statutory meaning, with the issue being whether the approach that agency took exceeded its allowable discretion to provide more detail. It should have been just as easy to resolve, but it proved otherwise.

The Zuni Public School District received federal aid meant to make up for lost tax revenue due to a large non-tax-paying federal presence there. Congress forbade states from using this occasion to reduce state aid to districts, unless used as part of a state program to equalize education expenditures throughout the state. The Department of Education ("the Department") was tasked with determining if a state was doing that by comparing the relative difference between expenditures in the state's school districts, excluding outliers.[51] The Department used a formula that showed New Mexico just barely made the cut, so the state could reduce aid to the Zuni Public School District.[52] Pre-*Chevron*, the district might have challenged the result by arguing that it was just the sort of district Congress meant to

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[49] Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, 66 ADMIN. L. REV 253, 281 (2014) ("*Chevron* was regarded as a godsend by executive branch lawyers charged with writing briefs defending agency interpretation of law. . . . [T]he opinion seemed to say that deference was the default rule in any case where Congress had not spoken to the precise issue in controversy. Since this describes (or can be made to seem to describe) virtually every case, *Chevron* seemed to say that the government should nearly always win.").

[50] *See generally* Zuni Pub. Sch. Dist. No. 89 v. Dep't of Educ., 550 U.S. 81 (2007).

[51] *Id.* at 82–84.

[52] *Id.* at 81–82, 88.

protect from reductions in state aid. But guided by *Chevron* and wishful thinking, the district argued that the method the Department used to exclude outliers was not allowed by statute, and instead the statute required a formula that, as it happened, would prevent New Mexico from reducing state aid.[53]

The statutory language at issue required the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State."[54] Based on this language, how was the Secretary supposed to figure out the outlying expenditures that should be disregarded? Must it be based on the top and bottom five percent of expenditures per student or per school district, or could the Secretary choose either method? Take a closer look at the statutory language. Does it help to know that at the time this language was adopted, the Secretary already was using the per-student approach and it was the Department that drafted the statutory language?[55] Read it again and put yourself in the place of the person at the Department who drafted this. As the drafter, wouldn't you have thought that what you wrote at least allowed the Department to continue with its existing approach?

But that very question split the Supreme Court, with a bare majority affirming the Department's position that it could adopt a regulation that discounted outliers based on per-pupil expenditure. The majority opinion suffered from some indecision as to what the statute meant. At one point, it suggested the agency drafted the statutory language to incorporate its existing per-pupil expenditure approach toward excluding outlying expenditures.[56] Later, it posited that the language was drafted to give the agency some flexibility in deciding how to address the issue.[57] In his dissent, Justice Scalia was his usual decisive self. He pointed out that another section of the same statute explicitly adopted the per-pupil method, stating that "the Secretary shall weigh the variation between per-pupil expenditures in each local educational agency . . . according to the number of pupils served by the

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[53] *Id.* at 88–89.

[54] 20 U.S.C. § 7709(b)(2)(B)(i) (2015).

[55] *See* Zuni Pub. Sch. Dist. No. 89, 550 U.S. at 90–91.

[56] *Id.* Failure to determine whether the statute mandated the approach the agency adopted or instead, simply allowed that approach as one of the options available to the agency did not affect the result, but it could have potential unintended consequences down the road. The easy approach to approving agency action under *Chevron* is simply to treat the statute as ambiguous and say that the agency's approach involved a plausible interpretation of that ambiguity. Doing so would suggest that the agency had other options. If that's not what the Court meant, it could leave the agency with the false sense that it could change its approach if it chose. Furthermore, the assumption that an agency has discretion might amount to a failure to wrestle with the proper interpretation of a statute in situations in which there could be only one correct answer.

[57] *Id.* at 98.

local educational agency."[58] Admittedly, the statute could have been clearer on this point, if that was all it meant to say. But just because a statute could have been more specific hardly means that the Secretary's chosen method was obviously excluded. At least four justices thought the language unambiguously meant that the Secretary had to perform the exclusion based only on the top and bottom five percent of school districts.[59] The argument that the open-ended provision at issue could mean only one thing, therefore, is hard to swallow, particularly when it took fourteen pages for Justice Scalia to explain why the meaning of the contested provision was so obvious.[60]

Both the majority and the dissent claimed to be following *Chevron*, but *Chevron* did not help them figure out whether the statute was clear or ambiguous. Indeed, because the Court focused on the resolution of the issue, it made sorting out the meaning of the statute harder than necessary. Look at the statutory language again: the Secretary must "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the state."[61] This time, look at it in terms of whether the Department had discretion to use per-pupil expenditure in its calculation. Local educational agencies are the subject of this provision, as the dissent pointed out,[62] but that does not necessarily mean that the excluded percentiles are to be determined by the expenditures of the highest and lowest school districts. The statute directs that the exclusion be based on per-pupil expenditures, but does not say whether the Department, when figuring out the top and bottom five percent of per-pupil expenditures in a state, must look at the expenditures student-by-student or in the top- and bottom-spending school districts. As in *Chevron*, the statutory language is an issue of the limit of meaning, rather than one of clarity or ambiguity. That is, so long as the agency adopted a method that, one way or another, was based on per-pupil expenditures, it ought to pass muster from a purely definitional point of view.

Zuni should have been a fairly routine statutory interpretation case. Yet, it managed to reach the Supreme Court and proved divisive. The *Chevron* rubric, on which all the justices relied, did not help reach a sensible resolution. Its premise is that clarity, ambiguity, or silence in a statute will lead to an obvious conclusion about whether an agency has discretion to act.

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[58] *Id.* at 120 (quoting 20 U.S.C. § 6337(b)(3)(A)(ii)(II)).

[59] *Id.* at 106–107. Justice Stevens concurred, providing the fifth vote for the majority, but suggested some sympathy for Justice Scalia's interpretation, saying, "Given the clarity of the evidence of Congress' 'intention on the precise question at issue,' I would affirm the judgment of the Court of Appeals even if I thought that petitioners' literal reading of the statutory text was correct."

[60] *See id.* at 108–22.

[61] 20 U.S.C. § 7709(b)(2)(B)(i) (2018).

[62] *See Zuni Pub. Sch. Dist. No. 89*, 550 U.S. at 110–11 (Scalia, J., dissenting).

But that did not happen in *Zuni*. The dissent adopted a narrow, wooden reading, while the majority failed to see clearly the discretion built into the statutory language that cannot rightly be said to be ambiguous. Thus, what should have been a simple case to resolve led to a mixed decision without a wholly satisfactory conclusion.

B. *Chemical Manufacturers: Purported Ambiguity Without Discretion*

Zuni is but one example of a statutory interpretation decision driven by the belief that figuring out whether the statutory language was clear or ambiguous will determine the result; discretion is typically the conclusion if the language is ambiguous. But rulings in favor of an agency that rely on the assumption that an agency faced with a purported ambiguity necessarily has discretion can lead to two possible flawed results: accepting a weak agency argument that would not withstand scrutiny if the court had been focused on trying to determine whether the agency really had discretion, and weakening the acceptance of an agency position the Court thinks is correct by treating it as merely one of various possible available options, as was the case in *Zuni*.

Chemical Manufacturers Association v. Natural Resources Defense Council[63] is an example of the former. It involved an argument between the parties over the meaning of the word "modify." The Clean Water Act placed limits on the discharge of pollution into waterways and tasked the EPA with establishing discharge standards for different categories of industry.[64] The statute allowed individual companies to seek exceptions in only two circumstances: if the company could show that it was doing the best it could, given its economic constraints, or if its discharge would not interfere with the overall attainment of water quality standards.[65] The Act also provided that the EPA administrator "may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list."[66]

On its face, this looked like a clear direction by Congress that limited what the Agency could do. By regulation, however, the EPA decided to allow variances to toxic discharge limits if a company could show that its plant was atypical of the category of its industry.[67] The Natural Resources Defense Council challenged the regulation as inconsistent with the statute's ban on modifying toxic pollutant discharge limitations.[68] The EPA defended its approach, contending that the cap on the administrator's ability to modify toxic discharge limits precluded the EPA from granting toxic pollution

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[63] Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, 470 U.S. 116, 116 (1985).

[64] *Id.* at 118–19.

[65] 33 U.S.C. §§ 1311(c), (g) (2021).

[66] *Id.* § 1311(l).

[67] Environmental Protection Agency: National Pollutant Discharge Elimination System; Revision of Regulation, 44 Fed. Reg. 32,854, 32,893–94 (June 7, 1979).

[68] *Chem. Mfrs. Ass'n*, 470 U.S. at 118, 125.

waivers only when issuing variances under the two exceptions contained within the statute.[69]

One obvious thing to note about this dispute is that if mere disagreement about the meaning of a statute (no matter how paper-thin the basis for the disagreement) demonstrates its ambiguity, then every statutory interpretation dispute involves an ambiguity. Needless to say, that would make ambiguity practically presumptive.

Justice White, for the majority, accepted the EPA's approach as a permissible and rational construction of a complex statute.[70] An argument can be made in favor of the Agency's position, and Justice White did so at length, exploring the statutory scheme and its legislative history. But no matter how plausible the EPA's position was, it amounted to a contention that although Congress described only two statutory exceptions, it nonetheless gave the agency discretion to create a novel toxic pollution exception by regulation—an exception that Congress had not thought was sufficiently meritorious to include in the statute and indeed one that the statute specifically banned. Fundamentally, the Court accepted the weaker argument about the meaning of the provision that barred modifications of toxic discharge limits.[71]

To *Chevron* adherents, this is a feature, not a flaw. Agencies need not adopt the best interpretation of a statute, only one that is plausible. Again, it is important to distinguish interpretation from implementation. If, when properly interpreted, a statute gives an agency implementation discretion, then the agency has the option to adopt a different approach than the one a court might think is the best. But the *Chevron* rubric, even on its own terms that focus on statutory interpretation, makes no sense unless the agency

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[69] *Id.* at 125.

[70] *Id.* at 125–34.

[71] Here's an example of the argument's weakness. Justice White quotes Representative Roberts, the House manager of the toxic pollution bill, as saying: "Due to the nature of toxic pollutants, those identified for regulation will not be subject to waivers from or modification of the requirements prescribed under this section, *specifically, neither section ... waivers based on the economic capability of the discharger nor ... waivers based on water quality considerations shall be available*. Leg. Hist. 328–329 (emphasis added)." *Id.* at 127. Justice White seemed to regard this quote as supporting EPA's position that the purpose of the bill was to ban toxic pollution waivers only when EPA was making otherwise-allowable exceptions to pollution discharge limits. The quote shows no such thing. Representative Roberts was clearly expressing particular concern with the existing waiver process and the possibility that EPA might, when issuing such waivers, grant toxic pollution waivers as well. The obvious reason for this concern was that economic and water quality waivers were the only waivers the statute allowed and were, thus, the only circumstance in which the agency might grant toxic pollution waivers. There would have been no reason for Representative Roberts to express concern with discharge permits issued without the two allowable statutory waivers because the Clean Water Act did not allow any exceptions for those permits. Moreover, at the beginning of the quoted sentence, he makes clear that no waiver should be allowed for any toxic pollutant discharges.

actually has more than one interpretive option. In this instance, there was only one other plausible option, which Justice Marshall vigorously defended in his dissent: that the EPA had no authority to grant variances to the limits placed on discharging toxic pollutants.[72] Regardless of whether one agrees with the majority or the dissent, given that the only apparent options were that the EPA had discretion to issue toxic pollution variances or it did not, it is hard to see how Congress could have intended that the EPA would be free to adopt either of two completely opposite approaches. Congress either meant to bar such toxic pollutant variances completely or to allow them. The majority, by adopting *Chevron*'s willingness to defer to a plausible agency position, failed to come to a definite conclusion as to what Congress meant the EPA's authority to be. Presumably, if the EPA's position had been that the statute barred it from granting toxic pollution variances, the majority would have accepted that position as well. But it is wholly unlikely that both positions could be correct.

This situation is far removed from the one in *Chevron*. There, whether the EPA chose to regulate individual pollution-emitting equipment, factory buildings, or an entire multi-building plant, each position would have been consistent with the statutory term "stationary source." In *Chemical Manufacturers*, the two positions present fundamentally opposite interpretations of the statutory ban on toxic pollution variances. To accept both as potentially valid is to say that the words of the statute have no meaning. Even if decent arguments could be made for either position, only one of them could be correct. The Court's role in the case was to decide between them, a role it failed to perform.

C. *King v. Burwell: Failure to Determine Whether Discretion Exists*

An example of a decision where the Court's holding is made weaker by relying on a finding of ambiguity can be found in one of its recent Affordable Care Act ("the ACA") decisions. One provision of the ACA called for the establishment of exchanges in each state that would allow residents to purchase health insurance. States were encouraged to establish these exchanges, but if any state did not, the federal government would step in and establish an exchange there.[73] The ACA also strove to maximize the number of people who purchased insurance through these exchanges by offering tax credits that would make health insurance more affordable. However, the portion of the statute dealing with these credits made them available only to those enrolled in a health insurance plan through an exchange "established by the State."[74] The Internal Revenue Service's ("the IRS") regulation implementing this provision allowed taxpayers the credit

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[72] *See id.* at 134–65.

[73] 42 U.S.C. § 18031 (2019); 42 U.S.C. § 18041 (2010).

[74] I.R.C. § 36B(b)–(c) (2021).

whether they bought insurance on a state or federal exchange.[75] Predictably, the plaintiffs who brought the suit argued that the statute was clear and disallowed tax credits for those who purchased insurance on a federal exchange.[76] Justice Scalia took this up in his dissent.[77]

Justice Roberts, writing for the majority in *King v. Burwell*, claimed that *Chevron* did not apply, for reasons I will discuss later, and thus no deference was to be accorded to the IRS's regulation.[78] But his opinion is imbued with the *Chevron* approach nonetheless. The statute literally refers to state exchanges only. On this point, Justice Scalia is certainly correct that the statute is clear. But instead of acknowledging this, Justice Roberts found ambiguity because other provisions of the ACA assumed that state and federal exchanges were functionally the same.[79] If this creates an ambiguity, then the IRS would have discretion not only to allow tax credits to those who purchased insurance on an exchange, but also to deny those credits as well. But Justice Roberts did not mean this.[80] He meant that Congress intended to allow tax credits for people who purchased insurance on federal exchanges, despite the literal meaning of what it wrote—and not merely that Congress meant to allow this yet failed inexplicably to do so, but rather that the statutory provisions assuming the tax credit's availability showed that Congress thought that it had done what it intended to do.[81] Thus, the references to exchanges "established by the State" in the tax credit provision were shorthand for whatever exchange had been established in the state, whether by the state itself or by the federal government.[82] But by not making this the decision's rationale, Justice Roberts opened the door to a future IRS that would deny tax credits to those who purchase health insurance on federal exchanges.

And, just as in *Chemical Manufacturers*, if you examine the possible options here, that should make it clear that the IRS does not have such discretion. There are only two options. Either the IRS must grant tax credits to those who purchase health insurance on a federal exchange or it is barred from doing so. Both cannot be true. Congress meant one or the other, and

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[75] 45 C.F.R. § 155.20 (2021).

[76] King v. Burwell, 576 U.S. 473, 483 (2015).

[77] *See generally id.* at 498–518 (Scalia, J., dissenting) (arguing that an exchange established by the Secretary of Health and Human Services is not an exchange established by the State).

[78] *Id.* at 485–86.

[79] *Id.* at 487–90 (Scalia, J., dissenting).

[80] *Id.* at 490. What he said was: "The upshot . . . is that the phrase 'an Exchange established by the State under [42 U.S.C. § 18031]' is properly viewed as ambiguous. The phrase may be limited in its reach to State Exchanges. But it is also possible that the phrase refers to *all* Exchanges—both State and Federal—at least for purposes of the tax credits."

[81] *Id.* at 494–97.

[82] *King*, 576 U.S. at 495 ("[I]t stands to reason that Congress meant for those provisions to apply in every State as well.").

the Court was obligated to choose.

The opinions in this case also illustrate the downside of the way *Chevron* channels attacks by opponents of agency action who strive to find some way to say that the agency's approach is precluded by a clear meaning inconsistent with what the agency is doing. Justice Scalia's dissent in *King* focuses on the literal meaning of the phrase at issue without addressing whether it might have been shorthand for something broader.[83] At the very least, whatever one's theory of how to read statutes, an attempt should be made to comprehend what Congress actually meant. Justice Scalia did not support his interpretation by citing any person who drafted or voted for the bill. But it did not prevent him from defending the wooden literalism of his interpretation by imagining that Congress might have intended to deny tax credits to those who purchased insurance on federal exchanges in an effort to pressure states to set up their own exchanges—a position he did not claim that any actual congressperson who voted for the ACA held.[84]

D. *Rapanos: Literalism in the Void*

At least in *King*, the literalist approach had some very literal language to work with. But the incentive to escape from the *Chevron* world in which statutory ambiguity equals agency discretion is so strong that clarity is claimed to exist in far less likely circumstances. As already noted, the dissent in *Zuni* chose to read what was likely a congressional invitation to exercise some discretion as a clear mandate that permitted only one approach.

The extent to which efforts to find clarity in the midst of evident obscurity can be seen most strikingly in *Rapanos v. United States*,[85] where the Supreme Court improbably found clarity amidst a dense statutory fog. *Rapanos* dealt with the Clean Water Act ("the Act"), which bars discharge of pollutants or fill into "navigable waters," which are defined as the "waters of the United States."[86] That definition is obscure enough but made more obscure by a provision that dealt with how much responsibility states could assume in enforcing the Act. There, in what was essentially an aside, Congress noted that the Act meant to cover wetlands, but nowhere does the Act define which wetlands those are.[87] Traditional notions of navigable waterways looked only to waterbodies that were actually navigable,[88] but the addition of wetlands to the equation was acknowledged by Justice Scalia,

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[83] *See id.* at 498–518 (Scalia, J., dissenting). I am reminded of my mother telling my brother who walked into the house with mud-caked arms to wash his hands before dinner. He would choose to take her literally and wash only his hands, though I'm sure he knew exactly what she meant.

[84] *See id.* at 498–518 (Scalia, J., dissenting).

[85] 547 U.S. 715 (2006).

[86] 33 U.S.C. §§ 1311(a), 1362(7), (12).

[87] *See* 33 U.S.C. § 1344(g)(1) (2012).

[88] *Rapanos*, 547 U.S. at 723.

in his plurality opinion, to show that "the Act's term 'navigable waters' includes something more than traditional navigable waters."[89] Still, somehow, despite this vagueness, Justice Scalia held that the statute plainly meant that intermittent streams and their associated wetlands were not waterways protected by the Act, and therefore an Army Corps of Engineers regulation that said that they were protected exceeded its authority.[90] To him, "waters" meant only water found in rivers, streams, oceans, or lakes, which are relatively permanent waterbodies.[91] An intermittent stream is not permanent and therefore cannot be protected by the Act. But to say that the Act covered only permanent waterbodies is a huge assumption not fairly grounded in the sparse text.[92] While Congress likely had in mind some idea of the waterways and wetlands it intended for the Act to cover, trying to figure that out from the sparse text of the Act is nearly impossible, by trying to find the Act's plain meaning.[93]

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[89] *Id.* at 731.

[90] *Id.* at 732–33.

[91] *Id.* at 733.

[92] One troubling aspect of Justice Scalia's opinion is that he appeared not to understand what an intermittent stream is. He looked to dictionary definitions of streams, which emphasized that streams flow. *Id.* at 732. From this he posited that the term "intermittent stream" is an "oxymoron" because it is inconsistent with the regular flow, which is an essential characteristic of streams. *Id.* at n.5. Taken literally, this interpretation suggests that the dictionary definition of a stream controls events in the physical world—a proposition he surely did not believe. Indeed, he acknowledged that he did not necessarily mean to exclude from the Act's coverage seasonal rivers that may not flow during dry months, which is exactly the way intermittent streams may behave. *Rapanos*, 547 U.S. at 715, n.5. Had Justice Scalia looked at the language that those in the wetlands and waterways field use, and not just at general purpose dictionaries, he would have seen that the intermittent stream is a widely used term. *See, e.g.*, 310 Mass. Code Regs. § 10.04 (2022) ("stream" defined to include "a body of running water . . . which moves in a definite channel in the ground due to a hydraulic gradient . . . [and] which does not flow throughout the year . . . is intermittent."); *see also Rapanos*, 547 U.S. at 801 (Stevens, J., with Souter, Ginsburg, and Breyer, JJ., dissenting) (pointing out that the U.S. Geological Survey includes intermittent streams on its topographical maps).

[93] The vagueness of the Clean Water Act regarding the extent of the Army Corps's jurisdiction, led by multiple opinions from the justices that proposed three different answers with no majority. In addition, Chief Justice Roberts, in a concurrence, chastised the Corps for failing to adopt a revised regulation after an earlier Supreme Court decision had rejected the Corps's broad definition of wetlands to include wetlands that did not border a waterbody. *Rapanos*, 547 U.S. at 757–58 (Roberts, C.J., concurring). Given the extreme vagueness of the statute, it is hard to see how a revised definition of covered waterbodies would have changed the result. Had the Corps adopted a more limited regulation, would Justice Roberts have changed his vote and agreed with the Corps, not Justice Scalia, that the Clean Water Act now covered intermittent streams?

Justice Stevens's dissent relies on the vagueness of the Act to argue that the Corps's broad definition is permissible, but his reasoning suggests that what he really meant was that the Corps was faithfully implementing Congress's intent. Although both he and Justice Scalia claimed to be adhering to *Chevron*, they were actually offering their definitive views on what

Left unanswered is whether Congress intended that the Army Corps regulate discharges into certain specific types of wetlands or if it is at the agency's discretion to figure out which wetlands should be covered. It may very well be some mix of direction and discretion, which *Chevron*'s clarity/ambiguity dichotomy will not help resolve. One possible alternative to determine what jurisdiction Congress intended appears in Justice Stevens's dissenting opinion. In 1977, Congress debated whether it should revise the Clean Water Act and declined to amend it, but appropriated funds for the creation of a National Wetlands Inventory to assist states in enforcing the Act.[94] That inventory, produced by the Fish and Wildlife Service at Congress's direction, could serve as a useful tool to clarify which water bodies and wetlands Congress meant to cover.

E. *MCI Telecommunications Corp: The Chevron Distraction*

This singular focus on whether a statute is clear or ambiguous has generated decisions in which it is clear that the agency has discretion, but the justices still end up needlessly arguing about the clarity/ambiguity distinction. A good example of this is found in *MCI Telecommunications Corp. v. American Telephone and Telegraph Co.*,[95] which dealt with a modern-day implementation of a 1930s-era statute. The statute in question required long-distance phone carriers to file their rates with the Federal Communications Commission.[96] It also granted the Commission the authority to "modify any requirement" of this section.[97] Both the majority and the dissent agreed that this meant the Commission had authority to make exceptions to the rate-filing requirement.[98] However, the justices disagreed as to how extensive this authority was,[99] and that was where they shoehorned *Chevron* into the decision. The extent of the agency's discretion, which was the focus of *Chevron*, mattered because the Commission had adopted an approach exempting every phone provider other than the dominant provider (AT&T) from the rate-filing requirement.[100] The majority thought "modify" could mean only an incremental change, and thus the agency's interpretation of the statute was not entitled to deference.[101] The dissent thought the

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the statute means, regardless of what the Corps thought at any given time. Had the Corps adopted the restrictive definition that Justice Scalia thought was correct, it is unlikely that Justice Stevens would have deferred to it.

[94] *Id.* at 797; *see Nat'l Wetlands Inventory*, U.S. FISH & WILDLIFE SERV., https://perma.cc/93GF-NSBR (last visited Mar. 21, 2022).

[95] 512 U.S. 218 (1994).

[96] 47 U.S.C. § 203(a).

[97] *Id.* § 203(b)(2).

[98] *MCI Telecomm. Corp.*, 512 U.S. at 234, 239–40.

[99] *Id.*

[100] *Id.* at 221–22.

[101] *Id.* at 225–29.

modifications could be narrow or broad; therefore, the agency had discretion to do what it did, and thus the Court should defer to it.[102]

But the meaning of "modify" was the main focus of neither the majority nor the dissent. The central argument was over the present-day meaning of a statute passed decades ago, when AT&T was the sole long-distance carrier and the rate-filing requirement was key to Congress's goal of ensuring reasonable rates for phone customers. Could the statute now be read broadly enough to allow the agency to drop the rate-filing requirement for non-dominant carriers as more companies enter the field, and competitive pressures on their own compel these new companies to offer reasonable rates? Even if Justice Scalia, who wrote the majority opinion, was willing to accept that "modify" could encompass major changes,[103] he would still have argued that the exception should not be allowed to swallow the rule.[104] And Justice Stevens, who authored the dissent, would still have argued that the agency was acting consistently with the main statutory purpose of making sure phone customers were charged reasonable rates.[105] The discussion of whether to defer to the agency's broad reading of the word "modify" was an unnecessary sideshow to what was otherwise an on-point debate about how much discretion the agency had to waive the rate-filing requirement.

III. Chevron Ancillary Rules

Not only has *Chevron* directed statutory interpretation disputes away from deciding whether Congress has actually given an agency discretion to implement a statute more than one way, it has also led to ancillary rules that stray further from a sensible approach to interpreting ambiguous statutes.[106] I will discuss whether statutory ambiguity or silence allows an agency to decide whether it has jurisdiction to act; the purported exception to *Chevron* when the statutory interpretation question is particularly important; and the

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[102] *Id.* at 239–40 (Stevens, J., with Blackmun and Souter, JJ., dissenting).

[103] Justice Scalia's linguistic argument is his weaker point. One would think from his discussion that the phrase "major modification" would be a crime against the English language. But someone neglected to tell him that Congress had used the phrase in drafting a statute that should be familiar from *Chevron*. The EPA adopted a definition of "major modification" in its Prevention of Significant Deterioration regulations that played a role leading up to *Chevron*. *See* 40 C.F.R. § 51.241(b)(2) (2021); 40 C.F.R. § 52.21(b)(2) (2021). A major modification is a "physical change in or change in the method of operation of a major stationary source that would result in a significant net emissions increase of any pollutant subject to regulation under the [Clean Air Act]."

[104] *MCI Telecomm. Corp.*, 512 U.S. at 232–34.

[105] *Id.* at 237–39 (Stevens, J., dissenting).

[106] Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 GEO. L.J. 833, 873 (2001). Many of these ancillary rules concern whether to apply Chevron at all. Professor Thomas Merrill coined the term "step zero" to describe "the inquiry that courts should undertake before moving on to step one of Chevron." *See also* Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187, 227 (2006).

question of which types of agency discretionary decisions deserve deference.

The manner in which the Court has resolved these questions is inconsistent with otherwise established approaches to administrative law. There would be no need for any of these added complexities if the court abandoned the assumption that statutory ambiguity equates to judicial discretion. An agency's jurisdiction ought to depend on what Congress enacted, not on an agency's attempt to expand or contract that jurisdiction. Whether an agency has discretion should depend on the analysis of a statute, not solely on whether the issue involved is important or routine. Furthermore, if the agency truly has discretion to implement a statute in a variety of ways and has exercised that discretion, the manner in which it acted may affect whether the statute is enforceable against the regulated community, it should otherwise not be caught up in any dispute over whether courts or agencies have the final say on a statute's interpretation.

A. *Agency Discretion to Pick its Jurisdiction*

Take the issue of jurisdiction. It is black letter administrative law that agencies are creatures of statute and have only as much power as Congress has given them.[107] But what if the statutory grant of authority is ambiguous? Traditionally, that should not matter. Ambiguity may make it harder to determine an agency's jurisdiction, but that does not give the agency any greater power to decide whether or not it has jurisdiction. Under *Chevron*, however, it might seem that agencies would get to pick and choose the limits of their authority in such an instance. If so, then at one time an agency may think it has a great deal of authority, while at another time it may decide it has less.

Even so, it is not at all clear under *Chevron* why mere ambiguity should be enough to give agencies a free hand to determine their own regulatory jurisdiction. After all, the premise of *Chevron* is that an agency is assumed to have some discretion in how it approaches a statutory ambiguity. This implies that there must be at least two viable options from which the agency has to choose. But if the only options are that the agency has regulatory jurisdiction under a statute or that it doesn't, only one can be correct, no matter how ambiguous the statute is. Thus, there are not two viable options between which the agency could choose. Furthermore, when an agency makes a decision about its own jurisdiction, it must be making such a decision with the idea that its interpretation is correct, not based on some notion that it was simply free to choose as it pleases between jurisdiction or the lack of it. That is, it is not acting as if it is making a discretionary decision.

Still, in 2013, Justice Scalia managed to convince five of his colleagues to go along with a ruling that agencies should be entitled to deference when

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[107] *See, e.g.*, La. Pub. Serv. Comm'n. v. FCC, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act . . . unless and until Congress confers power on it.").

they interpret ambiguous jurisdictional provisions. While the argument among the Justices concerned primarily the legal question of whether agencies can make jurisdictional decisions when interpreting a vague statute, the facts of the case are worth considering. *City of Arlington v. FCC*[108] involved the Telecommunications Act of 1996. Congress passed this statute in order to pressure state and local governments to speed up cell tower siting decisions, while still recognizing the importance of local decision-making.[109] To meet these two objectives, the Act directed state and local governments to act on cell tower siting applications "within a reasonable period of time after the request is duly filed,"[110] but it also stated that the Act shall not "limit or affect the authority of a State or local government"[111] overseeing decisions. These provisions, standing alone, might suggest that Congress wished the Federal Communications Commission ("FCC") to determine the proper balance between speedy cell tower permitting and the time needed for an adequate local permitting process. The FCC thought so and adopted time limits on the local process.[112] The state and local government petitioners, who opposed the FCC-determined time limit, contended that another provision of the Act foreclosed the FCC from adopting a uniform, nationwide regulation. This provision allowed cell tower applicants who were unhappy with slow local permitting to petition a federal district court for relief. The opponents of the FCC's rule argued that this private right of action was the exclusive means of enforcing the speedy-cell-tower-permitting provision of the legislation.[113] While this was not the strongest argument, it raised a central question: had Congress granted the FCC regulatory authority to determine how fast local cell tower permitting should proceed? Either the FCC had this authority or it did not. This was a pure question of jurisdiction. If Congress had granted the FCC the authority to write rules on cell tower permitting, the FCC could act; if it had not been granted such authority, the FCC could not act at all. This appeared to be a yes or no question to which there can be only one answer.

Justice Scalia avoided this obvious conclusion by saying that *Chevron* applies broadly to all questions of statutory interpretation of ambiguous statutes and that phrasing the issue as one of jurisdiction was simply an attempt to avoid this principle.[114] In his view, there was no clear line between jurisdictional issues, to which the petitioners contended *Chevron* should not apply, and nonjurisdictional issues, to which they conceded *Chevron* applied. He declared:

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[108] 569 U.S. 290, 290 (2013).

[109] *Id.* at 294.

[110] 47 U.S.C. § 332(c)(7)(B)(ii).

[111] *Id.* § 332(c)(7)(A).

[112] *City of Arlington*, 569 U.S. at 294–95.

[113] *Id.* at 295.

[114] *Id.* at 296–97.

> The argument against deference rests on the premise that there exist two distinct classes of agency interpretations: Some interpretations—the big, important ones, presumably—define the agency's "jurisdiction." Others—humdrum, run-of-the-mill stuff—are simply applications of jurisdiction the agency plainly has. That premise is false, because the distinction between "jurisdictional" and "nonjurisdictional" interpretations is a mirage. No matter how it is framed, the question a court faces when confronted with an agency's interpretation of a statute it administers is always, simply, whether the agency has stayed within the bounds of its statutory authority.[115]

Because he thought it would be hard in practice to tell the difference between jurisdictional and nonjurisdictional questions, Justice Scalia declared that *Chevron* should apply to both.[116]

This is mixing apples and oranges. Whether an agency is faced with a large or small question has nothing inherently to do with jurisdiction. But there are two types of jurisdiction questions. One is whether an agency has jurisdiction at all. *Barnhart* is an example of this, as the issue was whether the Social Security Administration had the authority at all to impose an eligibility requirement on disability applicants that would require them to have been unable to work for a specific length of time.[117] The other jurisdiction issue arises when an agency has the authority to address an issue, and the question is whether it has exceeded the limits of that authority. *Chevron* itself is such a case. The EPA had conceded authority to regulate stationary sources, and the only issue was whether the particular approach it intended to follow was within the limits of its discretion.[118]

Justice Scalia assumes that "there is *no difference*, insofar as the validity of agency action is concerned, between an agency's exceeding the scope of its authority (its 'jurisdiction') and its exceeding authorized application of authority that it unquestionably has,"[119] and thus there is no reason to apply *Chevron* only to statutory ambiguities that are non-jurisdictional. But a close look at the issues involving an agency potentially exceeding its discretionary authority shows that such cases present the same yes-or-no questions as in pure jurisdiction cases, and thus there exists no discretion that would call for application of *Chevron* at all. In the *Chevron* case itself, the EPA had undisputed jurisdiction to regulate stationary sources, with the only legal issue being whether it could go so far as to treat an entire plant as a stationary source. Either it could, in which case it could then use its discretion to pick that option, or it could not, and then would be confined to picking a different

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[115] *Id.* at 297 (emphasis omitted).

[116] *Id.* at 301.

[117] *See supra* Part I(A)(2).

[118] *See supra* Part I(B).

[119] *City of Arlington*, 569 U.S. at 299.

option. Thus, any discretion the EPA might have to adopt a plantwide approach existed only if its authority extended that far, and not otherwise.[120] This is just as much a jurisdictional question that demands a definitive answer as was the issue in *Barnhart* about whether the Social Security Administration had authority to impose an eligibility requirement on disability applicants that would require them to have been unable to work for a certain length of time. The EPA cannot simultaneously have the authority, confirmed by the Supreme Court, to treat an entire plant as a stationary source, then later decide that it also lacks such authority, and have the same Court affirm this opposite reading of the statute.

Thus, because issues involving claims that an agency is exceeding its admitted authority are truly jurisdictional, courts ought to approach them just the same way as jurisdictional issues involving whether an agency has authority to act at all. If an agency is acting in either manner, in excess of its jurisdiction, a court should say so. Similarly, if in one way or the other, an agency disclaims jurisdiction that it actually has, a court should not be bound to accept this erroneous interpretation.[121]

Although there is no reason to give *Chevron* deference to agencies making either kind of jurisdictional call, there is a real practical difference between the two types of jurisdiction issues, and this distinction goes to the heart of how a court handles the matter—and it is not as hard to sort out as Justice Scalia claimed. If an agency lacks jurisdiction over a topic, it has no discretion to act at all, and that is the end of the matter. If an agency has jurisdiction but exceeded its discretion, that discretionary authority will still exist, and can be exercised by the agency, but now in a manner more confined by statute than the agency had previously thought.

Consider how that would apply to the FCC in the cell tower issue before

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[120] *See, e.g.*, Am. Hosp. Ass'n v. Becerra, 142 S. Ct. 1896 (2022). The recent *Becerra* decision is an example of the Court examining whether an agency exceeded the limits of its discretion. The Department of Health and Human Services adopted a regulation establishing a lower reimbursement rate for outpatient prescription drugs purchased by a class of hospitals that served underserved communities. The agency sought to justify its approach by citing a statutory provision allowing reimbursement rates to be "adjusted by the Secretary as necessary." Although this provision obviously granted HHS some discretion, the Court in a unanimous decision authored by Justice Kavanaugh held that the statute did not give the agency this option because it allowed HHS to "vary [reimbursement rates] by hospital group" only if the agency had conducted a survey of hospital drug acquisition costs, a step HHS had not taken.

[121] Of course, there are instances in which Congress has given agencies what is, in effect, power to determine their jurisdiction. The classic example is the National Labor Relations Board ("the NLRB"). The NLRB enforces the National Labor Relations Act, which governs how businesses treat their employees. A determination by the NLRB that a certain class of workers are employees gave it jurisdiction; if it finds the workers were independent contractors, it lacks jurisdiction. But such determinations are questions of fact, not of law. *See* NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 130–31 (1944).

the Court in *City of Arlington*. If the FCC decided not to simply set a time limit on local permitting, but also added conditions to cell tower building permits that exceeded the powers granted to it by statute, this would be beyond its authority under 47 U.S.C. § 203 (a) and (b) and would be struck down. The agency just could not do it. If on the other hand, the FCC told local authorities they had just two days to decide whether to issue a permit or gave them two years to do so, chances are neither approach would withstand scrutiny because the agency failed to reasonably balance Congress's desire for speed in cell tower siting decisions and the need to provide enough time for localities to make that decision. A court rejecting either of these actions would not pick a time limit it thought proper, but would instead leave it to the agency to balance the relevant interests and then choose a new time limit.[122]

This is exactly what the Supreme Court has done when addressing agency jurisdiction issues head-on. In *Massachusetts v. EPA*,[123] for example, the Court considered whether the EPA had the authority to regulate greenhouse gasses under a Clean Air Act provision that gave the agency power to regulate emission of "any air pollutant [that] . . . may reasonably be anticipated to endanger public health."[124] At one time, the EPA thought it had such authority; then, it changed its mind.[125] The Court held that the EPA did have the authority but did not prescribe how the agency, in its discretion, should approach the issue.[126]

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[122] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 839–42, 846 (1984). Consider the provision of the Clean Air Act at issue in *Chevron* that gave EPA authority to regulate stationary sources. The EPA had no jurisdiction to use that authority to regulate mobile sources under this provision of the Act. Had it attempted to do so, a court would have struck down the attempt and barred EPA from using the stationary source provision to regulate mobile sources. But what if instead of picking from the possible options I previously listed as ways to look at stationary sources (a pollution emitting device, a factory building, an entire multiple building plant), the EPA chose to regulate a city as a stationary source? Cities don't move and, chances are, they have stationary pollution-emitting devices within their boundaries. But unless the city happens to be a company town, these devices are not likely all owned by the same person or business. Such an approach would be inconsistent with the Act and thus barred, but any court decision to that effect would not limit EPA's authority to pick among the allowable options.

[123] 549 U.S. 497, 497 (2007).

[124] 42 U.S.C. § 7521(a)(1) (2011).

[125] *Massachusetts*, 549 U.S. at 510–12.

[126] *Id.* at 528–35. The Court purported to follow *Chevron* when it held that the EPA, by denying that it had jurisdiction to regulate greenhouse gasses, had "refused to comply with [the] clear statutory command" to regulate air pollution, *Id.* at 533, but in reality it was making a call that EPA had jurisdiction. A few years later, the tables were turned. When EPA decided to regulate greenhouse gasses in the context of certain portions of the Clean Air Act that applied to stationary sources, the Court rejected the agency's effort to defend this as an exercise of discretion by determining that this interpretation of the statute would unreasonably expand the scope of regulation of such sources. Util. Air Regul. Grp. V. EPA, 537 U.S. 302, 315–16 (2014).

Justice Scalia cited two of the aforementioned cases as examples of how the Court has applied *Chevron* to many jurisdiction questions. These cases prove the weakness of the argument that *Chevron* should apply to any type of jurisdiction question. The first, *Chemical Mfrs. Assn. v. Natural Resources Defense Council, Inc.*, is a pure jurisdiction case.[127] The issue in this case was whether the EPA had the authority to grant discharge variances if the discharges included toxic pollutants. It either did or it didn't. There was no obvious room for discretion, as there was in *Chevron*. The failure of the Court to focus on this point is the problem with the decision—and with the *Chevron* approach itself—which allowed the Court to defer to the agency if one day it thought it could issue such variances and subsequently, thought it could not. A definitive answer was called for, yet none was made.

On the other hand, *MCI Telecommunications Corp. v. AT&T Co.* is what Justice Scalia would call a "nonjurisdiction case." The governing statute gave the FCC authority to modify rate-filing requirements.[128] Thus, the agency had jurisdiction to make such modifications. The question was whether it exceeded that authority by dropping rate-filing requirements for all phone companies other than AT&T. Though it strained to rely on *Chevron*, the decision of the Court was a definitive answer that the agency had exceeded its authority. Although the Court decided this was a violation, the FCC retained its discretion to modify rate-filing requirements, and the Court did not tell the FCC how to use this discretion. This shows that the Court could tell the difference between the two types of jurisdiction issues and how they affected the nature of the Court's decision.[129]

The case law also shows that the Court has decided jurisdiction questions of one sort or the other even when purporting to follow *Chevron*. This is most obvious when it has rejected the agency's interpretation. The Court has, on numerous occasions, rejected agency claims to jurisdiction. In *Rapanos*, for example, the plurality rejected the EPA's effort to regulate discharges into intermittent streams under the Clean Water Act.[130] Although the decision was an instance in which Congress had clearly denied the agency this authority, it is the Court that determines the extent of the EPA's jurisdiction under the Clean Water Act. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court's decision that the Food and Drug Administration did not have authority to regulate cigarettes was unabashedly a ruling on the Agency's jurisdiction.[131] The same is true when the Court rejects an agency's claim that it lacks jurisdiction. In *Massachusetts v. EPA*, the Court's

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Though the Court purported to reject EPA's effort under *Chevron* step two, it again was making a jurisdictional call.

[127] *See supra* notes 63–73; *supra* text accompanying note 71.

[128] *See supra* notes 95–105; *supra* text accompanying note 103.

[129] *See* MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 234 (1994).

[130] Rapanos v. United States, 547 U.S. 715, 739 (2006).

[131] 529 U.S. 120, 160–61 (2000).

rejection of the Agency's contention that it lacked authority to regulate greenhouse gasses under the Clean Air Act was a definitive jurisdictional determination.[132]

Even when the Court accepted an agency's view and based its decision upon the agency's discretion to interpret an ambiguous statute, it was making a decision on jurisdiction. As I pointed out earlier, the Court's decision in *Chevron*—allowing the EPA to adopt a plantwide approach to stationary sources—no matter how couched in deference, was a determination that this action did not exceed the Agency's jurisdiction.[133] When the Court in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*[134] decided whether the Interior Department could enforce the Endangered Species Act's prohibition against "harming" an endangered species,[135] the Court's decision in favor of the agency was a determination that the Secretary had jurisdiction to enforce the Endangered Species Act in this manner. The Court has also decided jurisdiction in an interpretation of statutory silence. For example, Title X provides federal money for family planning but forbids use of such funds "in programs where abortion is a method of family planning."[136] The statute does not say whether the Secretary of Health and Human Services, when implementing the statute, can place any conditions on what organizations receiving Title X funds can or cannot say about abortion.[137] The Court's decision in *Rust v. Sullivan* stated that the Agency could forbid organizations receiving Title X funds from providing abortion counseling was a clear jurisdictional call.[138]

B. *Important Issue Exception*

In the *Babbitt* and *Rust* decisions, the Court claimed to be following *Chevron* even though it was deciding jurisdictional issues. But sometimes, it drops the mask and makes these decisions without deferring to the agency. One of the exceptions to *Chevron* the Court has created is based on a presumed distinction between important and routine issues, with *Chevron* applying only if the issue is routine. This was the distinction Chief Justice Roberts relied upon in *King v. Burwell*, where the Court decided the case based on its own analysis without giving *Chevron* deference to the IRS's decision to award tax credits to individuals who purchased health insurance

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[132] 549 U.S. 497, 531, 534–35 (2007).

[133] *See supra* Part I(A).

[134] 515 U.S. 687, 708 (1995).

[135] Endangered Species Act, 16 U.S.C. §§ 1538(a)(1)(B) (2021) (barring "tak[ing]" an endangered species), 1532(19) (2021) (defining "take" as including "harm").

[136] Prohibition Against Funding Programs Using Abortion as Family Planning Method, 42 U.S.C. § 300a-6 (2022).

[137] *See* Rust v. Sullivan, 500 U.S. 173, 184 (1991).

[138] *Id.* at 187 (couching this decision and "defer[ring] to the [Health and Human Services] Secretary's permissible construction of the statute").

from federal exchanges set up under the Affordable Care Act.[139] The Chief Justice explained that the Court's normal assumption, that statutory ambiguity implies agency discretion, did not apply because the matter at hand was such a significant question:

> The tax credits are among the Act's key reforms, involving billions of dollars in spending each year and affecting the price of health insurance for millions of people. Whether those credits are available on Federal Exchanges is thus a question of deep "economic and political significance" that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly.[140]

A close analysis of the Affordable Care Act would lead to the conclusion that the statute could have meant only one thing, but beyond that, there are two basic problems with this *Chevron* exception. First, like *Chevron* itself, it is based on an assumption that Congress wished to have the last word on significant issues, even if expressed ambiguously (or silently), and not grant implementation discretion to the agency enforcing the statute. In some instances, as was the case in *Barnhart*,[141] while the statute was silent on the issue, the Court held that Congress intended to grant disability benefits only to those whose incapacity to work was lengthy. But there is no reason to believe that the assumption (that on all major issues Congress did not want agencies to have discretion when implementing important aspects of a statute) is universally true. Indeed, in some cases, the opposite assumption would be just as plausible. Take the Endangered Species Act's ban on "harming" endangered species that was the subject of *Babbitt*;[142] or the Clean Water Act's ambiguous direction to the Army Corps to regulate discharges into unspecified wetlands connected somehow to "navigable waters" that was at issue in *Rapanos*.[143] Each of the ambiguous terms was a central feature of the respective statute. It could just as easily be assumed that Congress gave only sparse direction to agencies tasked with implementing these statutes because it wanted them to determine, respectively, what types of

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[139] *See* King v. Burwell, 576 U.S. 473, 486 (2015).

[140] *Id.* at 485–86; *see also* Nat'l Fed'n of Indep. Bus. V. Dep't of Lab., 142 S. Ct. 661, 665 (2022) (holding that when the issue is whether an agency has any authority to address a topic, the Court expects Congress to clearly state that an agency may "exercise powers of vast economic and political significance."). There, the dispute was over whether OSHA had the authority to issue a broad vaccine mandate that applied to all businesses employing 100 or more people. As used in the *Chevron* context, an agency's authority over an important topic is conceded, with the issue being whether the agency has discretion in the manner in which it addresses the topic.

[141] Barnhart v. Walton, 535 U.S. 212, 214–15 (2002).

[142] Endangered Species Act, 16 U.S.C. § 1532(19) (1988); Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or., 515 U.S. 687, 690–91 (1995).

[143] Navigation and Navigable Waters, 33 U.S.C. §§ 1311(a), 1344(g)(1), 1362(7) (2020); Rapanos v. United States, 547 U.S. 715 (2006).

harm would put endangered species at risk and which wetlands needed to be protected to limit pollution of navigable waters.

As for silence, *Rust* is a good example.[144] It is hard to imagine a subject more controversial than abortion, and that very fact may well have led Congress to decide not to address abortion more than necessary when passing Title X. Instead, Congress deferred to the Department of Health and Human Services regarding what family planning organizations could say to their clients about abortion. Whether suppositions about endangered species, waterways discharges, and abortion legislation are true or not, they illustrate that examining whether Congress meant to limit an agency's discretion must be decided based on the facts of each instance, rather than on a universal assumption.

As Justice Scalia pointed out in *City of Arlington*, there is no good way to decide whether a particular case involves an important or routine statutory interpretation question. In an article authored by Justice Stephen Breyer prior to *City of Arlington*, Breyer cited examples from 1940s-era Supreme Court decisions interpreting the National Labor Relations Act to show that the distinction between important and routine interpretation questions had been made historically and was of continued utility.[145] Instead, his examples seemed to prove Justice Scalia's point.

Justice Breyer's examples concerned whether news distributors or foremen were employees subject to the Act. If you were unfamiliar with the two cases from which these examples were derived—*NLRB v. Hearst Publications, Inc.*[146] for news distributors and *Packard Motor Car Co. v. NLRB*[147] for foremen—would it be clear which was the routine matter and which was the important one? Granted, the question of whether foremen were employees was an issue widespread across many industries and seems the more important of the two. However, as Justice Robert Jackson declared in his majority opinion in *Packard*, the question was easy to answer because "[t]he point that these foremen are employees both in the most technical sense at common law as well as in common acceptance of the term, is too

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[144] *See* Rust v. Sullivan, 500 U.S. 173, 178–81, 183, 186–87 (1991). There is likely a difference between silence and ambiguity, however. An ambiguous phrase can place a topic within an agency's jurisdiction, even if it is not clear how the agency should approach it. But silence alone does no such thing. Title X's only direction to Health and Human Services was to forbid the agency from funding family planning programs that offered abortions. Title X did not say what the agency could tell the programs it funded what to say about abortion. Because federal agencies lack jurisdiction absent a positive grant from Congress, it could be argued that the statutory silence meant that Health and Human Services lacked authority to tell funded programs what they could or could not say about abortion.

[145] Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 ADMIN. L. REV. 363, 366–67 (1986).

[146] NLRB v. Hearst Publ'ns, Inc., 322 U.S. 111, 113 (1944).

[147] Packard Motor Car Co. v. NLRB, 330 U.S. 485, 486 (1947).

obvious to be labored."[148] So in that sense, both are routine. And these pre-*Chevron* cases are hardly adequate precursors of the Court's current effort to distinguish important from routine cases. The argument that Chief Justice Roberts made in *King*—that Congress would not have left it up to agencies to resolve truly important statutory interpretation questions—was mentioned in *Packard* as a reason not to consider foremen to be employees, but it was not decisive. Instead, it was a point made by Justice William Douglas[149] in his dissent from Justice Jackson's opinion that agreed with the agency's approach.[150]

Turning to more contemporary examples, the three cases I mentioned at the outset of this discussion all involve important questions: whether the Endangered Species Act bars species habitat destruction (*Babbitt*), the extent of the Army Corps of Engineers' jurisdiction to regulate discharge into wetlands that are near navigable waterways (*Rapanos*), and whether a family planning organization that receives Title X funds can be barred from advising its clients about abortion (*Rust*). If the application of *Chevron* was truly governed by an initial determination as to the importance of the statutory interpretation question at issue, these three cases should have been decided without reference to *Chevron*. But in each case, the Court relied on *Chevron*—in *Babbitt* and *Rust* to uphold the agency's approach, and in

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[148] *Id.* at 488.

[149] *Id.* at 495 (Douglas, J., dissenting) (arguing "tremendously important policy questions are involved in the present decision. My purpose is to suggest that if Congress, when it enacted the National Labor Relations Act, had in mind such a basic change in industrial philosophy, it would have left some clear and unmistakable trace of that purpose.").

[150] Justice Breyer noted that the Court in *Packard* did not defer to the NLRB in the same way that it did in *Hearst*. Thus, it had two apparently divergent approaches to deference, which he suggested could be explained by the Court having looked at many factors in figuring out whether or not to defer to an agency's interpretation of a statute. The decisions themselves seem to offer a more straightforward explanation. In *Packard*, Justice Jackson did not even consider deference when trying to decide whether foremen were employees because "[i]f [the Court] were obliged to depend upon administrative interpretation for light in finding the meaning of the statute, the inconsistency of the Board's decisions would leave us in the dark." 330 U.S. at 492. In *Hearst*, the Court did not accept the agency's view that "employee" should be defined in accordance with common law. Instead, Justice Rutledge determined that Congress wanted to establish a federal standard, but that in doing so "[i]t is not necessary in this case to make a completely definitive limitation around the term 'employee.' That task has been assigned primarily to the agency created by Congress to administer the Act." *Hearst*, 322 U.S. at 130. In both cases, the Court made a determination as to the meaning of the statute whose interpretation was contested. In *Packard*, the Court did not think the NLRB could help it make this determination because the agency had changed its mind so many times. In *Hearst*, the Court didn't really defer to the agency on the ultimate question of whether news distributors were employees. Rather, as opposed to the blanket assumption on which *Chevron* is based, the Court made a finding that as to this statute, Congress thought that there would be factual questions to be resolved when figuring out whether a particular type of worker was an employee or an independent contractor, and it intended that the agency make those determinations.

Rapanos to reject it.

The haphazard application of the distinction between important and routine questions of statutory interpretation suggests that the Court uses the distinction when it is convenient and to reach a desired result.[151] In *Barnhart*, although the Court acknowledged that the interpretation issue involved an $80 billion difference in Social Security disability payouts over a ten year period, the fiscal significance of the case did not lead the Court to conduct an independent inquiry into the meaning of the disputed statutory provision because the Social Security Administration had adopted a favorable interpretation.[152] But when the Food and Drug Administration ("the FDA") decided to regulate cigarette sales by determining that cigarettes were devices to deliver a drug, the majority of the Court in *Brown & Williamson* disagreed that the agency had such authority. However, the Court could not credibly rely on *Chevron* because nicotine is a drug and cigarettes are a device to deliver that drug.[153] And so Justice Sandra Day O'Connor declared this to be an "extraordinary case" in which *Chevron*'s typical assumption of agency discretion to interpret a statute did not apply.[154] She then proceeded to do her own full-blown analysis of the Food, Drug, and Cosmetics Act, other tobacco-related legislation, and the FDA's earlier position that it lacked authority to regulate cigarettes, before concluding contrary to the agency's position.[155]

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[151] Of late, the Court has relied heavily on the presence of major questions to invalidate significant executive branch programs. It disallowed the Centers for Disease Control nationwide eviction moratorium in response to the Covid pandemic. Ala. Assn. of Realtors v. Dep't of Health and Hum. Servs., 141 S. Ct. 2485, 2486, 2890 (2021) (per curiam). It invalidated the Occupational Safety and Health Administration's mandate that millions of corporate employees either get a Covid vaccine or undergo weekly testing. Nat'l Fed'n of Indep. Bus. V. OSHA, 142 S. Ct. 661, 662, 666 (2022). And it struck down the Obama administration's never-implemented Clean Power Plan regulations that sought to steer electric power generation away from fossil fuels. W. Va. V. EPA, 142 S. Ct. 2587, 2602, 2616 (2022). The *West Virginia* decision illustrates a different tone to the discussion of major cases. Chief Justice Roberts spoke of it as a major questions doctrine and did not refer to it as an exception to *Chevron*, although he did concede that in each instance the agency had asserted a plausible textual basis for its approach, which under *Chevron* ought to have led the Court to defer to the agency. *Id.* at 2609. Instead, he stated that although in "more 'ordinary' circumstances" an agency's interpretation of a statute would be upheld, "assertions of 'extravagant statutory power over the national economy'" would pass muster only if there was "clear congressional authorization." *Id.* The trouble with saying the Court would usually have accepted the agency's interpretation of a statute unless it thought the topic was too big is that it opens the Court up to the criticism that it is making policy, an opinion Justice Elena Kagan voiced in her dissent. She declared that "the Court [was] substitut[ing] its own ideas about policymaking for Congress's." *Id.* at 2643 (Kagan, J., dissenting).

[152] *See* Barnhart v. Walton, 535 U.S. 212, 217–18 (2002).

[153] *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 123 (2000).

[154] *Id.* at 159.

[155] *Id.* at 160–61. Given the gravitational pull of *Chevron*, Justice O'Connor strove to make her

If this distinction between important and routine questions has any validity, then it ought to apply just as much to questions that are so obviously unimportant that Congress must have left them to an agency to resolve. *Christensen v. Harris County*[156] is an example of a statutory interpretation dispute in which the stakes were low because whichever way the decision came out would likely make no practical difference. The dispute centered around compensatory time. The Fair Labor Standards Amendment of 1985 allowed states and localities to avoid paying overtime to their employees by granting them compensated ("comp") time instead.[157] Employees had to agree to be compensated in this way,[158] but once they agreed, the question was whether their employer could impose conditions on the use of accrued comp time, which the statute did not explicitly address. Harris County thought it could impose conditions on its own (despite the Secretary of Labor's contrary view) and placed a maximum limit on the number of comp time hours a deputy sheriff could accrue.[159] The dispute devolved into a question of whether a public employer could impose conditions on use of comp time once its employees had agreed to accept it or, alternatively, whether such conditions had to be part of the agreement before they could be imposed. Although the Court divided on this question,[160] the majority's acceptance of Harris County's view should have led to no different result than if the minority view had prevailed. If an employer can impose comp time use conditions of its choosing once its employees agreed to accept comp time in lieu of overtime payments, the basic requirement that the employees must agree to accept comp time in the first place still gives employees leverage. Before agreeing to accept comp time, any semi-alert employee representative, knowing the holding of *Christensen*, would demand that conditions on the use of comp time be negotiated and placed in the underlying agreement, and that any future changes in comp time practices be negotiated. Thus, the end result would be the same. Yet, despite the silence of the statute and the insignificance of the dispute, the majority did not give deference to the agency's opinion,[161] belying the supposed import of the routine/significant distinction when it comes to deciding whether to give deference.

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opinion fit the *Chevron* rubric saying that her lengthy statutory analysis made it clear that "Congress has directly spoken to the question at issue and precluded the FDA from regulating tobacco products."

[156] *See* Christensen v. Harris Cty., 529 U.S. 576, 587–88 (2000).

[157] Fair Labor Standards Act, 29 U.S.C. § 207(o)(1) (2010).

[158] *Id.* § 207(o)(2); 29 C.F.R § 553.21 (2022).

[159] *Christensen*, 529 U.S. at 580–81.

[160] *Compare id.* at 578–88 (containing Justice Thomas's majority opinion), *with id.* at 592–96 (containing Justice Stevens's dissent).

[161] *See id.* at 587–88.

C. *Which Agency Actions Deserve Deference?*

1. Christensen: Force of Law One

The majority in *Christensen* failed to give deference despite admitting that its opinion was only a "better reading" of the statute,[162] which suggests that the agency's alternative reading was reasonable and should have been given deference under *Chevron,* if it applied. The Court did not give such deference because it determined that the manner in which the agency acted did not warrant the complete deference *Chevron* would give to agency interpretations of ambiguous or silent statutory provisions. The Court has been willing to grant such complete deference when the agency takes a formal action, such as a notice and comment rulemaking or a formal adjudication.[163] The Court has had a harder time determining what other agency actions warrant *Chevron* deference. Unfortunately, examining this subsidiary problem presented by *Chevron* will take us down a rabbit hole and lead to long, winding passages with no apparent hope of seeing daylight.

In *Christensen*, the Secretary of Labor sent an opinion letter in response to the inquiry by Harris County in which he stated that neither the statute nor an agency's regulations allowed the county to require an employee to use accrued comp time.[164] According to Justice Thomas, this letter did not deserve deference because "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant *Chevron*-style deference."[165]

But why the insistence on formality and actions that have the force of law? One premise of *Chevron* is that statutory silence means the agency has the discretion to fill in any gap this silence occupies. Thus, the silence of the Fair Labor Standards Amendment of 1985 on whether an employer could impose conditions on the use of comp time should have meant that, if *Chevron* were being followed, the Secretary of Labor had the discretion to adopt any reasonable approach to the question. In that case, why would any discretionary action by the Secretary interpreting the statute not be deserving of deference? If it is authoritative, does it matter whether the Secretary's action has the "force of law," which is the position Justice Scalia took in a concurrence?[166]

The oddity of all this can be seen by turning to Justice Souter's brief concurrence. He only voted with the majority with the understanding that

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[162] *Id.* at 585.

[163] *See* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 866 (1984) (setting agency deference standard in rulemaking context)*; see also, e.g.*, INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999) (exemplifying *Chevron* deference in formal adjudication context).

[164] 529 U.S. at 580–81.

[165] *Id.* at 587.

[166] *See id.* at 591.

the Secretary retained the authority "to issue regulations limiting forced use" of comp time.[167] Why Justice Souter concurred with a majority opinion that appeared as if it viewed its interpretation of the statute as precluding such a result is a head-scratcher, except that the majority made much of the failure of the agency to put its interpretation into a regulation, suggesting that it too might have viewed the situation differently had the agency gone that route.

What would have happened if, in response to Harris County's inquiry, the agency had issued a regulation? Most obviously, it would have taken the Secretary a great deal longer to answer Harris County, which made this approach impractical for the Secretary to adopt routinely when answering such inquiries. But what real difference on the issue of whether the Secretary had exercised discretion would it have made if the Secretary had adopted a regulation? The interpretation would have been the same, though this time the regulation would have bound Harris County in a way the opinion letter did not. While that is certainly significant, it is hardly the case that an agency exercises its discretion only when it takes steps that legally bind regulated entities. The formal process of going through notice and comment before adopting a regulation might have improved the Secretary's thinking on the subject, but in the end, the discretionary choice was still the Secretary's; whether expressed in an opinion letter or in a regulation, either approach would have reflected the Secretary's discretionary decision.

It is worth considering what options were available in this situation. The initial question should be whether the silence of the statute meant that public employers could impose conditions on the use of comp time or whether it meant the agency had policy discretion to tell public employers what they could and could not do. If this was a question of legal interpretation, and the statute clearly meant to preclude the Department of Labor from imposing any conditions on a public employer's directions to its employees on the use of comp time, then the agency would not have discretion to determine which approach to take. But it would have been a stretch to say that silence clearly precluded the Department's regulatory authority, and hence the majority did not fully embrace this approach.[168] If, on the other hand, the statutory silence meant that Congress had expressed no intent as to whether employers could impose conditions on the use of comp time and left it up to the Secretary how to approach the issue, then the legal question would have reached a definitive resolution and, consequently, the Department of Labor would have discretion as a matter of policy to adopt an approach its Secretary thought best. Furthermore, the Supreme Court would have had no grounds to make a different policy choice when the question was brought before it, even if it thought there was a better way to approach the topic.

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[167] *Id.* at 589.

[168] *See id.* at 587 (noting that the Department's regulations do "not address the issue of compelled compensatory time," leaving open the possibility for future regulations to do so).

But the Court did not quite take either of these approaches. It did not separate the basic legal interpretation question of whether the Secretary had authority to act from the policy question —how the Secretary should act— but instead treated them as a single legal interpretation question. Some of this is due to the way the opinion letter was written. The agency phrased its answer in terms of the statute disallowing local authorities from placing conditions on the use of comp time. Because the agency had treated the question as one of legal interpretation, so did the Court. But in the end, the Court's failure to distinguish an interpretation from an implementation issue left open the possibility that although the agency lost the statutory interpretation issue before the Supreme Court, its view of the statute's interpretation could still prevail if the agency responded by adopting a regulation that implicitly rejected the Court's view.

2. Brand X: Agency Trumps Court

That an agency's legal interpretation of a statute could displace a court's interpretation was confirmed a few years later in *National Cable & Telecommunications Association v. Brand X Internet Services*,[169] in which the Court held that: "A court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion."[170]

Stop for a moment to think of the implications of this rule. If a statute is ambiguous or silent, and the agency has yet to choose its preferred interpretation, then whatever interpretation a court happens to pick to resolve the case will not preclude the agency from choosing a different interpretation in the future.

It is not easy to see how this would come about. After all, if a court recognized that it was being asked to make a legal ruling on an issue that an agency clearly had authority under *Chevron* to resolve in a variety of ways, why would it make a ruling at all, let alone an evanescent one that would disappear as soon as the agency made its choice?

Brand X presents a situation in which a court acted before the agency did. But the dispute involved does not present an ideal example of a court interpreting a statute one way, and an agency then adopting a different legal interpretation. This is because it was not generally agreed that the agency had discretion in the first place to make the desired legal interpretation.[171]

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[169] 545 U.S. 967 (2005).

[170] *Id.* at 982.

[171] Rather, it shows how confusing the application of *Chevron* can be, because it was not clear whether the agency's action should have been based on a determination of law or fact. The dispute in *Brand X* concerned the regulation of broadband access to the internet via cable modem. Under the Telecommunications Act of 1996, cable companies that offered cable modem internet access to its customers would either be classified as "telecommunications carriers," in

Christensen presents a better scenario in which to explore whether an agency interpretation can override an earlier legal interpretation of a statute by a court. That is because the majority agreed that the Department of Labor had the power to issue regulations that placed limits on a public employer's ability to set local rules on employee comp time accrual. If the Department had such regulatory authority, it did not disappear just because a majority of the Supreme Court thought that the better reading of the silence of the Fair Labor Standards Amendment was that public employers need not enter into an agreement with its employees on comp time accrual rules before imposing such rules. Instead, because there was a plausible alternative reading, the Secretary would still have the ability to adopt that alternative

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which case they would be subject to mandatory common carrier regulations, or as "information-service providers," who were not subject to the common carrier regulations. 545 U.S. at 977 (discussing 47 U.S.C. § 153(20), (44), (46)). The 9th Circuit ruled that the better reading of the statute was that cable service via a modem was a telecommunications service, but the Federal Communications Commission later decided cable service via a modem was an information service. *Id.* at 978–80, 984. The distinction between the two possible options was whether cable companies were "offering" a telecommunication service. There was no dispute that phone lines were a telecommunication service, and thus the cable companies' lines used to provide cable modem access to the Internet were telecommunication lines. *See id.* at 988. But the cable companies were only "offering" a telecommunications service if their customers perceived that was what they were buying. *Id.* at 987–88. The Supreme Court determined that the statute was unclear on the question, and the agency's conclusion that customers using a cable modem thought they were getting the information service provided by the internet was a reasonable reading of the statute, and thus was allowable. *Id.* at 996–97, 1000.

What makes this a less than ideal decision, in which to examine whether an agency rule can trump a court's statutory interpretation, is that the majority's opinion evades a major jurisdiction question raised by Justice Scalia in his dissent, and the decision ultimately turned on a factual—not a legal—issue. The legal conclusion that Justice Scalia objected to was that a company offering a service across its own telecommunications lines could somehow escape regulation as a telecommunication service. *Id.* at 1005–14. Though it was Justice Scalia who convinced the Court to hold that agencies could decide whether they have jurisdiction when a statute is ambiguous, here, he took a firm stand against the FCC doing so. He attempted to deregulate an industry that Congress intended the FCC to regulate, because in his opinion, it was "perfectly clear that someone who sells cable-modem service is 'offering' telecommunications." *Brand X*, 545 U.S. at 1014. Whether or not Justice Scalia was right, the legal question surrounding Congress's intention for the FCC's regulation as a telecommunications service admitted only two possible conclusions: (1) whether the FCC has to regulate such companies; or (2) whether it needs to regulate them only if it made a factual determination that the particular service offered would be perceived by a customer as an offer for a telecommunication service. These possibilities are inconsistent with each other. Thus, this is not the sort of question that allows room for agency discretion, and it should have been decided definitively. If Justice Scalia was right and the FCC was bound to regulate cable modem as a telecommunications service, then the issue of whether the prior court's decision or the agency rule should predominate would have disappeared. If the FCC was found to have the authority to decide as a factual matter whether providing cable modem access to the internet was offering a telecommunications service, then that factual decision would have no bearing on whether the agency, or the court's statutory interpretation should prevail.

and decide to issue regulations limiting public employers' flexibility to act in this way.[172] And because a decision now adopted by regulation would deserve *Chevron* deference, the same Court would now have to conclude that the regulation that adopted an interpretation contrary to the Court's own interpretation was nonetheless valid. This is a self-inflicted problem of the Court's own making caused, as I noted above, by it treating the question of the agency's authority and what was the preferred way to exercise it as one legal interpretation issue.

The problem faced in *Christensen* could have been resolved without ending up with the conundrum that made it look like the agency could

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[172] Two objections were raised in *Brand X* to the idea that an agency could adopt a different interpretation than one previously adopted by a court.

Oddly, in his *Brand X* concurrence, Justice Stevens took the position that while an agency might adopt a regulation that makes a different interpretation of a statute than a federal appeals court, he did not think this rule should apply if the Supreme Court had weighed in because "a decision by this Court . . . would presumably remove any pre-existing ambiguity." 545 U.S. at 1003. Why that would be so under the *Chevron* rubric is hard to understand. If the Court held the statute to be ambiguous, and accepted the agency's approach as plausible, that would not seem to limit the agency from adopting another plausible approach, even one that was contrary to the one the Court approved. If the Court rejected an agency's approach to a statutory provision as unreasonable, but thought the provision ambiguous, the agency could not revive that approach, but would presumably still have other options since the Court had not said the statute gave a clear direction.

Even more oddly, Justice Scalia, the long-time proponent of *Chevron* who had just convinced his colleagues that agencies should have the flexibility to decide their own jurisdiction in ambiguous instances, now objected to the Court's decision that gave agencies continued flexibility to go their own way, despite a court's prior interpretation of a statute, in instances in which the court did not rule that the statute had only one clear meaning. He described this as a "breathtaking novelty: judicial decisions subject to reversal by executive officers." *Id.* at 1016. While the Justice's consternation is understandable, think what would happen in the *Chevron* world if his approach were adopted. Which interpretation prevailed would depend on whether an agency or a court made the first decision. Any industry or public interest group that feared an agency was going to adopt an unfavorable interpretation of a statute would try to find a way to move the matter before a sympathetic court and obtain a ruling to their liking, thus stopping the agency in its tracks. Such suits can be imagined that do not involve the agency at all, say in *Christensen* had the sheriffs sued Harris County in federal court claiming that its comp time approach violated federal law. Had that happened, the federal court would have made a ruling on the meaning of the statute without any input from the agency.

But, even more fundamentally, if a court ruling can eliminate agency discretion, how much discretion could there have been in the first place? How do other plausible approaches become implausible just because a court picked a different one? That would not be the case in instances in which an agency truly had discretion. *Chevron* itself is a good example, as there were a number of viable ways for the EPA to look at stationary air emission sources. If someone somehow obtained a court ruling that favored one of these approaches before EPA acted, that would hardly have made any of the other alternative approaches less viable. And that should be the answer. The agency's discretion will solely be in the manner it implements a statute, and thus the anomaly of an agency essentially overruling a court on a legal interpretation will not exist.

overrule a Supreme Court legal interpretation. The issue of whether the Secretary had the authority to tell local officials how to handle comp time accrual was a question of jurisdiction. The Secretary either had this authority or lacked it.[173] A majority of the Justices thought the Secretary had it. That was as far as the interpretation issue should have gone once the majority recognized the agency could choose to regulate public employers' conditioning of the use of comp time. Although the majority also thought that an opinion letter was not an enforceable way to exercise this authority, this did not negate the existence of such authority. A subsequent regulation by the Department of Labor barring public employers from conditioning the use of comp time would not change the Court's interpretation at all since the Court would not have held that the statute required a particular way for the agency to approach the issue. That is, the resolution of the "force of law" question should have affected only the issue of the enforceability of the agency's approach, not any interpretation issue.

3. Mead: Force of Law Two

The Court, however, reinforced its connection between the deference a court owes to an agency's interpretation and the "force of law" of the agency's action when it issued *U.S. v. Mead*, which was discussed earlier. When *Mead* raised the issue of whether day planners were subject to the tariff applicable to diaries, Customs issued a "ruling letter."[174] In accordance with Customs's regulations, a ruling letter represented "the official position of the Customs Service with respect to the particular transaction or issue described therein and [was] binding on all Customs Service personnel" and the principle a ruling letter established "may be cited as authority in the disposition of transactions involving the same circumstances."[175] The Court did not doubt that a Customs's ruling letter was an authorized means of enforcing tariff compliance or that the ruling bound the entity that sought it.[176] Thus, Customs could determine whether day planners were diaries, and when it ruled that they were, Mead was obliged to pay the tariff. From Mead's perspective, this would look like the force of law, which was surely why Mead appealed first to the Court of International Trade and then to federal court.[177] Justice Souter emphasized, however, that ruling letters were

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[173] Another possibility also exists: both the Department of Labor and local authorities may each have some discretion. Congress, when it enacted the Fair Labor Standards Amendment of 1985, would have been aware that many employers impose conditions on the use of vacation time and limit its accrual, and thus thought public employers ought to have a similar opportunity to impose some restrictions on use of comp time while still granting the Department of Labor, in turn, the ability to impose limits on employers' options.

[174] 533 U.S. 218, 225 (2001).

[175] *Id.* at 222 (quoting 19 C.F.R. § 177.9(a) (2022)).

[176] *Id.* at 222–23.

[177] *Id.* at 225.

not "the legislative type of activity that would naturally bind more than the parties to the ruling"[178] because "Customs has regarded a classification as conclusive only as between itself and the importer to whom it was issued."[179] He noted that "[a]ny suggestion that rulings intended to have the force of law are being churned out at a rate of 10,000 a year at an agency's 46 scattered [Customs] offices is simply self-refuting."[180]

Whether an agency has few or many questions of statutory interpretation to address, or whether all of those decisions are made at agency headquarters or in multiple regional offices, has little or no bearing on whether an agency has actually taken a definitive discretionary action or whether any interpretation involved was a discretionary decision that was the agency's to make. If an agency that must make myriad decisions chooses to limit the impact of each individual decision so that it can maintain control of its process, that again has more to do with agency internal management than whether the agency has made a discretionary decision.

Be that as it may, Justice Souter appeared to suggest that an agency should be deferred to only when it has adopted rules of general applicability. But he did not limit deference to rulemaking or formal adjudication, which are typical ways agencies adopt such general rules, noting that the Court has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded."[181] He did not, however, explain what these circumstances were that should lead to deference for agency actions that were not as formal as rulemaking or adjudication.

But whether agency actions are formal, or nearly so, has little to do with the approach to statutory interpretation described in *Chevron*. If you take seriously the premise of *Chevron* that an ambiguous statute inherently gives an agency the authority and discretion to adopt any plausible meaning of the ambiguous phrase, then the first question ought to be whether the agency has used that purportedly inherent discretion to interpret an ambiguous phrase in an allowable fashion. This is the position that Justice Scalia took in his dissenting opinion. He argued that the focus should be on whether the Customs's ruling letter was the "agency's authoritative interpretation."[182] Indeed, in this case, not only had the Customs Headquarters Office made the initial determination, but it had affirmed it in a more extensive letter ruling, which Justice Souter admitted was "carefully reasoned."[183] Furthermore, the agency had defended this position all the way up to the Supreme Court.

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[178] *Id.* at 232.

[179] *Id.* at 233 (citing 19 C.F.R. § 177.9(c)).

[180] United States v. Mead Corp., 533 U.S. 218, 233 (2021).

[181] *Id.* at 231.

[182] *Id.* at 239 (Scalia, J., dissenting).

[183] *Id.* at 225.

And as a matter of legal interpretation, the agency's explanation of its interpretation of the law was clearer than the explanation EPA offered when it promulgated the rule that led to the *Chevron* decision. The entirety of EPA's explanation was that:

> The issue of the proper scope of the nonattainment area definition of "source" is not a clear-cut legal question. The statute does not provide an explicit answer, nor is the issue squarely addressed in the legislative history. The D.C. Circuit (in *Alabama Power Co. v. Costle*[184]) has stated by implication that EPA has substantial discretion to define the constituent elements of this term.[185]

This is simply an assertion of authority to further define "stationary source" in a regulation, not an explanation at all as to why the term could be read broadly enough so that the source might be considered an entire multi-building industrial plant.

Customs's explanation about whether day planners were "diaries" was based on its analysis of the two dictionary definitions of the word. According to the Court, "Customs concluded that 'diary' was not confined to the first [personal journal definition of diary], in part because the broader definition [that included day planners] reflects commercial usage and hence the 'commercial identity of these items in the marketplace.'"[186] Even in this brief description, Customs not only explained why it thought day planners were diaries, it also did two other things the Court should have noticed. First, it relied not simply on the dictionary definition of the word diary, which is something anyone could do, but on its own expertise in noting that in commerce, day planners were thought of as diaries. This is the sort of agency expertise that the Court remanded for further analysis, a seemingly unnecessary step since the evidence was already in the record. Second, the agency's analysis showed that it did not think it was making a discretionary decision. It thought Congress intended to place tariffs on all items that in commerce were considered diaries. What Customs did was similar to adopting a species of interpretive rule—one that need not go through notice and comment but sets forth what an agency thinks Congress has commanded it to do. If the Court really thought that Congress had not commanded the agency to adhere to this one broad definition of diary, and instead permitted the agency to pick any plausible definition of diary it wanted, Congress should have told the agency that it was not bound to consider day planners as diaries, and directed it to start again and decide, in its discretion, how it would treat day planners for tariff purposes.[187]

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[184] 636 F.2d 323 (D.C. Cir. 1979).

[185] Requirements for Preparation, Adoption, and Submittal of Implementation Plans, 46 Fed. Reg. 16,280, 16,281 (proposed Mar. 12, 1981) (amending 40 C.F.R. § 51.18, 40 C.F.R. § 52.24).

[186] *Mead Corp.*, 533 U.S. at 225.

[187] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Cal., 140 S. Ct. 1891, 1912 (2020)

While *Mead*, like other decisions discussed, did not adequately address whether the agency had discretion, its import was that agency interpretations of ambiguous statutory terms found in some agency action that was not a rulemaking or formal adjudication might or might not receive *Chevron* deference depending on some yet-to-be-defined standard. This, at best, would lead to inconsistency and at worst to results-oriented jurisprudence.

4. Barnhart: Developing a Mead Test

The Supreme Court followed up *Mead*'s vagueness on this score in *Barnhart* with an effort to establish a test to determine what types of agency actions that were not regulations or adjudications would qualify for *Chevron* deference. Mr. Barnhart developed schizophrenia, lost his job, and applied for Social Security disability benefits before the Social Security Administration had a regulation addressing how long a person must be unable to work before becoming eligible for such benefits.[188] The Social Security Administration denied his benefits application, relying on a long-stated view expressed in a Social Security ruling, a disability insurance manual, and a disability insurance letter that the inability to work must be for at least twelve months.[189] By the time the case reached the Supreme Court, the Social Security Administration embodied this twelve month requirement in a regulation,[190] which illustrates an obvious way for agencies to get their interpretations accepted post-*Mead*, and to bolster the case for *Chevron* deference. While the Court thought the agency's legal maneuver was valid and analyzed whether the regulation deserved *Chevron* deference,[191] it also thought the Social Security Administration's earlier actions, before it adopted a regulation, were deserving of deference. On this score, Justice Breyer stated:

> In this case, the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time all indicate that *Chevron* provides the appropriate legal lens through which to view the legality of the Agency

(depicting a recent example of the Court rejecting an agency approach based on its incorrect conclusion of what the law required, when instead, the agency had discretion) (rejecting the Attorney General's attempted rescission of the Deferred Action for Childhood Arrivals program because even if it was unlawful to "extend work authorization . . . to DACA recipients," this "did not cast doubt on the . . . original reasons for extending forbearance to childhood arrivals.").

[188] Barnhart v. Walton, 535 U.S. 212, 215–16 (2002).

[189] *Id.* at 215, 219-20.

[190] *Id.* at 217.

[191] *Id.* at 217–19.

interpretation here at issue.[192]

How much of a test is this, really? Can it usefully distinguish agency actions short of regulations that do or do not deserve *Chevron* deference? Close examination of the five factors listed shows that this is an easy test to pass, and it is only the last, and most questionable, criterion that has any teeth. If the statute is ambiguous, which is why *Chevron* deference is under consideration in the first place, then the interpretation issue presented must involve answering some question that Congress has not, which should make the question "interstitial." The one roadblock to such a finding, as noted earlier, would be if the question was so important that it was doubtful that Congress would leave it to agency discretion to resolve. The $80 billion question in *Barnhart* would appear to have been such a substantial question that should have precluded *Chevron* deference. That it did not, shows that the purported interstitial/substantial distinction is not so important that the Court feels the need to attempt to apply it consistently. But *Barnhart* aside, if the question presented involves an ambiguous statute, the chances are that the "interstitial nature of the legal question" can be established readily. The agency charged with implementing the statute presumably has expertise in this area of the law; therefore, the second factor is practically a giveaway. As for administrative complexity, I can think of no area of federal administrative law that its practitioners think is child's play. Taxation, environmental protection, securities regulation, health care, education, ERISA, telecommunications, immigration, and so on all involve considerable complexity.

The particular question at issue in *Barnhart*, though significant, was relatively straightforward, but if it was significant to the complex administration of Social Security disability, then most interpretation questions involving federal administrative law should pass this portion of the test as well. That leaves only the hurdle that the agency must have given the question "careful consideration . . . over a long period of time." Justice Scalia, in a concurrence, objected to relying on the longstanding nature of an interpretation as a reason to defer to an agency because "once it is accepted, as it was in *Chevron*, that there is a range of permissible interpretations, and that the agency is free to move from one to another, so long as the most recent interpretation is reasonable its antiquity should make no difference."[193] This factor represents Justice Breyer's long-held view[194] and happens to have worked in favor of the agency in *Barnhart*, but Justice Scalia is correct that it is inconsistent with the very case whose rule the Court was determining whether to apply. In all, despite its numerous factors, the test set forth in *Barnhart* is one that would allow many, if not most, agency

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[192] *Id.* at 222.

[193] *Id.* at 226 (Scalia, J., concurring).

[194] *See* Breyer, *supra* note 145, at 368.

actions short of regulations to be given *Chevron* deference—if, that is, a court chooses to apply this test. This will inevitably lead to result-oriented jurisprudence.

CONCLUSION

Chevron itself is longstanding, but it is time to discard its assumption that ambiguity or silence equals agency interpretive discretion. The Supreme Court decisions I have analyzed demonstrate this inadequacy. Had the Court first examined whether it was plausible that the agency had discretion to interpret the phrase at issue in more than one way, it should have been clear in *Chemical Manufacturers*, *King*, *Arlington*, and *Brand X* that the diametrically opposing positions on the meaning of the statute showed that Congress could not have intended both to be options the agency could choose between, and the Court could then have focused on which one was correct. A close examination of the statute in *Mead* should have shown that the agency lacked discretion, but that its interpretation was correct. Similarly, the agency in *Barnhart*, though it appeared to have some discretion really did not, and its interpretation was correct as well. *Christensen* shows that recognizing agency discretion should have an impact on the remedy chosen, while *MCI* shows that *Chevron* is, even on its own terms, not necessary to every statutory interpretation question. *Zuni* demonstrates that *Chevron* has made simple statutory interpretation questions more difficult. As I began with the notion that statutory interpretation can be hard, *Rapanos* is an example of this, one that is not made easier by *Chevron*.

The *Chevron* assumption that ambiguity or silence equals agency interpretive discretion is unnecessary and not useful. In the future, courts that analyze statutory ambiguity or silence should examine whether the agency actually has discretion in the way it implements the statute. Courts can further this inquiry by determining whether the agency has more than one option consistent with the basic meaning of the controlling statute to select.

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A Flickering Light in the Wilderness: Could the Recent "Plan of the Convention" Cases Correct and Simplify the Supreme Court's State Sovereignty Doctrine?

HON. RICHARD E. WELCH III*

The Supreme Court's interpretations of the Eleventh Amendment and its related doctrine of "state sovereign immunity" are uniquely untethered and puzzling. Imagine a world where the Supreme Court creates a state sovereign immunity doctrine contrary to written limitations contained in the Constitution. Imagine further that the Court, using this doctrine, holds that a person cannot obtain a remedy in any court for a right explicitly and legitimately mandated by Congress. Unfortunately, this nightmare is all too real. For example, the federal government, through the Fair Labor Standards Act, plainly can require states to pay a congressionally mandated minimum wage to its employees;[1] yet, if the state fails to abide by this federal law and pays less than the minimum wage, the employee cannot sue the employer-state (or a state-wide agency) for the past-due wages in either federal or state court because of "state sovereign immunity." This incongruous result shows that the Supremacy Clause can be a paper tiger and that a person can possess a right but have no remedy.[2]

* Adjunct Professor, New England Law | Boston; Associate Justice, Massachusetts Superior Court (Ret.). This article is dedicated to my two sons, Richard Cameron and Robert Marquand Welch, who are scholars in much different arenas and who patiently manage to stay awake and nod intelligently while I discuss the Supreme Court's Eleventh Amendment and state sovereignty jurisprudence.

1 *See* Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 556 (1985) (deciding that "the FLSA contravened no affirmative limit on Congress' power under the Commerce Clause").

2 *See* Alden v. Maine, 527 U.S. 706, 706–07 (1999). The *Alden* case, and the Supreme Court's state sovereign immunity doctrine, has produced an enormous scholarly reaction. For example, an entire issue of the Notre Dame Law Review, including ten articles from noted scholars, was dedicated to the issue. *See, e.g.*, 75 NOTRE DAME L. REV. 817–1161 (2000); *see also* Erwin Chemerinsky, *The Hypocrisy of* Alden v. Maine: *Judicial Review, Sovereign Immunity, and the*

But hold the presses. Relatively recently, a slim and shifting majority of the Court has decided two cases, buttressed by a 2006 decision, holding that Congress can overcome Eleventh Amendment or "state sovereign immunity" by legislating pursuant to its Article I powers of eminent domain and war powers.[3] These were not instances where Congress had attempted to "abrogate" the Eleventh Amendment by legislating pursuant to its Fourteenth Amendment powers by clearly allowing suits to be brought against states in federal court. Instead, the Court held in these recent cases that in such areas as bankruptcy, eminent domain, and war powers, the states are deemed to have "consented" to the lawsuits by the "plan of the Convention" which, we are told, is "shorthand for 'the structure of the original Constitution itself.'"[4] In other words, the Constitution gave nearly plenary power in these areas to the federal government, while concepts of state "sovereign immunity" were non-existent according to the "plan of the Convention."

This "plan of the Convention" reasoning is sound and, as the vigorous dissents fear, this reasoning is applicable to other Article I powers. Indeed, the "plan of the Convention" cases, if extended, could remedy much of the confusion sown by the Supreme Court's Eleventh Amendment and "state sovereignty" jurisprudence. Whether the majority of the Supreme Court will take the invitation to extend the "plan of the Convention" cases and correct some of its earlier erroneous holdings is questionable. Only time will tell.

I. A Brief Look at the Winding Road

In order to understand the significance of the Supreme Court's recent "plan of the Convention" cases, a brief review of the tangled web of Eleventh Amendment caselaw is necessary. Do not despair; the review is brief and the history of Eleventh Amendment interpretation is sufficiently surprising to make it interesting.[5]

As I tell my bewildered Federal Courts class each semester, the Eleventh

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Rehnquist Court, 33 LOY. L.A. L. REV. 1283 (2000); Ernest A. Young, Alden v. Maine *and the Jurisprudence of Structure,* 41 WM. & MARY L. REV. 1601 (2000); Daan Braveman, *Enforcement of Federal Rights Against States:* Alden *and Federalism Non-Sense*, 49 AM. U. L. REV. 611 (2000). The purpose of this article is not to plow ground that has been (perhaps excessively) plowed before. Instead, I wish to focus on a future possibility, namely that the recent "plan of the Convention" cases may provide an exit ramp by which the Supreme Court can remedy its past mistakes.

[3] Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2463, 2467, 2469 (2022) (involving war powers); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2254–56 (2021) (involving eminent domain); Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 379 (2006) (holding that States implicitly consented to bankruptcy lawsuits based on "the plan of the Convention").

[4] *PennEast Pipeline Co.*, 141 S. Ct. at 2258.

[5] Plenty of noted scholars have reviewed the peculiar history of the Eleventh Amendment. *See, e.g.*, John J. Gibbons, *The Eleventh Amendment and State Sovereign Immunity: A Reinterpretation*, 83 COLUM. L. REV. 1889 (1983); Henry P. Monaghan, *The Sovereign Immunity "Exception"*, 110 HARV. L. REV. 102 (1996); Young, *supra* note 2, at 1606–16.

is the first true amendment to the Constitution. The first ten amendments, i.e., the Bill of Rights, were promised during the ratification process and, thus, were essentially part and parcel of the original Constitution. As most everyone who has taken a Federal Courts class remembers, the Eleventh Amendment is the result of the Supreme Court's decision in *Chisholm v. Georgia*.[6] The Supreme Court that decided *Chisholm* in 1793 (a mere five years after the Constitution was ratified) was walking and talking "original intent." That Supreme Court was led by loyal Federalist John Jay, one of the three authors of the *Federalist Papers*. Three of the other Court members were members of the Constitutional Convention. The remaining two justices (the Supreme Court consisted of six members at the time) were members of their respective states' ratifying conventions.[7] In a 4–1 decision,[8] the majority rather easily concluded that the South Carolina executor could sue the State of Georgia in federal court. After all, Article III of the Constitution envisions exactly such a lawsuit being brought in federal court: Section 2 of Article III extends potential federal jurisdiction to cases "between a State and Citizens of another State."[9]

States, many of which were burdened by a variety of Revolutionary War debts, were not happy with the *Chisholm* holding, and state and federal legislators quickly raised a hue and cry.[10] The House of Representatives of Georgia, always prickly about federal intervention on its local prerogatives, promptly passed a bill that declared that any person attempting to execute upon the *Chisholm* judgment was "declared to be guilty of felony and

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[6] 2 U.S. 419, 420 (1793).

[7] ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 7.2, 440 (7th ed. 2016) ("[I]t must be remembered that the four justices in the majority in *Chisholm* had impeccable credentials, especially in discussing the intent behind constitutional provisions.").

[8] In the manner of the time, there was no "majority" opinion as each justice wrote separately. Chief Justice Jay along with Justices Cushing, Blair, and Wilson found the suit to be a constitutional exercise of jurisdiction. On the date of the *Chisholm* decision, the Supreme Court, although authorized to have six members, only had five sitting justices. Only Justice Iredell of North Carolina dissented on *statutory* grounds. Iredell believed that the statute at issue, Section 13 of the Judiciary Act, did not permit the lawsuit. *See* John V. Orth, *The Truth About Justice Iredell's Dissent in* Chisholm v. Georgia (1793), 73 N.C. L. REV. 255, 256 (1994). One of the many peculiarities of Eleventh Amendment caselaw is that later members of the Supreme Court have implied that Iredell's dissent rested on constitutional/state sovereignty grounds. *See* Hans v. Louisiana, 134 U.S. 1, 12 (1890); Seminole Tribe v. Florida, 517 U.S. 44, 109–11 (1996) (Souter, J., with Ginsburg and Breyer, JJ., dissenting); Alden v. Maine, 527 U.S. 706, 720 (1999).

[9] U.S. CONST. art. III, § 2. *See generally* Martha A. Field, *The Eleventh Amendment and Other Sovereign Immunity Doctrines: Part One*, 126 U. PA. L. REV. 515, 527–36 (1978) (discussing the conflicting views of the framers of the Constitution as to the amenability of states to sue in federal court, from Hamilton to Madison to George Mason to James Wilson to Edmund Randolph, and concluding that *Chisholm*'s construction of Article III "was not therefore the clear contravention of a general understanding that it has long been said to be").

[10] *See* 1 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 99 (1922).

[would] suffer death, without the benefit of clergy, by being hanged."[11] The more reserved legislature of the Commonwealth of Massachusetts adopted a resolution demanding the overturn of *Chisholm*.[12] On the federal side, the reaction was equally swift. Two days after the *Chisholm* decision, federal Representative Theodore Sedgwick of Massachusetts filed a proposed amendment to the Constitution in the House and Massachusetts Senator Strong filed the same proposed amendment in the Senate. Sedgwick's proposed amendment read:

> That no state shall be liable to be made a party defendant in any of the judicial courts, established, or which shall be established under the authority of the United States, at the suit of any person or persons whether a citizen or citizens, or a foreigner or foreigners, of any body politic or corporate, whether within or without the United States.[13]

But despite Sedgwick's power and popularity, his proposed amendment fell on deaf ears.[14] When passing the proposed Eleventh Amendment, Congress rejected the much broader language proposed by Sedgwick (which would have barred federal court suits against a state brought by citizens of the same state) and adopted the narrower wording of the Eleventh Amendment: "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." Deciding upon the narrower language of the Eleventh Amendment was eminently sensible. Citizens of a state are much more likely to have dealings and disagreements with the state in which they reside and may be in need of a neutral federal forum (i.e., a federal court) to hear the disagreement. The occurrence of a citizen of one state suing another state would be much less frequent (particularly given the mobility of citizens in 1795) and such a citizen of "another state" would be unlikely to hold a loyalty or allegiance to another state; thus, there was a need for such a suit to be heard in the distant state's court. One can view the Eleventh Amendment as essentially giving the state a home court advantage to any suit brought by a citizen of "another State."[15]

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[11] *Id.* at 100.

[12] *Id.* at 99–100.

[13] William A. Fletcher, *The Diversity Explanation of the Eleventh Amendment: A Reply to Critics*, 56 U. CHI. L. REV. 1261, 1269 (1989) (providing an excellent history of the adoption of the Eleventh Amendment).

[14] *See* RICHARD E. WELCH, JR., THEODORE SEDGWICK, FEDERALIST: A POLITICAL PORTRAIT 106, 107 n.2, 205 (1965) (discussing Sedgwick's background and his proposed amendment). Sedgwick became the Speaker of the House of Representatives within six years of the *Chisholm* decision.

[15] I am hardly the first to have reached this conclusion. *See, e.g.*, Monaghan, *supra* note 5, at 125 ("In large measure, the Eleventh Amendment operates only as a forum selection clause. Because the Eleventh Amendment doctrine prohibits federal claims against states sued in their

In 1890, however, the Supreme Court decided *Hans v. Louisiana*.[16] The *Hans* Court rejected the plain wording of the Eleventh Amendment, not to mention its legislative history, and vastly expanded the Amendment's scope by barring federal suits against a state by citizens of a different state *or* the same state. Justice Bradley, writing for the Court, acknowledged that the language of the Eleventh Amendment only prohibits "suits against a state which are brought by the citizens of another state . . . ." Confronted with this plain language, Bradley simply brushed it away by asking the following questions:

> Can we suppose that, when the Eleventh Amendment was adopted, it was understood to be left open for citizens of a state to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh Amendment, had appended to it a proviso that nothing therein contained should prevent a state from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the states?

Having asked the questions, Justice Bradley answered them by concluding: "The supposition that it would is almost an absurdity on its face."[17]

The glaring problem with Bradley's reasoning in *Hans* is that Congress *did* understand that the Amendment "left open for citizens of a state to sue their own state in the federal courts, whilst the idea of suits by citizens of other states, or foreign states, was indignantly repelled . . . ." After all, Sedgwick (a rather formidable political presence in 1793) proposed just the wording envisioned by the *Hans* Court, but that broader language was rejected and the narrower language (which did indeed distinguish between suits brought by citizens of the same versus another state) was adopted. Although it would be a fool's errand to attempt to find one original intent of the framers or ratifiers of the Eleventh Amendment, one can easily conclude that the wording of the Eleventh Amendment, or Mr. Hans' argument that the Eleventh Amendment did not apply to suits by citizens of the *same* state, is not "an absurdity on its face."[18] Despite the weakness of its analysis, the

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own name from being heard in federal court, it necessitates that plaintiffs either recast their claims as suits against state officers or bring them in state court. In *Reich v. Collins*, decided in the 1994 Term, a unanimous Court made clear that state courts must provide adequate relief when state officials deprive persons of their property in violation of federal law, irrespective of 'the sovereign immunity States traditionally enjoy in their own courts.'").

[16] 134 U.S. 1 (1890).

[17] *Id.* at 15. Here is a hint from a retired judge: whenever a judge uses language like "an absurdity on its face," the court is having a hard time with its reasoning and its research.

[18] The reasoning of *Hans* is a frequent target of criticism. *See, e.g.*, Erwin Chemerinsky, *Against Sovereign Immunity*, 53 STAN. L. REV. 1201, 1205–06 (2001); Bradford R. Clark, *The Eleventh*

Hans decision is considered by the current Court to be the cornerstone of its Eleventh Amendment or state "sovereign immunity" doctrine.[19]

The Court's 1996 *Seminole Tribe of Florida v. Florida* decision reaffirmed the over-century-old *Hans* holding and barred Congress from abrogating the Eleventh Amendment by passing a law pursuant to an Article I power (i.e., the Indian Commerce Clause).[20] Writing for the majority (this is an area of law that never produces unanimous decisions and often produces vigorous and lengthy dissents), Chief Justice Rehnquist stated: "[e]ven when the Constitution vests in Congress complete law making authority over a particular area, the Eleventh Amendment prevents congressional authorization of suits by private parties against unconsenting states."[21] At the same time, *Seminole* reaffirmed the *Fitzpatrick v. Bitzer*[22] holding (also written by then-Justice Rehnquist) that Congress could abrogate the "states' sovereign immunity" by legislating pursuant to the Fourteenth Amendment.[23] In distinguishing between abrogation pursuant to legislation passed pursuant to Article I versus the Fourteenth Amendment, the Court essentially used a time-line analysis: "the Fourteenth Amendment, adopted well after the adoption of the Eleventh Amendment and the ratification of the Constitution, operated to alter the pre-existing balance between state and federal power achieved by Article III and the Eleventh Amendment."[24] In

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Amendment and the Nature of the Union, 123 HARV. L. REV. 1817, 1820–21 (2010); John F. Manning, *The Eleventh Amendment and the Reading of Precise Constitutional Texts*, 113 YALE L.J. 1663, 1683–86 (2004).

[19] *See, e.g.*, Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 69–70 (1996); Alden v. Maine, 527 U.S. 706, 720–27 (1999); Torres v. Tex. Dep't of Pub. Safety, 142 S. Ct. 2455, 2470–71 (2022).

[20] 517 U.S. at 54, 69, 72.

[21] *Id.* at 72.

[22] 427 U.S. 445 (1976).

[23] *Seminole*, 517 U.S. at 59; *see Fitzpatrick*, 427 U.S. at 456–57. Using *Fitzpatrick*, which involved a 1972 amendment to Title VII of the Civil Rights Act of 1964, as an example of proper abrogation (versus Article I of the Indian Commerce Act involved in *Seminole*) shows the oddity of the *Seminole* majority's insistence upon a distinction between Congress' Article I and Fourteenth Amendment powers. Title VII of the Civil Rights Act of 1964 was passed solely under Congress' Article I Commerce Clause power (when Title VII passed in 1964, Congress believed that the Fourteenth Amendment power was insufficient to reach private discrimination) and the 1972 amendment was passed pursuant to *both* the Commerce Clause and the Fourteenth Amendment. The exact same piece of legislation could be passed pursuant to either the Commerce Clause or the Fourteenth Amendment. This fact begs the questions: (1) what if Congress does not specify the power under which it is legislating; and (2) is it appropriate for the Court to force Congress to categorize the power under which it is legislating? In the case of *Fitzpatrick*, it may be fair to say that Title VII primarily involved Congress legislating under its Article I Commerce Clause power; yet the Court assumed that the only issue at play was Congress' power under the Fourteenth Amendment.

[24] *Seminole*, 517 U.S. at 65–66. To be sure, the Court used an alternative reason to explain the difference between Article I and Fourteenth Amendment powers: the Fourteenth Amendment expanded federal power "at the expense of state autonomy" and Section 5 of the Fourteenth

other words, the Fourteenth Amendment came after, and, the reasoning goes, limits Eleventh Amendment immunity; but Article I, adopted before the Eleventh Amendment, is therefore limited by the Eleventh Amendment. Thus, once the smoke cleared after *Seminole*, Congress, if it used clear language, could abrogate the Eleventh Amendment if it legislated under its Fourteenth Amendment powers, but not pursuant to its Article I powers.

Post-*Seminole*, Congress accepted the Supreme Court's challenge and passed various laws under the Fourteenth Amendment's enforcement clause while also clearly abrogating Eleventh Amendment state immunity to suit. For example, Congress likened patents to "property" to be protected from violation by various parties, including state entities, by the Fourteenth Amendment's Due Process Clause.[25] In response, the Supreme Court majority established the "congruence and proportionality" test to determine if the congressional legislation was "appropriate legislation" as required by Section 5 of the Fourteenth Amendment.[26] Applying the "congruence and proportionality" test has been a quixotic effort at best.[27] Finally, in his *Tennessee v. Lane* dissent, Justice Scalia, who earlier had trumpeted "congruence and proportionality," rejected the test and concluded, with more than a little justification, that:

> The 'congruence and proportionality' standard, like all such flabby tests, is a standing invitation to judicial arbitrariness and policy-driven decisionmaking. Worst still, it casts the Court in the role of Congress's taskmaster. Under it, the courts . . . must regularly check Congress's homework to make sure that it has identified sufficient constitutional violations to make its remedy congruent and proportional.[28]

Still, the congruence and proportionality test survives despite its subjectivity and foundational weakness.

Amendment contains an explicit enforcement provision. *Id.* at 59. But this reasoning does not hold up under the most rudimentary analysis because Article I's Indian Commerce Clause also expanded federal power "at the expense of state autonomy" and the Necessary and Proper Clause of Article I contains the equivalent enforcement powers that Section 5 of the Fourteenth Amendment provides.

[25] Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 627–28 (1999).

[26] *Id.* at 639; City of Boerne v. Flores, 521 U.S. 507, 508 (1997).

[27] *Compare* Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001), *with* Tennessee v. Lane, 541 U.S. 509, 510 (2004); *compare* Nev. Dep't of Hum. Res. v. Hibbs, 538 U.S. 721, 728 (2003), *with* Coleman v. Ct. of App. of Md., 566 U.S. 30, 30 (2012). Justice Breyer described whether a particular piece of legislation would survive the test as a "great constitutional unknown." Allen v. Cooper, 140 S. Ct. 994, 1009 (2020) (Breyer, J., concurring).

[28] *Lane*, 541 U.S. at 557–58 (2004) (Scalia, J., dissenting); *see Coleman*, 566 U.S. at 44–45 (2012) (Thomas, J., concurring) ("[T]he varying outcomes we have arrived at under the 'congruence and proportionality' test make no sense . . . . This grading of Congress's homework is a task we are ill suited to perform and ill advised to undertake.").

One must also add into this stew of confusion the Supreme Court's rather startling holding in *Alden v. Maine*.[29] *Alden* extended Eleventh Amendment immunity to the state courts and changed the immunity terminology from "Eleventh Amendment immunity" to "sovereign immunity of the States."[30] Justice Kennedy, writing for the majority, found this sovereign immunity not in the Constitution,[31] but in "the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . ."[32] Extending immunity from suit to state court proceedings is a major expansion of state sovereignty. Prior to *Alden*, it was an article of faith that the Eleventh Amendment, or any related immunity doctrine, did not apply in state courts.[33] Thus, in *Quern v. Jordan*, the plaintiffs were able to pursue damages against the Illinois treasury in state court after *Edelman v. Jordan* ruled that *Ex Parte Young* relief did not include past damages. *Maine v. Thiboutot*[34] was also an action brought in state court for damages against the State of Maine (oddly enough, the same state later involved in *Alden*) for violations of the federal Social Security Act. Likewise, the Federal Employers' Liability Act, which allowed a damage action against a state employer, was enforced in state court in *Hilton v. South Carolina Public Railways*[35] (a decision the Court took extra and awkward pains to distinguish in *Alden*). But when Mr. Alden attempted to enforce his rights under the Federal Fair Labor Standards Act against his state employer in state court, the Supreme Court held that state sovereign immunity forbade such a lawsuit. Justice Kennedy, writing for the majority, stated with assurance that "the immunity of a sovereign in its own courts has always been understood to be within the sole control of the sovereign itself."[36] Really?

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[29] *See* Alden v. Maine, 527 U.S. 706, 759–60 (1999).

[30] *Id.* at 713.

[31] *Id.*; *see* Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 59 (1996). In deciding *Seminole*, the majority found that the state's immunity from suit embedded in the Eleventh Amendment, which superseded Congress' Article I powers, was limited by the later adoption of the Fourteenth Amendment. The *Alden* rationale appears to undermine the timeline explanation which underpinned the *Seminole* holding.

[32] *Alden*, 527 U.S. at 713.

[33] Monaghan, *supra* note 5, at 122–23 (1996). The noted constitutional and federal courts scholar Henry Monaghan was not alone in definitively stating, three years before the *Alden* decision: "state courts are available—indeed required—to hear suits against states for the violation of federal claims . . . ." Monaghan, *supra* note 5, at 122. *See also* Will v. Mich. Dep't of State Police, 491 U.S. 58, 66 (1989); Maine v. Thiboutot, 448 U.S. 1, 10–11 (1980); Nevada v. Hall, 440 U.S. 410, 421 (1979). The language in these cases indicate that the Eleventh Amendment does not apply in state court.

[34] 448 U.S. at 3.

[35] Hilton v. S.C. Pub. Rys. Comm'n, 502 U.S. 197, 200–01 (1991).

[36] *Compare Alden*, 527 U.S. at 749, *with id.* at 814 (Souter, Stevens, Ginsburg, & Breyer, JJ., dissenting) (Justice Souter's lengthy dissent in *Alden* concluded: "The resemblance of today's state sovereign immunity to the *Lochner* era's industrial due process is striking…. [T]he Court has chosen to close the century by conferring like status on a conception of state sovereign

The state sovereign immunity announced in *Alden* is rather jaw-dropping because it appears inconsistent with a long string of cases that have held that the general jurisdiction of the state courts is always available should there be a constitutional or federal statutory violation that cannot be addressed in federal court.[37] Remember that state courts have a duty to hear federal causes of action even if it is against their will.[38] Also, a series of cases spanning nearly a century has held that state courts have a duty to provide constitutional remedies.[39] This line of cases is underpinned by the Madisonian Compromise incorporated in Article III of the Constitution.

At the risk of restating well-established history, but to refresh the possibly rusty memories of some, Article III of the Constitution was the product of a compromise negotiated by James Madison. Initially, Madison and other Virginians wished the new Constitution to establish and mandate a separate federal judiciary. Many at the Constitutional Convention objected to such a structure as overkill because the existing state courts, with their general jurisdiction over both state and federal law, could deal with all lawsuits under the supervision of the United States Supreme Court. When Madison realized that he did not have the votes, he compromised. Article III, as approved, provided that there "shall" be one Supreme Court, but that

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immunity that is true neither to history nor to the structure of the Constitution. I expect the Court's late essay into immunity doctrine will prove the equal of its earlier experiment in laissez-faire, the one being as unrealistic as the other, as indefensible, and probably as fleeting.").

[37] *See* Henry M. Hart, Jr., *The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic*, 66 HARV. L. REV. 1362, 1401 (1953) (concluding that Congress can restrict federal court jurisdiction under Article III because one always has the general jurisdiction of the state courts to fall back upon).

[38] *See* Testa v. Katt, 330 U.S. 386, 393–94 (1947); *see also* Tafflin v. Levitt, 493 U.S. 455, 469–70 (1990) (Scalia, J., with Kennedy, J., concurring); Claflin v. Houseman, 93 U.S. 130, 136 (1876) ("The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are."). Justice Gorsuch relatively recently relied on *Testa* and *Claflin* and observed: "State courts that refused to entertain federal causes of action found little sympathy when attempting the very separate sovereigns theory underlying today's decision. In time, too, it became clear that federal courts may decide state-law issues, and state courts may decide federal questions." Gamble v. United States, 139 S. Ct. 1960, 1999 (2019) (Gorsuch, J., dissenting).

[39] Reich v. Collins, 513 U.S. 106, 109–10 (1994) (emphasizing the state court's duty to provide monetary remedy against the state for unconstitutional action notwithstanding "the sovereign immunity states traditionally enjoy in their own courts"); McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, 496 U.S. 18, 51–52 (1990) (finding that state courts must provide a remedy for unconstitutional deprivation of tax moneys); Ward v. Bd. of Cnty. Commissioners of Love Cnty., 253 U.S. 17, 24 (1920) (holding that even if state law provides no remedy, state court must provide remedy for constitutional violation and provide restitution or compensation due to Fourteenth Amendment); Gen. Oil v. Crain, 209 U.S. 211, 226 (1908) (noting that "[i]f a suit against state officers is precluded in the national courts by the 11th Amendment," there must be jurisdiction in the state courts or else "many provisions of the Constitution . . . could be nullified as to much of its operation").

any lower federal courts would only be established "from time to time" at the discretion of Congress. This so-called Madisonian Compromise is the basis of the well-established doctrine that Congress always can limit and curtail the jurisdiction of the lower federal courts.[40] The lack of lower federal courts, or lower federal court jurisdiction, is not a problem because Article III was drafted with the assumption that the state courts would be available to handle any federal matters. Indeed, state courts exclusively dealt with most federal questions until 1875, because Congress did not grant general federal question jurisdiction to the lower federal courts until then.[41] *Alden*'s assertion of complete "state sovereign immunity" in its own courts appears in tension with the Madisonian Compromise and these cases that are premised upon the Compromise.

II. More than a Feeling: Confronting History

At the heart of the Supreme Court's current insistence, states possess a "dual sovereignty" with the federal government.[42] Since at least *Seminole*, the majority of the Court seems to be frantically searching for a constitutional mooring for its deeply held belief that the states are sovereign. Citing "fundamental postulates implicit in the constitutional design"[43] and inherent state sovereignty,[44] which are never mentioned in the Constitution, the Court has woven its own state sovereignty doctrine. As the respected constitutional scholar Henry P. Monaghan has observed, the Court treats sovereign immunity as a "historical given, an article of faith incapable of and not needing justification, neither as to its existence nor as to its scope."[45] For a Court increasingly enamored with historical inquiry and insistent on textual support for any right, this is a startlingly discordant approach.[46] Nevertheless, the Court repeatedly insists, the "States entered into the federal system with their sovereignty intact."[47] This belief is the true

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[40] *See* Sheldon v. Still, 49 U.S. 441, 449 (1850); *see also* Herbert Wechsler, *The Courts and the Constitution*, 65 COLUM. L. REV. 1001, 1004–05 (1965).

[41] CHEMERINSKY, *supra* note 7, § 5.2.

[42] *See, e.g.*, *Tafflin*, 493 U.S. at 458 (terming "dual sovereignty" an "axiom"); *see* Alden v. Maine, 527 U.S. 706, 713–14 (1999).

[43] *Alden*, 527 U.S. at 729.

[44] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 54 (1996); Blatchford v. Native Vill. of Noatak, 501 U.S. 775, 779 (1991) ("[W]e have understood the Eleventh Amendment to stand not so much for what it says, but for the presupposition . . . which it confirms.").

[45] Monaghan, *supra* note 5, at 118.

[46] Young, *supra* note 2, at 1602 ("It is hard to see how a textualist could view Alden as anything other than a disaster. The Court's state sovereign immunity jurisprudence has always had a somewhat strained relationship to the text of the Eleventh Amendment. But Alden drops the textual fig leaf entirely, acknowledging that any principle of immunity applicable in state court can have no basis in the Eleventh Amendment.").

[47] *Alden*, 527 U.S. at 713 (quoting *Blatchford*, 501 U.S. at 779); Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 751 (2002); PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2258

foundation of the Court's state sovereign immunity doctrine. Unfortunately, this foundational statement is, at best, a misleading exaggeration, or at worst, a heartfelt sentiment that is demonstrably false.

Any objective view of the Constitution, and the considerable debate over its ratification, shows that the States gave up large chunks of "sovereignty" to the federal government.[48] There is a reason why the Articles of Confederation start with the assurance that the States retain their sovereignty, and the later Constitution does not mention state sovereignty.[49] For example, the States gave up their rights to negotiate, fight, or trade with the Indian Nations. The Constitution shifted that power exclusively to the federal government. Likewise, only Congress could regulate interstate commerce, immigration and naturalization, and patents and trademarks. Section 10 of Article I forbade the states from their former powers of levying customs duties, raising a navy, coining money, or producing paper money. In 1788, these were significant subtractions from state power. After all, levying duties on imports and exports was the primary vehicle states used to produce revenue. The coining of money and production of paper money was a power that states jealously guarded (and that aristocratic lenders,

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(2021); Torres v. Tex. Dept. of Pub. Safety, 142 S.Ct. 2455, 2470 (2022) (Thomas, J. dissenting). Judge John T. Noonan, Jr. addressing this statement has eloquently said: "'The States entered the federal system with their sovereignty intact.' If written in 1791, this sentence would have been understood as an anti-federalist's reservation as to the constitution. Uttered fifty years later in 1841, it would have expressed the new sectionalism and, in particular, the sensitivity of the South to any Northern encroachment on its peculiar institution of chattel slavery. But this statement was not made in 1791 or 1841. It was made in 1991 and was not made by an anti-federalist or a potential secessionist. It was made by the Supreme Court of the United States . . . .The Supreme Court repeated this statement with approbation in 1997 and again . . . in 1999. It is foundational for the current court's claim that the immunity of sovereigns is enjoyed today by each of the fifty states. To anyone familiar with the precedents of that court or with the text of the constitution of the United States or with the history of the Civil War, it is an extraordinary statement." JOHN T. NOONAN, JR., NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES 2 (2002).

[48] *See* GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776–1787, at 520–21 (1969); GORDON S. WOOD, EMPIRE OF LIBERTY: A HISTORY OF THE EARLY REPUBLIC, 1789–1815, at 36–37 (2009).

[49] ARTICLES OF CONFEDERATION, art. II. The Supreme Court has stated that the Constitution "specifically recognizes the States as sovereign entities." *Alden*, 527 U.S. at 713 (quoting *Seminole Tribe of Fla.*, 517 U.S. at 71, n. 15). The problem with this definitive statement that the Constitution "specifically recognizes" state sovereignty is that it is flatly false. Unlike the explicit assurance in Article II of the Articles of Confederation that each state retains its "sovereignty, freedom and independence, and every Power, Jurisdiction and right," no equivalent assurance is contained in the Constitution. Indeed, the word sovereignty is never used in the Constitution, particularly in relation to states that gave up so many of their sovereign powers when entering into the Constitution. Certainly, the general assurances of the Tenth Amendment do not "specifically recognize" state sovereignty. That Amendment simply restates the truism that those powers not given to Congress are retained by the states or the people of the United States.

many of whom designated themselves Federalists, despised and considered immoral). The Constitution's reshuffling of these powers to the federal government, particularly when combined with the Taxing, Spending, and Supremacy Clauses, produced great opposition from the Anti-Federalists precisely because the states were being denuded of their sovereign powers.[50] No wonder that John Tyler of Virginia, no political slouch in 1788, expressed his shock when reading the proposed Constitution: "it had never entered my head we should quit liberty and throw ourselves in the hands of an energetic government."[51]

Because the loss of sovereignty of the states was such a central complaint of the opponents of the proposed Constitution, the Federalists spent considerable effort explaining that sovereignty might be divided—the states having sovereign powers in all spheres which Congress did not. But when the Anti-Federalists continued to complain about the obvious power grab by the centralized federal government, the Federalist James Wilson of Pennsylvania "came up with a solution to break the deadlock."[52] As the historian Gordon S. Wood explains:

> Wilson shrewdly avoided choosing between the federal government or the states. Instead of lodging this sovereignty in either Congress or the state legislatures, he relocated it outside of both. Sovereignty in America, he said, did not reside in any institution of government, or even in all the institutions of government put together. Instead, sovereignty, the final, supreme, indivisible lawmaking authority, remained with the people themselves, the people at large.[53]

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[50] *See* Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1441 (1987) ("Although the Constitution's most sweeping assertions of federal power on behalf of individual rights lay three-quarters of a century and a Civil War away, the Federalists at Philadelphia succeeded in imposing significant federal restrictions on state power. Federal courts would prevent states from passing bills of attainder or ex post facto laws, coining money or emitting bills of credit, denying the privileges and immunities of out-of-staters, or impairing the obligation of contract; Congress would guarantee citizens of each state a republican state government by refusing to seat representatives from anti-republican regimes, and by helping to put down attempted insurrections and coups; and the President would retain ultimate command of state militias when they were called into national service.").

[51] GORDON S. WOOD, POWER AND LIBERTY: CONSTITUTIONALISM IN THE AMERICAN REVOLUTION 75 (Oxford Univ. Press, 2021).

[52] *Id.* at 93.

[53] *Id. See also* Amar, *supra* note 50, at 1440 ("The Federalists dissolved the dilemma by crafting the Constitution as a set of broad yet bounded delegations of sovereign power from the sovereign People to various agents who would constitute the new central government."); THE FEDERALIST NO. 81, at 601–02 (Alexander Hamilton) (John Church Hamilton ed., 1864). One must remember that the newspaper essays that are collected in *The Federalist Papers* were attempts by Madison, Hamilton, and Jay to "sell" the newly drafted Constitution and achieve its ratification in New York State. Thus, the authors attempted to minimize the states'

The Federalists loved this reasoning, traces of which can be seen in the later adoption of the Tenth Amendment, and accepted it fully.[54] The beauty of Wilson's theory is that it avoided the primary truth which animated so much opposition to the Constitution. Likewise, Hamilton and Madison attempted to minimize the stripping of state sovereignty in their essays which later constituted *The Federalist Papers*.[55] Like most political horse trading, particularly when trying to reach consensus on a document such as a constitution, the amount of "sovereignty" or power left to the states after the Constitution was a flash point that was left vague and open to later debate and compromise.[56] But there is no doubt that the states gave up vast powers once the Constitution was ratified and were no longer all-powerful or "sovereign" in any true sense of the word. To say that the states entered into the Constitution with their "sovereignty intact" is to deny history and to read the Constitution with blinders.

III. A Light Beyond These Woods: The Recent "Plan of the Convention" Cases

To paraphrase the American singer and songwriter Nanci Griffith, there may be a "light beyond these woods."[57] The woods of the Eleventh Amendment/state sovereign immunity doctrine are tangled and dark indeed. But the recent "plan of the Convention" cases show the way to that light.

A. *The Cases*

The modern "plan of the Convention" cases began in 2006 with *Central Virginia Community College v. Katz*.[58] Katz, the court-appointed liquidating

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diminished role under the proposed Constitution. But Hamilton did admit, somewhat vaguely, that the doctrine of sovereign immunity from suits against states would be "surrender[ed]" in some portion due to "the plan of the convention."

[54] WOOD, *supra* note 51, at 94, 98.

[55] WOOD, *supra* note 51, at 78–79 (citing letter from James Madison to Edmund Randolph (April 8, 1787), *in Papers of Madison* 9, 369–70). Although the current Supreme Court majority frequently cites Madison as a supporter of state sovereign immunity, history tells a somewhat different story. As the historian Gordon Wood explains, Madison saw the Constitution as a limit on and guard against states and their legislatures dominated by "middling" men. Madison believed that the states should not retain any of their "individual independence." His idea was that the new federal government held a "supremacy . . . while leaving in force the local authorities in so far as they can be useful."

[56] *See* PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1781–1788, at 84–85 (2010) (noting that the famous Federalist Papers are best viewed as intelligent propaganda written to downplay the more controversial provisions of the proposed Constitution that shifted so much power from the states to the centralized federal government).

[57] NANCI GRIFFITH, THERE'S A LIGHT BEYOND THESE WOODS (MARY MARGARET) (B.F. Deal Records 1978).

[58] 546 U.S. 356, 379 (2006).

supervisor of the bankrupt estate, sued a state college ("an arm of the State") in the federal Bankruptcy Court in order to set aside allegedly preferential property transfers by a then-insolvent bookstore. The state college asserted sovereign immunity, and citing the *Seminole* decision, argued that the immunity could not be abrogated by Congress as the federal bankruptcy power resided in Article I. The five-member majority decision authored by Justice Stevens found that abrogation was not necessary in that Section 8 of Article I gave Congress the power to establish "uniform Laws on the subject of Bankruptcies throughout the United States" and that Congress had enacted the federal bankruptcy code.[59] Bankruptcy litigation, the Court reasoned, is rather unique in that it often involves examining property transfers to state entities. As the Court reasoned, "[i]nsofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the Convention not to assert that immunity."[60] The Court hastened to add that the "scope of this consent was limited" in that bankruptcy proceedings are "chiefly *in rem*—a narrow jurisdiction that does not implicate state sovereignty to nearly the same degree as other kinds of jurisdiction."[61] Thus, the Court concluded, Congress could require states to face bankruptcy lawsuits in federal court, despite the Eleventh Amendment and *Seminole*, because the states had "consented" to such suits by ratifying the Constitution.[62]

Justice Thomas, joined by Chief Justice Roberts and Justices Scalia and Kennedy, began the dissent in *Central Virginia Community College* with the observation that the holding was "impossible to square with this Court's settled state sovereign immunity jurisprudence."[63] Relying on the *Seminole* and *Hans* holdings, the dissent emphasized that there was nothing special about the Article I bankruptcy power and that history showed that Congress did not create a national bankruptcy law until the late nineteenth century. Emphasizing the sovereignty of each state and quoting *Hans*, the dissent said a state had the "privilege of paying their own debts in their own way" without interference from Congress.[64] Thomas, apparently recognizing that the wording, intent, and history of Article I's Indian Commerce Clause and the Bankruptcy Clause were not readily distinguishable, concluded that: "It would be one thing if the majority simply wanted to overrule *Seminole Tribe* altogether. That would be wrong, but at least the terms of our disagreement would be transparent."[65]

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[59] *Id.* at 376 n.13.

[60] *Id.* at 357.

[61] *Id.* at 378.

[62] *Id.* at 377.

[63] 546 U.S. at 379.

[64] *Id.* at 387.

[65] *Id.* at 393.

In the 2021 *PennEast Pipeline v. New Jersey* case, the Supreme Court (in another 5–4 decision, consisting of a majority of Chief Justice Roberts and Justices Breyer, Alito, Sotomayor, and Kavanaugh) concluded that the Article I federal eminent domain power shared characteristics with the Bankruptcy Clause.[66] As a result, the Court concluded that states had consented to suits in federal court as part of the "plan of the Convention."[67] An eminent domain suit filed against the state of New Jersey in federal court, *PennEast* confronted the Eleventh Amendment directly because the plaintiff was an out-of-state corporation that the United States had delegated eminent domain powers to for the purpose of building a natural gas pipeline. Thus, tracking the actual language of the Eleventh Amendment, *PennEast* truly was a suit in federal court against a state by a citizen of a different state. Chief Justice Roberts, who had dissented in *Central Virginia Community College*, apparently felt differently about Congress' bankruptcy power versus the eminent domain power and wrote the majority opinion. Or perhaps the Chief Justice had a change of heart. After restating the highly questionable belief that "the States entered the federal system . . . with their sovereignty intact," he explained the states "consented" to certain suits through the "plan of the Convention":

> [A] State may be sued if it has agreed to suit in the "plan of the Convention," which is shorthand for "the structure of the original Constitution itself."[68] The "plan of the Convention" includes certain waivers of sovereign immunity to which all States implicitly consented at the founding.[69] We have recognized such waivers in the context of bankruptcy proceedings,[70] suits by other States, and suits by the Federal Government.[71]

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[66] 141 S. Ct. 2244, 2266 (2021).

[67] *Id.* at 2258.

[68] *Id.* (quoting Alden v. Maine, 527 U.S. 706, 728 (1999)).

[69] *Id.* (citing *Alden*, 527 U.S. at 755–56).

[70] *Id.* (citing *Cent. Va. Cmty. Coll.*, 546 U.S. at 379; Allen v. Cooper, 140 S. Ct. 994, 1002–03 (2020)).

[71] *Id.* (citing South Dakota v. North Carolina, 192 U.S. 286, 318 (1904); United States v. Texas, 143 U.S. 621, 646 (1892)). It is true that the Supreme Court has long held that states may be sued in federal court by other states and by the federal government regardless of any Eleventh Amendment or sovereignty constraint. Lately, the Court has shoehorned these much earlier rulings into the "plan of the Convention" construct. Reading those earlier opinions reveals that the "plan of the Convention" was never explicitly mentioned. Although the Court in *Texas* did reason that suits by the United States against a state were authorized because it "does no violence to the inherent nature of sovereignty" for a state to be sued by "the government established for the common and equal benefit of the people of all the States." *United States v. Texas*, 143 U.S. at 646. Overall, however, the Court mostly relied on the facts that Article III of the Constitution mentions that federal jurisdiction could include such suits (reasoning similar to that found in the discredited *Chisholm* decision) and that the Court had earlier allowed such lawsuits.

The Chief Justice then reviewed the history of the federal eminent domain power and found that "[s]ince its inception, the Federal Government has wielded the power of eminent domain, and it has delegated that power to private parties."[72] Based on Congress' far-reaching eminent domain power and its historical use, the majority opined: "The plan of the Convention contemplated that States' eminent domain power would yield to that of the Federal Government 'so far as is necessary to the enjoyment of the powers conferred upon it by the Constitution.'"[73]

Justice Barrett's main dissent (joined by Justices Thomas, Kagan, and Gorsuch) pointed out that, unlike the Bankruptcy Clause, the federal government's eminent domain power is not mentioned in any Article I clause.[74] But, as the Chief Justice argued, the Fifth Amendment's "Takings Clause" makes little sense if not for the implicit federal eminent domain power. Justice Barrett was equally critical of the majority's historical research. While there was a long history of the use of eminent domain and the delegation of that federal power to private parties, the dissent emphasized that there was no history of suits by the delegee against a state. The dissent argued that when stripped to its essentials, this was only "a private suit against a State that Congress has authorized pursuant to its commerce power."[75] As such, *Seminole*, the Eleventh Amendment, and state sovereignty prohibited the lawsuit.

While joining Justice Barrett's main dissent, Justice Gorsuch wrote a separate dissent (joined only by Justice Thomas) based on the Eleventh Amendment.[76] He saw no exception from the plain terms of the Amendment.

The recent *Torres v. Texas Department of Public Safety*[77] decision built on *PennEast*'s theory of consent through the structure of the original Constitution. *Torres* implicated the state sovereignty doctrine established in *Alden* as it involved a federal right being enforced in state court. This case involved Congress' war powers in that a federal law required employers (including state employers) to rehire workers after military service. Initially the federal law permitted veterans to sue their former employers in federal court. After the *Seminole* decision (but before the *Alden* decision), Congress amended the law to allow veterans to sue in state court and thus avoid Eleventh Amendment problems.

Torres was again a 5–4 decision with Justices Breyer, Roberts, Sotomayor, and Kavanaugh constituting the majority because Kagan concurred.[78] The

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[72] PennEast Pipeline Co., LLC, 141 S. Ct. at 2257.

[73] *Id.* at 2259 (quoting Kohl v. United States, 91 U.S. 367, 372 (1876)).

[74] *Id.* at 2266 (Barrett, J., with Thomas, Kagan and Gorsuch, JJ., dissenting).

[75] *Id.* at 2271 (Barrett, J., dissenting).

[76] *Id.* at 2263–65 (Gorsuch, J., dissenting).

[77] 142 S. Ct. 2455 (2022).

[78] *Id.*

makeup of the majority shifted from *PennEast*. Alito was now in the dissent, and Kagan (who dissented in *PennEast*) now accepted the *PennEast* decision and concurred with the majority. Alito's change in position is unexplained, although *Torres* involved a suit in state court (unlike *PennEast* which was brought in federal court) and implicated the *Alden* decision.[79]

Following the history-heavy analysis format set forth by Chief Justice Roberts in *PennEast*, Justice Breyer's majority opinion found "consent to suit" from the structure of the Constitution.[80] Citing Alexander Hamilton's essay in *The Federalist Papers* (No. 23) and the ratification debates, the majority stated "[t]he States ultimately ratified the Constitution knowing that their sovereignty would give way to national military policy."[81] Breyer also emphasized that Congress' Article I war power was exclusive to the federal government, or in other words "complete in itself."[82] Thus, the Court concluded:

> Text, history, and precedent show the States agreed that their sovereignty would "yield . . . so far as is necessary" to national policy to raise and maintain the military. . . . We consequently hold that, as part of the plan of the Convention, the States waived their immunity under Congress' Article I power "[t]o raise and support Armies" and "provide and maintain a Navy."[83]

In her concurrence, Justice Kagan accepted the *PennEast* decision as controlling law and reasoned that "the war powers—more than any other power, and surely more than eminent domain—were 'complete in themselves.' They were given by the States, entirely and exclusively, to the Federal Government."[84]

Justice Thomas wrote the dissent (joined by Justices Alito, Barrett, and Gorsuch) and argued that the *Alden* decision foreclosed this lawsuit.[85] Thomas reiterated the idea that states are "sovereign" and quoted the old chestnut that the states entered the Constitution "with their sovereignty intact" and that this sovereignty included immunity from private lawsuits.[86] The dissent argued that the *Alden* prohibition against any private lawsuit applied to all Article I powers, including the war power because in *Alden*,

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[79] *Compare id.*, *with PennEast Pipeline*, 141 S. Ct. at 2244 (illustrating Alito's change in position). The *Alden* decision was written by Justice Anthony Kennedy, whom both Justices Gorsuch and Kavanaugh clerked for. It is interesting that Gorsuch and Kavanaugh were on opposite sides in both *PennEast* and *Torres*.

[80] *Torres*, 142 S. Ct. at 2460.

[81] *Id.* at 2464.

[82] *Id.* at 2466 (quoting *PennEast Pipeline*, 141 S.Ct. at 2263).

[83] *Id.* (referring to U.S. Const. art. I, § 8, cls. 12–13).

[84] *Id.* at 2469 (Kagan, J., concurring).

[85] *Id.* at 2470 (Thomas, J., dissenting).

[86] *Torres*, 142 S. Ct. at 2470 (Thomas, J., dissenting).

"we did not engage in a clause-by-clause parsing of Article I's various powers."[87] Left unsaid was the fact that a "clause-by-clause parsing" never occurred because *Alden* only involved the Commerce Clause.[88] But this mattered little to the dissent because of its firm belief that "[s]tates would not have surrendered to Congress any of the immunity they enjoyed in their own courts."[89] The dissent also argued that the "complete in themselves" rationale used in *Torres* was contradicted by the reasoning of the *Seminole* case.[90] Justice Thomas noted that the Commerce Clause or the Indian Commerce Clause could be "complete in itself" and, according to *Seminole*, this Article I power was not sufficient to overcome the Eleventh Amendment prohibition.[91]

The shifting makeup of the dissents in the "plan of the Convention" cases is interesting and does not mirror the "conservative/liberal" split often found in the contentious area of state sovereignty. Justice Thomas has been consistent in his opposition, while Justice Breyer has consistently joined the majority. Chief Justice Roberts, by 2021, had shifted to be in the majority in *PennEast* and *Torres*. Justice Alito was in the majority in both *Central Virginia Community College* and *PennEast*, but shifted to opposing the federal law mandating suit against a state in state court in *Torres*. Justice Kagan dissented in *PennEast*, but abandoned her opposition to the "plan of the Convention" reasoning a year later and joined the majority in *Torres*. Justice Kavanaugh sided with the majority in both *PennEast* and *Torres*, while Justices Gorsuch and Barrett dissented in both cases. Given Chief Justice Roberts and Justice Kavanaugh's steady support for the doctrine, plus the occasional agreement of Justice Alito, one can assume that there will exist a reliable majority in any future "plan of the Convention" cases. This conclusion is based on two important, but reasonable, assumptions: (1) Justice Jackson will follow the now-retired Justice Breyer's consistent support for the "plan of the Convention" rationale; and (2) Justice Kagan's change of heart will continue in that she will accept that other Article I powers may justify the "plan of the Convention" reasoning.

IV. The Implications of the "Plan of the Convention" Cases and the Way Forward

The Supreme Court majority is plainly correct in holding that states sacrificed their sovereignty when ratifying the Constitution, at least in terms of lawsuits authorized by Congress based on Article I powers that are either unique to the federal government or evidence a strong preference for a

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[87] *Id.* at 2474 (Thomas, J., dissenting).

[88] *Id.*

[89] *Id.*

[90] *Id.* at 2483–84 (Thomas, J., dissenting).

[91] *Id.* at 2475 (Thomas, J., dissenting).

national uniformity. The Supreme Court prefers to term this as the state "consenting" to suit as part of the plan of the Constitutional convention and ratification. While there may be a bit of fictionalizing by calling this "consent," it is a construct that works well enough and it reflects the truth of the ratification debates.

The Supreme Court continues to appear intent on enshrining the Eleventh Amendment/state sovereignty triumvirate of *Hans*, *Seminole*, and *Alden* as constitutional interpretation.[92] But the "consent by plan of the Convention" cases are an important exception to both the *Seminole* and *Alden* holdings. Under this doctrine, Congress, if it evidences a clear intent, can enforce its Bankruptcy Clause, eminent domain, and war powers by permitting suits against states in either federal or state courts. As Chief Justice Roberts and Justice Breyer detail in both *PennEast* and *Torres*, the Constitution explicitly gives the eminent domain and war powers to Congress at the expense of the states.[93] For this reason, these powers are deemed "complete in themselves."

The question that remains is what is the limit of this "plan of the Convention" doctrine? Using the "consent" derived from the "plan of the Convention" doctrine, assuming that Congress grants an explicit cause of action, one would think that a person could sue in either federal or state court pursuant to a federal statute passed, for example, under the Trademark/Patent Clause, the Naturalization/Immigration Clause, the Coining of Money Clause, (all of Section 8 of Article I) and the treaty probation or import/export duties prohibition (contained in Section 10 of Article I). All of these powers are exclusively granted to the federal government and taken from the states as a result of the Constitution's ratification. Thus, to use the Court's terminology, these powers are "complete in themselves."

The dissenting justices recognize these implications fully. Thus, the vigor of the dissents. As Justice Thomas argued in his *Torres* dissent, the Indian Commerce Clause at issue in *Seminole* stands on the identical footing as the "complete in themselves" powers of bankruptcy, war, or eminent domain.[94] Under the Articles of Confederation, each state retained its sovereign powers to deal with the Indian Nations. Yet, the Constitution's Indian Commerce Clause (located in Article I Section 8) took that power

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[92] *See* Richard E. Welch III, *Mr. Sullivan's Trunk: Constitutional Common Law and Federalism*, 46 NEW ENG. L. REV. 275, 275 (2012). I previously argued that the expansive interpretation of *Hans* should be deemed "constitutional common law." But that argument has fallen on deaf ears, and the Supreme Court currently appears to reject the concept of "constitutional common law" while, rather paradoxically, accepting that the Court may make "prophylactic rules" to enforce Constitutional guarantees. Vega v. Tekoh, 142 S. Ct. 2095, 2106–07 (2022); Egbert v. Boule, 142 S. Ct. 1793, 1797 (2022).

[93] PennEast Pipeline Co. v. New Jersey, 141 S. Ct. 2244, 2254 (2021); *Torres*, 142 S. Ct. at 2463.

[94] *Torres*, 142 S. Ct. at 2483 (Thomas, J., dissenting).

away from the states and granted it exclusively to the federal government. Since early in the country's history, the Supreme Court has held that states cannot invade this exclusive federal domain.[95] Therefore, the *Seminole* ruling that Congress cannot authorize a lawsuit in federal court pursuant to its Indian Commerce Clause powers appears inconsistent with its "consent by plan of the Convention" reasoning. Whether the Supreme Court majority has the fortitude to reverse the *Seminole* holding remains unclear.

Likewise, the *Florida Prepaid* holding may conflict with the "plan of the Convention" cases.[96] The statute at issue in *Florida Prepaid* involved Congress' Trademark and Patent power, but following the *Seminole* decision, Congress decided to pass the law pursuant to the Fourteenth Amendment. The statute failed to satisfy the Court's "congruence and proportionality" test. In the 2020 *Allen v. Cooper* decision,[97] Justice Kagan found that the *Florida Prepaid* holding required the same result in the area of copyright protection. Kagan explicitly rejected the argument that the *Central Va. Community College* "plan of the Convention" reasoning should apply to the Intellectual Property Clause. She deemed the bankruptcy clause unique.[98] But, query if Justice Kagan would feel the same after seeing the progression of the "plan of the Convention" theory from bankruptcy (when she was not on the Court) to eminent domain (when she joined the dissent confining the "plan of the Convention" theory to bankruptcy) to war powers (where she joined the majority and accepted *PennEast* as binding precedent). After *PennEast* and *Torres*, a nearly identical statute could be passed by Congress using its Article I patent and trademark power to bypass the hazards of the "congruence and proportionality" test. After all, Article I gave the federal government plenary power over patents and trademarks and Congress has historically exercised exclusive jurisdiction over this area. This sure sounds like a power that is "complete in itself." While, as shown in the *Allen v. Cooper* case, the pull of stare decisis is strong, one must remember the Supreme Court's words in this area:

> Nevertheless, we always have treated *stare decisis* as a "principle of policy," and not as an "inexorable command[.]" "[W]hen governing decisions are unworkable or are badly reasoned, 'this Court has never felt constrained to follow precedent.'" Our willingness to reconsider our earlier decisions has been "particularly true in constitutional cases, because in such cases 'correction through legislative action is practically impossible.'"[99]

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[95] *E.g.*, Worcester v. Georgia, 31 U.S. 515, 570 (1832).

[96] *See* Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 647–48 (1999).

[97] 140 S. Ct. 994, 1007 (2020).

[98] *Id.* at 1002.

[99] Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 63 (1996) (quoting Helvering v. Hallock,

One can easily envision statutes passed pursuant to Congress' Article I immigration/naturalization power that might permit lawsuits against states in either federal and/or state court.[100] Congress would also pass these hypothetical statutes under their exclusive and plenary power explicitly conferred to them from state to federal authority pursuant to the "plan of the Convention." Thus, these statutes could be upheld and would not have to be analyzed under the Court's abrogation doctrine or be subjected to the "congruence and proportionality" test.

The elephant in the room, of course, is the Commerce Clause. *Union Gas*, a case holding that Congress could abrogate the Eleventh Amendment pursuant to the Commerce Clause, was reversed in *Seminole* in no uncertain terms.[101] The Commerce Clause grants Congress the exclusive power to regulate interstate commerce. As the Dormant Commerce Clause cases indicate, the states cannot interfere with or burden interstate commerce. The government has long held interstate commerce as an exclusive federal domain. Despite the logical consistency of including the Commerce Clause power within the "plan of the Convention" construct, it may be an unrealistic expectation. The Commerce Clause power has been broadly and extensively used and the current Court seems leery of Congress' efforts to pass legislation on the outer rim of this historic power.[102] Further, states can pass legislation that concerns interstate commerce as long as the commerce is not burdened. Ergo, one might expect that the current Court will attempt to distinguish Commerce Clause cases from the "plan of the Convention" holdings.

Still, the dissents are correct that the "plan of the Convention" line of cases is a powerful exception to the current Court's Eleventh Amendment/state sovereignty doctrine. Given the Court's unjustified expansions of state sovereignty, the "plan of the Convention" cases and their anticipated cousins are good news. After all, the "plan of the Convention" rationale is plainly correct. There simply is no doubt that the Constitution shifted power away from the states to the federal government to exclusively deal with immigration, naturalization, the raising of armed forces, dealings with Native American tribes, the issuance of currency, the regulation of patents and trademarks, etc. Article III of the Constitution makes it clear that

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309 U.S. 106, 119 (1940); Payne v. Tennessee, 501 U.S. 808, 827–28 (1991)).

[100] U.S. CONST., art. I, § 8. At the risk of sounding like a law professor, imagine a state engaged in extensive efforts to enforce, perhaps excessively, the federal immigration laws by arresting citizens and aliens with little regard to their rights and forcibly shipping them to other states. Assume that Congress, pursuant to its Article I Immigration and Naturalization powers, passes a law prohibiting these practices and providing a cause of action to anyone illegally detained by the state to sue that state for damages in state or federal court.

[101] 491 U.S. 1, 19, 23 (1989).

[102] *See, e.g.*, Printz v. United States, 521 U.S. 898, 923–24 (1997); Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 549–50, 552, 557, 560, 588 (2012).

Congress may create lower federal courts and grant them jurisdiction, but state courts are to aid in enforcing federal law. The "plan of the Convention" cases recognize these simple but significant Constitutional truths.

Using this relatively new doctrine, Congress may legislate in areas explicitly and traditionally reserved for the federal government. And Congress may constitutionally enforce its legislation by authorizing suits against states or state-wide agencies in either federal or state courts. Such "plan of the Convention" legislation would avoid the use of *Seminole's* rather artificial distinction between Article I and Fourteenth Amendment powers. It would also limit the use of the subjective and controversial "congruence and proportionality" test. Finally, such lawsuits would be a salutary restriction on *Alden's* state sovereignty doctrine. As emphasized in *Torres*, states do not have an absolute right to immunity from federal damage suits in their own courts. After all, states cannot close their courthouse doors to federal damage actions because federal and state laws form one integrated system of jurisprudence.[103] Furthermore, despite some contrary statements in *Alden*, state courts have an obligation to provide a remedy to violations of federal constitutional rights. That is what the Madisonian Compromise and Article III are all about.

CONCLUSION

Call me a traditionalist. I have always assumed that if someone is provided a federal right for which Congress has explicitly created a cause of action, that person is entitled to enforce that right and obtain a remedy. I believe that anyone steeped in English common law, as were many of the men who drafted and ratified the Constitution, would tend to agree with me. I have also always understood Article I of the Constitution to grant certain finite, but important, powers that are within the primary control of Congress; these powers were taken from the states at the time of ratification of the Constitution. This shifting of power from the states to a centralized federal government was the primary cause of the Anti-Federalist opposition to the newly drafted Constitution. But the Anti-Federalists lost and the Federalists won. Thus, the states surrendered large amounts of government powers and hence lost their "sovereignty." Given constitutional history and centuries of caselaw, Article III and the entire constitutional structure are based on the availability of state courts to enforce federal rights when a federal forum does not exist. Indeed, the state courts are obligated to provide a forum for federal constitutional deprivations. To me, at least, these are basic constitutional truths–truths the "plan of the Convention" doctrine implicitly recognizes.

The Supreme Court's earlier efforts to expand and strengthen the Eleventh Amendment and to develop a "state sovereign immunity" doctrine

[103] Testa v. Katt, 330 U.S. 386, 389–90, 393–94 (1947).

in state courts are unjustified. The Court's attempt to weave a state-immunity-from-federal-suit doctrine has no basis in the text of the Constitution or the history of its ratification. This approach is rather surprising for a Court so tied to historical inquiry and textual requirements when interpreting other constitutional provisions. But recently, a majority of the Supreme Court correctly held that Congress can legislate under such exclusive and/or important Article I powers such as bankruptcy, eminent domain, and war. Congress may enforce that legislation by authorizing damage actions by individuals against states in either federal or state court. In these cases, the Court reasons that states have "consented" to these lawsuits as part of the "plan of the Convention." There is no logical reason to confine this new doctrine to the three powers of bankruptcy, eminent domain, and war. The "plan of the Convention" rationale applies equally to Congress' Indian Commerce, Patent and Trademark, and Naturalization/Immigration Clauses, along with other Article I powers. By legislating in this fashion, Congress can avoid many of the unfortunate restrictions erected by the Court in its efforts to protect so-called "state sovereignty." This salutary result can be achieved if the Supreme Court continues to extend its "plan of the Convention" reasoning appropriately and logically. But only time will tell if the Court takes up this opportunity and responsibility.

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From Arkham to *Arcane*: Assessing Video Game Intellectual Property Through Comic Book Characters and Caselaw Comparisons

Blythe Bull[*]

INTRODUCTION

For sub-markets of the entertainment industry, intellectual property (or "IP") expansion through cross-industry collaboration enhances monetary value by increasing its audience and usage across platforms.[1] This is an important consideration for video games, where popular characters and their thematic story elements have found growing success in adaptations for film, television, and books.[2] However, cross-industry expansion risks inevitable substantive changes to the intellectual property, diluting copyright ownership, encouraging infringement, and delaying further expansion through contractual disputes.[3] Without proper legal methodology in place, video game copyright could suffer mass casualties across sub-markets.[4]

This Note will argue that legal scholarship must look to outside sources, particularly in the video game and comic book industries, for developing adequate standards to address video games' unique interactive copyright

[*] J.D., New England Law | Boston (2023); B.A., Music and Political Science, Hendrix College (2019). To Oscar, Megan, and Mrs. Susan Dore, the seventh-grade teacher that permitted my first historical term paper topic on Pokémon.

[1] *See* ROB SALKOWITZ, COMIC-CON AND THE BUSINESS OF POP CULTURE: WHAT THE WORLD'S WILDEST TRADE SHOW CAN TELL US ABOUT THE FUTURE OF ENTERTAINMENT 11, 41, 65 (2012).

[2] *See, e.g.*, Bill Desowitz, '*Arcane': How the Netflix Animated Series Transcended Its Video Game Origin as an Innovator*, INDIEWIRE (June 15, 2022, 5:30 PM), https://perma.cc/FW6W-TUAB; Adam Fitch, *Why Is Harley Quinn so Popular? Kevin Conroy Has an Idea*, CBR (Aug. 29, 2017), https://perma.cc/HV5M-ND6N; *see* Brandon Katz, *Video Games Will Soon Be Hollywood's Next Great IP War*, OBSERVER (Dec. 23, 2020, 8:00 AM), https://perma.cc/R2KK-T26J.

[3] *See, e.g.*, SALKOWITZ, *supra* note 1, at 41–43, 63–64, 106–12.

[4] *See* Arlen Papazian, *Let's Stop Playing Games: A Consistent Test for Unlicensed Trademark Use and the Right of Publicity in Video Games*, 8 WM. & MARY BUS. L. REV. 577, 594–96 (2017) (delineating video game market's high value and increasing codependency with sub-markets).

and proper audiovisual transmedia analysis. Part I provides background by defining a video game through its caselaw and corresponding IP: the technical, substantive, and interactive components. Part II illustrates the importance of the video game market and how cross-industry expansion of IP creates value through audience engagement and improved versatility. Part III highlights problems in the judicial system's understanding of video game IP and how proper analysis should handle infringement and right of publicity analysis. Part IV identifies the interactive nature of video game copyright by defining gameplay. Part V considers how comic book industry caselaw can address legal ambiguities in the video game market and in independent transmedia within its substantive copyright. This Note will move beyond current scholarship conclusions that state updates to video game copyright law are necessary, instead defining the legal components of its IP—and how that value substantively increases—as the industry continues to expand.

I. Background

A. *Video Games and Intellectual Property*

A video game is an interactive audiovisual work displayed through an electronic or digital medium.[5] At its core, there are three things that make up a video game: a technical foundation, audiovisual content, and an interactive element.[6] The technical, audiovisual, and interactive components that define video games are known as intellectual property, or a video game's IP.[7] These are the intangible but original identities, ideas, and creations that have legal protections from infringement, or being stolen or copied.[8]

Intellectual property is an umbrella term for concepts and creations with legal protections: patents, trademarks, and copyright.[9] While not a physical object, it identifies tangible creations that hold value, in which an owner can be identified.[10] The United States Constitution provides original protections,

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[5] Kamran Sedig et al., *Player-Game Interaction and Cognitive Gameplay: A Taxonomic Framework for the Core Mechanic of Video Games*, 4, no. 1, INFORMANTICS, 1, 3 (2017), https://perma.cc/QM7F-MNJV (citing KATIE SALEN TEKINBAS & ERIC ZIMMERMAN, RULES OF PLAY: GAME DESIGN FUNDAMENTALS (2004)).

[6] Deborah F. Buckman, Annotation, *Intellectual Property Rights in Video, Electronic, and Computer Games*, 7 A.L.R. FED. 2D 269, 269 (Westlaw through June 18, 2022); John Kuehl, Article, *Video Games and Intellectual Property: Similarities, Differences, and a New Approach to Protection*, 7, NO. 2 CYBARIS, 314, 319 (2016) (citing Christopher Lunsford, *Drawing a Line Between Idea and Expression in Videogame Copyright: The Evolution of Substantial Similarity for Videogame Clones*, 18 INTELL. PROP. L. BULL. 87, 96–99 (2013)); *see* Sedig et al. *supra* note 5, at 1, 3.

[7] Buckman, *supra* note 6, § 2.

[8] *Trademark, Patent, or Copyright*, U.S. PAT. & TRADEMARK OFF., https://perma.cc/R9CT-DBMS (last visited May 7, 2023) [hereinafter *Trademark, Patent, or Copyright*].

[9] *Id.*

[10] *See id.*

recognizing that innovation and expression are important to further science and the arts.[11] When developers reference a video game franchise's IP, they are referring to a mixture of patents, trademarks, and copyright.[12] Each type of IP protects something different, with rights either automatically vested or requiring initial licensing.[13]

Patents are licensed inventions or mechanisms that solidify an exclusive right to produce the resulting product.[14] This protects an inventor's right to decide how the new design, invention, or process will be used by themselves or third parties.[15] To receive protections, the creator must file an application for a patent with the United States Patent and Trademark Office.[16] The creation has to be new, unique, and usable within an industry to receive protections; otherwise, the patent is not granted.[17]

Trademarks protect an identifiable name, brand, or logo to maintain the value of the product associated with an acquired identity.[18] An improper use of a trademark borrows the reputation of the market associated with its brand or logo, which could misrepresent a product to a consumer and weaken, or dilute, the market value.[19] There is a legal presumption of ownership over a trademark, but registering with the United States Patent and Trademark Office acts as clear evidence of ownership and strengthens the scope of protections and legal remedies.[20] The Lanham Act, or the Trademark Act, regulates the use of trademarks for commercial purposes.[21]

Copyright protects original works of authorship, giving the owner power to decide how their original ideas and expressions are shared, used, and monetized.[22] Artwork, films, original stories, sound recordings, and even architectural designs are a few examples of original ideas granted copyright protections.[23] The Copyright Act of 1976 defines rights of authorship.[24] Once an original idea is created and presented in a tangible

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[11] U.S. CONST. art. I, § 8, cl. 8.

[12] *See, e.g.*, *Legal Jibber Jabber*, RIOT GAMES, https://perma.cc/Z4EF-8SFS (last updated Aug. 2018) (describing legal ramifications of League of Legends's IP in accessible, non-legal terms).

[13] *See Trademark, Patent, or Copyright*, *supra* note 8.

[14] *Trademark, Patent, or Copyright*, *supra* note 8.

[15] *See Trademark, Patent, or Copyright*, *supra* note 8.

[16] *Trademark, Patent, or Copyright*, *supra* note 8.

[17] 35 U.S.C. § 101.

[18] *Trademark, Patent, or Copyright*, *supra* note 8.

[19] *See Trademark, Patent, or Copyright*, *supra* note 8.

[20] *Trademark, Patent, or Copyright*, *supra* note 8.

[21] *See generally* Lanham Act, 15 U.S.C. §§ 1051–1127 (2013).

[22] *Trademark, Patent, or Copyright*, *supra* note 8.

[23] Copyright Act of 1976, 17 U.S.C §§ 101, 106 (1976) (defining copyright and works of authorship).

[24] *See generally id.* § 101 ("Definitions").

form, those ideas are copyrighted.[25]

Unlike patents, original creative expressions do not need to be unique to receive protections; thematic elements in storytelling and design are shared components of art one person cannot withhold from another.[26] Additionally, copyright protections are mortal; at minimum seventy years after an author dies, their copyright automatically enters the public domain for all to freely use and distribute.[27] While they are alive, copyright owners may share distribution rights with others for adaptations, which retain the same copyright protections as the original work.[28]

In contrast, parodies inspired by original copyright from a different author are deemed derivative works.[29] Whereas a sequel or adaptation borrows and expands the original copyright, derivative works engage with original copyright to produce a fundamentally different creation.[30] If the artistic expression is substantially different, or derivative of the original work, then it is original copyright with separate protections.[31]

In questions of copyright infringement, the initial question is whether one's work is based, in some form, upon the other's copyright.[32] If the offending work stems from another's copyright, then legal analysis must determine if it is sufficiently transformed enough to be a derivative work.[33] In cases of substantial similarity, the offending work is an adaptation; such works created without the author's permission or distribution rights infringe upon original copyright.[34]

B. *The Technical IP of Video Games*

Video games are a digital or electronic medium; put simply, the technical IP is its technology, or the mechanics that run the game itself.[35] This

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[25] *Id.* § 102(a).

[26] *How Is Copyright Different from a Patent or Trademark?*, RABIN KAMMERER JOHNSON, https://perma.cc/47KD-DWRU (last visited May 7, 2023).

[27] *See* 17 U.S.C. § 302(a).

[28] *Id.* § 106(a); *see* Kuehl, *supra* note 6, at 319.

[29] 17 U.S.C. § 101.

[30] *See id.*; *see also* Elisabeth S. Aultman, *Authorship Atomized: Modeling Ownership in Participatory Media Productions*, 36 HASTINGS COMMC'NS & ENT. L.J. 383, 390 (2014).

[31] *See* 17 U.S.C. § 103(b).

[32] *See id.* § 501; Kuehl, *supra* note 6, at 341 (finding infringement correlated to "just how far the defendants went in copying").

[33] *See* 17 U.S.C. § 501; Kuehl, *supra* note 6, at 348 (citing Capcom U.S.A., Inc. v. Data East Corp., 1994 WL 1751482, at *1 (N.D.CA. Mar. 16, 1994)) (warning derivative works can "look similar and play similarly but are different products").

[34] *See* 17 U.S.C. § 501. *see, e.g.*, Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 410 (2012) ("akin to literal copying").

[35] Buckman, *supra* note 6, § 1; *see generally* Sedig et al., *supra* note 5, at 3.

has two components.[36] The first is the actual machinery that powers a video game, such as the console or the joystick on its controller, which is an original invention protected through patents.[37] Patent protections are not automatically vested and have to be acquired through licensing with the United States Patent and Trademark Office.[38]

The second type of technical IP is the intangible technology that runs a video game, such as its software and coding.[39] Unlike the physical machinery, these underlying mechanics receive copyright protections, which protect original ideas and artistic expressions as works of authorship whose use belongs to the original creator. [40] Computer programming variations are not an original invention, but there are infinite possibilities how codes will be strung together and combined; this is analogous to words in a copyrighted novel, or notes in an original song.[41]

The scope of these copyright protections are, however, limited by time.[42] Until the copyright expires and enters the public domain, authors can either grant permission to use or grant distribution rights for others to produce new material using their copyright.[43] Use of copyright against the owner's permission is copyright infringement, in which the owner can take legal action to maintain control over how their creations are shared, used, and monetized.[44] Such remedies are generally settlements for financial reparations or court actions requesting preliminary injunctions during a video game's installment or before its official release.[45]

The Digital Millennium Copyright Act of 1998 ("DMCA") governs copyright infringement for technical IP.[46] Software infringement such as piracy and emulating (copying game software and uploading it for others to

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[36] *See* Sedig et al., *supra* note 5, at 3.

[37] *See e.g.*, Kyle Orland, *Sony Patents Method for "Significant Improvement of Ray Tracing Speed*," ARS TECHNICA (Feb. 28, 2022, 3:35 PM), https://perma.cc/62HR-97UK (illustrating the evolution of patented hardware and its complexity with examples of higher processing for lighting software); Incredible Techs., Inc. v. Virtual Techs., Inc., 400 F.3d 1007, 1011 (7th Cir. 2005) (classifying trackball on a golf arcade machine as a patent issue, not a copyright issue).

[38] *See Trademark, Patent, or Copyright*, *supra* note 8.

[39] *See generally* Copyright Act of 1976, 17 U.S.C §§ 101, 117 (1976).

[40] *See id.* § 102(a).

[41] *Cf.* 1 WILLIAM F. PATRY, COPYRIGHT LAW AND PRACTICE 168 (1994), *cited in* Micro Star v. FormGen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) ("What, after all, does sheet music do but describe in precise detail the way a copyrighted melody sounds?").

[42] 17 U.S.C. § 106A(d).

[43] *Id.* § 106A(e).

[44] *See id.* § 501.

[45] *See id.*

[46] *See generally id.* §§ 512, 1201–02; U.S. COPYRIGHT OFF., THE DIGITAL MILLENNIUM COPYRIGHT ACT OF 1998: U.S. COPYRIGHT OFFICE SUMMARY (1998), https://perma.cc/7DVN-SK6C.

download and play online) are prohibited by the DMCA.[47] Reverse engineering, a form of infringement through tinkering, is the inverse of inventing: taking a mechanism apart to determine how it works.[48] Unlike piracy or emulating, reverse engineering can involve both hardware and software infringement because both physical machinery as well as a line of code can be broken apart to discover its functions.[49]

This was the issue at the heart of *Sega Enterprises LTD. v. Accolade, Inc.*, a copyright infringement case where Sega modified their video game cartridge's coding to prevent competitors in the industry from producing video games for their Genesis console.[50] Developers at Accolade, Inc. isolated Sega's code in the cartridges through reverse engineering; through disassembly, Accolade learned how the programming was different and subsequently copied the modified coding for the purposes of producing their own games.[51] The Ninth Circuit decided that Sega's code was technical copyright with legal protections.[52] However, they concluded that Accolade's actions were a fair use of the copyright and did not constitute copyright infringement; Accolade had a legitimate reason for disassembling the code, and doing so was the only way Accolade could learn from the IP.[53]

Although the case occurred before Congress passed the DCMA, the Court applied the fair use doctrine, which remains a valid exception to an infringement claim.[54] This doctrine excuses unauthorized copyright usage for permitted purposes including education, research, reporting, critiques, or commentary.[55] In application, courts use four primary factors to consider fair use on a case-by-case basis: the nature of the copyrighted work, the proportion copied, the reason for its use, and the effect the use had on the potential market for the copyrighted work.[56] The Court utilized *Sega* to tailor the fair use doctrine for video game technology, identifying three key considerations to assess in conjunction with fair use: functionality, public

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[47] *See* 17 U.S.C. § 512; Kuehl, *supra* note 6, at 322.

[48] 17 U.S.C. §§ 1201(a)(1)(A), (f); *see Coders' Rights Project Reverse Engineering FAQ*, ELEC. FRONTIER FOUND., https://perma.cc/E9UY-7D48 (last visited May 7, 2023) (explaining reverse engineering legality in accessible terms).

[49] David Syrowik, *Restriking the Balance: The Uniform Computer Information Transactions Act (UCITA) and Reverse Engineering*, 82 MICH. BAR J., 30, 32 (Mar. 2003), https://perma.cc/P2HL-ZMG2 (noting the reporter's commentary on whether reverse engineering "is permitted for computer programs" under copyright or patent laws).

[50] 977 F.2d 1510, 1515 (9th Cir. 1992).

[51] *Id.* at 1515–16.

[52] *Id.* at 1517.

[53] *Id.* at 1518; *see* Kuehl, *supra* note 6, at 338–40, 344–45 (explaining that copying is critical for industry).

[54] *See* 17 U.S.C. §§ 107, 512, 1201–1202.

[55] *Id.* § 107.

[56] *Sega Enters. Ltd.*, 977 F.2d at 1523–24, 1527.

policy interests, and the impact of underlying commercial purposes.[57]

In *Sega*, the primary use for reverse engineering stemmed from Accolade's intentions to develop their own original creative works in the form of video games.[58] Fair use is generally inapplicable for large commercial uses or instances of exclusive financial gain.[59] Similar to the thematic elements of a story under the Copyright Act, basic functional concepts of coding should be available to the general public so others can continue to build upon growing material.[60] The Court reasoned that the greater the code's functional use, the weaker its copyright protections.[61] Public policy at that time also encouraged expansion and competition in the video game industry, and the Court ruling otherwise would have been against these public interests, in support of monopolizing a still-developing market.[62]

Although for-profit, Accolade's motive behind disassembling the code was an "essentially non-exploitative purpose" that rendered its commercial purposes "of minimal significance."[63] Ultimately, the Court reasoned that infringement disputes should assess marketed derivative works under the fair use exception—by weighing the technical IP's functional nature against its impact on commercial interests.[64] Technical IP's infringement analysis under the DMCA follows similar reasoning as the Copyright Act: to preserve ingenuity in the "inherently creative" industry, courts must delineate protected expressive elements from its functional components.[65]

C. *The Substantive IP of Video Games*

1. Audiovisual Works Under Copyright Law

The Copyright Act covers seven categories of artistic expression, most of which are single-element creations, such as sound recordings, visual

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[57] *Id.*; *see* Kuehl, *supra* note 6, at 317, 319, 328 (pointing out the platform's difficult fit within copyright law).

[58] *Sega Enters. Ltd.*, 977 F.2d at 1518.

[59] *See* Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 451 (1984).

[60] *See Sega Enters. Ltd.*, 977 F.2d at 1527 (citing Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 349–50 (1991)); *see also* Atari Games Corp. v. Nintendo of Am., 975 F.2d 832, 842–43 (Fed. Cir. 1992); Kuehl, *supra* note 6, at 338–40, 344–45.

[61] *Sega Enters. Ltd.*, 977 F.2d at 1527.

[62] *Id.* at 1523–24, 1527; *see* James Grimmelmann, *Copyright and the Romantic Video Game Designer*, PRAWFSBLAWG (Feb. 2, 2012), https://perma.cc/VBL8-K28S (citing Williams Elecs., Inc. v. Artic Int'l., Inc., 685 F.2d 870, 870 (3d Cir. 1982)), *quoted in* Kuehl, *supra* note 6, at 340–41.

[63] *Sega Enters. Ltd.*, 977 F.2d at 1522–23.

[64] *Id.* at 1526–27; *see* Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1220 (N.D. Cal. 1999) ("Accolade created something new. Here, Connectix is not creating its own product to be used *in conjunction with* Sony's Playstation. Rather, VGS is a *substitute* product.").

[65] *See Sega Enters. Ltd.*, 977 F.2d at 1526–27.

designs, or live performances.[66] An audiovisual work is defined separately because it is multi-layered, combining recorded sounds and corresponding images to tell a story.[67] This IP is the product of the technical, comprising elements of a story and its thematic accessories.[68] Like television or a major motion film, video games are an audiovisual platform.[69]

In its simplest description, audiovisual copyright is a relay of images with accompanying sound; however, the artistic mediums covered under that legal definition are much broader because of two key considerations.[70] The first consideration is that audiovisual works are displayed by "machines[] or devices," meaning electronic equipment.[71] Physical, live performances, like a musical or a band, cannot constitute an audiovisual work.[72] Film, television, sound recordings, and video games all have this in common: the audiovisual category of copyright is electronic in nature, requiring both the audio and the visual components to be prerecorded.[73]

The second consideration regards its audio element: the sound isn't actually necessary.[74] Both elements, recorded sights and sounds, are considered under a singular entity.[75] This means that the audio and visual components cannot be separated; they are protected as one product.[76] If a video game has no sound, it is still considered an audiovisual work because what matters is the visual display (how the story is being told). [77]

This is evident by the Copyright Act's distinction between literary works, which are specifically defined as "other than audiovisual" material.[78] Although they could be displayed through audiovisual platforms like films or television, the platform used to tell the story does not matter because literary works are expressions of "numbers, or other verbal or numerical symbols or indicia" displayed through textual depictions.[79] When reading a

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[66] Copyright Act of 1976, 17 U.S.C §§ 101, 106 (1976).

[67] *See id.*

[68] *See id.*

[69] *See* SALKOWITZ, *supra* note 1, at 15–16 (highlighting audiovisual's multimedia platform crossovers, including video games); Sedig et al., *supra* note 5, at 3–4 (concluding a video game's audiovisual content "at the heart of design").

[70] *See* 17 U.S.C. §§ 101, 106.

[71] *Compare id.* § 101, *with* SALKOWITZ, *supra* note 1, at 2 (delineating graphic storytelling qualities in comic book medium with print and digital publications).

[72] *See* 17 U.S.C. § 101.

[73] *See id.*; *see also* SALKOWITZ, *supra* note 1, at 15 (defining "media convergence" as synthesized sub-markets and digitized comic publications).

[74] *See* 17 U.S.C. § 101.

[75] *See id.*

[76] *Id.*

[77] *Id.*; *see also* SALKOWITZ, *supra* note 1, at 16 (engaging the audience on "multiple levels").

[78] 17 U.S.C. § 101; *see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (9th Cir. 1978) (delineating literary characters from comic book characters).

[79] 17 U.S.C. § 101; *see* SALKOWITZ, *supra* note 1, at 15 (noting the "convergence of media");

book, the story is told through descriptions, whether read on a page, spoken aloud, or heard on an audiobook.[80] This is fundamentally different from the defined "motion pictures" that tell a story through the "impression of motion"; in films and other audiovisual works, the story is shown to you, providing a display of motion that an audience member must observe to interpret and piece together the story in their mind.[81]

Noting this distinction, copyright law considers the difference in how an audiovisual story is told, rather than on what platform audiovisual works will be displayed.[82] To define the distinction, a fundamental question must be asked: was the original story told or observed?[83] Through literary works, a story is told.[84] Through audiovisual, the story is observed.[85]

2. Video Games and Audiovisual IP

For copyright infringement, there must be substantial similarity in the offending audiovisual's objective details, such as thematic elements, as well as in its "similarity of expression" and overall "feel of the works." [86] Fictional characters and other related substantive elements require a different test than a video game's technical IP; unlike software and programming, copying the thematic elements from another work of authorship does not have an underlying functional use.[87] Instead, the courts use a test to determine whether the copied material constitutes a "derivative work."[88] To constitute a derivative work, the audiovisual copyright must have a fixed, tangible form that significantly incorporates the preexisting work.[89]

The Ninth Circuit outlined the "derivative works" test for video games in *Micro Star v. FormGen Inc*.[90] The game at the center of the lawsuit allowed

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Michael Jon Anderson, *The Rise of the Producer-Novelist: Shifting Perceptions of Authorship in Transmedia Publishing*, 2 CASE W. RSRV. J.L. TECH. & INTERNET 47, 49 (2011) (noting audiovisual history rooted in "media convergence" of "text and images").

[80] *See* 17 U.S.C. § 101; *see also Walt Disney Prods.*, 581 F.2d at 755.

[81] 17 U.S.C. § 101; *see* SALKOWITZ, *supra* note 1, at 16, 18 (requiring audience participation in storytelling); *see also* Sedig et al., *supra* note 5, at 14 ("This type of reaction behaves like a movie, where changes to a scene are stacked in time and once scene replaces another.").

[82] *See* 17 U.S.C. § 101.

[83] *See id.*; Sedig et al., *supra* note 5, at 14–15 (explaining stacked transition elements).

[84] *See* 17 U.S.C. § 101; *Walt Disney Prods.*, 581 F.2d at 755.

[85] *See* SALKOWITZ, *supra* note 1, at 16; Sedig et al., *supra* note 5, at 14 (analogizing stacked transitions to a movie's story process).

[86] Litchfield v. Spielberg, 736 F.2d 1352, 1356–57 (9th Cir. 1984); *see* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 620 (7th Cir. 1982); SALKOWITZ, *supra* note 1, at 65.

[87] *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998).

[88] *See id.* at 1110; 17 U.S.C. § 101 (defining "derivative work").

[89] *Micro Star*, 154 F.3d at 1110; Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992); *Litchfield*, 736 F.2d at 1357.

[90] 154 F.3d at 1110.

players to create and share their own levels with other players.[91] Micro Star copied multiple player-created levels on game discs and sold them, raising the issue of whether Micro Star's product constituted a derivative work under the Copyright Act.[92] The Court found that Micro Star's product was substantially similar in audiovisual display; absent significant adaptations to the preexisting material, the product's resulting stories are sequels rather than its own original, derivative work.[93]

3. Transmedia and Trademarks

A key consideration of a video game's audiovisual nature is its perpetual entanglement with trademark law.[94] For two primary reasons, audiovisual IP requires the courts to synthesize copyright and trademark protections. [95] First, to maintain the value of a game franchise's brand and prevent consumer confusion, unique and identifiable audiovisual copyright receives trademark protections against improper use.[96] Prominent character identities, such as the main character's name, face, and original combat moves, are unique for their direct association to a video game's franchise and company.[97] Those portions of individual IP, such as video game characters and other audiovisual copyright, are called "transmedia" for their ability to transition between media platforms and sub-markets.[98] For example, Sega's speedy blue hedgehog is a transmedia copyright of Sega's *Sonic the Hedgehog* franchise.[99] Although the character originated from a video game platform, Sonic and other foundational elements of the game have easily translated over into Saturday morning cartoons and a successful box office opener from 2020.[100]

A playable avatar may have a distinct name, an identifiable weapon, or a unique set of fighting moves that are unmistakably associated with that

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[91] *Id.* at 1109.

[92] *Compare id.*, *with* Kuehl, *supra* note 6, at 341 (delineating "wholesale copying").

[93] *Micro Star*, 154 F.3d at 1112.

[94] *See* Robert Van Arnam & Andrew Shores, *Protection or Expression: The Evolution of Copyright Protection and Right of Publicity in the Video Game Industry*, 61 FOR THE DEFENSE MAG. 16, (2019), https://perma.cc/X3JA-8XQ5 (exploring the balance between copyright and trademark in video game IP); *see also* SALKOWITZ, *supra* note 1, at 65.

[95] *See* Van Arnam & Shore, *supra* note 94.

[96] Papazian, *supra* note 4, at 580; *see* SALKOWITZ, *supra* note 1, at 65.

[97] *See, e.g.*, Blizzard Entertainment v. Lilith Games (Shanghai), 149 F.Supp.3d 1167, 1170 (providing examples from "Warcraft" video game series); SALKOWITZ, *supra* note 1, at 152 (describing the success of Batman); Papazian, *supra* note 4, at 602 (a game using a character with likeliness to a famous football player to attract consumers).

[98] SALKOWITZ, *supra* note 1, at 41; Anderson, *supra* note 79, at 48, 50.

[99] *See, e.g.*, Michael McWhertor, *The Origins of Sonic the Hedgehog*, POLYGON (Mar. 21, 2018, 10:13 PM EDT), https://perma.cc/27N7-LZYN.

[100] *Compare, e.g.*, *id.*, *with* Anderson, *supra* note 79, at 50 (developing digital aided multi-platform media), *and* Aultman, *supra* note 30, at 386-87.

game franchise, and as a result, that company could trademark that character.[101] However, a unique character is an original concept, design, and creation, which constitutes clear copyright.[102] Another iconic video game character—Nintendo's Pikachu—is trademarkable property with a clear and direct association to the Pokémon franchise and its corresponding value.[103] Pikachu is also The Pokémon Company's copyrightable entity, with over eight hundred other playable Pokémon creations spanning across audiovisual depictions in classic games on Nintendo's Game Boy Advance, GameCube, DS and 3DS, Wii, and Switch; as well as Niantic, Inc.'s *Pokémon GO* for mobile gaming.[104]

4. Right of Publicity

The second reason a game's substantive copyright is fundamentally intertwined with trademark law is the visual elements of a game, its graphics, or a pixelated display.[105] Substantial improvements in image quality have encouraged greater realism and consequential trademark conflicts.[106] The better the graphics, the harder it is to discern original copyright from copied identities.[107] The Ninth Circuit considered this issue a few times in regard to the game franchise Grand Theft Auto.[108] In *E.S.S. Entertainment 2000 v. Rock Star Videos*, a strip club sued the franchise's game developers, Rockstar, claiming their game's virtual city parodying Los Angeles included a nearly identical depiction of their business.[109] The Court ultimately ruled that although the quality of the game's graphics invoked an impeccable sense of realism, Rock Star Videos intended for Grand Theft Auto to be an artistic caricature of Los Angeles.[110] Realistic similarities were

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[101] SALKOWITZ, *supra* note 1, at 65; *see, e.g.*, Rich Johnston, *Riot Games Opposes Archie Comics Over Jinx Trademark*, BLEEDING COOL (Aug. 9, 2020, 7:50 AM), https://perma.cc/NQU3-FWL7 (noting trademark dispute where both Archie Comics and League of Legends has a character named "Jinx," known as "The Loose Canon").

[102] *See, e.g.*, *Legal Jibber Jabber*, *supra* note 12.

[103] *Compare Legal Information*, THE POKÉMON CO., https://perma.cc/79ZG-W8GW (last visited May 8, 2023) [hereinafter *Legal Info Pokémon*], *and Legal Information*, NINTENDO OF AUSTRALIA, https://perma.cc/8YLK-7Q5F (last visited May 8, 2023), *with* SALKOWITZ, *supra* note 1, at 65.

[104] *Legal Information Pokémon*, *supra* note 103; Sara Peterson, *How Many Pokemon Are There in Total? (2023 Updated)*, TOYNK (Mar. 29, 2022), https://perma.cc/B2LW-4U9T; *see Nintendo Shares Soar on Pokemon Go Success*, BBC (Jul. 11, 2016), https://perma.cc/W5PD-GGEX.

[105] *See* Van Arnam & Shores, *supra* note 94.

[106] *See* Van Arnam & Shores, *supra* note 94.

[107] *See, e.g.*, Kuehl, *supra* note 6, at 328 ("video games such as *Call of Duty* face legal action for depictions of historical figures."); *see* Van Arnam & Shores, *supra* note 94.

[108] *See, e.g.*, Kuehl, *supra* note 6, at 328; *see also* Anderson, *supra* note 79, at 50 (delineating "franchise storytelling"); Aultman, *supra* note 30, at 386 (defining "fictional franchise universe").

[109] 444 F. Supp. 2d 1012 (C.D. Cal. 2006).

[110] *Id.*; *see* Van Arnam & Shores, *supra* note 94.

insufficient absent exact replicated details, like the strip club's name or its physical description.[111]

An individual's identity is a trademarkable brand, legally protected as a right of publicity.[112] This is a critical consideration in the video game industry where internet personas and their associated avatars are creating income through e-sports, streaming, and building their brand.[113] Recently, legal disputes surrounding audiovisual IP have stemmed from celebrities accusing developers of creating characters copied off of them, infringing on the market value associated with their identity.[114] The Lanham Act and trademark laws apply where someone profits from a commercial endeavor by causing consumers to believe that a celebrity was involved either: intentionally, through deceit, or unintentionally, by mistake.[115]

There's some confusion, however, about how to properly address its improper use as a question of law.[116] The ambiguity stems from this entanglement between trademark and copyright; video games are commercial in nature, falling under the Lanham Act's trademark provisions, but most lawsuits surrounding celebrity depictions are based on the graphics and audiovisual copyright.[117] The Lanham Act's scope for trademark protections is narrow, finding liability where someone either intentionally used another's identity for deceptive purposes or unintentionally caused an economic injury through consumer confusion.[118] This gray area in substantive IP created two separate tests: the *Rogers* and the *Transformative*.[119]

In *Rogers v. Grimaldi*, the Second Circuit determined that a question of improper use of a celebrity's name as a movie title was a trademark issue covered as a claim of false endorsement under the Lanham Act.[120] They developed the *Rogers* test, a two-prong system for assessing right of publicity cases under trademark law.[121] Right of publicity violations occur when consumers make financial decisions based on a celebrity's endorsement,

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[111] *E.S.S. Ent. 2000*, 444 F. Supp. 2d at 1012.

[112] Lanham Act, 15 U.S.C. §§ 1125(a), 1127 (2013); *see* Rogers v. Grimaldi, 875 F.2d 994, 1000 (2nd Cir. 1989).

[113] *See generally* Jake Ritthamel, Note, *Copyright's Final Boss Encounter: Ownership of Player-Characters in Online Multiplayer Role-Playing Video Games*, U. ILL. J.L. TECH. & POL'Y 183 (2022).

[114] Van Arnam & Shores, *supra* note 94.

[115] *See* 15 U.S.C. §§ 1125(a), 1127.

[116] Van Arnam & Shores, *supra* note 94; *see* Hart v. Elec. Arts, Inc., 717 F.3d 141, 153 (3rd Cir. 2013) (assessing all possible balancing tests in absence of agreed standard).

[117] *See generally* Van Arnam & Shores, *supra* note 94.

[118] 15 U.S.C. §§ 1125(a), 1127; *see Hart*, 717 F.3d at 158; Van Arnam & Shores, *supra* note 94.

[119] *Compare* Rogers v. Grimaldi, 875 F.2d 994, 1000 (2d Cir. 1989), *with Hart*, 717 F.3d at 158.

[120] 875 F.2d at 1000.

[121] *Id.* at 999.

participation, or association with a business and its product.[122] The first prong regards standing, or the nexus that mistaken association occurred because of the defendant's actions; in other words, defendants actively marketed using the celebrity's identity.[123] The second prong asks how the celebrity's identity would have been used in marketing the product.[124] Courts find no infringement in cases where defendants created a stock character, parody, or caricature; this means that any misleading depictions were intended as artistic expression rather than as advertising through an outside brand.[125]

In *Hart v. Electronic Arts, Inc.*, the Third Circuit described a football player's likeness in a video game as a copyright issue, finding trademark protections under the Lanham Act too narrow to otherwise apply.[126] The Court recognized *Rogers* as appropriate for trademark interests, limiting its function as finalizing disputes on consumer confusion.[127] There was no question in this case that Electronic Arts ("EA") based the video game character on Hart, and that this had minimal impact on *Madden*'s market value because—although the industry has drastically adapted to support isolated transmedia sales through in-game content exclusives—players bought games as a unit, regardless of individual character options.[128] Therefore, the Court reasoned that consumer confusion was not the primary issue; they vested the actual violation in Hart's privacy interests, rather than whether consumers believed the character resembled Hart.[129]

The Third Circuit instead applied an alternative test, asking whether Hart's right to privacy outweighed EA's freedom of expression.[130] In other words, the *Transformative* test is another variation of the derivative works exception; it has a substantial difference threshold, requiring the work to have "sufficiently transformed" the celebrity's likeness in the video game to receive copyright protections as an original creation.[131] If the character's likeness is sufficiently transformed, First Amendment protections of the

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[122] *See generally* 15 U.S.C. §§ 1125(a), 1127; Van Arnam & Shores, *supra* note 94.

[123] *Rogers*, 875 F.2d at 1000.

[124] *Id.*

[125] Hart v. Elec. Arts, Inc., 717 F.3d 141, 154–55 (3rd Cir. 2013); *Rogers*, 875 F.2d at 1000, 1004–05.

[126] 717 F.3d at 154–55, 157–58.

[127] *Id.* at 155.

[128] *Id.* at 145–46; *see, e.g.*, Kuehl, *supra* note 6, at 326–28 (outlining market trends in free to play games); Ritthamel, *supra* note 113, at 188–89, 194–206 (discussing transmedia content's substantial role in the modern video game market through *World of Warcraft* and *Final Fantasy XIV* comparisons).

[129] *Hart*, 717 F.3d at 151.

[130] *Id.* at 165.

[131] *Id.* at 163. *Compare* Micro Star v. FormGen Inc., 154 F.3d 1107, 1113 (9th Cir. 1998) (utilizing "derivative works" test), *with* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24, 1527 (9th Cir. 1992) (copying functional code to create derivative works is acceptable).

right to creative expression will outweigh a celebrity's protections under the right of publicity.[132]

D. *The Interactive IP of Video Games*

In sum, the technical IP is the console, its controllers, and the programmed commands that relay communication between them.[133] Patents protect the invention of the individual game cartridge, for example, and the copyright covers the coding embedded within that game cartridge.[134] The audiovisual is the television's display, both on its screen and through its speakers, after the console turns on; this includes even the first eight seconds, before the game begins.[135] Trademark and copyright protections overlap, particularly with popular franchises whose copyrights are so well known by individual characters alone.[136]

In this analogy, however, the interactive IP is the gameplay, or everything within the player's control: the direction they turn the controller's joystick, the implications of that decision in the video game, and what the player feels as a result.[137] This is the interactive component that makes video games fundamentally unique from any other audiovisual work.[138] The player's control over the story customizes the experience, making it different every time for every player.[139] For example, when a villain lunges at the protagonist, one player may go for a killing blow,

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[132] *Hart*, 717 F.3d at 163.

[133] *See How Do Video Games Work? Basic Architecture.*, HOW TO MAKE AN RPG, https://perma.cc/XJ38-MDZX (last visited May 8, 2023) ("From Code to Screen"); *see, e.g.*, Operating Portion of Controller for Electronic Game Machine, U.S. Patent No. D456,854 fig.1 (issued May 7, 2002) [hereinafter *GameCube Controller*]

[134] *See, e.g.*, Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1215 (N.D. Cal. 1999) (describing PlayStation console's hardware components with patent category of "processes" and firmware as holding "copyright registrations"); Benj . Edwards, *The Untold Story of the Invention of the Game Cartridge*, FAST CO. (Jan. 22, 2015), https://perma.cc/TRZ3-4ML6 (illustrating differences in technical IP through Kirschner's patentable hardware and Haskel's programming copyright); Orland, *supra* note 37.

[135] *See, e.g.*, rubbermuck, *GameCube Startup Logo (HQ)*, YOUTUBE (Jan. 17, 2008), https://perma.cc/2XMG-223W.

[136] *See* SALKOWITZ, *supra* note 1, at 69; *see, e.g.*, SmashBrosIGN, *Villager Trailer – Super Smash Bros.*, YOUTUBE (June 5, 2014), https://perma.cc/Z6DB-T8B4 (illustrating prominence of Nintendo's video game character copyright as franchise trademarks in crossover game, *Super Smash Bros.*—including The Wii Fit Trainer).

[137] Sedig et al., *supra* note 5, at 3; *see, e.g.*, Alex Shevrin Venet, *Letters from My Dead Mom in Animal Crossing*, MOD. LOSS (Mar. 17, 2021), https://perma.cc/2543-ME2V (showing the impact of gameplay in emotional response and player's actions).

[138] Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 798 (2011); *see* Ent. Software Ass'n v. Granholm, 426 F. Supp. 2d 646, 651 (E.D. Mich. 2006) (finding video games inseparable from their interactive element because the expressive and functional elements are "closely intertwined and dependent on each other in creating the virtual experience").

[139] *See* Sedig et al., *supra* note 5, at 3, 5.

whereas another may dodge and evade.[140] The interactive component gives every player the same tools to create their own experience, resulting in potentially infinite versions of a single story.[141]

The Supreme Court finally defined interactive IP's significance in its *Brown v. Entertainment Merchants Association* decision.[142] The Court addressed a California law banning violent video game sales to minors, finding it violated First Amendment protections for freedom of speech.[143] In its decision, the Court made two substantial distinctions for video game law.[144] First, they recognized that video games have artistic merit as audiovisual works.[145] Second, they delineated video games as unique from other audiovisual works due to their interactive component.[146]

There was discourse in the *Brown* decision as to what that interactive component entailed.[147] Justice Scalia's majority opinion defined all audiovisual works as containing a "degree of interaction."[148] He distinguished video games as having a substantially higher degree of interaction than other audiovisuals.[149] The concurring opinion agreed with the majority decision, but Justice Alito argued that other audiovisual works do not contain interactive components the way video games are "concretely interactive."[150] He also critiqued the majority because the opinion required more substantial consideration of the interactive element and the players who, consequently, "experience in an extraordinarily personal and vivid way."[151]

Beyond *Brown*, interactive IP remains an abstract concept in legal scholarship.[152] Its impact on caselaw has been subtle; courts often refer to it without naming it.[153] In *Micro Star*, the Court acknowledged a difference

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[140] *Cf.* Sedig et al., *supra* note 5, at 1, 5.

[141] *See* Kuehl, *supra* note 6, at 318; *see, e.g.*, Venet, *supra* note 137; *see also* Matthew Ball, *Netflix and Video Games*, MATTHEWBALL.VC (Aug. 24, 2021), https://perma.cc/Z7VS-TGFX [hereinafter Ball, *Netflix and Video Games*] (noting the significance of "multiplayer storytelling").

[142] 564 U.S. at 798.

[143] *Id.* at 789.

[144] *Id.* at 790.

[145] *Compare id.*, *with* SALKOWITZ, *supra* note 1, at 2, 15–16.

[146] *Brown*, 564 U.S. at 798; *see* Kuehl, *supra* note 6, at 314, 318, 325, 327 (comparing films and video games).

[147] *See* 564 U.S. at 805–21 (Alito, J., concurring).

[148] *Compare Brown*, 564 U.S. at 798 (citing Am. Amusement Mach. Ass'n. v. Kendrick, 244 F.3d 572, 577 (7th Cir. 2001)), *with* SALKOWITZ, *supra* note 1, at 16, 18.

[149] *Brown*, 564 U.S. at 798 (citing *Kendrick*, 244 F.3d at 577).

[150] *Id.* at 819–20 (Alito, J., concurring).

[151] *Id.*

[152] *See id.* at 798, 819–20; Kuehl, *supra* note 6, at 340–41; Papazian, *supra* note 4, at 602 (difficulty defining when both "an artistic medium and a commercial product").

[153] *See, e.g.*, Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012); Micro Star v. FormGen, Inc., 154 F.3d 1107, 1112 (9th Cir. 1998) (citing Litchfield v. Spielberg,

between objective and subjective, or interactive, copyright.[154] They reasoned that substantial similarity in objective copyright, the audiovisual elements, will result in infringement on the subjective: the artistic expression, the feel of the game, and its influence on the player.[155]

II. Importance

A. *The Lucrative Industry of Video Games*

The video game industry is often described as "relatively new," but after fifty years, it's anything but; the gaming market is already larger than film and television by 43%.[156] Forty percent of the entire worldwide population play video games.[157] More people in the United States own a video game console than all of the Amazon Prime users in the world.[158] To put that in perspective, before the COVID-19 pandemic, the film industry set a global box office record in ticket sales: $42.5 billion.[159] That same year, the video game industry was estimated to be worth $150 billion.[160]

B. *The Entertainment Industry and Sub-Market Expansion Potential*

Video game developers can increase the value in their substantive IP, the audiovisual, by expanding out into the entertainment industry.[161] This is an umbrella term for an expansive portion of the economy derived from various sub-industries of pop culture and art, including film, music, television, and radio.[162] Main characters have market value; without additional creative effort, sub-market expansion of a character into a film or television adaptation has shown to increase audience engagement and diversity as well as multifunctional use of the character.[163]

Expansion occurs when sub-industries collaborate, allowing individual IP to be utilized across various forms of media and entertainment.[164]

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736 F.2d 1352, 1356 (9th Cir. 1984); Atari, Inc. v. North American Philips Consumer Elec. Corp., 672 F.2d 607, 620 (7th Cir. 1982)); Kuehl, *supra* note 6, at 329-30 ("idea-expression dichotomy").

[154] 154 F.3d at 1112.

[155] *Id.*; *accord Litchfield* 736 F.2d at 1356–57; Sonali D. Maitra, *It's How You Play the Game: Why Videogame Rules Are Not Expression Protected by Copyright Law*, 5 LANDSLIDE NO. 4, Mar./Apr. 2015, at 16-21, https://perma.cc/XT8D-EBA2 (discussing "merged" ideas and expression).

[156] Katz, *supra* note 2. *Compare* SALKOWITZ, *supra* note 1, at 4, 107, 151 (accounting comic industry's IP at financial mercy of film and television), *with* Kuehl, *supra* note 6, at 328.

[157] Katz, *supra* note 2.

[158] Katz, *supra* note 2; *see* Kuehl, *supra* note 6, at 315.

[159] *See* Katz, *supra* note 2.

[160] Katz, *supra* note 2; *see* Kuehl, *supra* note 6, at 314–15, 318, 325.

[161] *See* SALKOWITZ, *supra* note 1, at 5, 41–42, 65.

[162] *See* SALKOWITZ, *supra* note 1, at 3, 15.

[163] *See* SALKOWITZ, *supra* note 1, at 5, 37, 41–42, 63–65; Andersoen, *supra* note 79, at 50.

[164] *See* Anderson, *supra* note 79, at 50–51, 53; Aultman, *supra* note 30, at 385–86; Matthew Ball, *7 Reasons Why Gaming IP is Finally Taking Off in Film/TV*, MATTHEWBALL.VC (Feb. 27, 2020),

Collaboration is required to expand into other forms of media because each sub-industry is specialized in how it markets, whom it attracts, and what it produces. [165] In other words, each branch within the industry has different resources, making it both cost-effective and efficient to work with other industries.[166] The result is a contractual relationship connecting two contrasting industries by one's copyright and the other's production resources.[167]

C. *Current Trends in Video Game Adaptations*

Film and television adaptations of video games are not a recent occurrence, but what has changed is their success in creating value.[168] There were several failed game adaptations in the late 1990s, with limited opportunity for video game heroes to make Hollywood debuts as successful as Angelina Jolie's over the next decade.[169] Most notably, in 1993, an ill-received *Super Mario Brothers* film adaptation grossed $20.9 million on a $40 million budget.[170] Bob Hoskins, who played Mario, described the adaptation in a 2007 interview as "the worst thing I ever did" and a huge disappointment.[171] The film found fame as a cult classic two decades later, but its failure at the box office set the tone for many years: success on the N64 would not translate over to the 8mm film.[172]

This changed in the late 2010s.[173] Blizzard Entertainment, the video game developer for *World of Warcraft*, released *Warcraft* in partnership with Legendary Pictures; it remains the highest grossing video game film adaptation.[174] Sega's *Sonic the Hedgehog* found box office success in 2020 and

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https://perma.cc/L6W4-FZ42 [hereinafter Ball, *7 Reasons Why*]; *see, e.g.*, SALKOWITZ, *supra* note 1, at 41, 63–64 (discussing franchise transmedia);

[165] *See* SALKOWITZ, *supra* note 1, at 3.

[166] *See* Ball, *7 Reasons Why*, *supra* note 164.

[167] *E.g.*, SALKOWITZ, *supra* note 1, at 107 (discussing Marvel and Disney's collaborations); *see* Ball, *7 Reasons Why*, *supra* note 164. *But see* Anderson, *supra* note 79, at 53 (collaborating complicates ownership).

[168] *See* SALKOWITZ, *supra* note 1, at 35, 63–64, 72, 100, 104, 106 (changing generational interests and film culture for comic industry as predecessor for video games); Ball, *7 Reasons Why*, *supra* note 164.

[169] Ball, *7 Reasons Why*, *supra* note 164.

[170] *Super Mario Bros: The First Movie Based on a Video Game*, WARPED FACTOR (Mar. 27, 2021), https://perma.cc/B82R-5J9X [hereinafter *Super Mario Bros*].

[171] *Id.*

[172] *See id.*; Katz, *supra* note 2.

[173] *Compare* SALKOWITZ, *supra* note 1, at 4 (expanding comic culture with Marvel's superhero film adaptations and DC's "New 52" initiative occurred in the early 2010s), *with* Katz, *supra* note 2.

[174] *See Blizzard Entertainment® and Legendary Pictures to Produce Live-Action Warcraft® Movie*, GAMESINDUSTRY (May 10, 2006), https://perma.cc/43UX-DPB5; Eddie Makuch, *Highest-Grossing Video Game Movies of All Time*, GAMESPOT (Apr. 14, 2023, 3:58 PM PDT), https://perma.cc/N9Z6-

secured a sequel.[175] Nintendo grossed approximately $430 million worldwide in the Pokémon spinoff, *Detective Pikachu*; even a second attempt at a Mario adaption is in the works for 2022.[176] A recent *Uncharted* adaptation received positive reviews and box office success.[177] Other game series with a larger adult demographic, such as *Assassin's Creed*, *Monster Hunter*, and *Mortal Kombat*, have seen box office success as well.[178]

There are several explanations for video games' recent success in Hollywood.[179] Not only are video games more mainstream, but franchises have now been around for multiple generations, encouraging greater nostalgia.[180] Improvements in animation technology for film aid in depicting action and high fantasy themes, which were previously a challenge in capturing the essence of a game into a movie.[181] Additionally, movies have finally figured out the formula for what makes video game storytelling so popular with audiences and now emulate it in their own filmmaking techniques.[182]

ANALYSIS

III. Legal Scholarship Needs to Level Up by Assessing Infringement Through Agreed upon Standards

A. *Judicial Challenges Behind Understanding a Video Game*

1. Outdated Perceptions

Absent adequate definition or standard clarity, there are two significant misconceptions prevalent in legal scholarship and caselaw.[183] First, some judges still describe video games as "relatively new" media and are not

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VDQQ.

[175] Katz, *supra* note 2.

[176] *Pokémon: Detective Pikachu (2019)*, THE NOS., https://perma.cc/K726-HVQB (last visited May 8, 2023); *see Super Mario Bros*, *supra* note 170; Katz, *supra* note 2.

[177] Scott Mendelson, *Box Office: BTS Rocks $33 Million Global as 'Uncharted' Tops $300 Million Worldwide*, FORBES (Mar. 13, 2022, 12:30 PM EDT), https://perma.cc/8S26-SPTZ.

[178] Katz, *supra* note 2.

[179] *See* SALKOWITZ, *supra* note 1, at 35, 63–64, 72, 104, 106, 110; *Katz, supra* note 2. *See generally* Ball, *7 Reasons Why*, *supra* note 164.

[180] *See* SALKOWITZ, *supra* note 1, at 41, 63–65, 125; Anderson, *supra* note 79, at 50; Katz, *supra* note 2.

[181] *See Salkowitz, supra* note 1, at 63–65*;* Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 386–87; Ball*, 7 Reasons Why*, *supra* note 164; Katz, *supra* note 2.

[182] *See* Katz, *supra* note 2 ("Thanks to emerging technologies, the increasing popularity of gaming, and developing mainstream storytelling tactics, there's no better supply of high-upside gambles than video game properties."). S*ee generally* Ball, *7 Reasons Why*, *supra* note 164.

[183] *See* Kuehl, *supra* note 6, at 316–17 (discussing video game incompatibility as traditional copyright).

aware that the industry has progressed since Pong, a primitive tabletop tennis match controlled by a joystick.[184] Video games have been on the market for the general public since the Magnavox Odyssey in 1972—and later that year, Atari released Pong.[185]

These games had a major impact, but that was fifty years ago.[186] Pac-Man first debuted in Tokyo arcades over forty years ago.[187] The Nintendo Entertainment System, or NES, and Sega Genesis are almost forty years old.[188] Crash Bandicoot turned twenty-five years old in 2021.[189] The Sims said "Sul Sul" to the gaming world over two decades ago.[190] The Wii is sixteen years old.[191] The Xbox, its 360 remake, and the first three PlayStation consoles are even older.[192] The courts must acknowledge that video games have evolved, reaching cinematic heights in software, story, style, and gameplay.[193]

2. Misunderstanding the Artistic Merit

The second problem highlights a more substantial concern in legal scholarship: judges lack understanding that all video game IP has artistic

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[184] *The Father of the Video Game: The Ralph Baer Prototypes and Electronic Games*, SMITHSONIAN, https://perma.cc/F3SJ-S7PV (last visited May 8, 2023) [hereinafter *The Father of the Video Game*] ("Pong, an arcade ping-pong game"); *accord* Nathan Deardorff, *An Argument That Video Games Are, Indeed, High Art*, FORBES (Oct. 13, 2015, 8:15 AM EDT), https://perma.cc/4UG7-VLH8 (comparing Pong to a present-day video game would show an "exponential difference" in the market).

[185] *The Father of the Video Game, supra* note 184 (dating Pong's arcade and home console release in June 1972 and 1975, respectively). *See generally* Magnavox Co. v. Activision, Inc., 848 F.2d 1244 (Fed. Cir. 1988) (finding a patent infringement of Pong in the first video game lawsuit).

[186] *See* Kuehl, *supra* note 6, at 328; *The Father of the Video Game*, *supra* note 184.

[187] *History*, PAC-MAN, https://perma.cc/48S8-F7RB (last visited May 8, 2023) ("It's been 40 years since the beloved PAC-MAN game was introduced to the world.").

[188] *Video Game Consoles Timeline*, WORLD HIST. PROJECT, https://perma.cc/6ALV-EMTQ (last visited May 8, 2023).

[189] *See* Blake Hester, *Crash Bandicoot: An Oral History*, POLYGON (Jun. 22, 2017, 12:00 PM EDT), https://perma.cc/XE5U-VCWF.

[190] *See* Brennan Kilbane, *A History of Simlish, the Language That Defined the Sims: 20 Years of 'Sul Sul*,*'* THE VERGE (Feb. 7, 2020, 9:30 AM EST), https://perma.cc/3VHM-8ZKR ("'Sul-sul' is akin to 'Aloha.'").

[191] David M. Ewalt, *Nintendo's Wii Is a Revolution*, FORBES (Nov. 13, 2006, 9:15 AM EST), https://perma.cc/7GLM-8R9E.

[192] *Id.*; *Video Game Consoles Timeline*, *supra* note 188.

[193] *Compare, e.g.*, Nintendo of America, *The Legend of Zelda: Breath of the Wild – Nintendo Switch Presentation 2017 Trailer*, YOUTUBE (Jan. 13, 2017), https://perma.cc/DJR6-2MBF (illustrating differences in modern audiovisual and gameplay from the same initial story presented in 1986), *with* Zelda Dungeon, *Legend of Zelda (NES) Intro*, YOUTUBE (Sep. 22, 2009), https://perma.cc/QJ5L-QVJG (showing original audiovisual storytelling with the 1986 Legend of Zelda for the NES).

worth—even *Pong*.[194] Computer software has moved beyond the bounds of simplistic code.[195] Issues surrounding graphics and artistic realism remain a central legal dispute, where image quality will only continue to improve in the age of virtual reality.[196] No one bats an eye when drawings and paintings could be mistaken for photographs.[197] However, these concerns reflect broader gaps in judicial perceptions; the range of games on the market is not reflected in pure realism.[198] In other words, the focus on graphics becoming too realistic only furthers disbelief that video games are, at their core, a work of art.[199] These misconceptions affect how video game developers can hold their competition accountable, encouraging aggressive use of the courts by titans in the industry while limiting smaller protections against infringement.[200]

B. *Absence of Adequate Understanding by the Courts Leads to Case Law Ambiguity*

Legal scholarship generally acknowledges that a video game's IP has technical and substantive qualities.[201] However, the motion picture remains the only delineated audiovisual work in the Copyright Act.[202] Without adequate guidance, the courts struggle to address video games and their IP's unique nature.[203] They have been left to their own devices to define the legal

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[194] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 789 (2011); Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012); SALKOWITZ, *supra* note 1, at 2, 15–16 (standing at crossroads between art and commerce, graphic storytelling is applied to many art styles including fine art); Suzanne Jackiw, *Title Defense: Creating Consistency in Video Game Title Trademark Law*, 96 J. PAT. & TRADEMARK OFF. SOC'Y 1, 13 (2014).

[195] *See* Kuehl, *supra* note 6, at 328; Orland, *supra* note 37 (showing evolution of hardware's complexity); Van Arnam & Shores, *supra* note 94 ("evolving beyond functional aspects of game architecture and code to all aspects of the creative elements of this art form").

[196] *See* Van Arnam & Shores, *supra* note 94.

[197] *Compare* Papazian, *supra* note 4, at 602 (noting court's difficulty to decide whether to be treated as a commercial product or having artistic merit), *with Hyperrealism Art – The Best Hyper-Realistic Paintings and Artists*, ART IN CONTEXT (Aug. 6, 2021), https://perma.cc/86H9-MKJ4 (praising the modern art form of hyperrealism and photorealism including a list of notable commercial artists).

[198] *See* SALKOWITZ, *supra* note 1, at 63, 65; Jackiw, *supra* note 194, at 13; Ball, *7 Reasons Why*, *supra* note 164. *See generally* Nicolle Lamerichs, Romancing Pigeons: The Deconstruction of the Dating-Sim in Hatoful Boyfriend, 3 WELL PLAYED: A J. ON VIDEO GAMES, VALUES AND MEANING 43, 43 (2015) (discussing favored absurdity and fantasy in video games).

[199] *See* Aultman, *supra* note 30, at 400–01 ("current copyright regime does embrace financially-motivated creative activity"); Jackiw, *supra* note 194, at 13.

[200] *See* Jackiw, *supra* note 194, at 13.

[201] *See* Copyright Act of 1976, 17 U.S.C. § 101 (1976) (defining "audiovisual" and "major motion picture"); Kuehl, *supra* note 6, at 318–19.

[202] *See* 17 U.S.C. § 101.

[203] *Compare* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1524 (9th Cir. 1992) ("Thus far, many of the decisions in this area reflect the courts' attempt to fit the proverbial square peg in

boundaries of video game IP.[204] Legal scholarship cannot agree on the proper analysis because decisions are based on case-by-case inquiries by judges with varying viewpoints on the industry.[205] It is impossible to create legal methodology if everyone utilizes differing definitions; as a result, there are multiple standards and methodologies, creating further confusion in the present copyright doctrine.[206]

1. Legal Impact on the Interactive Component

This is evident from case law that struggles to recognize a connection between the story and interactive elements of the platform.[207] For example, the Court in *Gravano v. Take-Two Interactive Software, Inc.* determined that video games like "Grand Theft Auto V" qualified as an audiovisual work of artistic merit.[208] They reasoned that the video game was worthy of equal protections as film or television because it contained "story, characters, dialogue, and environment."[209] However, they also noted that this made the nature of Grand Theft Auto V "unique," or different from other video games.[210]

Although early case law supported this opinion, it is no longer precedent; the Supreme Court's decision in *Brown* solidified that every game has artistic merit worthy of copyright protections.[211] However, the New York Supreme Court's decision in *Gravano* occurred seven years after *Brown*.[212] Beyond an understanding that its IP invokes technical and substantive qualities, the platform's interactive element remains ambiguous, often absent, in case law.[213] Without an adequate definition, the Court misunderstood in *Gravano* that all games have protected interactive expression, regardless of the quantity or quality of its audiovisual content.[214]

Champion v. Take Two Interactive Software, Inc. expanded on *Gravano*'s

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a round hole."), *with* Kuehl, *supra* note 6, at 317, 319, 328.

[204] *See* Papazian, *supra* note 4, at 602.

[205] *See* Papazian, *supra* note 4, at 602.

[206] *See* Papazian, *supra* note 4, at 578, 602 (explaining how video game questions of law "muddled by multiple standards" cause "inconsistent application of those standards to a relatively new medium" by the courts).

[207] *See, e.g.*, Champion v. Take Two Interactive Software, Inc., 64 Misc. 3d 530, 540–41 (N.Y. Sup. Ct. 2019); Gravano v. Take-Two Interactive Software, Inc., 142 A.D.3d 776, 777 (N.Y. Sup. Ct. 2016); *see also* Papazian, *supra* note 4, at 602.

[208] *Gravano*, 142 A.D.3d at 777.

[209] *Id.*

[210] *Id.*

[211] *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 798 (2011).

[212] *Compare Gravano*, 142 A.D.3d at 776 (finding in 2018), *with Brown*, 564 U.S. at 786 (finding in 2011).

[213] *See* Buckman, *supra* note 6, § 2; Kuehl, *supra* note 6, at 316, 343–44.

[214] *See Brown*, 564 U.S. at 798; SALKOWITZ, *supra* note 1, at 16, 18, 23.

misunderstanding, deciding that a question of legal infringement rested on whether the basketball game, NBA2k18, included an actual story.[215] Reasoning that only games with artistic merit qualified for First Amendment protections, the New York Supreme Court found NBA2k18 was not a protectable work of fiction because it lacked similar elements as Grand Theft Auto V; for qualifying artistic merit, the Court expected "detailed plot created by the game designers."[216] NBA2K18's gameplay instead left the "plot and storyline and completely defin[ing] their character" exclusively to the player.[217] The Court added that "[c]ertainly, games entirely lacking these qualities—for example Pong and Pac-Man—do not meet this literary standard."[218]

Champion and *Gravano* outline where the courts fall behind, still defining some video games as having no substantive worth at all.[219] No matter how simple, video games have recognized copyright protections for gameplay and expression.[220] Further, the unique nature of video games as an audiovisual work is the creation of a custom story through the interaction with each player.[221] The reality is Pac-Man deserves the same protections as Grand Theft Auto V or NBA2k18, because both tell a story through a video game's inseparable interactive element, regardless of detail.[222]

2. Standardization Struggles for the Right of Publicity

Additional failures to address artistic merit include tension between identifying video games as art or commerce; this is evident in right of publicity matters, where courts remain divided on whether to use the *Rogers* or the *Transformative* test because legal scholarship cannot agree on treating it as a copyright violation or a commercial trademark infringement.[223] The *Rogers* test stems from trademark interests, but the Lanham Act is too narrow to provide adequate protections.[224] The *Transformative* test applies derivative works assessment from copyright law, but the right of publicity stems from

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[215] 64 Misc. 3d 530, 541 (N.Y. Sup. Ct. 2019) (citing *Gravano*, 142 A.D.3d at 777).

[216] *Compare id.* (quoting statements from the "Holdings" subsection), *with* Deardorff, *supra* note 184.

[217] *Champion*, 64 Misc. 3d at 541.

[218] *Id. But see* Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 617 (7th Cir. 1982) (holding Pac-Man had certain "copyrightable expression[s]").

[219] *See* Papazian, *supra* note 4, at 603.

[220] *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012).

[221] *Compare* SALKOWITZ, *supra* note 1, at 18, *with* Kuehl, *supra* note 6, at 318, *and* Sedig, *supra* note 5, at 3.

[222] *See Atari*, 672 F.2d at 617 (holding Pac-Man had certain "copyrightable expression[s]").

[223] *See* Aultman, *supra* note 30, at 400–01; Jackiw, *supra* note 194, at 13.

[224] *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3rd Cir. 2013); Van Arnam & Shores, *supra* note 94.

trademark infringement.[225] Additionally, the *Transformative* test assumes that infringement occurred, but freedom of expression often outweighs an individual's privacy interests.[226]

It is unclear if the *Transformative* test provides any greater protections than *Rogers*, where most cases conclude in favor of the video game franchises.[227] There is even a third methodology, the Predominant Use Test, which the Court dispelled from doctrine discussion in *Hart v. Entertainment Association, Inc*.[228] Such ambiguity would not be an issue if judges had a standard understanding of how video games sit between the boundaries of both copyright and trademark law.[229]

C. *Main Objective: Modding Outdated Methodologies*

1. Categorizing Case Law Trends is Critical for Copyright Analysis

Legal scholarship will benefit from a more standardized approach in assessing its intellectual property.[230] This begins with a working legal definition of a video game as an interlay of technical, substantive, and interactive IP rooted both in art and commerce.[231] Additionally, substantive IP can be further categorized into a dichotomy resulting in two fundamentally different legal approaches.[232]

2. A Sandbox Standard for Substantial Similarity

Court cases involving the audiovisual copyright in its entirety, or "the feel of the works," rely on substantial similarity for their analysis.[233] Such copyright matters, which carry the majority of case law, require two main steps.[234] First, does the offending work stem from an original work of authorship?[235] Second, if it does, is it a derivative work that receives

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[225] *See Hart*, 717 F.3d at 158; Van Arnam & Shores, *supra* note 94.

[226] *See Hart*, 717 F.3d at 158–60; Van Arnam & Shores, *supra* note 94.

[227] *See, e.g.*, *Hart*, 717 F.3d at 158, 170.

[228] *Id.* at 153–54.

[229] *See* Buckman, *supra* note 6, § 2. *Compare* SALKOWITZ, *supra* note 1, at 2, 15–16, 65, *with* Aultman, *supra* note 30, at 391.

[230] *E.g.*, Kuehl, *supra* note 6, at 316–17, 319, 328, 343–44; *see* Papazian, *supra* note 4, at 602.

[231] *See* Kuehl, *supra* note 6, at 319; Papazian, *supra* note 4, at 602; Sedig et al., *supra* note 5, at 3, 5; *see also* Deardorff, *supra* note 184 ("Not all games deserve the title of art or high art. But, to be fair, we also sell terrible paintings and trashy books.").

[232] *Compare* Buckman, *supra* note 6, § 2, *with* Jackiw, *supra* note 194, at 13.

[233] *See, e.g.*, Litchfield v. Spielberg, 736 F.2d 1352, 1356–57 (9th Cir. 1984); Maitra, *supra* note 155.

[234] *See* Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

[235] *Id.*

copyright protections independent of the original work?[236]

Courts should begin their analysis by categorizing the issue as technical or substantive.[237] That variation tweaks how substantial similarities are addressed.[238] In other words, each category of video game copyright asks these two questions in different ways.[239] If legal assessment initially identifies the IP invoked, then natural methodologies already in place will flow.[240]

For example, questions of content infringement are cases involving a video game's substantive IP.[241] These are copyright matters, involving substantial similarity analysis when it is unclear whether the offending work copied the purported original.[242] Audiovisual provisions apply from the Copyright Act.[243] If the offending work initially stemmed from another author's original, then the court must determine whether there is sufficient difference to deem the offending work a derivative, with independent copyright protections.[244]

In contrast, software infringement cases involve a video game's technical IP.[245] Software cases are also copyright matters, involving a substantial similarity analysis when it is unclear whether reverse engineering actually occurred.[246] From there, however, courts instead apply the DMCA to analyze whether the fair use exception applies.[247] Generally, copying software for commercial purposes will not fall under the fair use exception.[248] In that case, courts apply the modified derivative works test from *Sega*, weighing the code's function to create a derivative work against its replication to capitalize on the original work's commercial market.[249]

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[236] *Id.*

[237] *Compare* Micro Star v. FormGen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998), *and* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 396 (D.N.J. 2012), *with* Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24 (9th Cir. 1992), *and* Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596, 599 (9th Cir. 2000).

[238] *Compare* 17 U.S.C. §§ 101, 102(b), *with* 17 U.S.C. §§ 512, 1201–02.

[239] *See* 17 U.S.C. §§ 101, 102(a), 512, 1201–02.

[240] *See Micro Star*, 154 F.3d at 1112; *Sega Enters. Ltd.*, 977 F.2d at 1523–24; *Tetris Holding, LLC*, 863 F. Supp. 2d at 396; *Sony Comput. Ent., Inc.*, 203 F.3d at 602.

[241] *See* 17 U.S.C. § 101 (defining audiovisual works); *see, e.g.*, *Micro Star*, 154 F.3d at 1110.

[242] 17 U.S.C. § 102(a)(6); *see, e.g.*, *Micro Star*, 154 F.3d at 1110.

[243] *See* 17 U.S.C. § 101.

[244] 17 U.S.C. § 102(a); *see Micro Star*, 154 F.3d at 1110; *see also* Kuehl, *supra* note 6, at 341.

[245] *See Sega Enters. Ltd.*, 977 F.2d at 1514; Buckman, *supra* note 6, § 1 (differentiating between substantive and technical IP).

[246] *See* Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1222 (N.D. Cal. 1999).

[247] 17 U.S.C. §§ 512, 1201–1202; *see, e.g.*, Sony Comput. Ent., Inc. v. Connectix Corp., 203 F.3d 596, 602 (9th Cir. 2000).

[248] *See Sega Enters. Ltd.*, 977 F.2d at 1523 (citing Sony Corp. v. Universal City Studios, 464 U.S. 417, 451 (1984)).

[249] *Id.*

2. Transmedia Analysis: Tackling *Rogers* and *Transformative*

In audiovisual storytelling, basic thematic elements are open-ended enough to allow expansive worldbuilding and new storylines with each new publication.[250] The thematic universe that makes up the franchise is a macro view of the copyright.[251] The foundational elements that ground the story's continuity are single portions of audiovisual IP within an entire franchise.[252] A single, independent element of copyright within an overarching work is "transmedia" copyright, referencing its ability to transcend into other works and platforms.[253] Audiovisual copyright consists of combined transmedia elements; separating an individual piece from the copyright as a whole requires different analysis, focusing on questions of copyright infringement for entities such as fictional characters and their associations, i.e., combo moves.[254]

In games based in realism, such as Grand Theft Auto or Madden, the *Rogers* or *Transformative* tests are more appropriate for disputes surrounding nonfictional entities, such as businesses and celebrities.[255] Although rooted in substantial similarity comparisons, transmedia copyright encompasses inevitable entanglement with trademark law.[256] Acknowledging video games as a commodity with artistic merit better addresses the relationship between copyright and trademark law.[257] These tests are similarly intertwined; they both assess a video game character as a precipitate of a real, recognizable person.[258]

The *Rogers* and *Transformative* tests could be synthesized because they handle each side of the same sword.[259] *Rogers* asks whether infringement occurred, establishing liability through identifying who caused the economic injury and how; *Transformative* follows up by clarifying, if it did occur, whether the identity was sufficiently transformed to constitute an

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[250] *See* Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 388.

[251] *See* SALKOWITZ, *supra* note 1, at 41; Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 386–87.

[252] *See* SALKOWITZ, *supra* note 1, at 41, 65; Andersoen, *supra* note 79, at 52.

[253] *See* SALKOWITZ, *supra* note 1, at 42; Anderson, *supra* note 79, at 48; Aultman, *supra* note 30, at 385–86.

[254] *See, e.g.*, DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); Blizzard Ent. v. Lilith Games (Shanghai) Co., 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015); *see also* Anderson, *supra* note 79, at 51–52 (defining "spiderweb transmedia").

[255] *See* Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3rd Cir. 2013); Van Arnam & Shores, *supra* note 94.

[256] *See* SALKOWITZ, *supra* note 1, at 65; Jackiw, *supra* note 194, at 13; Van Arnam & Shores, *supra* note 94.

[257] *See* SALKOWITZ, *supra* note 1, at 2, 15–16, 65; Aultman, *supra* note 30, at 400–0l; Buckman, *supra* note 6, at 269; Van Arnam & Shores, *supra* note 94. *See generally* Deardorff, *supra* note 184.

[258] *See* Van Arnam & Shore, *supra* note 94.

[259] *See* Van Arnam & Shore, *supra* note 94.

exception.[260] Once *Rogers* finds sufficient substantial similarities to cause association between the character and the persona, then *Transformative* assesses the depiction's originality to determine whether separate copyright protections are given for the celebrity caricature.[261] In other words, *Rogers* and *Transformative* are variations of the substantial similarity analysis and derivative works exception, respectively.[262]

In cases concerning identity infringement, the court must address whether the video game transmedia is based in realism and intends to depict a real entity.[263] Consequently, the injury would stem from an individual's market value and privacy interests, rather than conceptual property.[264] In contrast, transmedia claims based on original content infringement of artwork and depictions from fantasy genres should utilize a copyright analysis based on a presumption of originality.[265] There is a need to standardize factors considering substantial similarity comparisons for video game transmedia, as well as questions of derivative works: appearance, consistency across works, function within the work, and relationship with other prominent elements.[266]

IV. Video Game Industry Scholarship Provides a Framework for Assessing Interactive IP in Substantial Similarity Analysis.

A. *Building Upon Brown: Objective Gameplay Standards*

Precedent considers interactive IP as a subjective and abstract concept in copyright law.[267] In reality, it is only the court's understanding of the gameplay, or the interactive relationship between the player and the game, that remains subjective.[268] The player responds to the game's audiovisual by inputting their decisions into the game's hardware.[269] The hardware then communicates with its programming, and the cycle continues.[270] Gameplay is the nexus between the platform and its user, creating a cyclical bond.[271]

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[260] *See Hart*, 717 F.3d at 154–55; Van Arnam & Shore, *supra* note 94.

[261] *See* Van Arnam & Shore, *supra* note 94.

[262] *See* Van Arnam & Shore, *supra* note 94.

[263] *See* Buckman, *supra* note 6, § 2; Van Arnam & Shore, *supra* note 94.

[264] *See* Jackiw, *supra* note 194, at 13.

[265] *See* DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); Blizzard Ent. v. Lilith Games (Shanghai) Co., 149 F. Supp. 3d 1167, 1173 (N.D.Cal. 2015); *see, e.g.*, SALKOWITZ, *supra* note 1, at 5, 63.

[266] *See DC Comics*, 802 F.3d at 1021; SALKOWITZ, *supra* note 1, at 43.

[267] *See, e.g.*, Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 788 (2011); Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012).

[268] *See* Sedig et al., *supra* note 5, at 3, 6 (describing video games as "systems" with "quantifiable outcomes" and proposing objective factors for analysis).

[269] *See* Sedig et al., *supra* note 5, at 4–5.

[270] *See* Sedig et al., *supra* note 5, at 4–5.

[271] *See* Sedig et al., *supra* note 5, at 3, 5.

However, gameplay occurs at a particular point in the relationship.[272] When the player makes a decision, the game takes a concurring action predetermined by the rules and parameters set forth in the code.[273] The player then sees the outcome of their initial decision through the audiovisual display.[274] It is then up to the player to assess how their decision correlated to the action taken by the game.[275] However, they can only infer this relationship from what is available to them: the result.[276]

In other words, gameplay is the result, where the game directly communicates with the player.[277] More importantly, it is the nexus between the game's creator and their audience that legal scholarship often identifies as the "idea-expression dichotomy."[278] Gameplay is unique to each individual and impossible to replicate, but it is not the player's sole creation.[279] Game developers offer the idea; players perform and, consequently, express.[280]

The bond between idea and expression is not too merged to separate; courts have lacked the objective, analytical standards to do so.[281] The courts can analyze gameplay through objective factors: game mechanics and player feedback.[282] There are twelve proposed gameplay factors for analyzing interactive elements, known as the "INFORM Framework."[283]

1. Game Mechanics

Game mechanics are the actions provided by the game.[284] These action choices interplay with the player's reactions, influencing their following

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[272] *See* CARLO FABRICATORE, GAMEPLAY AND GAME MECHANICS DESIGN: A KEY TO QUALITY IN VIDEOGAMES 1.1 (2007), https://perma.cc/TQB9-MXKK.

[273] *See id*.

[274] *See* Sedig et al., *supra* note 5, at 4–5.

[275] *See* FABRICATORE, *supra* note 272, at 1.1.

[276] *See* FABRICATORE, *supra* note 272, at 1.1; Sedig et al., *supra* note 5, at 4–5.

[277] *See* FABRICATORE, *supra* note 272, at 1.1.; Sedig et al., *supra* note 5, at 3, 5.

[278] *Compare* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012), *with* Sean Baron, *Cognitive Flow: The Psychology of Great Game Design*, GAME DEVELOPER (Mar. 22, 2012), https://perma.cc/9JC2-AZ49 (offering objective parameters on how to influence player's interaction with a video game).

[279] *See generally* Baron, *supra* note 278.

[280] *See* FABRICATORE, *supra* note 272, at 1.1; Baron, *supra* note 278.

[281] *See* Sedig et al., *supra* note 5, at 3, 6 (describing video games as "systems" with "quantifiable outcomes" and proposing objective factors for analysis).

[282] Sedig et al., *supra* note 5, at 5–6, 11.

[283] Sedig et al., *supra* note 5, at 6.

[284] Sedig et al., *supra* note 5, at 5–6; *e.g.*, Kuehl, *supra* note 6, at 327 (explaining how smartphone Free to Play apps incentivizes payment options for players to speed up gameplay); *see* Maitra, *supra* note 155 (proposing game rules as "limitations and affordances" given to the player).

decisions.[285] These are the relevant factors within interactive IP, resulting in a cyclical relationship.[286] Game mechanic factors relate to the presentation of a player's options.[287] These are: player agency in decisions; sense or flow of time within the game; the amount of time available to a player to make a choice; intended focal points of action; "granularity," or complexity of steps within an action; and presence, or how visually obvious a potential choice displays to the player.[288]

2. Player Feedback

In turn, feedback factors involve a player's perceptions of and reactions to the game.[289] Perception factors include: "activation," or reaction time in response to a committed action; how the player's perceptions of the audiovisual content stay consistent or change as the game progresses; the "flow" of a reaction; and whether an emotional response is immediate or gradual.[290] Resulting decision factors include: whether a player's decision affects either a singular element or congruent game components; the resulting changes to audiovisual elements displayed to the player; and the temporal and spatial transitions between those audiovisual changes.[291]

3. Courts and the Core Mechanic: Identifying Interactive IP

Assessing interactive IP requires asking what makes each gameplay unique.[292] The INFORM Framework presents a model for deciphering gameplay, but not all twelve factors will always be relevant; each game has its own distinct combination of mechanics and player reactions.[293] This is known as the *core mechanic*.[294] Consider gameplay factors as thematic elements, or individual building blocks whose unique combination creates a distinct core mechanic.[295] Identifying the core mechanic uncovers a video

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[285] Sedig et al., *supra* note 5, at 3, 11; *see* Maitra, *supra* note 155 (explaining how resulting structure offered by game rules creates meaning in player's actions).

[286] Sedig et al., *supra* note 5, at 3–5. C*ompare* Copyright Act of 1976, 17 U.S.C. § 102(a)–(b) (1976) (providing that copyright protection does not extend to ideas), *with* Deardorff, *supra* note 184 ("[T]he goal of art is to embody an idea or invite an experience and/or reaction.").

[287] Sedig et al., *supra* note 5, at 5–6; *see, e.g.*, Maitra, *supra* note 155.

[288] Sedig et al., *supra* note 5, at 7–11.

[289] *See* Maitra, *supra* note 155; Sedig et al., *supra* note 5, at 11.

[290] Sedig et al., *supra* note 5, at 11–15.

[291] Sedig et al., *supra* note 5, at 11–15.

[292] *Compare* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012), *with* Sedig et al., *supra* note 5, at 5 (defining core mechanic).

[293] *Compare* Micro Star v. FormGen Inc., 154 F.3d 1107, 1110, 1112 (9th Cir. 1998) ("What, after all, does sheet music do but describe in precise detail the way a copyrighted melody sounds?") (citing WILLIAM F. PATRY, COPYRIGHT L. & PRAC. 168 (1994)), *with* Sedig et al., *supra* note 5, at 6.

[294] Sedig et al., *supra* note 5, at 5.

[295] *See* Sedig et al., *supra* note 5, at 3 (noting cognitive gameplay "designed indirectly"

game's partial fingerprint, or the interactive "feel of the works."[296] Distinctive core mechanics can arise from game mechanics or player feedback factors.[297] The result discerns a unique, distinguishable interactive experience.[298]

For example, SUPERHOT is a game where the player has to survive varying situational shootouts.[299] Its game mechanic factors are notably unique; time, and the opposing shooters, only move when the player moves.[300] As a result, the player feels as if they actively control every shooters' moves while only deciding the actions of one character.[301] Unlike any other virtual fight, the timing function and granularity within a single move affect how players decide to act; they must solve the puzzle by considering how the game's perceived obstacles will respond to the player's feedback.[302] This interaction between the game's puzzle and the player's strategy is SUPERHOT's core mechanic.[303]

Portal is another unique puzzle game because of its core mechanic: a portal gun, utilizing a point-and-click interface on walls to create passageways.[304] The player is a test subject that must escape rooms, problem solving by "thinking with portals" to warp between locations, among other objectives.[305] The Portal game mechanics shape the player's feedback and

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through other game components); *see also* Maitra, *supra* note 155 (determining "uncopyrightable aspects of a video game [requires the court] not only [to] define the uncopyrightable idea of a game, but also its uncopyrightable rules").

[296] S*ee* SALKOWITZ, *supra* note 1, at 43 ("The key to survival is identifying your core creative value and differentiation."). *Compare* Litchfield v. Spielberg, 736 F.2d 1352, 1356–57 (9th Cir. 1984) ("feel of the works"), *with* Sedig et al., *supra* note 5, at 5 (defining core mechanic).

[297] Sedig et al., *supra* note 5, at 5–11. *Compare* GameSpot, *SUPERHOT - Launch Trailer*, YOUTUBE (Feb. 25, 2016), https://www.youtube.com/watch?v=vrS86l_CtAY, *with* Gamehelper, *Portal Teaser Trailer*, YOUTUBE (Jul. 18, 2006), https://perma.cc/3U9K-CARA (showing core mechanic tutorial).

[298] *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012); *see also* Deardorff, *supra* note 184 (inviting the idea that experience is art). *But see Copyright Form Letters: Games*, FINDLAW, https://perma.cc/4ZXX-3U3L (last updated Sept. 21, 2012) ("Copyright protects only the particular manner of an author's expression in literary, artistic, or musical form.").

[299] GameSpot, *supra* note 297.

[300] *See* GameSpot, *supra* note 297, at 00:37 ("COOLEST GAME MECHANIC I'VE SEEN MY ENTIRE LIFE.").

[301] *See* GameSpot, *supra* note 297. *Compare* GameSpot, *supra* note 297, *with* Maitra, *supra* note 155 (resulting structure offered by game rules creates meaning in players' actions).

[302] *See* GameSpot, *supra* note 297. *Compare* GameSpot, *supra* note 297, *with* Sedig et al., *supra* note 5, at 7–15, *and* Maitra, *supra* note 155.

[303] *Compare* GameSpot, *supra* note 297, *with* Sedig et al., *supra* note 5, at 7–15.

[304] *Compare* Gamehelper, *supra* note 297 (showing unique game mechanic utilizing a "portal gun" and resulting player feedback factor that "now you're thinking with portals"), *with* Sedig et al., *supra* note 5, at 11–17.

[305] *See* Gamehelper, *supra* note 297.

how they decide to interact with the portal gun.[306] Although Portal's Aperture Laboratories and other relevant audiovisual elements are unique, this is fundamentally different from its core mechanic; together, these substantive factors define "the feel of the works" in pinpoint detail.[307]

C. *Copyright Co-Op: Substantive and Interactive Interplay*

Core mechanics are a separate form of unprotected copyright indirectly formed from audiovisual IP.[308] The ambiguous "degree of interaction" referenced in *Brown v. Entertainment Merchants Association* was a primitive acknowledgment of the balance between an audiovisual platform's substantive and interactive IP.[309] There are many games that lack substantial audiovisual content but are known instead for their gameplay.[310] In fact, that was the fundamental issue at hand in *Tetris*; the game had a distinct core mechanic analyzed beyond its rules and mechanics.[311] Pong, Pac-Man, and now Wordle all share similar merit in gameplay, despite their simplistic designs.[312]

Nevertheless, core mechanics are intangible precipitates of substantive IP, requiring legal assessment to occur in conjunction with audiovisual copyright.[313] If both the audiovisual and gameplay are substantially similar, then the video game infringed on another work, regardless of how simplistic

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[306] *See* Maitra, *supra* note 155; Gamehelper, *supra* note 297.

[307] *See* Maitra, *supra* note 155 ("Consider the game of chess. The rules of the game are familiar and, even if invented today, uncopyrightable. Yet creators often receive copyright protection for chess sets. . . . The differences lie in the expressive/nonfunctional elements of the games."). *Compare* Gamehelper, *supra* note 297 (highlighting interactive IP by explaining Portal's gameplay), *with* Lore, *Portal Lore in a Minute!*, YOUTUBE (Feb. 22, 2012), https://perma.cc/RPK8-R4XR (highlighting substantive IP by explaining Portal's story).

[308] *See* Sedig et al., *supra* note 5, at 3 (noting cognitive gameplay "designed indirectly" through other game components); Van Arnam & Shores, *supra* note 94.

[309] *See* 564 U.S. 786, 798 (2011).

[310] *See, e.g.*, Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 405 (D.N.J. 2012).

[311] *Id.*; *see* Sedig et al., *supra* note 5, at 2 ("For example, in the game *Tetris*, the essential interactions are rotation and movement of a shape, and these are repeated continually while playing the game. Consequently, these two interactions form the core mechanic."). *But see* Maitra, *supra* note 155 (arguing that the *Tetris* case decision was incorrectly based on uncopyrightable game rules rather than core mechanic consideration in tandem with substantive audiovisual).

[312] *Compare Wordle*, N.Y. TIMES, https://perma.cc/PY3R-X3PN (last visited May 8, 2023), *with* Kuehl, *supra* note 6, at 347–48 (comparing protected expression in Atari, Inc. v. N. Am. Philips Consumer Elecs. Corp., 672 F.2d 607, 607 (7th Cir. 1982) *and Tetris Holding, LLC*, 863 F. Supp.2d at 394)), *and* andys-arcade, *Original Atari PONG (1972) Arcade Machine Gameplay Video,* YOUTUBE (Dec. 11, 2014), at 2:00, https://perma.cc/W5AB-DHLG.

[313] *See* Sedig et al., *supra* note 5, at 3 (noting cognitive gameplay "designed indirectly" through other game components); *see also* Kuehl, *supra* note 6, at 340–41 (noting historical deference to weak protections for game mechanics).

the game seems.[314] This is because similar audiovisual, coupled with similar core mechanics, will result in similar player reactions.[315] In other words, assessing infringement of a video game in its entirety is fundamentally unique from other copyright assessments because it rests on substantial similarity in both audiovisual and gameplay copyright.[316]

1. Discerning Derivative Works from Core Mechanics

Additionally, gameplay analysis aids the derivative works test.[317] This analysis concerns copyright infringement disputes on video game infringement cases like *Micro Star* and *Tetris*.[318] In other words, this type of analysis examines whether one video game, assessing its audiovisual content in its entirety, copied the IP of another.[319] If two games contain substantially similar audiovisual IP, one may still be distinguishable as an inspired but original work.[320]

For example, modding, or consumer-created modifications to original games, is a common form of derivative works in the gaming community.[321] What if a developer utilized identical audiovisual content from Portal, but its gameplay was fundamentally different?[322] "Aperture Tag: The Paint Gun Testing Initiative" is a fan-made game mod of Portal, where a paint gun replaced the portal gun mechanic.[323] "The Paint-Gun Device" shoots varying Gels that change surface terrain, allowing players to bounce off of walls and

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[314] *E.g.*, Kuehl, *supra* note 6, at 334–48 (citing Blizzard Ent. v. Lilith Games (Shanghai), 149 F. Supp. 3d 1167, 1173 (N.D.Cal. 2015)); *see Tetris Holding, LLC*, 863 F. Supp. 2d at 405.

[315] *See* Micro Star v. Formgen, Inc., 154 F.3d 1107, 1112 (9th Cir. 1997) (citing Litchfield v. Spielberg, 736 F.2d 1352, 1356 (9th Cir. 1984)); *Atari, Inc.*, 672 F.2d at 620. *See generally* Sedig et al., *supra* note 5, at 1–2.

[316] *See, e.g.*, *Tetris Holding, LLC*, 863 F. Supp. 2d at 405; *see also* Kuehl, *supra* note 6, at 341 (copying is improper when egregious but not necessarily identical). *Compare Micro Star*, 154 F.3d at 1109–10 (reasoning through the "derivative works" test), *with* Sedig et al., *supra* note 5, at 1–2 (conceptualizing core mechanics and gameplay).

[317] *Cf. Aperture Tag: The Paint Gun Testing Initiative*, STEAM (July 15, 2014), https://perma.cc/J69J-FFD5 (showing an example of derivative work) [hereinafter *Aperture Tag*].

[318] *See, e.g.*, *Tetris Holding, LLC*, 863 F. Supp. 2d at 405; *Micro Star*, 154 F.3d at 1109.

[319] *See, e.g.*, *Tetris Holding, LLC*, 863 F. Supp. 2d at 405; *Micro Star*, 154 F.3d at 1109–10.

[320] Kuehl, *supra* note 6, at 341; *e.g.*, David Nathaniel Tan, Note, *Owning the World's Biggest eport: Intellectual Property and DotA*, 31 HARV. J.L. & TECH. 965, 969 (2018) (accounting historical creation of DotA from Warcraft III); *see Micro Star*, 154 F.3d at 1109; Lewis Galoob Toys, Inc. v. Nintendo of Am., Inc., 964 F.2d 965, 967 (9th Cir. 1992); Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984).

[321] Michael Wueste, *Gaming Mods and Copyright*, MICH. TECH. L. REV., (Nov. 6, 2012), https://perma.cc/PWJ3-4T29. *See generally* Tan, *supra* note 320.

[322] *Compare* CodyCanEatThis, *I Made Portal 3 Because Valve Wouldn't*, YOUTUBE (Oct. 2, 2020), at 00:22, https://perma.cc/8UZA-RDS3 (showing an example of noncommercial infringement), *with Aperture Tag*, *supra* note 317 (showing an example of derivative work).

[323] *See Aperture Tag*, *supra* note 317.

gain speed to beat the clock in varying puzzles and games of virtual tag.[324]

Although initially copied from Portal, Aperture Tag's game mechanic, solving puzzles with painting, is fundamentally different from the portal interface; this causes a player to "think with Gels" instead of the original player feedback factor, "thinking with portals."[325] The core mechanic changed from a portal to a paint gun, resulting in separate copyright protections.[326] A change in fundamental gameplay factors creates a different overall "feel of the works."[327] As a result, the hypothetical would more likely constitute a parody or a derivative work inspired from Valve's Portal.[328] Establishing what defines a video game, creating standards from already established case law, and characterizing interactive copyright through core mechanics will aid future analysis of game mods, the right of publicity, and other legal gray areas.[329]

V. Courts Must Turn to the Comic Industry for Established Takeaways in Transmedia

A. *Telling Tales Through Transmedia: Industry Crossovers in Audiovisual IP*

Comics are a graphic form of storytelling, emphasizing worldbuilding around a portion of transmedia copyright, such as a superhero or other visually distinct protagonist.[330] The platform tells its story through visual, screenshot depictions of motion coupled with audible elements of dialogue, narration, and sound effects communicated through speech bubbles.[331] What makes comics and graphic novels unique is their representations of motion through individual images known as "panels" or snapshots of moments in time; these allow their readers to observe and fill in the open-ended gaps of

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[324] *See Aperture Tag*, *supra* note 317.

[325] *See* Sedig et al., *supra* note 5, at 11–15. *Compare Aperture Tag*, *supra* note 317 ("[T]hink with Gels!"), *with* Gamehelper, *supra* note 297, at 2:18 ("Now you're thinking with portals.").

[326] *See* Copyright Act of 1976, 17 U.S.C. § 102(a) (1976); Tan, *supra* note 320, at 977 ("Each version of DotA is therefore a unitary, derivative work and entitled to full protection under the Copyright Act.").

[327] Litchfield v. Spielberg, 736 F.2d 1352, 1357 (9th Cir. 1984); *see* Micro Star v. Formgen Inc., 154 F.3d 1107, 1109 (9th Cir. 1998). *See generally* Sedig et al., *supra* note 5, at 15–20.

[328] *See Litchfield*, 736 F.2d at 1357; Tan, *supra* note 320, at 977; *see also* Sony Comput. Ent., Inc. v. Connectix Corp., 48 F. Supp. 2d 1212, 1220 (N.D. Cal. 1999) ("Accolade created something new. Here, Connectix is not creating its own product to be used *in conjunction with* Sony's Playstation. Rather, VGS is a *substitute* product.").

[329] Jackiw, *supra* note 194, at 5; *see* Tan, *supra* note 320, at 986 (noting industry has embraced modding).

[330] *Compare* SALKOWITZ, *supra* note 1, at 2, 41, 63–65, *and* Aultman, *supra* note 30, at 385–87, *with* Anderson, *supra* note 79, at 50, 52.

[331] DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015); SALKOWITZ, *supra* note 1, at 2, 16, 18, 65; Anderson, *supra* note 79, at 49.

the story. [332] Similar to video games, this open-ended nature of graphic storytelling encourages a higher degree of interaction between the reader and the media.[333]

1. Episodic Elements Affect Audience Engagement

As an artistic medium, comics are an audiovisual work, distinct from written literature in the same way as motion pictures, television, and video games.[334] In literary copyright, story through description requires substantial time to develop, and the characters are dependent on the novel plot, whereas audiovisual copyright has a faster turnover rate.[335] Comics are also episodic in nature, allowing quick publication with detailed continuity embedded in storylines.[336] Although television series are also episodic in nature, their seasonal production of multiple episodes at one time limits the degree of interaction fans can have between episodes.[337]

In contrast, comic developers have an intimate relationship with their fan base, allowing the unique opportunity to observe their responses, process the feedback, and apply it to future publications.[338] In other words, the comic industry can gauge how fans would like the story to proceed between comic issues and adapt their storylines accordingly.[339] The relationships between audiences and films can influence a storyline; the mediums which hold substantially less opportunity for interaction than comics provide less story influence and, consequently, inconsistent consumer engagement.[340]

2. Character Development in Situational Storytelling

Comic book characters are easily recognizable transmedia, appearing in

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[332] SALKOWITZ, *supra* note 1, at 2, 16; Anderson, *supra* note 79, at 48, 50; Aultman, *supra* note 30, at 385–87 (identifying audience participation).

[333] SALKOWITZ, *supra* note 1, at 2, 18, 65; Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 385–87; *see* Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 798 (2011); Ball, *Netflix and Video Games*, *supra* note 141.

[334] Walt Disney Prod. v. Air Pirates, 581 F.2d 751, 755 (1978); SALKOWITZ, *supra* note 1, at 2. *But see* Copyright Act of 1976, 17 U.S.C. § 101, § 102(a)(b) (1976) (lacking statutory delineation).

[335] SALKOWITZ, *supra* note 1, at 2; Anderson, *supra* note 79, at 50; *see* Ball, *Netflix and Video Games*, *supra* note 141.

[336] SALKOWITZ, *supra* note 1, at 2, 41, 63–65, 81; Anderson, *supra* note 79, at 50-51; Aultman, *supra* note 30, at 384–86; Ball, *Netflix and Video Games*, *supra* note 141.

[337] *Compare* SALKOWITZ, *supra* note 1, at 2, 37, *with* Ball, *Netflix and Video Games*, *supra* note 141.

[338] SALKOWITZ, *supra* note 1, at 5, 11, 37, 65, 109; *see, e.g.*, Aultman, *supra* note 30, at 393–94 (identifying fanfiction and user generated content as derivative works).

[339] *See* SALKOWITZ, *supra* note 1, at 5, 11; Anderson, *supra* note 79, at 48–50; Aultman, *supra* note 30, at 386–87, 390.

[340] *Compare* SALKOWITZ, *supra* note 1, at 2, 5, 11, 15–16, *with* Ball, *Netflix and Video Games*, *supra* note 141.

comics as well as film, television, and video games.[341] In contrast, literary characters are generally indistinguishable without their textual descriptions because they cannot be separated from their stories.[342] For example, it would be impossible to delineate copyright protections for a brunette teenage girl holding a bow without first knowing about her victory in the 74th annual Hunger Games.[343] A textual description is insufficient, while a physical depiction allows the courts to identify a character without any knowledge of their story.[344]

The fundamental differences stem from story development.[345] For books, authors write and build upon a plot; as they do, literary characters develop from those plot lines.[346] In graphic storytelling, plots are written in episodes where story developers build scenes and situations around already-established characters.[347] In other words, every comic book issue starts with the hypothetical: if we placed this character in that sticky situation, what would occur?[348]

3. Compatibility in Cross-Industry Collaboration

To bridge the gaps in video game copyright, the courts can turn to comic book case law.[349] Video game transmedia is primarily similar to comic books and graphic novels, holding a strong relationship between the two audiovisual platforms.[350] Their similarity in story elements and episodic nature allow conclusions about video game IP to be drawn from comic book history.[351] This is because comic book characters and video game avatars are cut from the same cloth; the substantive nature of their IPs hold similarities

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[341] SALKOWITZ, *supra* note 1, at 15–16, 63–65; *see* Anderson, *supra* note 79, at 52 (explaining spiderweb model of transmedia storytelling).

[342] *See* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (1978).

[343] *Compare* Tirzah Price, *Katniss Everdeen: A Hunger Games Character Guide*, AUDIBLE (Feb. 22, 2022), https://perma.cc/2CRV-TQLW (summarizing literary character), *with* Lionsgate Movies, *The Hunger Games (2012 Movie) – Official Theatrical Trailer – Jennifer Lawrence & Liam Hemsworth*, YOUTUBE (Nov. 14, 2011), https://perma.cc/8HX9-P988 (showing more distinct character as audiovisual transmedia).

[344] *See* DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015) ("physical and conceptual qualities").

[345] *See* SALKOWITZ, *supra* note 1, at 2.; Anderson, *supra* note 79, at 48; Aultman, *supra* note 30, at 385–86; Ball, *Netflix and Video Games*, *supra* note 141.

[346] SALKOWITZ, *supra* note 1, at 2, 41–42, 63–65, 81; *see* Anderson, *supra* note 79, at 50; Aultman, *supra* note 30, at 386–87.

[347] Anderson, *supra* note 79, at 52; Aultman, *supra* note 30, at 386.

[348] *See* Ball, *Netflix and Video Games*, *supra* note 141; *see also* Anderson, *supra* note 79, at 52.

[349] *See, e.g.*, Blizzard Ent., Inc. v. Lilith Games (Shanghai) Co., 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015) (citing DC Comics v. Towle, 802 F.3d 1012, 1012 (9th Cir. 2015)).

[350] SALKOWITZ, *supra* note 1, at 15–16, 110; *see* Katz, *supra* note 2.

[351] SALKOWITZ, *supra* note 1, at 2–3, 15–16, 81; Anderson, *supra* note 79, at 53.

in story development, publication timing, and audience engagement.[352] Video games are similarly focused on situational storytelling, developing subplots and side quests around a singular avatar with one overarching motive.[353]

Scalia's distinction of interactive IPin the *Brown* decision also supports why comics hold the greatest similarity to video games.[354] The relationship between a video game and its player results in immediate interaction influencing the story.[355] For comics, the reader also maintains an influential, interactive relationship with the media.[356] This is due to its episodic nature in storytelling coupled with an active and engaging fan base.[357] The comic industry is rich with similar transmedia copyright, including caselaw history after Marvel and DC's cinematic success of comic book superheroes.[358]

B. *Lessons from Caselaw: Copyright Protections for Comic Book Characters*

The Ninth Circuit established copyright protections for comic book characters in *Walt Disney Productions v. Air Pirates*, an infringement case about a parody comic book series depicting Mickey Mouse and other iconic Disney cartoon characters with adult themes.[359] There was ambiguity as to whether Mickey and his friends should be treated as audiovisual elements from a cartoon strip, or literary characters from books and other stories.[360] The Court held that comic book characters were distinct from literary characters because their descriptions were shown rather than told: "a comic book character, which has physical as well as conceptual qualities, is more likely to contain some unique elements of expression."[361] This established cartoon and comic book characters as audiovisual copyright because a physical design is an original work of authorship independent of an overarching storyline.[362]

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[352] SALKOWITZ, *supra* note 1, at 41–42, 65; *see* Anderson, *supra* note 79, at 52–53.

[353] *See* SALKOWITZ, *supra* note 1, at 2, 15–16, 65, 81; Aultman, *supra* note 30, at 386–87; Kuehl, *supra* note 6, at 318.

[354] *See* Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 798 (2011); Ball, *Netflix and Video Games*, *supra* note 141.

[355] Ball, *Netflix and Video Games*, *supra* note 141.

[356] SALKOWITZ, *supra* note 1, at 2, 5, 11, 16, 18; *see, e.g.*, Aultman, *supra* note 30, at 393–94.

[357] SALKOWITZ, *supra* note 1, at 4, 36, 107; *see* Anderson, *supra* note 79, at 48, 50; Aultman, *supra* note 30, at 393–94.

[358] *See* SALKOWITZ, *supra* note 1, at 4, 36, 107.

[359] 581 F.2d 751, 755 (9th Cir. 1978).

[360] *Id.* at 757–58.

[361] *Id.* at 755; s*ee also* TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228, 228 (D.P.R. 2007).

[362] *Walt Disney Prods.*, 581 F.2d at 755; *see* SALKOWITZ, *supra* note 1, at 41–42, 106–07; Anderson, *supra* note 79, at 52–53.

1. Batmobile Begins: The DC v. Towle Test

The Court in *DC v. Towle* synthesized a three-pronged test to determine whether a comic book character is entitled to copyright protection.[363] The Court had to determine whether the Batmobile received copyright protections after DC sued Towle for running a business making and selling exact replicas of various models.[364] The Court applied the three-pronged character test, noting that even when a character lacks sentient attributes and does not speak, such as a car, it can still be a protectable character.[365]

First, the character must have ''physical as well as conceptual qualities.''[366] This simply means that it must be audiovisual IP, otherwise it would fall under literary copyright.[367] Second, the character must be consistently recognizable whenever it appears; the character need not have the same visual appearance, but it must have "consistent, identifiable character traits and attributes." [368] Third, the character must be ''especially distinctive'' and ''contain some unique elements of expression.''[369]

2. Objective Standards for Character Copyright

When assessing a comic book character, there is a blended objective and subjective standard.[370] As audiovisual copyright, the Batmobile had multiple visual appearances in comic books as well as film and television adaptations.[371] The Court applied its objective standard, the three-pronged test, by utilizing a fact-specific description to define the crime-fighting vehicle's identity.[372] The Court observed the Batmobile's first appearance in 1941 and discerned consistent traits of the automobile in a holistic look at the derivative works.[373]

Some of the key characteristics the Court noted were appearance and design style, carried weaponry, functional role within the story, and relationship.[374] For example, the Court identified the Batmobile as sleek and

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[363] 802 F.3d 1012, 1021 (9th Cir. 2015).

[364] *Id.*

[365] *Id.* (quoting Halicki Films, LLC v. Sanderson Sales & Mktg., 547 F.3d 1213, 1224 (9th Cir. 2008)); *see* SALKOWITZ, *supra* note 1, at 65 (discussing recognizability).

[366] *Walt Disney Prods.*, 581 F.2d at 755.

[367] *Id.*

[368] *DC Comics*, 802 F.3d at 1022; Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003).

[369] *Halicki*, 547 F.3d at 1224–25; *see also* Copyright Act of 1976, 17 U.S.C. § 201(a) (1976); TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228 (D.P.R. 2007) (finding stock characters are not copyrightable).

[370] *See* Societe Civile Succession Guino v. Renoir, 549 F.3d 1182, 1186 (9th Cir. 2008).

[371] *DC Comics*, 802 F.3d at 1021 (quoting *Walt Disney Prods.*, 581 F.2d at 755). *Compare* SALKOWITZ, *supra* note 1, at 15, 37, *with* Anderson, *supra* note 79, at 50–51.

[372] *DC Comics*, 802 F.3d at 1021.

[373] *Id.*

[374] *Id.* at 1021–22.

always "bat-like" in appearance; it carried "high-tech gadgets and weaponry" such as the bat-phone, or shark repellant spray.[375] Its function within the story served Batman as a powerful "crime-fighting" sidekick, aiding Gotham's hero by allowing quick maneuvers while he fights villains.[376] The Court held that the Batmobile deserved copyright protections as a comic book character, noting that its distinctive name identified it as more prominent and recognizable than a stock character.[377]

B. *Multi-Media Metaverse: Synthesizing Character Case Law*

Through the *Towle* test, the Court established three consistent points about comic book IP.[378] First, although absent acknowledgment in the Copyright Act, comic books are audiovisual in nature.[379] Second, trademark law is also inexplicably intertwined with a comic book's audiovisual copyright.[380] Third, the character's copyright strength stems from consistency and distinctive design.[381]

1. The Legal Basis Behind *Blizzard v. Lilith*

Blizzard Entertainment v. Lilith Games (Shanghai) solidified the *Towle* test's cross-industry function when the Ninth Circuit considered transmedia copyright protections for prominent video game franchises.[382] Valve and Blizzard Entertainment are the names behind several well-established franchises in the industry, including "Warcraft," "World of Warcraft," "Starcraft," "Diablo," and "DotA."[383] As Plaintiffs in *Blizzard Entertainment*, they claimed Defendants made two mobile games that copied substantial portions of their audiovisual copyright, including "settings, terrain, background art, and other assets" from their various franchises.[384] "DotA Legends" was initially released in China, and UCool, Inc. later adapted it

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[375] *Id.*

[376] *Id.*

[377] *Id.* at 1022; *see also* Copyright Act of 1976, 17 U.S.C. § 201(a) (1976); TMTV Corp. v. Pegasus Broad. of San Juan, 490 F. Supp. 2d 228 (D.P.R. 2007).

[378] *DC Comics*, 802 F.3d at 1021.

[379] *Id.*; *see* SALKOWITZ, *supra* note 1, at 2; *see also* 17 U.S.C. § 201(a); *TMTV Corp.*, 490 F. Supp. 2d at 235–36 (finding especially distinctive transmedia protectable independent of the entirety of the work); Anderson, *supra* note 79, at 49 (noting audiovisual roots in non-digital "media convergence").

[380] *DC Comics*, 802 F.3d at 1021–22; *see* Walt Disney Prods. v. Air Pirates, 581 F.2d 751, 755 (1978); SALKOWITZ, *supra* note 1, at 65.

[381] *DC Comics*, 802 F.3d at 1021–22; *see* Aultman, *supra* note 30, at 389; Papazian, *supra* note 4, at 602.

[382] 149 F. Supp. 3d 1167, 1173 (N.D. Cal. 2015) (citing *DC Comics*, 802 F.3d at 1012, 1019).

[383] *Id.* at 1169.

[384] *Id.* at 1169–70. *See generally* Aultman, *supra* note 30, at 386 (defining universe parameters).

into an English version called "Heroes Charge."[385]

Plaintiffs essentially sought standing for copyright infringement of their substantive copyright, regardless of their gameplay.[386] As a result, Blizzard and Valve had to present their claim as mass infringement of multiple transmedia, arguing each separate portion within the collective game were "distinctive characters" by "names . . . appearances, clothing, weapons, traits, abilities." including "copied. . . 'spells' (or in-game abilities), special powers, and icons," as well as "ongoing stories."[387] In other words, they created a general blanket statement; by copying the entirety of the "Warcraft" multiverse, all identifiable transmedia making up the mobile game's audiovisual copyright was a separate offending work, and the majority of the infringed transmedia had copyright protections.[388] The blanket statement attempted to forgo individually listing each piece of Warcraft transmedia they claimed Defendants had copied.[389]

This attempt had a secondary purpose beyond saving everyone in the legal proceeding from inevitable, tedious categorization.[390] If a game series had a unique and original copyright, its franchise would develop in correlation with how popular and notable the series became.[391] Prominent transmedia within the game would become more recognizable as the series developed, and more transmedia would be added with each new game in the franchise; consequently, the multiverse expands in tandem.[392]

By forgoing individual delineation, Plaintiffs claimed copyright protections for their transmedia by association with Warcraft's multiverse.[393] If they agreed, the Court would have reasoned that the franchise's popularity established its originality, and each playable character or other transmedia had equal copyright protections in proportion with their prominence in the franchise.[394] By this logic, copyright protections would be based on association, rather than their originality in design.[395] The Court in

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[385] *Blizzard Ent.*, 149 F. Supp. 3d at 1169–70; Kuehl, *supra* note 6, at 334–38; Tan, *supra* note 320, at 975.

[386] *Blizzard Ent.*, 149 F. Supp. 3d at 1170. *See generally* Anderson, *supra* note 79, at 50, 52 (delineating franchise and spiderweb models for transmedia storytelling).

[387] *Blizzard Ent.*, 149 F. Supp. 3d at 1170.

[388] *See id.*; Anderson, *supra* note 79, at 50–51.

[389] *See Blizzard Ent.*, 149 F. Supp. 3d at 1170.

[390] Anderson, *supra* note 79, at 50.

[391] *E.g.*, SALKOWITZ, *supra* note 1, at 134 (discussing multiverse expansion strategy); *see* Aultman, *supra* note 30, at 393–94.

[392] Anderson, *supra* note 79, at 50; *see* SALKOWITZ, *supra* note 1, at 41, 63–64.

[393] *Blizzard Ent.*, 149 F. Supp. 3d at 1170, 1173; *see* Anderson, *supra* note 79, at 50–51 (delineating franchise transmedia).

[394] *But see Blizzard Ent.*, 149 F. Supp. 3d at 1173 (quoting Feist Publ'n, Inc. v. Rural Telephone Serv. Co., Inc., 499 U.S. 340 (1991)).

[395] *Compare, e.g.*, Kuehl, *supra* note 6, at 343 ("Maybe because the space the Kardashian family currently occupies in popular culture, their identifying characteristics could fit within the scope

Blizzard Entertainment found this line of analysis incorrect; instead, the Court found the Plaintiffs' all-encompassing description insufficient because the "Warcraft" transmedia could not receive copyright protections based on their role within the franchise.[396]

For their analysis, the Ninth Circuit looked to the comic industry rather than industry-specific caselaw.[397] They cited *DC Comics v. Towle* to explain the insufficiency in the Plaintiffs' description.[398] Specifically, they noted that the Batmobile only received copyright protection "after extensively cataloging the car's distinctive characteristics," whereas Plaintiffs described their transmedia through "conclusory statements."[399] Unless Plaintiffs take the time to both name and describe each instance of alleged transmedia infringement, they "plead no facts demonstrating that any one of the dozens of characters are plausibly copyrightable."[400] In other words, their claim failed to describe what made their purported transmedia original and how the Court could identify uses of their original concept.[401]

2. Identifying Infringement in Conceptual Copying

By citing *DC Comics v. Towle*, the Ninth Circuit determined that legal analysis of video game transmedia rests on the root of the purported injury, rather than a video game as art or commerce.[402] The prominence and popularity, or how recognizable transmedia is to a consumer, concerns its value as an identifiable trademark and its resulting market value.[403] If the claim concerns someone's trademark, identity, or right of publicity, then the purported infringement claims injury by stealing from the economic value of an original commodity.[404] In contrast, the transmedia's substantive content concerns its role as an art medium; although infringement may profit off of another's success, that value is earned by stealing the original

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of the three-part *Towle* test.") *with, e.g.*, Marc J. Rachman & Brooke Erdos Singer, *Was Missguided Misguided? Kim Kardashian West Obtains $2.7 Million Judgment in Right of Publicity and Trademark Suit*, DAVIS + GILBERT, LLP (Aug. 1, 2019), https://perma.cc/78QQ-LDH3 (explaining rather than selling the Kardashian persona itself, injury stems from "us[ing] her persona and likeness to sell" because it makes consumers "erroneously believe that she was affiliated").

[396] *Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[397] *Compare* Hart v. Elec. Arts, Inc., 717 F.3d 141, 153 (3rd Cir. 2013), *with Blizzard Ent.*, 149 F. Supp. 3d at 1173 (quoting DC Comics v. Towle, 802 F.3d 1012, 1019 (9th Cir. 2015)), *and* Rice v. Fox Broad. Co., 330 F.3d 1170, 1175 (9th Cir. 2003).

[398] *Blizzard Ent.*, 149 F. Supp. 3d at 1174.

[399] *Id.* at 1173–74 (citing *DC Comics*, 802 F. 3d at 1025).

[400] *Id.* at 1174.

[401] *See id.* at 1173; *see also* Kuehl, *supra* note 6, at 330, 332 (differentiating between originality versus novelty).

[402] *See Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[403] *See id.*; SALKOWITZ, *supra* note 1, at 65.

[404] *Compare* Hart v. Elec. Arts, Inc., 717 F.3d 141, 153 (3rd Cir. 2013), *with* 15 U.S.C. §§ 1051–1127.

content itself.[405]

Consequently, this limited the scope of both the *Rogers* and the *Transformative* tests in video game infringement claims.[406] The *Rogers* test determines whether association with the original commodity occurred; the *Transformative* test assesses whether such association is permitted as a derivative work.[407] For plaintiffs to otherwise pursue this analysis, each portion of infringed transmedia must have been a registered trademark of the franchise.[408] Put simply, courts should use the *Rogers* and *Transformative* tests in cases where plaintiffs claim a video game character infringes on a real identity, such as a registered trademark or a celebrity's right of publicity[409]

Claims of copying someone else's original content—such as a multiverse, character, or other fictional entity—should first utilize the *Towle* test to determine whether the defendant's copyright is unique and original enough to claim ownership.[410] Courts must apply the substantial similarity standard and derivative works analysis once plaintiffs establish sufficient delineation of their transmedia: that their character concept is deemed original enough to receive legal protections.[411]

CONCLUSION

As cross-market collaboration within the entertainment industry continues to expand, it becomes increasingly imperative that the legal field establish standardized audiovisual scholarship.[412] That starts with acknowledging the three types of copyright that constitutes a video game, its merit as both art and commerce, and its connection to trademark law.[413] At its core, copyright analysis invokes substantial similarity comparisons and derivative work exceptions; the challenge lies in determining which variation applies. [414] Technical IP invokes fair use and functionality considerations.[415] Analysis of a game requires discerning its core mechanic,

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[405] *E.g.*, Kuehl, *supra* note 6, at 341; *see* SALKOWITZ, *supra* note 1, at 43.

[406] *Compare Blizzard Ent.*, 149 F. Supp. 3d at 1173 (citing DC Comics v. Towle, 802 F.3d 1012, 1021 (9th Cir. 2015)), *with Hart*, 717 F.3d at 153.

[407] *See Hart*, 717 F.3d at 153.

[408] *See* Lanham Act, 15 U.S.C. §§ 1051–1127 (2013); *Hart*, 717 F.3d at 153.

[409] *See Hart*, 717 F.3d at 153; Papazian, *supra* note 4, at 601–03.

[410] *DC Comics*, 802 F.3d at 1021; *see, e.g.*, *Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[411] *Blizzard Ent.*, 149 F. Supp. 3d at 1173.

[412] *See* Papazian, *supra* note 4, at 594–96, 602.

[413] *See* Jackiw, *supra* note 194, at 13; Kuehl, *supra* note 6, at 316–17; Van Arnam & Shores, *supra* note 94.

[414] Copyright Act of 1976, 17 U.S.C. § 102(a) (1976).

[415] *See* Micro Star v. Formgen Inc., 154 F.3d 1107, 1112 (9th Cir. 1998); Sega Enters. Ltd. v. Accolade, Inc., 977 F.2d 1510, 1523–24 (9th Cir. 1992).

or what makes its gameplay unique, through a comparison of both the Interactive IP and its relations to the audiovisual elements.[416] Transmedia under the Substantive IP considers a *Rogers-Transformative* tag-team for issues stemming from real entities and their identity interests: fictional and conceptual characters are questions of originality under the comic book character's *Towle* test.[417] As courts begin to standardize how they discuss video games, legal scholarship will move past *Pong* into a rich, expansive industry, well on its way towards dominating the box offices.[418]

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[416] *See* Tetris Holding, LLC v. Xio Interactive, Inc., 863 F. Supp. 2d 394, 396 (D.N.J. 2012); Maitra, *supra* note 155; Sedig et al., *supra* note 5, at 3–5; *see also* FABRICATORE, *supra* note 272.

[417] DC Comics v. Towle, 802 F. 3d 1012, 1021 (9th Cir. 2015); Hart v. Elec. Arts, Inc., 717 F.3d 141, 158 (3rd Cir. 2013); *see* SALKOWITZ, *supra* note 1, at 41–42; Van Arnam & Shores, *supra* note 94.

[418] *See* Salkowitz, *supra* note 1, at 41–42; Ball, *Netflix and Video Games, supra* note 141; Ball, *7 Reasons Why*, *supra* note 164; Katz, *supra* note 2.

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The United States Can Protect Those Who Suffer Humanitarian Emergencies: How and Why Immigration Policy Should Be Amended to Assist Crisis Migrants

Joana Jankulla[*]

INTRODUCTION

In times of humanitarian crisis, migration ensues.[1] This migration is often a result of multiple factors that have built up over time and exploded during a pivotal moment.[2] In the summer of 2021, Haiti suffered multiple humanitarian emergencies: a presidential assassination, an earthquake, and a tropical storm.[3] While these crises caused an uptick in migration, decades of political strife, meddling, and poor disaster management made these crises exponentially worse.[4] This migration led Haitian migrants to the Southern Border as they sought stability in the United States.[5] The photos of border patrol officers on horseback violently attacking Haitians circulated the United States.[6] These cruel and horrific scenes showcased the U.S. agents' treatment of the migrants as they fled the humanitarian emergency in their country.[7]

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[*] J.D., New England Law | Boston (2023). B.A., Classical Studies with high honors & Language and Linguistics, Brandeis University (2018). This Note was inspired from my time with the Afghan Refugee Support Project, where I had the honor of working for Professor Dina Francesca Haynes. Thank you to my mentor on this Note, Samantha Howland Zelaya, as well as Briana Broberg, and the members of the *New England Law Review*. Finally, thank you to my sister Kleopatra, my friends, and my partner Ian, for always supporting me and my aspirations.

[1] *See* SUSAN F. MARTIN ET AL., HUMANITARIAN CRISES AND MIGRATION, 30 (2014).

[2] *See id.*

[3] Nicole Narea, *The Afghan Refugee Crisis Has Revealed the Artificial Limits of America's Will to Welcome*, VOX (Sept. 23, 2021, 11:10 AM EDT), https://perma.cc/T9L9-KCKJ.

[4] *See id.*

[5] Eileen Sullivan & Zolan Kanno-Youngs, *Images of Border Patrol's Treatment of Haitian Migrants Prompt Outrage*, N.Y. TIMES, https://perma.cc/5W9L-3NTT (last updated Oct. 19, 2021).

[6] *Id.*

[7] *Id.*

In the summer of 2021, Afghanistan's government collapsed as the Taliban took over following the departure of U.S. presence.[8] While this crisis caused a surge in migration, it was more accurately the culmination of decades of military occupation coupled with an unstable government.[9] Again, images of Afghan nationals trying to force their way out of the country surfaced—hoping to end up on flight manifests and escape the repressive Taliban regime.[10] The United States' subsequent attempts to maintain a calm exit received backlash as chaos persisted.[11] Ultimately, while some found a way out, many could not and remain living in fear.[12]

Immigration policy in the United States is highly discretionary when it comes to addressing humanitarian emergencies.[13] This Note will argue short- and long-term solutions that should be implemented in the United States to assist crisis migrants during times of humanitarian emergencies. First, this Note will discuss that in the short-term, Humanitarian Parole and Temporary Protected Status should be implemented to assist in immediate temporary protections for at-risk migrants. Then, this Note will argue that in addition to policies that assist in the short-term, there must also be long-term policy changes that allow migrants to become permanent residents. Finally, this Note will determine the reasons why Adjustment Acts should be passed during times of humanitarian emergencies.

Part I of this Note provides information on immigration policy in the United States. Furthermore, Part I gives a history of Afghanistan and Haiti. Part II gives reasons why the United States should develop a streamlined approach in dealing with humanitarian emergencies. Part III outlines short-term, temporary immigration solutions that should be established when dealing with humanitarian emergencies. Finally, Part IV explains why the United States should offer long-term immigration solutions to crisis migrants fleeing emergencies in their home country.

I. Background

A. *Immigration Law and Policy*

1. Humanitarian Parole

The Immigration and Nationality Act ("INA") outlines important laws

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[8] David Zucchino, *The U.S. War in Afghanistan: How It Started, and How It Ended*, N.Y. TIMES (Oct. 7, 2021), https://perma.cc/X3KT-5NDX.

[9] *See id.*

[10] *Id.*

[11] *Id.*

[12] Dan De Luce, *U.S. 'Left Behind' 78,000 Afghan Allies in Chaotic Withdrawal: NGO Report*, NBC NEWS (Mar. 1, 2022, 4:58 PM EST), https://perma.cc/FD8M-GDKL.

[13] *See generally Humanitarian Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/MNB2-VGQP (last visited May 29, 2023) (explaining that this policy addresses urgent humanitarian reasons and is discretionary).

regarding immigration, naturalization, refugee assistance, and terrorist removal procedures.[14] The Attorney General may grant a migrant Humanitarian Parole ("HP") as a way to enter the United States "on a case-by-case basis for urgent humanitarian reasons or significant public benefit."[15] This grant "allows an individual who may be inadmissible or otherwise ineligible for admission into the United States to be in the United States for a temporary period."[16] These migrants must be outside of the United States to apply for HP.[17] This grant does not bestow a parolee any permanent status, but only a temporary protection where they may be in the United States for a predetermined period (generally one year).[18] However, this grant does allow parolees the right to apply for work authorization for the duration of their parole.[19] HP is rarely granted.[20] In instances where it is granted, it is used for emergencies such as reuniting sick family members, attending funerals, and testifying in lawsuits.[21] While parolees are within their designated duration of stay, they are eligible to adjust their status through other avenues.[22] The U.S. government has full discretion to approve or deny HP claims.[23]

Historically, the U.S. government has granted HP in many instances following humanitarian crises brought on by war.[24] The U.S. government implemented Operation Safe Haven in 1957 to evacuate over 27,000 at-risk Hungarians after the Hungarian Revolution.[25] Later, the U.S. government implemented Operation New Life to evacuate 140,000 at-risk migrants at the conclusion of the Vietnamese War.[26] After the fall of the governments of South Vietnam and Khmer Republic (also known as Cambodia) in April

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[14] *Immigration and Nationality Act*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/ZBC8-UHEX (last visited May 29, 2023).

[15] 8 U.S.C.A. § 1182 (2021).

[16] *Humanitarian Parole*, *supra* note 13.

[17] ANDORRA BRUNO & CONG. RSCH. SERV., R46570: IMMIGRATION PAROLE 5–6 (2020), https://perma.cc/8K6E-KT3A.

[18] *See* Jill Goldenziel, *Humanitarian Parole Can Save Afghan Allies. The U.S. Should Let Them Use It.*, FORBES (Sept. 1, 2021, 1:48 PM EDT), https://perma.cc/8LQ8-RQVM.

[19] BRUNO & CONG. RSCH. SERV., *supra* note 17, at 1.

[20] *See* Philip Marcelo & Amy Taxin, *Hundreds of Afghans Denied Humanitarian Entry into US*, U.S. NEWS & WORLD REP. (Dec. 30, 2021, 7:39 AM), https://perma.cc/K77H-9LHZ.

[21] *How to Get into the U.S. with Humanitarian Parole*, SHOUSE CAL. L. GRP., https://perma.cc/2B6G-84WF (last visited May 29, 2023).

[22] *See* Goldenziel, *supra* note 18.

[23] *See* BRUNO & CONG. RSCH. SERV., *supra* note 17, at 1.

[24] *See* Letter from #AfghanEvac Coal. et al., to Alejandro N. Mayorkas, Sec'y of Homeland Sec., & Mendoza Jaddou, Dir., U.S. Citizenship & Immigr. Servs., *Request for Creation of the Afghan Parole Program, a Designated Parole Program for At-Risk Afghans* 1–2 (Feb. 15, 2022), https://perma.cc/6P9N-4BXA [hereinafter #AfghanEvac Letter].

[25] *Id.*

[26] *Id.*

1975, the United States immediately paroled evacuees within U.S. borders.[27] From 1960 to 1961, the United States granted parole to "hundreds of thousands" of Cubans as a safety measure against Fidel Castro's rule.[28] In the 1980's, 100,000 Cubans were paroled into the United States for similar reasons, while Haitians were only paroled in at 1,000 monthly.[29] After the 2010 earthquake, the United States established the Special Humanitarian Parole Program for Haitian Orphans to parole orphans being adopted by families in the United States.[30] In 2014, the Haitian Family Reunification Parole Program granted "eligible U.S. citizens and lawful permanent residents" ("LPR") the chance to parole in members of their family located in Haiti.[31] Most recently, in 2021, the Biden administration utilized HP to bring "tens of thousands" of migrants into the United States following the evacuation of at-risk Afghans in Operation Allies Welcome.[32]

2. Temporary Protected Status

The Immigration Act of 1990 created Temporary Protected Status ("TPS") as a method of offering relief to individuals already living in the United States whose countries suffered from humanitarian disasters.[33] A country is designated for TPS by the Secretary of the Department of Homeland Security ("DHS") "due to conditions in the country that temporarily prevent the country's nationals from returning safely, or in certain circumstances, where the country is unable to handle the return of its nationals adequately."[34] TPS is granted due to either "ongoing armed conflict," "environmental disaster," or "other extraordinary and temporary conditions" that would make it difficult for nationals to return safely to their home countries.[35] Countries may receive TPS designation due to one or more

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[27] COMPTROLLER GEN. OF THE U.S., EVACUATION AND TEMPORARY CARE AFFORDED INDOCHINESE REFUGEES: OPERATION NEW LIFE, NO. 76–63, at 6 (1976), https://perma.cc/Y3CF-5G35 [hereinafter OPERATION NEW LIFE].

[28] Joshua Rodriguez, *Explainer: What We Can Learn from Prior Adjustment Acts and What They Mean for Afghan Resettlement*, NAT'L IMMIGR. F. (Nov. 10, 2021), https://perma.cc/6JBG-QRHY.

[29] *See* Carlos Ortiz Miranda, *Haiti and the United States During the 1980s and 1990s: Refugees, Immigration, and Foreign Policy*, 31 SAN DIEGO L. REV. 673, 681 (1995).

[30] Whitney A. Reitz, *Reflections on the Special Humanitarian Parole Program for Haitian Orphans*, 55 N.Y. L. SCH. L. REV. 791, 792–93 (2011).

[31] *The Haitian Family Reunification Parole (HFRP) Program*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/A6NQ-ETW3 (last visited May 29, 2023).

[32] Rebekah Wolf, *Concerns Grow over Denials of Afghan Humanitarian Parole Requests*, IMMIGR. IMPACT (Jan. 7, 2022), https://perma.cc/49Z2-2B8U.

[33] *See* Diana Roy & Claire Klobucista, *What is Temporary Protected Status?*, COUNCIL ON FOREIGN RELS., https://perma.cc/3VF9-LJEM (last updated Jan. 4, 2023, 4:03 PM EST).

[34] *Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/85EA-BK9P (last visited May 29, 2023).

[35] Roy & Klobucista, *supra* note 33.

of these circumstances.[36]

These grants come in periods of six to eighteen months and may be renewed at the discretion of the Secretary of DHS if the country continues to "meet the conditions for designation."[37] Additionally, the designation is accompanied by a decision that, on a specific date, those who apply for this protection need to prove "actual physical presence in the United States for the entire period specified in the regulations."[38] This designation date for continuous physical presence may remain the same even if TPS is extended, or the DHS Secretary can change it to a newer date closer to the most recent designation, known as "redesignation," in which nationals must prove continuous physical presence.[39] Altogether, TPS may be designated (meaning the initial time a country receives TPS), extended (meaning a country's TPS designation is drawn out further so individuals who arrived on or before the original designated time can continue to remain in the United States, but new individuals who arrived after the original date of designation are not eligible), and redesignated (meaning the initial arrival date of the designation can be updated to a more recent date so individuals who arrived after the initial date of designation may apply).[40] During the designated period, a TPS recipient (who is presently undocumented) is not removable, is eligible for employment authorization, and may receive travel authorization.[41] A grant of TPS itself is not a pathway to lawful immigration status.[42] However, these individuals may apply for other pathways to lawful immigration status if they are eligible.[43]

To date, the United States has designated nineteen TPS countries, and thirteen countries are currently under TPS designation including: Burma, Venezuela, Syria, Ukraine, Afghanistan, and Haiti.[44] Burma is designated as a TPS country due to the "extraordinary and temporary conditions" that prevent nationals from returning home safely because of the political crisis and human rights abuses occurring in the country.[45] Venezuela's

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[36] JILL H. WILSON & CONG. RSCH. SERV., RS20844: TEMPORARY PROTECTED STATUS AND DEFERRED ENFORCED DEPARTURE 2 (2022), https://perma.cc/G8M3-FUAY.

[37] *Id.* at 3.

[38] AM. IMMIGR. LAW. ASS'N, TEMPORARY PROTECTED STATUS (TPS) QUESTIONS AND ANSWERS (2021), https://perma.cc/5CX8-G2SB.

[39] WILSON & CONG. RSCH. SERV., *supra* note 36, at 3.

[40] WILSON & CONG. RSCH. SERV., *supra* note 36, at 3.

[41] WILSON & CONG. RSCH. SERV., *supra* note 36, at 3–4.

[42] *Temporary Protected Status*, supra note 34.

[43] *See* Ilona Bray, *Supreme Court Says TPS Does Not Turn an Unlawful Entry into a Lawful One for Purposes of Adjusting Status*, NOLO (June 8, 2021), https://perma.cc/8RYK-D5LQ (explaining that one pathway for TPS holders is applying for asylum or permanent resident status).

[44] *See* Roy & Klobucista, *supra* note 33.

[45] Designation of Burma (Myanmar) for Temporary Protected Status, 86 Fed. Reg. 28,132, 28,135-01 (May 25, 2021).

designation is due to "extraordinary and temporary conditions" arising out of the humanitarian emergency in the country that is causing economic, human rights, and health crises.[46] Syria's designation is extended due to "extraordinary and temporary conditions" and "ongoing armed conflict" caused by the Syrian civil war which exacerbated the humanitarian crisis in the country.[47] Haiti's designation is extended due to the "extraordinary and temporary conditions" the country is facing as a result of political violence and ongoing human rights injustices.[48] Afghanistan's designation comes as a result of "armed conflict" and "extraordinary and temporary conditions" the country is facing because of the Taliban's rise to power.[49]

3. Refugee and Asylum Status

The United Nations 1951 Convention Relating to the Status of Refugees and the 1967 Protocol Relating to the Status of Refugees ensure the protection of refugees.[50] Within this convention, the principle of non-refoulement states that "a refugee should not be returned to a country where they face serious threats to their life or freedom."[51] A refugee is defined as one who "is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."[52] Being admitted as a refugee in the United States grants an individual a pathway to permanent resident status, which may be applied for one year after being admitted.[53]

The Universal Declaration of Human Rights memorialized asylum on December 10, 1948, stating "[e]veryone has the right to seek and to enjoy in other countries asylum from persecution."[54] In the United States "any

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[46] Designation of Venezuela for Temporary Protected Status and Implementation of Employment Authorization for Venezuelans Covered by Deferred Enforced Departure, 86 Fed. Reg. 13,574, 13,575-01 (Mar. 9, 2021).

[47] Extension and Redesignation of Syria for Temporary Protected Status, 86 Fed. Reg. 14,946, 14,947-01 (Mar. 19, 2021).

[48] Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41,863, 41,864-01 (Aug. 3, 2021).

[49] *Secretary Mayorkas Designates Afghanistan for Temporary Protected Status*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Mar. 16, 2022), https://perma.cc/FL4H-52P9 [hereinafter *Mayorkas Designates Afghanistan*].

[50] *See generally An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL, https://perma.cc/A8BK-WM6A (last modified Oct. 22, 2022).

[51] *The 1951 Refugee Convention*, UNHCR, https://perma.cc/C7KG-7VZ2 (last visited May 29, 2023).

[52] 8 U.S.C.S. § 1101 (2022).

[53] *See* U.S. CITIZENSHIP & IMMIGR. SERVS., USCIS WELCOMES REFUGEES AND ASYLEES 3 (Nov. 2019), https://perma.cc/CK8M-6GDG [hereinafter USCIS WELCOMES].

[54] Universal Declaration of Human Rights, Dec. 10, 1948, 217 A (III) U.N.T.S. 3; *see* AM. IMMIGR. COUNCIL, ASYLUM IN THE UNITED STATES 1 (2022), https://perma.cc/9QCQ-TNCQ

[noncitizen][55] who is physically present in the United States or who arrives in the United States . . . may apply for asylum."[56] Asylum seekers have the burden of proving that they meet the definition of a refugee and that they have a "well-founded fear" of facing persecution in their country.[57] Being granted asylum in the United States presents an individual a pathway to permanent resident status, which may be applied for one year after being granted asylee status.[58] Both refugee and asylum seekers share the experience of leaving their countries due to fear of persecution or serious human rights violations.[59] However, the most important distinction between the two is that refugees are currently outside of their country, while asylees are present in the country in which they are seeking asylum.[60]

4. Adjustment of Status

A nonimmigrant may apply to adjust to LPR status "if (1) the [noncitizen][61] makes an application for such adjustment, (2) the [noncitizen][62] is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed."[63] The INA lists several examples that would make an individual inadmissible including: if an individual has a conviction for a crime involving moral turpitude, if an individual has multiple criminal convictions for which the aggregate sentences to confinement were five years or more, or if an individual has committed terrorist activities.[64] Generally, an applicant must have an approved immigrant petition to apply for LPR status.[65] Common examples of approved immigrant petitions are through sponsorship by an LPR or a U.S. citizen family member or spouse, certain employment

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[hereinafter ASYLUM IN THE U.S.].

[55] *See generally* Hamed Aleaziz, *"Illegal Alien" Will No Longer Be Used in Many US Government Communications*, BUZZFEED NEWS https://perma.cc/WJH3-MU5N (last updated Feb. 16, 2021, 7:20 PM) (explaining that President Biden has officially stopped the use of the word "alien" to describe noncitizens; this Note will follow suit and not use this dehumanizing word).

[56] 8 U.S.C.S. § 1158 (2021).

[57] ASYLUM IN THE U.S., *supra* note 54, at 1.

[58] *See* USCIS WELCOMES, *supra* note 53, at 3.

[59] *Refugees, Asylum-Seekers and Migrants*, AMNESTY INT'L, https://perma.cc/7ZRB-F2A5 (last visited May 29, 2023).

[60] *See id.*

[61] *See generally* Aleaziz, *supra* note 55 (explaining that President Biden has officially stopped the use of the word "alien" to describe noncitizens; this Note will follow suit and not use this dehumanizing word).

[62] *See generally* Aleaziz, *supra* note 55.

[63] 8 U.S.C.S. § 1255(a) (2022).

[64] 8 U.S.C.S. § 1182 (2022).

[65] *See Adjustment of Status (AOS) Before USCIS Flow Chart (I485)*, NAT'L IMMIGR. JUST. CTR, https://perma.cc/X6A9-LTLU (last visited May 29, 2023).

categories, a Special Immigrant status (such as if you are a juvenile and granted protection due to abuse, abandonment, or neglect), and asylum status.[66]

There is an alternate method of providing a pathway to LPR status for those who do not have any immigrant petition available to them.[67] This method is only utilized during times of conflict or humanitarian emergencies.[68] It is a piece of legislation that must be passed by Congress, known as an Adjustment Act.[69] The United States has passed several Adjustment Acts including the Cuban Adjustment Act, the post-Vietnam War Adjustment Act, and several Iraqi Adjustment Acts.[70] The Cuban Adjustment Act gave an avenue to Cuban nationals who entered the United States via HP after fleeing Fidel Castro's regime.[71] If they qualified, Cuban nationals could adjust to LPR status after one year in the United States.[72] The Cuban Adjustment Act amounted to 1.2 million Cubans obtaining LPR status.[73] The Haitian Refugee Immigration Fairness Act allowed eligible Haitian parolees to gain LPR status.[74] Congress passed several Adjustment Acts to address the number of refugees paroled into the United States after the Vietnam War.[75] Over 150,000 parolees obtained LPR status via this avenue.[76] Most recently, Congress passed multiple Adjustment Acts following the U.S. military occupation in Iraq which gave Iraqi asylum seekers an avenue toward LPR status if they met certain requirements.[77] This program allowed over 10,000 migrants to receive LPR status.[78]

B. *Defining "Humanitarian Crisis" and "Crisis Migrant"*

A humanitarian crisis is defined as "any situation in which there is a widespread threat to life, physical safety, health or subsistence that is beyond the coping capacity of individuals and the communities in which

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[66] *See generally Green Card Eligibility Categories*, U.S. CITIZENSHIP & IMMIGR. SERVS. https://perma.cc/H6DA-7998 (last visited May 29, 2023) (explaining different ways one may obtain a green card in the United States).

[67] Rodriguez, *supra* note 28.

[68] Rodriguez, *supra* note 28.

[69] *See generally* Rodriguez, *supra* note 28.

[70] Rodriguez, *supra* note 28.

[71] Rodriguez, *supra* note 28.

[72] Rodriguez, *supra* note 28.

[73] Rodriguez, *supra* note 28.

[74] *Green Card for a Haitian Refugee*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/PPG3-N8EF (last visited May 29, 2023).

[75] Rodriguez, *supra* note 28.

[76] *See* Rodriguez, *supra* note 28.

[77] Rodriguez, *supra* note 28.

[78] *See* Rodriguez, *supra* note 28.

they reside."[79] Many see a humanitarian crisis as a sudden emergency that arises out of complete normalcy and needs an urgent response.[80] Although certain events or processes may be the immediate cause of these crises, they are often the result of core problems that have developed in countries due to poor governance, levels of poverty, human rights abuses, environmental challenges, and more.[81] Due to the urgency of humanitarian crises, they cause "a state of affairs in which a decisive change for better or worse is imminent."[82] This can often lead to what is known as crisis migration.[83]

Crisis migration is defined as "a response to a complex combination of social, political, economic, and environmental factors, which may be *triggered* by an extreme event, but not caused by it."[84] This migration occurs because individuals are forced to leave their home country, as it is no longer sustainable to stay.[85] Out of crisis migration comes those who are known as "crisis migrants."[86] Crisis migrants are "those who move and those who become trapped and are in need of relocation in the context of humanitarian crises."[87] Oftentimes, the terms "migrant," "asylum-seeker," and "refugee" are used interchangeably.[88] The major difference between these terms is that refugees have fled their home countries due to a fear of persecution and have a right to international protection; asylum-seekers request protection while physically being in another country due to fear of persecution; and migrants are a catch-all phrase used to describe those that leave their home countries under positive or negative circumstances.[89] While migrants may not fit the legal definition of a refugee, they may nevertheless be fleeing their home countries due to fear of danger and should therefore be protected.[90]

C. *Countries That Have Suffered Recent Humanitarian Crises: Haiti*

1. Overview

The country of Haiti, situated in the Caribbean, has a history of exploitation beginning with its discovery by Christopher Columbus and continuing through colonization by the French in the seventeenth century.[91]

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[79] MARTIN ET AL., *supra* note 1, at 29.

[80] *See* MARTIN ET AL., *supra* note 1, at 29.

[81] *See* MARTIN ET AL., *supra* note 1, at 5.

[82] MARTIN ET AL., *supra* note 1, at 30.

[83] *See* MARTIN ET AL., *supra* note 1, at 30.

[84] MARTIN ET AL., *supra* note 1, at 34 (emphasis in original).

[85] *See* MARTIN ET AL., *supra* note 1, at 30, 34.

[86] *See* MARTIN ET AL., *supra* note 1, at 30.

[87] MARTIN ET AL., *supra* note 1, at 12.

[88] *Refugees, Asylum-Seekers and Migrants*, *supra* note 59.

[89] *See Refugees, Asylum-Seekers and Migrants*, *supra* note 59.

[90] *See Refugees, Asylum-Seekers and Migrants*, *supra* note 59.

[91] *See Haiti: A Brief History of a Complex Nation*, INST. OF HAITIAN STUD.,

Although once known as the Pearl of the Antilles as a call to the wealth Haiti produced, the hundreds of thousands of slaves who created this wealth could not appreciate it.[92] In 1804, after years of resistance against the French, the Haitians seized their independence as a result of a slave rebellion.[93] This independence alarmed slave-owning countries everywhere, so much so that Haiti had to sign an agreement to pay the French twenty-one billion dollars in reparations, an obligation which haunted the country for 122 years.[94] In order to pay off this debt, Haiti took loans at high interest rates, which completely ruined the Haitian economy.[95] Furthermore, after the Haitian Revolution which ousted the French, the United States did not formally recognize Haitian independence and instead tried to take over Haiti itself.[96] This sent the state of the Haitian government into turmoil as it saw seven presidents through four years, in addition to the United States stealing its gold reserve.[97] Then, the United States occupied Haiti from 1915 to 1934 in a failed attempt to fix Haiti's government and force the country to pay back its debt.[98] Since then, Haiti has gone through many political regimes that have continued to ruin the country.[99]

2. Environmental Challenges

Haiti has faced several environmental challenges through the years.[100] The country is vulnerable to earthquakes as it "sits on a fault line between huge tectonic plates, big pieces of the Earth's crust that slide past each other over time."[101] This is harmful as the country is built to survive "hurricanes, not earthquakes."[102] Haiti has suffered severe consequences as a result of a multitude of natural disasters.[103] This is due to a variety of factors including

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https://perma.cc/5U9C-6VGG (last visited May 29, 2023).

[92] Jon Henley, *Haiti: A Long Descent to Hell*, GUARDIAN (Jan. 14, 2010, 14:00 EST), https://perma.cc/3CF2-3J3X.

[93] *Haiti: A Brief History of a Complex Nation*, *supra* note 91.

[94] Dan Sperling, *In 1825, Haiti Paid France $21 Billion to Preserve Its Independence -- Time for France to Pay It Back*, FORBES (Dec. 6, 2017, 6:10 PM EST), https://perma.cc/UX2B-CUH2.

[95] *See* Greg Rosalsky, *'The Greatest Heist in History': How Haiti Was Forced to Pay Reparations for Freedom*, NPR (Oct. 5, 2021, 10:25 AM ET), https://perma.cc/K5F8-LC88.

[96] Chris Cameron, *As U.S. Navigates Crisis in Haiti, a Bloody History Looms Large*, N.Y. TIMES (Dec. 19, 2021), https://perma.cc/D5KN-AEP6.

[97] *Id.*

[98] *Id.*

[99] *See generally id.* (explaining the history of Haiti's politics from the Duvalier dynasty to Jovenel Moïse).

[100] *See generally* Jaclyn Diaz, *Why Earthquakes in Haiti Are So Catastrophic*, NPR (Aug. 16, 2021, 10:00 AM ET), https://perma.cc/2EEJ-XELV (presenting numerous examples of past earthquakes in Haiti).

[101] *Id.*

[102] *See id.*

[103] Rocio Cara Labrador & Diana Roy, *Haiti's Troubled Path to Development*, COUNCIL ON

deforestation, bad housing infrastructure, and poor planning.[104] In 2010, a 7.0 magnitude earthquake devastated Haiti which killed 220,000 nationals and expelled 1.5 million Haitians.[105] From 2015 to 2017, a drought impacted the nation which led to 70% of a total loss of crops.[106] Additionally, in 2016, Hurricane Matthew struck Haiti which completely obliterated the infrastructure, housing, and livestock in the country.[107]

3. Current Events

In the summer of 2021, a combination of political and environmental events led Haiti to a state of turmoil.[108] On July 7, 2021, the political unrest and gang violence in Haiti escalated due to the assassination of President Jovenel Moïse.[109] On August 14, 2021, a 7.2 magnitude earthquake hit the southwest region of Haiti, causing damage similar to the 2010 earthquake.[110] Two days later, on August 16, Tropical Depression Grace struck.[111] This affected more than 800,000 people in Haiti, expelled 30,000, and left 650,000 in need of humanitarian support.[112] In response to these challenges, a minimum of 14,000 Haitians attempted to migrate to the United States to seek refuge.[113]

During the Trump administration, the United States began utilizing Title 42 as a method of ousting migrants at the border without considering their asylum claims.[114] The 1944 Public Health Service Act established Title 42 to "ban people and goods from entering the United States when doing so is required in the interest of public health."[115] Opponents to this practice

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FOREIGN RELS., https://perma.cc/2846-UX5Z (last updated Sept. 9, 2022, 4:37 PM EST).

[104] *See* Diaz, *supra* note 100.

[105] Labrador & Roy, *supra* note 103.

[106] Labrador & Roy, *supra* note 103.

[107] Labrador & Roy, *supra* note 103.

[108] *See generally How Haiti Is Weathering Two Natural Disasters at Once*, NPR (Aug. 18, 2021, 5:00 PM ET), https://perma.cc/4T5D-5A7B (outlining the presidential assassination, earthquake, and tropical storm that subsequently hit Haiti).

[109] Natalie Kitroeff & Anatoly Kurmanaev, *How the Assassination of Haiti's President Follows Years of Strife and Gridlock*, N.Y. TIMES, https://perma.cc/5ZRM-RKYZ (last updated July 10, 2021).

[110] Diaz, *supra* note 100.

[111] The Associated Press, *A Tropical Storm Is Drenching Earthquake-Stricken Haiti*, NPR (Aug. 17, 2021, 6:10 AM ET), https://perma.cc/E9J5-DBCT.

[112] *Stop US Deportations and Abuse Against Haitians on the Move: An Urgent Step Towards Creating Just Policies for Haitians,* AMNESTY INT'L (Dec. 15, 2021), https://perma.cc/246S-2Q3G [hereinafter *Stop US Deportations*].

[113] *See* James Dobbins et al., *How Hope, Fear and Misinformation Led Thousands of Haitians to the U.S. Border*, N.Y. TIMES, https://perma.cc/J7QH-YUAN (last updated Oct. 5, 2021).

[114] *See* Ryan Bort, *Biden Channels Stephen Miller to Deport Haitian Asylum Seekers*, ROLLING STONE (Sept. 21, 2021), https://perma.cc/LM8Z-YVGA.

[115] *See* Tom K. Wong & Nicole Prchal Svajlenka, *The Title 42 Expulsion Policy Does Nothing to*

challenged it in different lawsuits and argued it is not being utilized for public health concerns, but rather in a racist way to expel migrants from certain countries.[116] In the summer of 2021, Haitian migrants traveled to the border in Del Rio, Texas hoping to apply for asylum.[117] Border Patrol officers confronted them with violence on horseback and pushed these migrants back into Mexico with force.[118] As the Biden administration began deportation flights of all Haitian migrants back to Haiti, regardless of whether they actually resided in Haiti before attempting to migrate to the United States, many Haitians did not have the chance to apply for asylum.[119] Title 42 has had a disproportionate impact on Haitian migrants, with over 15,000 being sent on flights back to Haiti in 2021.[120]

The United States has a history of designating Haiti for TPS.[121] The Trump administration rescinded TPS from Haitians in 2017, giving them until 2019 to leave the United States or face deportation.[122] When appointed by the Biden administration, DHS Secretary Alejandro Mayorkas redesignated Haiti for TPS, allowing any Haitian who can prove to have "continuously resided in the United States since July 29, 2021, and who have been continuously physically present in the United States since August 3, 2021" this temporary protection.[123]

Prevent the Spread of COVID-19, CTR. FOR AM. PROGRESS (May 10, 2022), https://perma.cc/H7GJ-3BVV.

[116] *See* Uriel J. García, *U.S. Supreme Court Cancels Arguments over Title 42, the Pandemic-Era Policy to Quickly Turn Away Migrants*, TEX. TRIB. (Feb. 16, 2023, 5:00 PM CST), https://perma.cc/D2WS-KFUP (indicating that "Title 42 has been the subject of various lawsuits" due to being used as a racist tactic to prevent immigration rather than what it is intended for); *More Than 40 Human and Civil Rights Leaders: Ongoing Mistreatment and Expulsions of Haitians and Asylum Seekers Will Stain Biden's Legacy*, NAT. IMMIGRANT JUST. CTR. (Nov. 17, 2021), https://perma.cc/59X9-628B (delineating "racial justice" contentions against the use of Title 42).

[117] Dobbins et al., *supra* note 113.

[118] *See* Bort, *supra* note 114.

[119] Camilo Montoya-Galvez, *U.S. Expels Nearly 4,000 Haitians in 9 Days as Part of Deportation Blitz*, CBS NEWS (Sept. 27, 2021, 9:28 PM), https://perma.cc/NE77-DYLF.

[120] *See* Bort, *supra* note 114.

[121] *See generally* Sophia Asare, Comment, *"This Land Cannot Die": U.S. Involvement in the Rebuilding Haiti*, 33 HOUS. J. INT'L L. 177, 179–80 (2010) (explaining that the Obama administration issued TPS to Haitians in 2010).

[122] *See* Sarah E. Baranik de Alarcón, David H. Secor & Norma Fuentes-Mayorga, "*We Are Asking Why You Treat Us This Way. Is It Because We Are Negroes?" A Reparations-Based Approach to Remedying the Trump Administration's Cancellation of TPS Protections for Haitians*, 26 MICH. J. RACE & L. 1, 2 (2020).

[123] Designation of Haiti for Temporary Protected Status, 86 Fed. Reg. 41,863, 41,863 (Aug. 3, 2021).

D. *Countries That Have Suffered Recent Humanitarian Crises: Afghanistan*

1. Overview

The landlocked country of Afghanistan has suffered for centuries through war and the struggle for independence.[124] It has warded off many invasion attempts by multiple countries, such as Great Britain and the Soviet Union, throughout the years.[125] During the Soviet Union's attempt to invade the country, Osama Bin Laden created Al-Qaeda.[126] The Taliban emerged from this resistance to the Soviet Union's invasion, gained popularity for pledging to stabilize Afghanistan, and eventually seized control of the government.[127] After gaining control of the government, the Taliban welcomed Al-Qaeda into the country and formed strong ties with them.[128] In 1999, the UN officially recognized Al-Qaeda and the Taliban as terrorist organizations.[129]

On September 11, 2001, Al-Qaeda attacked the United States, killing thousands and sparking President George W. Bush to declare the "war on terror" in Afghanistan on October 7, 2001.[130] Post 9/11, the United States overhauled its immigration policies because members of Al-Qaeda had easily secured visas before the attacks due to low vetting for certain visas.[131] The United States created the Department of Homeland Security, Immigration and Customs Enforcement ("ICE"), and Customs and Border Protection ("CBP") to ensure the country strictly followed immigration laws.[132] Additionally, a massive upheaval of national security occurred, as the United States introduced enhanced interrogation techniques along with the President's Surveillance Program and the Patriot Act.[133] These changes increased Islamophobia and anti-immigrant sentiments in the United States.[134]

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[124] *See* Mónica Serrano, Christine Fellenz & Lawson Parker, *How Centuries of Strife Shaped Modern Afghanistan*, NAT'L GEOGRAPHIC (Aug. 16, 2021), https://perma.cc/3XG5-NBP2.

[125] *See id.*

[126] *See* CLAYTON THOMAS & CONG. RSCH. SERV., IF11854: AL QAEDA: BACKGROUND, CURRENT STATUS, AND U.S. POLICY 1 (2022), https://perma.cc/LB6H-ZFF6.

[127] *See* Lindsay Maizland, *The Taliban in Afghanistan*, COUNCIL ON FOREIGN REL., https://perma.cc/4B6H-VKVB (last updated Jan. 19, 2023, 10:45 AM EST).

[128] *See* Saurav Sarkar, *The Taliban and Al-Qaeda: Enduring Partnership or Liability?*, THE DIPLOMAT (June 16, 2020), https://perma.cc/G4HK-G4LE.

[129] *The U.S. War in Afghanistan: 1990-2021*, COUNCIL ON FOREIGN REL., https://perma.cc/W272-3S6L (last visited May 29, 2023).

[130] *Id.*

[131] *See* Ali Soufan, *America Played into Al-Qaeda's Hands*, THE ATL. (Sept. 11, 2021), https://perma.cc/B4HW-7Y2C.

[132] Madeleine Carlisle, *How 9/11 Radically Expanded the Power of the U.S. Government*, TIME (Sept. 11, 2021, 7:00 AM EDT), https://perma.cc/K2ZB-FDKP.

[133] *Id.*

[134] *See id.*

2. Current Events

After two decades of war in Afghanistan, on November 17, 2020, the United States announced a withdrawal of armed forces, followed by President Joe Biden's decision on April 14, 2021, to completely withdraw by September 11, 2021.[135] Trying to get ahead of the chaos, the United States expanded the Special Immigrant Visa ("SIV") program.[136] The United States later followed by expanding the Priority 2 Visa ("P2") program.[137] SIVs immediately had procedural delays upon introduction in 2006.[138] Furthermore, these visas continue to be limiting, as those that qualify must have worked for the U.S. government in some capacity.[139]

The tide changed in Afghanistan on August 15, 2021, when the Taliban once again overtook Kabul, the capital, after President Ghani fled the country.[140] A scene of pure chaos ensued as tens of thousands of U.S. citizens, LPRs, and Afghan nationals scrambled to board planes out of the country, fearing for their lives at the hands of the Taliban.[141] Over 60,000 Afghan allies, meaning those who worked for the U.S. government in some capacity, could not secure SIV and P2 visas and are currently still in Afghanistan.[142]

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[135] *See generally The U.S. War in Afghanistan: 1990-2021*, *supra* note 129 (outlining major events that occurred in the "war on terrorism," including the capture of Osama Bin Laden during the Obama administration).

[136] *See generally Fact Sheet: Overview of the Special Immigrant Visa Programs*, NAT'L IMMIGR. F. (June 22, 2021), https://perma.cc/WV82-B86A (stating those eligible for SIV visas are Afghans "translators or interpreters who have worked with U.S. military forces" or "any other Afghan national who was employed by or on behalf of the United States government in the region").

[137] *See generally* Jennifer Hansler, Nicole Gaouette & Michael Conte, *Biden Administration Expands Access To Refugee Program for Afghans Who Worked with US*, CNN, https://perma.cc/A9BA-HMJG (last updated Aug. 2, 2021, 5:44 PM EDT) (explaining that those eligible for P2 visas are Afghans who "'work or worked as employees of contractors, locally-employed staff, interpreters/translators' for the US government, US or NATO forces, those 'who work or worked for a U.S. government-funded program or project in Afghanistan supported through a U.S. government grant or cooperative agreement,' and those 'who are or were employed in Afghanistan by a U.S.-based media organization or non-governmental organization'").

[138] *See* Ryan C. Crocker & Philip M. Caruso, *Our Allies Deserve Better Than Starvation and a Life on the Run*, N.Y. TIMES (Feb. 17, 2022), https://perma.cc/3CDR-UPUR.

[139] *See generally* Danilo Zak, *Fact Sheet: Pathways To Protection for Afghans at Risk*, NAT'L IMMIGR. F. (Sept. 1, 2021), https://perma.cc/85XT-QKAU (explaining those who qualify for an SIV visa are "interpreters, embassy workers, and others who have directly supported U.S. military efforts," while those who qualify for a P2 visa are "vulnerable Afghans who worked for U.S. military contractors or U.S.-based non-governmental organizations (NGOs) but who do not qualify for SIV status").

[140] *The U.S. War in Afghanistan: 1990-2021*, *supra* note 129.

[141] *See* Michael D. Shear, Lara Jakes & Eileen Sullivan, *Inside the Afghan Evacuation: Rogue Flights, Crowded Tents, Hope and Chaos*, N.Y. TIMES, https://perma.cc/96GQ-3DYC (last updated Nov. 12, 2021).

[142] *See* Crocker & Caruso, *supra* note 138.

Realizing there needed to be another way to process the 125,000 Afghans evacuated, most of whom were recognized as "vulnerable Afghans" who did not qualify for any other visa into the United States, the Biden administration began utilizing HP.[143] After evacuating migrants into transit sites known as "lily pads," U.S. officials began screening and processing Afghan nationals, paroling them into the United States if they passed safety screenings.[144] Around 82,015 Afghans in total evacuated, with 70,192 entering the United States through HP.[145] The United States officially pulled troops from Afghanistan on August 30, 2021.[146] While tens of thousands evacuated, 78,000 allies and high-risk individuals still remain in Afghanistan.[147] On March 16, 2022, the Biden administration designated Afghanistan for Temporary Protected Status.[148]

II. Importance

A. *The United States Must Establish Short- and Long-Term Solutions To Immigration Policy During Times of Humanitarian Emergency Because Such Times Are Becoming More Frequent*

An estimated 274 million migrants across the world require humanitarian aid.[149] An estimated 68 million migrants have escaped their home countries due to conditions of war and fear of persecution.[150] An estimated 14 million migrants are forced out of their home countries due to drastic weather and climate change.[151] An estimated 690 million migrants experience hunger.[152] Humanitarian emergencies are increasing around the world as numerous conflicts lead to war and the effects of climate change displace millions of people.[153]

Although this Note will focus on the humanitarian emergencies in Haiti and Afghanistan, many countries face similar crises.[154] Most recently, the

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[143] *See* Nick Miroff, *For Afghan Evacuees Arriving To U.S., a Tenuous Legal Status and Little Financial Support*, WASH. POST (Sept. 1, 2021, 10:05 PM EDT), https://perma.cc/2BTB-44WJ.

[144] *See id.*

[145] *See* DEP'T OF HOMELAND SEC., OPERATION ALLIES WELCOME AFGHAN EVACUEE REPORT 2–7 (2021), https://perma.cc/ZM52-8PFE.

[146] Zucchino, *supra* note 8.

[147] De Luce, *supra* note 12.

[148] *Mayorkas Designates Afghanistan*, *supra* note 49.

[149] *Global Humanitarian Overview 2023*, UNITED NATIONS OFF. FOR THE COORDINATION OF HUMANITARIAN AFFS., https://perma.cc/5D8E-4HG8 (last visited May 29, 2023).

[150] *Conflicts and Disasters*, OXFAM INT'L, https://perma.cc/4ZPF-744P (last visited May 29, 2023).

[151] *Id.*

[152] *Id.*

[153] *See id.*

[154] *See The Top 10 Crises the World Can't Ignore in 2022*, INT'L RESCUE COMM., https://perma.cc/KA64-8RNK (last updated July 18, 2022).

humanitarian crisis in Ukraine is gaining nationwide attention.[155] As it is unclear what will come from Russia's attack on Ukraine, the United States cannot continue to ignore that humanitarian emergencies cause an increase in immigration.[156] In fact, the United States developed an immigration plan for at-risk Ukrainian migrants after receiving months of pressure.[157] Therefore, there must be a solid plan in place for how the country will address humanitarian emergencies through immigration policy in the short- and long-term.[158] When President Biden took office, he made numerous promises for changes in immigration policy.[159] His time to act, especially to fix how crisis migrants are treated, is now.[160]

B. *The United States Has a Duty to Rectify Certain Situations Where It Has Directly or Indirectly Contributed to These Humanitarian Emergencies*

The United States is a dominant figure in both Afghanistan and Haiti; as such, it has a moral obligation to rectify the humanitarian emergencies it caused in these countries.[161] The United States interfered with many of Haiti's political elections, often to Haiti's detriment.[162] The proximate chain of events that led to the current humanitarian emergency in Haiti started after the 2010 earthquake.[163] During the 2010 election year, the United States, along with other world leaders, compelled Haiti to hold its elections—not considering the devastation the earthquake inflicted on Haiti.[164] President Martelly, the United States' preferred candidate, won the election and supported Jovenel Moïse to succeed him in 2016, after which Moïse ruled Haiti as an authoritarian with implicit approval from both the Trump and Biden administrations.[165] Moïse selected Ariel Henry as prime minister, who

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[155] *See* Eugene Robinson, *The War in Ukraine Could Hardly Be Going Worse for Putin. Don't Assume He Agrees.*, WASH. POST. (Mar. 17, 2022, 6:05 PM EDT), https://perma.cc/WL4V-U27B.

[156] *See id.*

[157] *See generally Explainer: Uniting for Ukraine*, NAT'L IMMIGR. F. (Apr. 28, 2022), https://perma.cc/Q7MF-D4A8 (outlining how the U4U program established by the Biden administration will help at-risk Ukrainian migrants immigrate to the United States).

[158] *See generally* #AfghanEvac Letter, *supra* note 24, at 1–2 (requesting the creation of an Afghan Parole program as one way to address the Afghan emergency).

[159] *See* Mimi Dwyer, *Factbox: U.S. President-Elect Biden Pledged to Change Immigration. Here's How*, REUTERS (Jan. 15, 2021, 10:19 AM), https://perma.cc/CP77-VD5G.

[160] *See generally Stop US Deportations*, *supra* note 112 (illustrating that President Biden has maintained a racist Title 42 policy against Haitian migrants, which should be stopped).

[161] *See generally* Cameron, *supra* note 96 (outlining the history between the United States and Haiti); Zucchino, *supra* note 8 (outlining the history between the United States and Afghanistan).

[162] *See* Cameron, *supra* note 96.

[163] *See* Cameron, *supra* note 96.

[164] *See* Cameron, *supra* note 96.

[165] *See* Cameron, *supra* note 96.

faced punishment in 2021 for aiding in Moïse's assassination.[166] The United States' political meddling caused substantial hardship for Haitians, and created an obligation for the United States to help Haitian migrants.[167]

The United States' occupation in Afghanistan lasted twenty years and encompassed the United States' attempt to build a pro-Western democracy to keep the United States and its allies safe from the Taliban.[168] Although the United States built schools, hospitals, and other facilities, corruption that the United States could not solve continued in the country.[169] Furthermore, the Taliban persisted by building up their attack forces.[170] In 2020, former President Trump negotiated an agreement with the Taliban that included full U.S. withdrawal.[171] This agreement did not establish a way of ensuring the Taliban would follow through with their promises.[172] The Taliban agreed to no longer affiliate with Al Qaeda and the Islamic State to cut down on violence and to cooperate with the Afghan government backed by the United States.[173] Despite these promises, the Taliban continue to wreak havoc in Afghanistan, especially Kabul, by killing thousands and bringing fear to the most vulnerable populations in the nation.[174] Because of the deteriorating situation in Afghanistan after the U.S. withdrawal, the United States has a duty to assist Afghan migrants.[175]

C. *The Core Principles of Immigration in the United States Call for Humanitarianism in Times of Need*

The United States has the largest population of immigrants in the world.[176] However, the topic of immigration continues to be heavily debated by parties everywhere.[177] The INA establishes and encourages "migration flows into the United States according to principles of admission that are based upon national interest."[178] Humanitarian assistance is one of these

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[166] *See* Cameron, *supra* note 96.

[167] *See* Fabiola Cineas, *Why America Keeps Turning Its Back on Haitian Migrants*, VOX (Sept. 24, 2021, 2:40 PM EDT), https://perma.cc/KK8X-EZWM.

[168] *See* Zucchino, *supra* note 8.

[169] *See* Zucchino, *supra* note 8.

[170] *See* Zucchino, *supra* note 8.

[171] Zucchino, *supra* note 8.

[172] Zucchino, *supra* note 8.

[173] Zucchino, *supra* note 8.

[174] *See* Zucchino, *supra* note 8.

[175] *See* Crocker & Caruso, *supra* note 138.

[176] *Our Nation of Immigrants*, BROOKINGS, https://perma.cc/YTU8-X6JU (last visited May 29, 2023).

[177] *Id.*

[178] WILLIAM A. KANDEL & CONG. RSCH. SERV., R45020: PRIMER ON U.S. IMMIGRATION POLICY 1 (2021), https://perma.cc/FSU9-PLFW.

"principles of admission that are based upon national interest."[179] Both temporary and permanent immigration avenues showcase that the United States can and should continue to accept immigrants, especially those fleeing humanitarian emergencies.[180]

ANALYSIS

III. In the Short-Term, the United States' Focus Should Be to Grant Temporary Protection When a Sudden Humanitarian Emergency Occurs to Migrants Fleeing These Scenarios, so They May Escape Life Threatening Circumstances

A. *First, a Humanitarian Parole Program Should Be Established to Quickly and Safely Evacuate At-Risk Crisis Migrants Who Suffer as a Result of Humanitarian Disasters*

The first step that should be taken in times of humanitarian emergency is that the United States should process crisis migrants into the country using HP.[181] This is because when a humanitarian emergency occurs, the most important urgent response is to equally allow all at-risk migrants a safe haven.[182] This response would allow those that are outside U.S. borders a means for being paroled in so they may flee the immediate danger that is threatening their livelihood.[183] Studying the humanitarian emergencies that recently occurred in Afghanistan and Haiti, it is clear that an equal HP program would have benefitted migrants from both countries.[184]

1. The United States Should Implement a More Effective Humanitarian Parole Program for Afghanistan

Although the United States implemented HP as a way of processing tens of thousands of Afghan evacuees into the United States, many at-risk migrants in Afghanistan could not evacuate due to the limitations of the program.[185] While at the time, at-risk Afghans hoped the United States

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[179] *Id.*

[180] *See generally* Julia Gelatt, *Explainer: How the U.S. Legal Immigration System Works*, MIGRATION POL'Y INST. (Apr. 2019), https://perma.cc/ZQ4N-FPSN (explaining the numerical ceilings that both permanent and temporary visas in the United States have).

[181] *See generally* BRUNO & CONG. RSCH. SERV., *supra* note 17, at 1 (explaining that HP allows a national to be present in the United States for a humanitarian reason).

[182] *See generally Investigating USCIS' Implementation of Humanitarian Parole and Refugee Processing for Afghan Nationals*, AM. IMMIGR. COUNCIL (Mar. 15, 2022), https://perma.cc/KH3W-7SPT (illustrating that in the Afghan crisis, the United States processed Afghan nationals by using HP).

[183] *See* BRUNO & CONG. RSCH. SERV., *supra* note 17, at 5–6.

[184] *See* Narea, *supra* note 3.

[185] *See* Wolf, *supra* note 32.

would help them all, that hope left when the United States left them stranded.[186] However, the urgent humanitarian emergency that merits a grant of HP in Afghanistan did not end when U.S. military forces withdrew.[187] Rather, the situation is now arguably even worse with the Taliban's control of the government in Afghanistan.[188] These conditions demonstrate that the urgent humanitarian need that warrants the use of HP is still ongoing.[189] Critics of the Biden administration have argued that unless the United States immediately assists Afghanistan, the disastrous emergency that is haunting Afghanistan will continue to grow.[190]

The United States implemented policies which implied that those who remained in Afghanistan would be able to apply for HP.[191] However, it has become practically impossible to be granted parole, both because applying for HP has become challenging and because there are high burdens of proof for granting HP.[192] As a result, the program is not functioning as well as it could be, which hints that had the United States implemented a clear plan for dealing with the migrants left behind in Afghanistan prior to withdrawal, more migrants would have benefitted from a grant of parole.[193] In terms of applying for HP, the downfall is that the U.S. Embassy in Kabul is closed and unable to complete processing requests.[194] Afghan nationals who might be eligible for parole, if they submit their own applications or if a third party files their requests, must travel to a third country that has a U.S. embassy so their requests may be completely processed.[195] Traveling outside of Afghanistan is a challenge as the Taliban recently restricted such travel unless nationals "had a clear destination" and further stated that "women

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[186] *See* Wolf, *supra* note 32.

[187] *See* Jane Ferguson, *Afghanistan Has Become the World's Largest Humanitarian Crisis*, THE NEW YORKER (Jan. 5, 2022), https://perma.cc/CGE8-ZMQB.

[188] *See id.*

[189] *See* #AfghanEvac Letter, *supra* note 24, at 1–2.

[190] *See* Ezra Klein, *If Joe Biden Doesn't Change Course, This Will Be His Worst Failure*, N.Y. TIMES (Feb. 20, 2022), https://perma.cc/RP3W-K6U5.

[191] *See generally Information for Afghan Nationals on Requests to USCIS for Parole*, U.S. CITIZENSHIP & IMMIGR. SERVS., https://perma.cc/CHS3-AB4R (last visited May 29, 2023) [hereinafter *HP for Afghan Nationals*] (explaining how Afghans both in and outside of Afghanistan may apply for HP).

[192] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr., President of the U.S., Alejandro N. Mayorkas, Sec'y of Homeland Sec., U.S. Dept. of Homeland Sec., Ur Mendoza Jaddou, Dir., U.S. Citizenship & Immigr. Servs., Kamala D. Harris, Vice President of the U.S. & Antony Blinken, Sec'y of State, U.S. Dept. of State, *Joint Letter to Biden Administration Expressing Concern Regarding Humanitarian Parole Denials for Afghans* (Dec. 14, 2021), https://perma.cc/BH8J-23MV.

[193] *See generally id.* (providing recommendations for ways the U.S. could fix the current issues migrants are facing when applying for Humanitarian Parole).

[194] *See HP for Afghan Nationals*, *supra* note 191.

[195] *HP for Afghan Nationals*, *supra* note 191.

could not travel overseas for study without a male guardian."[196] In addition, it is nonsensical to think that those who remained in Afghanistan will be able to travel to third countries, as many at-risk individuals, especially human rights advocates, have gone into hiding.[197]

Even still, those who manage to have third parties file their applications for them at U.S. Citizenship and Immigration Services ("USCIS") are being swiftly denied.[198] The United States has a chance to positively affect many Afghan lives, but instead, it is requiring high evidentiary burdens that are impractical to meet, causing yet another downfall in their execution of helping those migrants left behind.[199] In one denial notice, USCIS writes the denial is due to lack of "documentation from a third-party source *specifically naming the beneficiary, and outlining the serious harm they face*."[200] Frustratingly, parole denials like this one do not even follow the proper standards explained in the USCIS Training Manual on Humanitarian Parole.[201] This manual explains that parole may be granted due to fear of generalized violence, but denials are calling for more particular descriptions that assert a fear of specified harm.[202] Although HP only provides temporary protection, these high evidentiary burdens are similar to the burdens for asylum; asylum provides a permanent status in the United States and HP does not.[203] There is no reason a program that only offers temporary resettlement in the United States should have the same heightened evidentiary burden as one that is meant to provide permanent status.[204]

Yet another downfall of the current HP program is the inequality of evidentiary burdens that at-risk Afghans in Afghanistan are facing now that Afghans evacuated in August 2021 did not face.[205] Those paroled by the United States during the Afghan evacuation are no different from those who are still trying to obtain parole, but the latter are facing complicated burdens

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[196] *Taliban Restrict Afghans Going Abroad, Raises Concern from U.S. and UK*, REUTERS (Mar. 1, 2022, 1:42 AM EST), https://perma.cc/JK2Z-PJXJ.

[197] *See generally Afghanistan: Taliban Wasting No Time in Stamping out Human Rights Says New Briefing*, AMNESTY INT'L (Sept. 21, 2021), https://perma.cc/7JXW-WNCX (explaining that the Taliban are going door-to-door to look for human rights defenders, so they have no choice but to hide).

[198] *See* Sophia Cai & Stef W. Kight, *Scoop: U.S. Begins Denying Afghan Immigrants*, AXIOS (Dec. 8, 2021), https://perma.cc/RY6J-ZQ4D.

[199] *See id.*

[200] *Id.*

[201] *See id.*

[202] *See id.*

[203] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[204] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[205] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

that the former did not face.[206] Furthermore, Afghans that risked their lives and fled to third countries can no longer establish a specific, imminent, harm to their lives by the Taliban because they fled, despite that fear of harm still existing.[207] Instead, as a result of no legal status or poor living conditions, these migrants in third countries are living in uncertainty, and with continued denials they are stuck with no resolution.[208] If the United States continues to uphold these heightened evidentiary burdens, at-risk Afghans will die before seeing their HP approvals.[209] Consequently, USCIS must reconsider the appropriate threat standard that Afghans in Afghanistan could reasonably meet, such as something closer to the "generalized violence" the USCIS manual requires.[210]

Additionally, the United States should use evidence of prior parole programs enacted for similar humanitarian reasons to equally and swiftly amend the current HP program backlogs for at-risk Afghans.[211] After amending the program, the United States will be able to offer parole to at-risk migrants that remain in Afghanistan.[212] For guidance, the United States can learn a lot from similar post-military occupations such as Operation New Life.[213] Most notably, Operation New Life occurred over a period of eight months and resettled over 94% of refugees in the United States.[214] This far exceeded the maximum of three weeks that the United States evacuated at-risk Afghans before pulling out their forces.[215] In Operation New Life, the United States implemented four reception centers that served as halfway points for processing these refugees before they reached U.S. shores.[216] While the United States took similar action processing Afghan evacuees at lily pad

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[206] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[207] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[208] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[209] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[210] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[211] *See* #AfghanEvac Letter, *supra* note 24, at 1–2.

[212] *See* #AfghanEvac Letter, *supra* note 24, at 1–2.

[213] *See generally* #AfghanEvac Letter, *supra* note 24, at 1–2 (explaining that the United States has had prior success with many HP programs).

[214] OPERATION NEW LIFE, *supra* note 27, at 2, 7.

[215] *See generally* Scott Neuman et al., *The Final U.S. Military Plane Has Left Afghanistan as America's Longest War Ends*, NPR, https://perma.cc/G4Y5-CJDJ (last updated Aug. 30, 2021, 8:45 PM ET) (outlining that the United States evacuated Afghans from around August 14 until August 30, which is about a two-week period).

[216] OPERATION NEW LIFE, *supra* note 27, at 6.

stations, this only lasted until the United States withdrew forces.[217]

Looking at Operation New Life's success from establishing multiple refugee processing stations, the United States should recognize that stations must be installed abroad to process the multitude of HP applications currently being filed; this would serve a similar purpose to prior lily pad stations.[218] One such option is to create a way for Afghans to easily enter third countries that have U.S. embassies.[219] Then, at-risk Afghans would not fear having to leave Afghanistan and potentially expose themselves to the Taliban.[220] Rather, with the help of the United States, after entering a third country, Afghans would be screened and their applications processed by an adjudicator who recognizes the significant humanitarian reason for processing their request.[221] Keeping national security in mind, this application would then go through an identity verification process that would confirm the identity of Afghan nationals.[222] Afghans who are already in third countries with U.S. embassies would immediately benefit from this program.[223] Another option would be to conditionally accept at-risk Afghans into the United States while conducting the same vetting process for their HP applications.[224] Despite these options, many at-risk Afghans still remain in Afghanistan, including U.S. allies, family members of American citizens, and those in vulnerable communities such as human rights defenders, female leaders, and LGBTQ individuals.[225] The United States needs to act by improving the HP process and immediately approving parole for these vulnerable populations still facing emergency humanitarian circumstances.[226]

2. The United States Should Use Humanitarian Parole to Welcome Haitian Migrants

Even though the Afghan evacuee program came with its own set of challenges, Afghan migrants had an option of parole; yet, the United States

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[217] *See* Miroff, *supra* note 143.

[218] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[219] *See* Joint Letter from Afghan Network for Advoc. & Res. et al. to Joseph R. Biden, Jr. et al., *supra* note 192.

[220] *See* #AfghanEvac Letter, *supra* note 24, at 1–2.

[221] *See* INT'L REFUGEE ASSISTANCE PROJECT ET AL., FULFILLING AMERICA'S PROMISE: OPTIONS TO MAKE U.S. HUMANITARIAN PROTECTION PATHWAYS VIABLE FOR AT-RISK AFGHANS 4 (Nov. 2021), https://perma.cc/J6NA-KYYP [hereinafter IRAP et al.].

[222] *See id.* at 4–5.

[223] *See id.* at 4.

[224] *See* Zak, *supra* note 139.

[225] *See* IRAP ET AL., *supra* note 221, at 3.

[226] *See* IRAP ET AL., *supra* note 221, at 2–3.

did not remotely consider at-risk Haitian migrants for parole.[227] Haitian migrants attempted entry into the United States through the Southern Border after numerous humanitarian emergencies occurred in their home country.[228] This lack of consideration showed inequity on the part of the United States; even though considerations are highly discretionary, the United States clearly favored one group by extending HP to them, but not to the other, even though both groups faced emergencies.[229] Instead of using HP as a means for allowing Haitians to enter the United States at the border, the United States instead decided to do the exact opposite and expelled these migrants through Title 42.[230] While the United States attempted to treat Afghans humanely through HP, Haitians at the Southern Border faced inhumane treatment.[231] The Biden administration denounced the treatment of Haitians at the border but did nothing to stop their Title 42 expulsion.[232] This inequity is nonsensical because similar urgent humanitarian needs exist in Haiti that exist in Afghanistan.[233] Even DHS Secretary Mayorkas has noted that "it is unprecedented for us to see that number of people arrive in one discrete point along the border in such a compacted period of time."[234] These unprecedented numbers at the border should prove to leadership just how serious the humanitarian emergency in Haiti is.[235]

It is difficult not to question why the United States only offered HP to Afghans but not Haitians when both faced extreme humanitarian emergencies that warranted the use of HP.[236] Migrants from Afghanistan

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[227] *See* Narea, *supra* note 3.

[228] Letter from Iván Espinoza-Madrigal, Exec. Dir., Laws. for C.R. et al. to Alejandro Mayorkas, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., Merrick Garland, Att'y Gen., U.S. Dep't of Just. & Xavier Becerra, Sec'y of Health & Hum. Servs., U.S. Dep't of Health & Hum. Servs., Humanitarian Immigr. Prot. and Relief for Haitian Refugees 2 (Oct. 25, 2021), https://perma.cc/RKF4-MR9Z.

[229] *See* Narea, *supra* note 3.

[230] *See More Than 40 Human and Civil Rights Leaders: Ongoing Mistreatment and Expulsions of Haitians and Asylum Seekers Will Stain Biden's Legacy*, NAT'L IMMIGRANT JUST. CTR. (Nov. 17, 2021), https://perma.cc/R489-BSCB [hereinafter Mistreatment and Expulsions].

[231] *See* Narea, *supra* note 3.

[232] *See* Sean Sullivan & Tyler Pager, *Facing Black Leaders' Anger, Biden Condemns Treatment of Haitians*, WASH. POST (Sept. 24, 2021, 10:58 AM EDT), https://perma.cc/2SX5-N6L9.

[233] *See generally* Letter from Jessica Chicco, Director of New Americans Initiatives, MIRA Coal. et al. to Joseph R. Biden, Jr., President of the U.S. & Alejandro N. Mayorkas, Sec'y of Homeland Sec., U.S. Dep't of Homeland Sec., *MIRA Coalition Letter to Biden Administration – Haiti* (Oct. 15, 2021), https://perma.cc/E6YQ-XV73 (highlighting the political, criminal, and environmental situation that Haiti is facing).

[234] Nick Miroff, *Most of the Migrants in Del Rio, Tex., Camp Have Been Sent to Haiti or Turned Back to Mexico, DHS Figures Show*, WASH. POST (Oct. 1, 2021, 5:58 PM EDT), https://perma.cc/R35V-8FD.

[235] *See id.*

[236] *See generally Mistreatment and Expulsions*, *supra* note 230 (urging President Biden to welcome at risk Haitians and other Black migrants into the United States).

fled the Taliban takeover of the government, which created dire circumstances.[237] Migrants fleeing Haiti not only fled an unstable government after the assassination of Haitian President Jovenel Moïse, but also back-to-back natural disasters, which also created dire circumstances.[238] DHS Secretary Mayorkas acknowledged the difference in treatment between Afghanistan and Haiti by stating that the United States would help those in Afghanistan who "stood up for us."[239] But, this should not be the only factor that determines whether the United States helps a country suffering a humanitarian emergency, as the obligation of non-refoulement should equally weigh in.[240] United Nations human rights advocates have condemned the United States for expelling thousands of Haitian migrants before giving them the chance to seek asylum as these actions are "inconsistent with international norms."[241] Haitian migrants who arrive at the border possess the right to have their claims of fear of persecution in their country of origin, also known as asylum, assessed.[242]

It is even more appalling that the emergency in Haiti compares to an older situation of political strife following the Cuban Revolution, which prompted the United States to implement a Humanitarian Parole Program for Cuban migrants.[243] Under this program, which continued for years, the United States paroled Cubans into the country due to "urgent humanitarian reasons."[244] During this time, the United States placed some groups of Cubans, who specifically arrived by boat, into refugee camps and later allowed them into the United States.[245] Today, Haitian migrants who make the dangerous journey by boat to the United States do not receive the same welcome.[246] The United States recognized that the political strife and extenuating circumstances in Afghanistan and Cuba warranted the use of HP due to the extreme humanitarian emergencies that occurred.[247] On this

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[237] *See* Associated Press, *Explainer: What Happened to the Afghanistan Evacuation?*, U.S. NEWS & WORLD REP. (Nov. 26, 2021, 8:38 AM), https://perma.cc/U3T8-6FNQ.

[238] *See* Joint Letter from Amnesty Int'l et al. to Biden Admin., *The United States Must Stop Deportations and Abuse Against Haitians* (Dec. 15, 2021), https://perma.cc/RHQ7-4G89.

[239] *See* Khaleda Rahman, *Jim Acosta Asks Why U.S. Is 'Welcoming Afghans' but 'Sending Haitians Back,'* NEWSWEEK (Sept. 20, 2021, 8:02 AM EDT), https://perma.cc/M7HG-U8MH.

[240] *See generally* Stephanie Nebehay, *U.S. Expulsions of Haitians May Violate International Law - UN Refugee Boss*, REUTERS (Sept. 21, 2021, 5:25 PM EDT), https://perma.cc/H737-VVH7 (stating that the U.N. disapproves the U.S. tactics of expelling asylum seekers at the border).

[241] *Id.*

[242] *Id.*

[243] *See* Danilo Zak, *Explainer: Humanitarian Parole and the Afghan Evacuation*, NAT'L IMMIGR. F. (Aug. 30, 2021), https://perma.cc/W3L9-EK7K.

[244] *Id.*

[245] *See* Cineas, *supra* note 167.

[246] *See* Kiara Alfonseca, *Hundreds of Migrants Arrive on Boat in Florida Keys*, ABC NEWS (Mar. 7, 2022, 1:02 PM), https://perma.cc/P6T3-DHB9.

[247] *See* Zak, *supra* note 243.

same note, the political, environmental, and societal impacts of the current humanitarian emergency in Haiti should also warrant establishing an HP program.[248] The lack of a clear HP plan for emergency humanitarian situations has left Haitian migrants to suffer immensely.[249]

Furthermore, comparing the logistics of an Afghan HP program versus a Haitian HP program, vetting Haitian migrants at the border and admitting them into the United States through HP is arguably much easier.[250] In the case of Afghanistan, the United States needs to allocate extra resources to find ways to get these migrants into third countries and process their HP applications.[251] In the case of Haiti, at-risk migrants arrived at the border in Del Rio, Texas.[252] The Del Rio border alone has ten stations that could be used in a manner similar to the lily pad stations created during the Afghanistan evacuation.[253] Additionally, these HP requests could be processed at the makeshift camps the U.S. government created to allegedly allow Haitians to pursue their claims of asylum before being expelled back to Haiti.[254] This is one way the United States could handle Haitian HP requests at the border.[255]

The Biden administration continues a long history of racist U.S. immigration policies against Haitian migrants.[256] The violent and inhumane tactics that border patrol used to physically remove Haitian migrants from the border "blatantly display the clear historical relationship between slavery and modern immigration policy, policing, and the carceral state."[257] When the Trump administration began utilizing Title 42, it did so "to maintain a white majority in the United States."[258] The administration used words such as "invasion" to describe the migration of Haitians.[259] Title 42

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[248] *See* Joint Letter from Amnesty Int'l et al. to Biden Admin., *supra* note 238.

[249] *See generally* Letter from Iván Espinoza-Madrigal et al. to Alejandro Mayorkas et al., *supra* note 228, at 2 (arguing that if Haitians returned to Haiti they would "walk into the arms of death").

[250] *See generally* Miroff, *supra* note 234 (showing Haitian migrants stuck in border camps and then sent on flights back to Haiti).

[251] *See generally* IRAP ET AL., *supra* note 221, at 2–3 (explaining that the United States should create more stations abroad to process Afghan evacuees).

[252] *See* Miroff, *supra* note 234.

[253] *See generally Border Patrol Sectors*, U.S. CUSTOMS & BORDER PROT., https://perma.cc/2H92-VERB (last visited May 29, 2023) (listing the numerous border stations at Del Rio, Texas).

[254] *See generally* Miroff, *supra* note 234 (describing that Haitians were forced into camps while they awaited processing of their asylum applications).

[255] *See generally* Letter from Iván Espinoza-Madrigal et al. to Alejandro Mayorkas et al., *supra* note 228, at 2 (requesting an urgent HP program for Haiti).

[256] *See* Marjorie Cohn, *Biden's Expulsion of Haitian Migrants Is Racist, Illegal — and Trumpian*, TRUTHOUT (Oct. 2, 2021), https://perma.cc/TUL3-6QQA.

[257] *Id.*

[258] *Id.*

[259] *CERD: US Discrimination Against Black Migrants, Refugees and Asylum Seekers at the Border*

affected 22,000 Haitians, at a rate unlike any other population.[260] Furthermore, in May 2022, Haitian migrants populated 6% of the Southern Border but populated 60% of mandatory flights back to Haiti; while at the same time, the United States admitted 98.9% of white, Ukrainian migrants.[261] The writing on the wall is clear—racism continues to drive U.S. immigration policy when it comes to Haitian migrants.[262] Haiti has faced many humanitarian emergencies in the past that had advocates calling for the use of HP, such as after the 2010 earthquake, but the United States did not act.[263] The United States could operate a HP program for at-risk Haitians similar to the one it conducted for at-risk Afghans, but the Biden administration is choosing not to.[264] The United States must act because Haitian migrants are suffering at levels never seen before and have suffered exclusion from the United States for years, while their country has suffered numerous humanitarian emergencies.[265]

3. A Humanitarian Parole Program Has a Different Purpose Than Refugee Resettlement Programs

Critics of a streamlined HP program argue that it is a means of bypassing established refugee resettlement programs, which provide permanent status only to those that qualify.[266] However, an established parole program would not take away from the current refugee resettlement programs.[267] Rather, it would benefit those fleeing emergencies who would otherwise not be able to have their claims addressed quickly because of the already high number of refugees worldwide.[268] Across the world in 2020, the refugee count totaled an estimated 26.3 million.[269] Due to this high volume, addressing humanitarian emergencies through refugee resettlement programs means the entire process could take a minimum of eighteen to twenty-four months.[270] Not doing so would leave many migrants in "dangerous locations

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and Beyond, HUM. RTS. FIRST., (Aug. 8, 2022), https://perma.cc/KM53-XGNP.

[260] *Id.*

[261] *Id.*

[262] *See* Cineas, *supra* note 167.

[263] *See* Memorandum from Colum. L. Sch. Hum. Rts. Clinic et al., to Roxana Bacon, Chief Couns., U.S. Citizenship & Immigr. Servs., *In Support of a U.S. Pol'y Generously Granting Humanitarian Parole for Haitian Victims of the Earthquake of January 12, 2010* 3 (Feb. 25, 2010), https://perma.cc/U8SU-ULN.

[264] *See* Rahman, *supra* note 239.

[265] *See* Azadeh Erfani, *President Biden, It Is Past Time to Protect Haitian Asylum Seekers*, NAT'L IMMIGRANT JUST. CTR. (Sept. 20, 2021), https://perma.cc/GMW4-UJ2D.

[266] *See* #AfghanEvac Letter, *supra* note 24, at 4–5.

[267] *See* #AfghanEvac Letter, *supra* note 24, at 4–5.

[268] *See* #AfghanEvac Letter, *supra* note 24, at 4–5.

[269] *See An Overview of U.S. Refugee Law and Policy*, *supra* note 50.

[270] *See generally An Overview of U.S. Refugee Law and Policy*, *supra* note 50 (illustrating the delays in the refugee resettlement process).

or in difficult circumstances."[271] Since these life-threatening emergencies need immediate attention, HP would take the burden away from the backlogged refugee resettlement programs and not entirely replace these programs.[272] Then, these refugee resettlement programs would be used as intended, applying the allocated resources to resettle refugees worldwide rather than focusing all their time and money on resettlements only during humanitarian emergencies.[273]

4. The United States Must Plan to Utilize Humanitarian Parole for Future Crises

In general, the crises of Afghanistan and Haiti should teach the United States that there needs to be a more streamlined process for granting HP when humanitarian emergencies occur.[274] This new avenue would allow for applications to be quickly and accurately addressed.[275] With this in mind, the United States could welcome at-risk Afghans, Haitians, and any future at-risk individuals suffering from emergency humanitarian crises by allowing them to apply for parole and benefit from getting immediate relief.[276] Furthermore, this would allow for Haitian migrants to stop experiencing disproportionate racism at the border.[277] Extending HP during times of humanitarian emergencies is the correct first step in helping crisis migrants, but the short-term protections do not stop there.[278]

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[271] *An Overview of U.S. Refugee Law and Policy*, *supra* note 50.

[272] *See* #AfghanEvac Letter, *supra* note 24, at 4–5.

[273] *See generally An Overview of U.S. Refugee Law and Policy*, *supra* note 50 (explaining the refugee resettlement program in the United States).

[274] *See generally* #AfghanEvac Letter, *supra* note 24, at 4–5 (arguing that an Afghan Parole Program should be established because there is an urgent need for it).

[275] *See generally* INT'L REFUGEE ASSISTANCE PROGRAM, PROTECTING AT-RISK AFGHANS AFTER THE U.S. MILITARY WITHDRAWAL 2 (2021), https://perma.cc/D4N3-GDJV (stating that an Afghan Parole Program would accelerate the review of parole applications).

[276] *See generally* Khaleda Rahman, *50,000 Afghans Could Be Allowed into U.S. on Humanitarian Parole*, NEWSWEEK (Aug. 25, 2021, 10:40 AM EDT), https://perma.cc/L53H-D3ZT (stating that thousands of Afghans received the immediate relief of HP).

[277] *See* Letter from Iván Espinoza-Madrigal et al. to Alejandro Mayorkas et al., *supra* note 228, at 2 (outlining the years of racism Haitian migrants have faced and explaining why HP should be utilized).

[278] *See generally* Zak, *supra* note 243 (stating that broadly extending HP for Afghanistan is an important step).

B. *Countries That Are Facing Humanitarian Emergencies Should Be Designated for Temporary Protected Status So That Both Those Nationals Evacuated into the United States and Those Nationals Who Might Already Be in the United States Will Not Be Sent Back*

1. Temporary Protected Status Must Come After Humanitarian Parole

Following the first step of granting HP to at-risk migrants as a way of welcoming them into the United States, the necessary second step is to grant TPS to nationals of the country facing the humanitarian emergency.[279] This way, at-risk migrants may extend their temporary protection in the United States and those migrants already living in the United States undocumented will no longer face fear of deportation.[280] While there is a possibility to apply for re-parole, it is rarely granted.[281] The better way to ensure continued short-term protection of at-risk migrants is to use TPS.[282] The burden would then be on the United States to recognize when nationals cannot safely return to their countries during humanitarian emergencies, rather than forcing the at-risk migrants already in the United States to prove individualized fear of harm upon returning.[283]

2. Haiti's Current Designation Does Not Protect Those Fleeing Environmental Conditions

Haiti's current designation allows all nationals who have continuously resided in the United States "on or before July 29, 2021" to receive temporary protection.[284] Although helpful, this designation came as a result of the political strife following the assassination of the President Moïse and does not account for any Haitian migrants who potentially entered the United States undocumented after back-to-back natural disasters in August of 2021.[285] This is most likely because the United States did not want to encourage Haitians to emigrate during that time.[286] Haiti is facing not only

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[279] *See generally Temporary Protected Status: An Overview*, AM. IMMIGR. COUNCIL, https://perma.cc/D7AS-8M3U (last modified Dec. 23, 2022) (explaining parameters for designating a country for TPS).

[280] *See generally id.* (stating TPS protects those who may be undocumented).

[281] *See* Eileen Sullivan & Miriam Jordan, *Biden Offers Protected Status to Afghans Already in the United States*, N.Y. TIMES (Mar. 16, 2022, 00:10 EST), https://perma.cc/J98A-L5BW.

[282] *See generally* Roy & Klobucista, *supra* note 33 (explaining the protections TPS ensures).

[283] *See Temporary Protected Status: An Overview*, *supra* note 279.

[284] U.S CITIZENSHIP & IMMIGR. SERVS., TEMPORARY PROTECTED STATUS (TPS)- QUESTIONS AND ANSWERS 2 (2022), https://perma.cc/J8NV-7FUT.

[285] *See* Alex Dugherty, *Haitian Advocates Appeal for Immediate End to Deportations and Expansion of TPS*, MIA. HERALD (Aug. 17, 2021), https://perma.cc/FD7T-ZR68.

[286] *See generally* Oma Seddiq, *Psaki Says 'Horrific' Footage of Border Patrol Agents Thrashing Their Reins at Haitian Migrants Is 'Not Who We Are'*, BUS. INSIDER (Sept. 21, 2021, 1:44 PM),

extraordinary political conditions, but also repeated environmental disasters; in 2021, it sustained a devastating earthquake—which drew comparisons to the 2010 earthquake—followed by a major tropical storm.[287] As a result, conditions in Haiti have gone from bad to worse as these environmental disasters have further disrupted Haitians' access to healthcare, food, and income.[288]

For example, the combination of the earthquake and tropical storm has particularly impeded access to healthcare in rural areas.[289] The Emergency Medical Team of the International Medical Corps arrived in Haiti to treat these vulnerable populations, who suffered either directly or indirectly from these environmental conditions.[290] Those directly affected experienced trauma and mental health problems, while those indirectly affected, including those who slept in tents outside as a result of the destruction of their homes, suffered from skin and respiratory infections.[291]

Haitian nationals who are even more at risk as a result of these environmental disasters are pregnant women and individuals with disabilities.[292] Additionally, because of these environmental conditions, access to water and sanitation services have greatly declined, as before the earthquake and tropical storm hit, two-thirds of the population alone already suffered from the absence of sanitation services.[293] The combination of the earthquake and tropical storm reduced agricultural output and left those who rely on agriculture sales without any form of income.[294] Haiti's conditions following the environmental disasters warrant an expansion and extension of TPS to include Haitians who managed to enter the United States after these events occurred.[295] This is because those nationals would not be safe returning to Haiti.[296] In addition, similar to the TPS expansion and extension after the 2010 earthquake, TPS needs to continue to be expanded

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https://perma.cc/6S5M-ALFF (quoting DHS Secretary Mayorkas "[w]e have sent a very clear message early on, in light of the fact that we are in the midst of a pandemic, that the border is not open, and people should not take the perilous journey here.").

[287] *2021 Haiti Earthquake and Tropical Storm Grace*, CTR. FOR DISASTER PHILANTHROPY, https://perma.cc/4GWY-4PBG (last updated Nov. 9, 2021).

[288] *See* INT'L MED. CORP., 2021 HAITI EARTHQUAKE SITUATION REPORT #3 1 (2021), https://perma.cc/2HRA-AY8N.

[289] *See id.*

[290] *See id.*

[291] *Id.*

[292] *Id.*

[293] *Haiti: Events of 2021*, HUM. RTS. WATCH, https://perma.cc/U4TM-ZHVZ (last visited May 29, 2023).

[294] *Id.*

[295] *See* Dugherty, *supra* note 285.

[296] *See generally Haiti: Events of 2021*, *supra* note 293 (explaining extraordinary conditions in Haiti following the earthquake and tropical storm).

and extended as this emergency will be ongoing.[297]

3. Afghanistan's Designation Should Have Followed Closer to the Evacuation

The Biden administration designated Afghanistan for TPS on March 16, 2022, for Afghans "already in the United States on or before March 15, 2022."[298] This is a step in the right direction, as many migrants who only had one year with their HP status had to find another way to validly stay in the United States.[299] However, this designation should have come earlier than seven months after the Afghanistan evacuation.[300] This is because a TPS designation would have helped those estimated 1,500 to 2,000 Afghan nationals already in the United States in danger of losing their status, such as those on student visas.[301] Additionally, due to this delayed designation, these Afghan nationals potentially faced deportation to their home country.[302]

Afghanistan, at a minimum, fell under the broad "other extraordinary conditions" prong needed to grant TPS following the U.S. evacuation in August 2021.[303] Ongoing extraordinary conditions prevented Afghan nationals from returning safely.[304] For example, the Taliban and Islamic State of Khorasan Province ("ISKP") terrorist groups murdered hundreds of civilian Afghan nationals in 2021.[305] The Taliban killed an estimated 40% of nationals, half being women and children.[306] Taliban forces made a number of religiously motivated attacks, specifically at schools and neighborhoods

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[297] *See generally DHS Expands Temporary Protected Status for Haitians in U.S.*, AXIOS (May 22, 2021), https://perma.cc/AM9D-7XQP (stating that DHS believes "persistent effects of the 2010 earthquake" have continued to be a detriment to Haiti).

[298] *DHS Allows Afghan Immigrants in the U.S. to Apply for Temporary Protected Status*, BOUNDLESS (Mar. 16, 2022), https://perma.cc/H9DH-EVY8.

[299] Rebecca Beitsch, *DHS Gives Temporary Protected Status to Afghans in US*, THE HILL (Mar. 16, 2022, 9:59 AM EDT), https://perma.cc/LX52-5JPG [hereinafter Beitsch, *DHS Gives Temporary Protected Status to Afghans in US*].

[300] *See generally* Rebecca Beitsch, *Biden Weighs Temporary Protected Status for Afghans*, THE HILL (Feb. 17, 2022, 1:45 PM EST), https://perma.cc/M523-3JUC (explaining that February marked six months since the evacuation and the United States had to designate Afghanistan for TPS) [hereinafter Beitsch, *Biden Weighs Temporary Protected Status for Afghans*].

[301] *See id.*

[302] *See id.*

[303] *See generally Afghanistan: Events of 2021*, HUM. RTS. WATCH, https://perma.cc/4GYB-QVGX (last visited May 29, 2023) (explaining the harsh conditions that Afghanistan is facing since the Taliban takeover).

[304] *See generally id.* (explaining the harsh conditions that Afghanistan is facing since the Taliban takeover).

[305] *See id.*

[306] *Id.*

largely populated by the minority Hazara Shia community.[307] Women's rights also suffered under Taliban control in 2021.[308] Female students faced school closings in October 2021.[309] The Taliban caused female educators, female humanitarian workers, and female government employees to lose their jobs or face gender segregation.[310] Furthermore, the Taliban closed shelters for abused women.[311] As a result, women were forced to either move back in with their abusers or find new places to hide from them.[312]

Anticipating that the Taliban takeover would make it increasingly impossible to access any freedoms in Afghanistan, the United States should have granted TPS closer to the Afghanistan evacuation to protect those that risked deportation due to expiring visas.[313] Redesignation of the TPS protections should have come next so that those who had HP had a way to temporarily remain in the country.[314] Many nationals that are left in Afghanistan cannot find jobs that are more than one day a week and cannot afford food as a result.[315] Afghanistan's designation for TPS, followed by a later redesignation as HP, should have come earlier because the "extraordinary and temporary conditions" in the country made it so nationals could not safely return.[316]

4. In Future Crises, Temporary Protected Status Should Follow Humanitarian Parole as It Provides Stronger Short-Term Protections

In future humanitarian emergencies, the United States should follow a grant of HP with a designation for TPS.[317] As seen with Haiti and Afghanistan, the extraordinary conditions that warrant a grant of TPS last for a long time.[318] Both Haiti and Afghanistan are still suffering because of

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[307] *Id.*

[308] *Id.*

[309] *See Afghanistan: Events of 2021*, *supra* note 303.

[310] *See id.*

[311] Amie Ferris-Rotman & Zahra Nader, *'I Don't Know Where to Go': Uncertain Fate of the Women in Kabul's Shelters*, GUARDIAN (Oct. 1, 2021, 2:00 AM EDT), https://perma.cc/HN3F-8XMW.

[312] *See id.*

[313] *See Afghanistan: Events of 2021*, *supra* note 303.

[314] *See generally* Beitsch, *DHS Gives Temporary Protected Status to Afghans in US*, *supra* note 299 (explaining the benefits of designating TPS for Afghanistan).

[315] *See Educated Urban Afghans Are New Face of Hunger as Jobs and Incomes Dry Up*, WORLD FOOD PROGRAMME (Sept. 22, 2021), https://perma.cc/M3C3-YA2Q.

[316] *See generally The Deteriorating Security Situation in Afghanistan*, VISION OF HUMAN., https://perma.cc/8XN9-8A4U (last visited May 29, 2023) (showing that data collected affirms Afghanistan is the least peaceful country in the world in 2021).

[317] *See, e.g.*, Beitsch, *DHS Gives Temporary Protected Status to Afghans in US*, *supra* note 299 (showing an effective use of HP combined with TPS).

[318] *See Afghanistan: Events of 2021*, *supra* note 303; *Haiti: Events of 2021*, *supra* note 293.

their respective humanitarian emergencies, and it is unsafe for nationals from either country to return.[319] Future humanitarian emergencies should earn a designation under any of the three TPS prongs, but especially "extraordinary and temporary conditions" due to either political instability, environmental disasters, or human rights violations that will inevitably occur.[320] TPS will act as a complement to HP and will maximize the best short-term solutions for crisis migrants so they can remain in the United States and not fear deportation to their home countries.[321]

IV. In the Long Term, the United States' Focus Should Shift to Providing Avenues Through Which These Crisis Migrants, Who Only Have Temporary Protection, Will Be Able to Adjust Their Status So That They May Permanently Remain in the United States

A. *The Use of Adjustment Acts Will Prove to Be Beneficial, as They Provide a Streamlined Way for At-Risk Migrants Who Fled Humanitarian Emergencies to Secure Permanent Status in the United States*

1. Alternate Pathways to LPR Status Are Not Realistic for Crisis Migrants

Addressing humanitarian emergencies in the long term will require lasting solutions that will offer permanent status to crisis migrants.[322] In the short term, the solutions of HP and TPS will address the urgency of providing immediate protection to at-risk migrants.[323] However, there must be a logical next step that offers lasting protections to at-risk migrants, as it will still be unsafe for them to return to their home countries because these humanitarian crises will likely continue.[324] In general, crisis migrants have limited options in applying for permanent status in the United States.[325] These include applying for family-based immigration, SIV visas, or asylum.[326] These options are impractical not only for Afghan, Haitian, and

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[319] *See generally Afghanistan: Events of 2021*, *supra* note 303 (explaining the current country conditions in Afghanistan); *Haiti: Events of 2021*, *supra* note 293 (explaining the current country conditions in Haiti).

[320] *See* MARTIN ET AL., *supra* note 1, at 5.

[321] *See generally* Beitsch, *DHS Gives Temporary Protected Status to Afghans in US*, *supra* note 299 (explaining the benefits of a TPS designation for Afghan parolees).

[322] *See generally* LIRS, AFGHAN EVACUATION: FROM PAROLE TO PERMANENT PROTECTION 1, 5 (2021), https://perma.cc/E24M-UWM7 (explaining that evacuated Afghans deserve a pathway to LPR status) [hereinafter LIRS, AFGHAN EVACUATION].

[323] *See generally* Beitsch, *DHS Gives Temporary Protected Status to Afghans in US*, *supra* note 299 (explaining why following a grant of HP with TPS will immediately help at-risk migrants).

[324] *See* Stewart Verdery, *Congress Should Pass an Afghan Adjustment Act*, ROLL CALL (Oct. 19, 2021, 6:30 AM), https://perma.cc/X8EX-EBEJ.

[325] *Id.*

[326] LIRS, AFGHAN EVACUATION, *supra* note 322, at 5.

future crisis migrants, but also for the United States, given the major backlogs at USCIS.[327]

During humanitarian emergencies, at-risk migrants may not have other options for adjusting their status, likely because they would not have family members in the United States who could sponsor them for permanent residence.[328] Additionally, most migrants either do not qualify for or cannot wait for the long waiting periods that are currently facing SIV programs.[329] There are around 20,000 SIV applications for principal applicants currently awaiting processing.[330] Moreover, although at-risk migrants technically meet the refugee definition due to the nature of their admission to the United States through HP, they are not eligible for refugee status.[331] This is because refugees must apply for this status while they are outside the country which they permanently settle in.[332] Another option these migrants have is to apply for asylum in the United States, which would grant them permanent residence.[333] One downside is that the asylum process has continued to face major setbacks and the Biden administration has not yet addressed these issues.[334]

The COVID-19 pandemic has contributed to the major backlog in processing immigration applications.[335] In 2020, the USCIS and State Department offices, which process these applications, were closed for months.[336] The COVID-19 pandemic made an already delayed system significantly worse.[337] USCIS currently faces an unprecedented 9.5 million requests waiting to be decided.[338] The State Department, where in-person consular interviews are held, is now 532,000 interviews behind.[339] Furthermore, almost 10 million cases are pending with USCIS.[340] There are

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[327] *See* Verdery, *supra* note 324.

[328] *See* Montoya-Galvez, *supra* note 119.

[329] *See* LIRS, AFGHAN EVACUATION, *supra* note 322, at 4–5.

[330] Julia Gelatt & Doris Meissner, *Straight Path to Legal Permanent Residence for Afghan Evacuees Would Build on Strong U.S. Precedent*, MIGRATION POL'Y INST., https://perma.cc/42NV-CWN5 (last updated Mar. 16, 2022).

[331] LIRS, AFGHAN EVACUATION, *supra* note 322, at 4–5.

[332] LIRS, AFGHAN EVACUATION, *supra* note 322, at 5.

[333] LIRS, AFGHAN EVACUATION, *supra* note 322, at 5.

[334] Muzaffar Chishti & Julia Gelatt, *Mounting Backlogs Undermine U.S. Immigration System and Impede Biden Policy Changes*, MIGRATION POL'Y INST. (Feb. 23, 2022), https://perma.cc/S54C-5MZC; Zack Colman et al., *No Avoiding It Now: Immigration Issues Threaten Biden's Climate Program*, POLITICO (Mar. 6, 2023, 12:42 PM EST), https://perma.cc/P5A7-E3EW.

[335] Chishti & Gelatt, *supra* note 334.

[336] Chishti & Gelatt, *supra* note 334.

[337] Chishti & Gelatt, *supra* note 334.

[338] Chishti & Gelatt, *supra* note 334.

[339] Chishti & Gelatt, *supra* note 334.

[340] Chishti & Gelatt, *supra* note 334.

400,000 affirmative asylum cases in the queue awaiting decisions.[341] In January 2022, the standard immigration case took two and a half to three years to be decided.[342]

The lack of availability of certain immigrant visas combined with shocking delays in processing applications, specifically asylum applications, proves that these avenues are not effective to address humanitarian emergencies.[343] The current immigration system is not built for emergency humanitarian disasters; it would be unjust to allow crisis migrants to wait in long processing times and to require those who must go through the normal immigration process to wait any longer than they already have.[344] Therefore, there must be a different method introduced during times of humanitarian emergency that provides another way for crisis migrants to adjust their status.[345]

2. The Use of Adjustment Acts Are a Fair and Effective Way to Allow Migrants to Adjust Their Status

Precedent lays the framework for how Adjustment Acts may be utilized to allow crisis migrants to adjust their status.[346] An Afghan Adjustment Act was officially introduced on August 7, 2022.[347] There is currently no such talk of a Haitian Adjustment Act, which in part could be because the United States did not implement HP for at-risk Haitians, or because Haitians have historically not received the option to adjust their status.[348] In order to address the current humanitarian emergencies in Afghanistan and Haiti, a long-term solution calls for Adjustment Acts to be passed for migrants of both countries.[349]

Congress must pass the newly introduced Afghan Adjustment Act.[350] Logistically, this Afghan Adjustment Act could operate similarly to past Adjustment Acts following times of war.[351] For example, refugees received HP into the United States following the Vietnam War under the Indochina Migration and Refugee Act of 1975.[352] Two years later, Congress modified

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[341] LIRS, AFGHAN EVACUATION, *supra* note 322, at 7.

[342] Chishti & Gelatt, *supra* note 334.

[343] *See* LIRS, AFGHAN EVACUATION, *supra* note 322, at 5–6.

[344] LIRS, AFGHAN EVACUATION, *supra* note 322, at 7.

[345] *See* LIRS, AFGHAN EVACUATION, *supra* note 322, at 7.

[346] Rodriguez, *supra* note 28.

[347] S. Res. 4787, 117th Cong. (2022).

[348] *See generally* Cineas, *supra* note 167 (providing background of how Haitian migrants have been treated by the United States).

[349] *See* Narea, *supra* note 3.

[350] *See Congress Introduces the Afghan Adjustment Act*, LIRS (Aug. 9, 2022), https://perma.cc/4EWQ-WGHC.

[351] Rodriguez, *supra* note 28.

[352] Rodriguez, *supra* note 28.

this Act to give these parolees a pathway to attain LPR status.[353] Under this Act, those parolees admitted between March 31, 1975 and January 1, 1979 could adjust.[354] These migrants were given four years to enter the United States, which was a significant period of time that allowed for a maximized number of refugees to benefit from this law.[355] For the Afghan Adjustment Act, the current proposal is for any Afghan national who has either received "special immigrant status" or was otherwise paroled into the United States, and it does not set a specific timeline for how long the national has to get to the United States.[356] This is positive as there are still Afghan allies remaining in Afghanistan, and this bill provides a way for the United States to process the nationals left behind.[357]

Additionally, these migrants who entered the United States after the Vietnam War had to be present in the United States for two years and also be admissible.[358] Congress determined the realistic boundaries for the period in which parolees could have entered and resided in the United States before being able to adjust.[359] For the Afghan Adjustment Act, these migrants should have resided in the United States for two years, which follows the set precedent from the Vietnam War.[360] Moreover, for those who have national security concerns, a regular adjustment of status application goes through a screening.[361] Therefore, adding another screening process to an Afghan Adjustment Act similar to refugee vetting, in addition to prior parole vetting, adds another layer of confirming identities and ensuring individuals do not pose security threats.[362] Just as Congress did not put extra burdens on parolees after the Vietnam War, such as having to prove an individualized claim of eligibility to adjust their status, the same should still hold true for Afghan parolees.[363]

After offering temporary protections, the next step is creating a Haitian Adjustment Act using precedent for migrants fleeing "a history of repressive

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[353] Rodriguez, *supra* note 28.

[354] Rodriguez, *supra* note 28.

[355] *See* Rodriguez, *supra* note 28 (stating that migrants fleeing the Vietnam War must have come to the United States between 1975 and 1979).

[356] *See* S. Res. 4787, 117th Cong. (2022).

[357] *See id.*; LIRS, AFGHAN EVACUATION, *supra* note 322, at 6.

[358] Rodriguez, *supra* note 28.

[359] *See generally* Verdery, *supra* note 324 (explaining that like in the past when Congress passed Adjustment Acts, Congress must pass an Afghan Adjustment Act to ensure the safety of parolees).

[360] *See* S. Res. 4787; Gelatt & Meissner, *supra* note 330.

[361] *See generally Green Card Through Adjustment of Status*, CITIZENPATH, https://perma.cc/GG64-KPNH (last visited May 29, 2023) (explaining that all Adjustment of Status applications have a required biometric screening where USCIS conducts a background check using a photo, fingerprints, and signature).

[362] *See* S. Res. 4787; Gelatt & Meissner, *supra* note 330.

[363] *See* Gelatt & Meissner, *supra* note 330.

governments with documented human rights violations."[364] The Cuban Adjustment Act allowed eligible Cuban refugees to adjust their status.[365] Haitian migrants should be allowed to similarly adjust their status, like prior Cuban nationals.[366] For Cuban refugees to adjust, they must have entered the United States after January 1, 1959, a manageable period as many refugees entered in 1960 or 1961.[367] Even more notably, this Adjustment Act was to be active until the President of the United States decided "democratically elected government in Cuba is in power."[368] A similar measure could be taken for Haitian migrants, as in the past, Haitian and Cuban migrants have comparably suffered through multiple governments and other crises.[369]

Cuban refugees only had to be present in the United States for one year before applying to adjust status; the same policy could be in place for Haitian migrants, where after one or two years they are able to adjust their status.[370] Finally, like the Cuban Adjustment Act, those migrants who want to adjust under a Haitian Adjustment Act must show they are admissible to the United States.[371] It is especially important to compare the Cuban Adjustment Act with a potential Haitian Adjustment Act because although both Cuban and Haitian migrants traveled to the United States by boat seeking asylum, Cuban migrants were accepted and Haitian migrants were not.[372] A Haitian Adjustment Act is yet another opportunity for the United States to right past wrongs when it comes to Haitian migrants.[373]

Taking the comparisons drawn from past Adjustment Acts, future Adjustment Acts can operate effectively in a similar manner.[374] Based on precedent, Congress can determine the period for which migrants had to have entered the United States and how long the adjustment is ongoing, either for a set period or until there are certain actions taken by the country facing the humanitarian emergency.[375] Once again following this precedent, it is fair to say that the proper time a migrant should reside in the United

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[364] Asare, *supra* note 121, at 203.

[365] Asare, *supra* note 121, at 203.

[366] *See generally* Asare, *supra* note 121, at 203 (explaining that Cuban nationals were able to adjust their status after one year in the United States).

[367] Rodriguez, *supra* note 28.

[368] Rodriguez, *supra* note 28.

[369] *See* Cineas, *supra* note 167.

[370] *See generally* Asare, *supra* note 121, at 203 (explaining that the Cuban Adjustment Act could be amended to include Haitian migrants).

[371] *See* Rodriguez, *supra* note 28.

[372] *See* Cineas, *supra* note 167.

[373] *See generally* Asare, *supra* note 121, at 204 (stating Haitian migrants have been historically excluded).

[374] *See* Rodriguez, *supra* note 28.

[375] *See generally* Rodriguez, *supra* note 28 (giving the specific periods that each prior Adjustment Act stated a migrant must have arrived in the United States).

States before adjusting is a period of one to two years.[376] Then, this Adjustment Act should ensure a migrant is admissible to the United States.[377] Finally, additional measures can be taken to ensure national security, such as additional screenings that go along with the adjustment of status application.[378] Past Adjustment Acts have demonstrated that Adjustment Acts for future humanitarian emergencies will work.[379]

B. *The Failure to Utilize Adjustment Acts Will Be Catastrophic to Those Who Do Not Have Alternate Pathways for Adjusting Their Status, As They Will Constantly Live in a State of Uncertainty*

If crisis migrants could not adjust their status, they would live in a constant state of "legal limbo."[380] There are individuals on the opposing end of the argument that believe these migrants should not be able to adjust their status.[381] As a result, it becomes relatively impossible for Congress to pass legislation that would have lasting impacts for crisis migrants who suffer humanitarian emergencies.[382] Migrants with temporary protection are valuable to the United States because they work, pay taxes, and have lasting impacts on their communities.[383] A potential revocation of temporary protections would affect not only these crisis migrants, but also those that benefit from their contributions to society.[384]

In the long-term, migrants with only temporary protections will inevitably establish equity in the United States.[385] For example, these migrants become homeowners.[386] An estimated 31.9% of TPS holders own homes in the United States.[387] Additionally, these migrants pay property taxes, participate in neighborhood organizations, and perform community

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[376] *See generally* Rodriguez, *supra* note 28 (illustrating that prior Adjustment Acts stated how long a migrant needed to reside in the United States before adjusting).

[377] *See generally* Rodriguez, *supra* note 28 (explaining that prior Adjustment Acts required admissibility of the migrant to the United States).

[378] *See generally* Gelatt & Meissner, *supra* note 330 (suggesting that an Afghan Adjustment Act could have additional screening measures).

[379] *See* Gelatt & Meissner, *supra* note 330.

[380] Caroline Coudriet, *Thousands of Afghan Evacuees In 'Legal Limbo' In US*, ROLL CALL (Feb. 1, 2022, 5:41 AM), https://perma.cc/PX6R-EP24.

[381] *See* Geoffrey Heeren, *The Status of Nonstatus*, 64 AM. U. L. REV. 1115, 1180–81 (2015).

[382] *See id.*

[383] *Id.* at 1181.

[384] *See* Nicole Prchal Svajlenka, *What Do We Know About Immigrants with Temporary Protected Status?*, CAP (Feb. 11, 2019), https://perma.cc/6UWH-C58A.

[385] *See id.*

[386] CECILIA MENJÍVAR, TEMPORARY PROTECTED STATUS IN THE UNITED STATES: THE EXPERIENCES OF HONDURAN AND SALVADORAN IMMIGRANTS 19 (2017), https://perma.cc/W694-NKWS.

[387] *Id.*

service.[388] Furthermore, an estimated 80.3% of migrants with temporary protection pay income taxes.[389] Annually, these taxes benefit both the federal government, where they amount to $2.3 billion, and state and local governments, where they amount to $1.3 billion.[390] Over 88.5% of TPS holders work, sometimes more than one job.[391] These are essential jobs, such as building and grounds cleaning, maintenance, construction, child care, personal care, and home health aides.[392] Given the contributions migrants with TPS make to society, it is unjust to keep them living in fear of losing all they have built in the United States and potentially having to return home.[393]

Another issue with leaning on temporary protections in the long term is that any administration that may rise to power in the United States can rescind these protections at any time.[394] For example, in 2017, Haiti lost its TPS designation.[395] Even though the country had a continuing humanitarian emergency, DHS determined that Haiti could safely receive these migrants as "steps [had] been taken to improve the stability and quality of life for Haitian citizens."[396] At that time, the 59,000 Haitians that lived and worked in the United States grew weary of potentially being put in removal proceedings.[397] Putting more migrants in unwarranted removal proceedings would continue to burden the immigration courts where these proceedings occur.[398] The average wait time for a case to be adjudicated is fifty-eight months in these courts, as there are 1.6 million cases currently outstanding.[399] The immigration courts cannot absorb new cases because these wait times will become even longer and will waste even more resources.[400] Furthermore, certain administrations may use racist and anti-immigrant reasoning to justify eliminating these temporary protections.[401] For example, two months after his administration removed Haiti's TPS designation, former President Trump specifically said Haiti, El Salvador, and certain

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[388] *Id.*

[389] *Id.*

[390] Svajlenka, *supra* note 384.

[391] MENJÍVAR, *supra* note 386, at 12.

[392] Svajlenka, *supra* note 384.

[393] *See* Svajlenka, *supra* note 384.

[394] *See generally* Miriam Jordan, *Trump Administration Ends Temporary Protection for Haitians*, N.Y. TIMES (Nov. 20, 2017), https://perma.cc/S3DL-L2TK (explaining that the Trump administration ended TPS for many vulnerable populations).

[395] *See id.*

[396] Leila Fadel, *U.S. Cancels Program for Recent Haitian Immigrants; They Must Leave by 2019*, NPR (Nov. 20, 2017, 9:43 PM ET), https://perma.cc/S6Q7-RPYV.

[397] *See* Jordan, *supra* note 394.

[398] *See* Jasmine Aguilera, *A Record-Breaking 1.6 Million People Are Now Mired in U.S. Immigration Court Backlogs*, TIME (Jan. 20, 2022, 11:31 AM EST), https://perma.cc/D2WV-PB8X.

[399] *Id.*

[400] *See id.*

[401] *See* Baranik de Alarcón et al., *supra* note 122, at 30–31.

African nations were "sh*thole countries."[402] Leaving decisions regarding crisis migrants with temporary protections at the hands of an administration that could easily rescind these protections would be unjustifiable.[403]

Crisis migrants, especially those on temporary protections, build lives in the United States.[404] They experience unconscionable levels of pain, torture, and violence.[405] It goes against moral and humanitarian obligations to make these migrants suffer through the long-term uncertainty of temporary protection.[406] Just because the current immigration system is broken does not mean these migrants should suffer even more pain and uncertainty concerning their futures in the United States.[407] Permanent, lasting protection will not only safeguard migrants but also reward them for the contributions they make in the United States.[408] The United States must act by passing Adjustment Acts in times of humanitarian emergencies.[409]

CONCLUSION

The time has come for the United States to implement a clear and equal plan to address humanitarian emergencies. As a major international player, the United States has an obligation to help crisis migrants in times of need. Picture the United States in the future, working towards aiding migrants rather than turning away or putting limits on how many are welcome. With Afghanistan, many migrants were left behind and continue to fear the Taliban to this day. With Haiti, many migrants were forced back and continue to fear the violence and instability in their country. The United States has an obligation to assist these migrants directly, and in the future, to implement solutions for dealing with humanitarian emergencies so inequalities no longer occur. In the short-term, HP and TPS will give migrants immediate temporary protection in the United States. In the long-term, a pathway to LPR status must be given to these migrants as precedent shows it can and should be done. The United States must understand the

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[402] Ali Vitali, Kasie Hunt & Frank Thorp V, *Trump Referred to Haiti and African Nations as 'Sh*thole' Countries*, NBC NEWS, https://perma.cc/JH4G-5Q4S (last updated Jan. 12, 2018, 7:47 AM EST).

[403] *See, e.g.*, Baranik de Alarcón et al., *supra* note 122, at 30–31 (giving examples of former President Trump's anti-immigrant rhetoric and decision making on Hispanic, Black, and Muslim immigrants).

[404] *See* Verdery, *supra* note 324.

[405] *See Why Congress Must Pass an Afghan Adjustment Act*, INT'L RESCUE COMM. (Sept. 12, 2022), https://perma.cc/U7JR-E7DH.

[406] *See id.*

[407] *See id.*

[408] *See generally* Svajlenka, *supra* note 384 (explaining the contributions of immigrants to the United States).

[409] *See generally* LIRS, AFGHAN EVACUATION, *supra* note 322, at 6–7 (stating the benefits of an Afghan Adjustment Act).

urgency of humanitarian situations, offer protection to migrants, and ensure this protection will last.

The Robots Are Coming! And Maybe We Should Let Them: How Increased Use of Artificial Intelligence in the Workforce Could Pave the Way for a Shorter Work Week

Kierra Burda Martin[*]

INTRODUCTION

Artificial intelligence ("AI") is everywhere: it controls the facial recognition that unlocks your new iPhone, the chatbot you talk to when you contact Amazon's customer service, and the show recommendations you end up binging on Netflix.[1] With the widespread use of AI in our daily lives, it is not surprising that AI is becoming standard in nearly all industries.[2] As a result, estimated job losses resulting from increased automation range from anywhere between 9% and 47%.[3] AI has the potential to drastically improve our daily lives, but various changes are necessary to avoid the detrimental effects of AI job loss.[4] The implementation of a shorter work week could be a part of this solution.[5]

[*] J.D., New England Law | Boston (2023). B.B.A., Roanoke College (2020). I would like to say a special thank you to my husband, Paul, for his constant love and support; to my dad, who inspired me to write about a topic that I have come to love; and to my entire family for their encouragement, guidance, and advice throughout the entire writing process. I would also like to thank the members of the *New England Law Review* for all their hard work and dedication.

[1] Ilija Mihajlovic, *How Artificial Intelligence Is Impacting Our Everyday Lives*, TOWARDS DATA SCI. (June 13, 2019), https://perma.cc/H9K5-T35N.

[2] *See Artificial Intelligence in Every Sector*, BSA | THE SOFTWARE ALLIANCE, https://perma.cc/P5PG-TCGU (last visited Apr. 25, 2023) (discussing the impacts of AI on a variety of different industries).

[3] EXEC. OFF. OF THE PRESIDENT, ARTIFICIAL INTELLIGENCE, AUTOMATION, AND THE ECONOMY 2 (2016), https://perma.cc/6W9C-H2X7.

[4] *E.g.*, David Schwartz, *The Real-World Potential and Limitations of Artificial Intelligence*, MCKINSEY PODCAST, at 01:38–03:40 (Apr. 25, 2018), https://perma.cc/9JD6-9PDH.

[5] Jonathan Crane, *Is Artificial Intelligence the Key to a 4-Day Workweek?*, RECRUITER, https://perma.cc/7SRN-BWMK (last visited Apr. 25, 2023).

Throughout history, the work week changed with the needs of society, and modern movements to increase productivity and work-life balance support implementing a shorter work week.[6]

This Note will address how AI could pave the way for a shorter work week. Using reduced working hours as a solution to AI job loss will both improve workers' quality of life and help the economy withstand this major shift in employment. Part I will give an overview of the development of AI, its effect on employment, historical responses to major shifts in employment, and the current trend towards a shorter work week. Part II will discuss the importance of implementing a shorter work week to minimize the economic consequences of AI and to maximize AI's potential benefits to society. Part III will argue that a public-private initiative to shorten the work week would be an effective solution to AI job loss if implementation of such a program is gradual and targeted. Part IV will outline the need for a comprehensive legislative framework to support a shorter work week and protect the workers most harmed by AI.

I. Background

A. *What Is Artificial Intelligence?*

When people think of AI, the image that typically comes to mind is one of a futuristic world with humanoid robots and self-driving cars.[7] However, AI is far from futuristic—modern technologies have already started the process of effortlessly integrating elements of AI into nearly every aspect of our daily lives.[8] Despite this widespread use of AI, defining the term "artificial intelligence" is no easy task.[9] Merriam-Webster defines AI as "a branch of computer science dealing with the simulation of intelligent behavior in computers."[10] Nils Nilsson, one of the leading computer scientists in early artificial intelligence,[11] provides a different definition:

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[6] *See* Mary Meisenzahl, *People Have Toyed with the Idea of a 4-Day Workweek for over 80 Years. Here's How the Concept Has Evolved, from the Great Depression to Microsoft's Latest Successful Experiment*, BUS. INSIDER (Nov. 7, 2019, 8:36 AM), https://perma.cc/2YW9-9QVD; *see also* Jack Kelly, *There's a Growing Movement and Petition Circulating to Push for a Four-Day Workweek*, FORBES (June 27, 2021, 2:56 PM EDT), https://perma.cc/S9MZ-YB8U (explaining the societal push for a four-day work week, which mimics many labor movements of the past).

[7] *See* Dan Robitzski, *You Have No Idea What Artificial Intelligence Really Does*, FUTURISM (Oct. 16, 2018), https://perma.cc/67DX-6LCC.

[8] *See* RJ Reinhart, *Most Americans Already Using Artificial Intelligence Products*, GALLUP (Mar. 6, 2018), https://perma.cc/NK9T-PLVJ (finding that 85% of Americans currently use at least one product that incorporates AI into its technology).

[9] Scott J. Shackelford & Rachel Dockery, *Governing AI*, 30 CORNELL J.L. & PUB. POL'Y 279, 285 (2020).

[10] *Artificial Intelligence*, MERRIAM-WEBSTER DICTIONARY, https://perma.cc/JA7E-DSK6 (last visited Apr. 25, 2023).

[11] John Markoff, *Nils Nilsson, 86, Dies; Scientist Helped Robots Find Their Way*, N.Y. TIMES (Apr.

"[A]rtificial intelligence is that activity devoted to making machines intelligent, and intelligence is that quality that enables an entity to function appropriately and with foresight in its environment."[12] Despite varying definitions, several common themes appear to help make sense of what exactly artificial intelligence involves: a machine that (1) perceives its environment; (2) processes information; (3) makes autonomous decisions; and (4) achieves a specific goal.[13]

One reason a universal definition of artificial intelligence is so hard to find is because the expectations and capabilities of AI have changed drastically since AI's inception almost a century ago.[14] While the concept of artificial intelligence can be traced back to the ancient Greeks,[15] the discipline of AI dates back to only the mid-20th century.[16] Alan Turing, subject of the 2014 film *The Imitation Game*,[17] is often considered to be the father of AI.[18] While *The Imitation Game* focuses primarily on Turing's impact on decoding German messages in World War II,[19] Turing's lesser-known activities included studying computers and asking the question of whether a computer could rival human thought.[20] In his paper "Computing Machinery and Intelligence," Turing proposed a test for determining whether a computer could think like a human.[21] While the "Turing Test," as it is known today, has little applicability in modern-day artificial intelligence, Turing's work acted as a catalyst for the discipline of AI, which flourished in the mid-to-late 20th century.[22]

The post-Turing development of AI occurred in waves, featuring a series of rapid progress followed by slow growth.[23] Early enthusiasm for AI began with the "Dartmouth Summer Project on Artificial Intelligence" in

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25, 2019), https://perma.cc/FAM9-5CPT.

[12] NILS J. NILSSON, THE QUEST FOR ARTIFICIAL INTELLIGENCE: A HISTORY OF IDEAS AND ACHIEVEMENTS 13 (2010).

[13] JOINT RSCH. CTR., AI WATCH: DEFINING ARTIFICIAL INTELLIGENCE 8 (2020), https://perma.cc/Y9LX-6Z5J.

[14] *See* Rockwell Anyoha, *The History of Artificial Intelligence*, HARV. UNIV. (Aug. 28, 2017), https://perma.cc/67P8-H5XT.

[15] *See* Tanya Lewis, *A Brief History of Artificial Intelligence*, LIVE SCI. (Dec. 4, 2014), https://perma.cc/7HF6-R5ZK.

[16] STEPHAN DE SPIEGELEIRE, MATTHIJS MAAS & TIM SWEIJS, ARTIFICIAL INTELLIGENCE AND THE FUTURE OF DEFENSE 31 (2017).

[17] THE IMITATION GAME (The Weinstein Co. 2014).

[18] Mandy Tomlinson, *Spotlight on Alan Turing – Father of Artificial Intelligence*, ISABEL HEALTHCARE (July 14, 2016), https://perma.cc/VMY3-STW5.

[19] THE IMITATION GAME, *supra* note 17.

[20] Tomlinson, *supra* note 18.

[21] Benjamin St. George & Alexander S. Gillis, *Turing Test*, TECHTARGET, https://perma.cc/J5CR-RBMR (last updated June 2021).

[22] *Id.*

[23] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 31–39.

1956, which consisted of ten researchers gathering to discuss this brand-new scientific discipline.[24] This first period of AI growth was primarily one of research, narrow application, and developing excitement over the vast capabilities of AI; however, these idealistic expectations of what AI could do were more advanced than the technology of the time could handle, resulting in a subsequent period of disappointment and decreased funding for research.[25] In the 1980s, the development of expert systems—systems that use programmed human knowledge to emulate the decision-making of an expert in that particular field—sparked a second wave of AI progress,[26] but once again AI underdelivered as the high cost of testing and updates quickly overwhelmed the overall value of these expert systems.[27] This second period of slow growth was short-lived, and, somewhat ironically, the disappointment of AI in the past sparked the next period of rapid development beginning in the 1990s.[28] Instead of idealistic goals aimed towards creating "human-level" AI, researchers narrowed their focus to solving specific problems, which resulted in visible technological success in certain aspects of daily life that we continue to see today.[29]

Since the wave of growth that began in the 1990s, the capabilities and practical applications of AI have rapidly progressed to a point where the average person uses AI on a daily basis.[30] Prior to 2012, the progression of AI closely followed Moore's Law—the theory that computing power doubles approximately every two years[31]—but more recently, computing power has doubled every three to four months.[32] Practically speaking, this means that AI is moving into a new era.[33] The previous era was dominated by "narrow AI," where machines performed a specific task or set of tasks.[34]

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[24] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 31–32; *Artificial Intelligence Coined at Dartmouth*, DARTMOUTH, https://perma.cc/J7BR-DHG3 (last visited Apr. 25, 2023).

[25] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 32.

[26] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 33; *What Is Expert System (ES)*, IGI GLOB., https://perma.cc/99FQ-BLF3 (last visited Apr. 25, 2023).

[27] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 34.

[28] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 34.

[29] SPIEGELEIRE, MAAS & SWEIJS, *supra* note 16, at 34 ("[R]esearch was finding utility in a wide range of fields, from games (notably the famous 1997 chess victory, of IBM's Deep Blue over world champion Garry Kasparov); to logistics, spacecraft and satellite monitoring; robotics; traffic management; medical diagnosis; speech recognition, autonomous vehicles and Google's search engine, to name a few.").

[30] Bernard Marr, *The 10 Best Examples of How AI Is Already Used in Our Everyday Life*, FORBES (Dec. 16, 2019, 12:13 AM EST), https://perma.cc/XF7S-NDUU.

[31] Cliff Saran, *Stanford University Finds That AI Is Outpacing Moore's Law*, COMPUT. WKLY. (Dec. 12, 2019, 9:56), https://perma.cc/9SMN-GZ95.

[32] *Id.*

[33] Jeff Garberson, *Computers, AI Improve Life as the World Enters New Era*, INDEP. (Oct. 17, 2019), https://perma.cc/W9G8-4VQJ.

[34] Shackelford & Dockery, *supra* note 9, at 286.

The new era is the one envisioned by the ambitious researchers of the 1950s, an era of "artificial general intelligence," where machines "exhibit intelligent behavior across a broad range of cognitive tasks."[35] With self-driving cars and Jeopardy-winning robots as merely the beginning, the future of AI is on track to drastically alter daily life.[36]

B. *Impact of AI on Employment*

Of all the changes AI may bring, one of the most frequently discussed in the news is the anticipated job loss associated with its increased use in the workforce.[37] Headlines that scream "The Robots Are Coming!" incite fear in the public that robots will soon take their jobs.[38] There is some truth to these statements—some predictions indicate that artificial intelligence could replace 30% of the world's labor force as soon as the year 2030.[39] This process of artificial intelligence replacing jobs has already started,[40] and "The Great Resignation" of COVID-19 has forced businesses to automate at an increased rate to make up for widespread labor shortages.[41]

Despite this, many argue that AI will not replace jobs but rather create new jobs, "just as it has been doing since the dawn of the Industrial Revolution."[42] This comparison to the Industrial Revolution, most commonly known as the "Second Industrial Revolution," is not surprising.[43] In fact, the rapid technological change of the 21st century is referred to as the

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[35] Shackelford & Dockery, *supra* note 9, at 282, 286–87; *accord* Ashish Yadav et al., *Artificial Intelligence – New Era*, 3 INT'L J. NEW TECH. & RES., Mar. 2017, at 30, 30, https://perma.cc/PP9P-VDSE.

[36] Luke Dormehl, *A History of Artificial Intelligence in 10 Landmarks*, DIGIT. TRENDS (Sept. 23, 2017), https://perma.cc/WH5L-WS89.

[37] *See* Calum McClelland, *The Impact of Artificial Intelligence – Widespread Job Losses*, IOT FOR ALL (July 1, 2020), https://perma.cc/4WDZ-8YYH.

[38] *See, e.g.*, Chris Anstey, *The Robots Are Coming*, BLOOMBERG (Nov. 8, 2021, 6:06 AM EST), https://perma.cc/J9HA-2PL9; David Deming, *The Robots Are Coming. Prepare for Trouble.*, N.Y. TIMES (Jan. 30, 2020), https://perma.cc/8VPM-ZTQL; Daphne Leprince-Ringuet, *The Robots Are Coming, and This Is How They Will Change the Future of Work*, ZDNET (July 1, 2020), https://perma.cc/9VTT-ZS2M; Kenneth A. Taylor, *The Robots Are Coming: Ethics, Politics, and Society in the Age of Artificial Intelligence*, BOS. REV. (Mar. 9, 2020), https://perma.cc/6RPM-RM2W.

[39] McClelland, *supra* note 37.

[40] *See* Valerias Bangert, *AI Is Quietly Eating up the World's Workforce with Job Automation*, VENTUREBEAT (Jan. 8, 2022, 6:20 AM), https://perma.cc/S4YX-34UW (noting that AI replaced approximately 400,000 factory jobs from 1990 to 2007).

[41] Ian Thomsen, *A 'Red Alert' for Workers: Businesses Embrace Automation During the COVID-19 Pandemic*, NORTHEASTERN GLOB. NEWS. (Dec. 7, 2021), https://perma.cc/65ZX-8MQ7.

[42] Aaron Smith & Janna Anderson, *AI, Robotics, and the Future of Jobs*, PEW RSCH. CTR. (Aug. 6, 2014), https://perma.cc/9PWW-VWAK.

[43] *See generally* Eric Niler, *How the Second Industrial Revolution Changed Americans' Lives*, HIST. (Jan. 25, 2019), https://perma.cc/U9SY-M76W (describing the significance of the Second Industrial Revolution).

"Fourth Industrial Revolution."[44]

However, there are several reasons why this next wave of automation in the workforce will differ from those of the past.[45] One major reason is that AI has the capability to automate virtually all industries, whereas past machine automation consisted of only single, industry-specific tasks.[46] Another is the rapid rate of acceleration in the field of artificial intelligence—recall Moore's Law, the idea that technological progress increases exponentially, doubling every two years (or, in AI's case, every couple of months).[47] It is difficult to comprehend exactly how quickly this technology is actually developing; according to University of Colorado physics professor Albert Allen Bartlett, "[t]he greatest shortcoming of the human race is our inability to understand the exponential function."[48] The rapid acceleration of automation across virtually all industries presents a very different picture than the primarily factory-focused changes of the past, making modern automation a serious threat to the workforce and the economy.[49]

While AI has the capability to affect nearly every industry, some industries are at an even greater risk of automation; production, transportation, and food preparation industries are sometimes recognized as facing an even higher risk of automation.[50] These industries are most affected because they involve a high percentage of easily automated, predictable physical activities with relatively little human interaction.[51] Automation replaces the less-educated, lower-skilled workers, and the jobs created tend to require more cognitively complex tasks and higher education levels.[52] Thus, automation is different this time because job displacement will contribute to growing inequality in wages,[53] while the "fruits of innovation" will go directly to the businesses rather than the displaced workers.[54]

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[44] Thomas Philbeck & Nicholas Davis, *The Fourth Industrial Revolution: Shaping a New Era*, 72 J. INT'L AFF. 17, 17 (2018).

[45] Cynthia Estlund, *What Should We Do After Work? Automation and Employment Law*, 128 YALE L.J. 254, 263–83 (2018); McClelland, *supra* note 37.

[46] McClelland, *supra* note 37.

[47] McClelland, *supra* note 37; Saran, *supra* note 31.

[48] McClelland, *supra* note 37.

[49] McClelland, *supra* note 37; Freddie Wilkinson, *Industrialization, Labor, and Life*, NAT'L GEOGRAPHIC, https://perma.cc/4RPZ-RPH2 (last updated June 2, 2022).

[50] Mark Muro et al., *Automation and Artificial Intelligence: How Machines Are Affecting People and Places*, BROOKINGS (Jan. 24, 2019), https://perma.cc/BP8B-XWRP.

[51] Estlund, *supra* note 45, at 268.

[52] MARTIN FORD, RISE OF THE ROBOTS: TECHNOLOGY AND THE THREAT OF A JOBLESS FUTURE 48 (2015).

[53] Estlund, *supra* note 45, at 264.

[54] FORD, *supra* note 52, at 35.

C. *Governmental Focus on AI*

The vast potential of AI and the effects that innovation has on society have generated increased interest by recent government administrations in the developments of AI.[55] In October 2016, the Obama administration released two reports on AI: "Preparing for the Future of Artificial Intelligence" and "The National Artificial Intelligence Research and Development Plan."[56] The reports, largely overshadowed by the 2016 presidential election, outlined the importance of AI and the government's role in regulating it while still encouraging innovation.[57] This focus on AI continued and even flourished throughout the Trump administration; during his four years in office, Trump issued an executive order on AI, doubled AI research investment, established national AI research institutes, released new regulatory guidance on AI, hosted a National Summit on Artificial Intelligence, and even issued an update to Obama's National Artificial Intelligence Research and Development Plan.[58] The Biden administration is on track to continue the work of its predecessors in AI, recently launching the National Artificial Intelligence Research Resource Task Force to develop a comprehensive strategy and implementation plan for the development of AI.[59]

Despite increased government interest in AI, legislative action to actually regulate it is lacking.[60] Congress recently enacted the National AI Initiative Act of 2020, but the bipartisan legislation once again focuses on

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[55] *See, e.g.*, Ajay Agrawal, Joshua Gans & Avi Goldfarb, *The Obama Administration's Roadmap for AI Policy*, HARV. BUS. REV. (Dec. 21, 2016), https://perma.cc/3D24-J9NC (explaining the Obama administration's focus on AI); Michael Kratsios & Chris Liddell, *The Trump Administration Is Investing $1 Billion in Research Institutes to Advance Industries of the Future*, TRUMP WHITE HOUSE (Aug. 26, 2020), https://perma.cc/CE6W-524V (explaining the Trump administration's focus on AI); Tony Samp, Steven R. Phillips & Ignacio E. Sanchez, *Technology, Artificial Intelligence in Focus for the Biden Administration and the 117th Congress Seen Through the Lens of Competition with China,* LEXOLOGY (Mar. 18, 2021), https://perma.cc/QP6B-EZHJ (explaining the Biden administration's focus on AI).

[56] EXEC. OFF. OF THE PRESIDENT & NAT'L SCI. & TECH. COUNCIL COMM. ON TECH., PREPARING FOR THE FUTURE OF ARTIFICIAL INTELLIGENCE (2016), https://perma.cc/U4GB-TY7E; NAT'L SCI. & TECH. COUNCIL, THE NATIONAL ARTIFICIAL INTELLIGENCE RESEARCH AND DEVELOPMENT STRATEGIC PLAN (2016), https://perma.cc/G4QX-MC2J.

[57] Agrawal, Gans & Goldfarb, *supra* note 55.

[58] *Artificial Intelligence for the American People*, TRUMP WHITE HOUSE, https://perma.cc/M3D3-6FP5 (last visited Apr. 25, 2023).

[59] *The Biden Administration Launches the National Artificial Intelligence Research Resource Task Force*, WHITE HOUSE (June 10, 2021), https://perma.cc/MGN2-3ZGD; *see also National Artificial Intelligence Initiative Overseeing and Implementing the United States National AI Strategy*, NAT'L A.I. INITIATIVE OFF., https://perma.cc/F4TN-V65X (last visited Apr. 25, 2023) (containing information on the current government programs and initiatives aimed at the development of AI).

[60] *See* Shackelford & Dockery, *supra* note 9, at 300–02.

research and development of AI technology rather than on a plan to minimize the economic consequences of AI implementation.[61] Enacted legislation geared towards regulating AI is often industry specific and lacks any national scheme to combat widespread issues like AI job loss.[62] Yet, the government is not oblivious to the potential effects of increased automation; in December 2016, as a follow up to the two October 2016 reports, the Obama administration released an additional report called "Artificial Intelligence, Automation, and the Economy," which focused on the disruption to the labor market caused by AI.[63] While the government has repeatedly recognized the impact that AI will have on employment and the economy, it has chosen to avoid regulating AI out of fear that doing so will hinder innovation.[64]

D. *Governmental and Societal Responses to Historical Shifts in Employment*

As critics of the "robots will take your job" narrative love to point out, automation in the workforce is nothing new.[65] The Second Industrial Revolution marked a period of overall economic growth as new technologies increased productivity and economic output.[66] These new technologies shifted society away from agriculture and towards urbanized factory employment.[67] However, the government never needed to intervene to combat job loss from increased automation in the agricultural industry because more jobs were created as factory work increased.[68] These factory jobs were easy to transition into due to short training periods, lack of formalized education requirements, and routine work—a situation that is quite different from the jobs created by artificial intelligence today.[69]

While the Industrial Revolution did not cause high unemployment rates as predicted in today's automation wave, the shift in employment towards

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[61] *See* National Artificial Intelligence Initiative Act of 2020, H.R. 6216, 116th Cong. (2020).

[62] Shackelford & Dockery, *supra* note 9, at 301.

[63] EXEC. OFF. OF THE PRESIDENT, *supra* note 3, at 1.

[64] *See* Mark MacCarthy, *AI Needs More Regulation, Not Less*, THE BROOKINGS INST. (Mar. 9, 2020), https://perma.cc/8EPV-7ECN.

[65] John Hawksworth, *Is Artificial Intelligence Replacing Jobs? Here's the Truth*, WORLD ECON. F. (Sept. 18, 2018), https://perma.cc/L4L8-RX4V.

[66] Ryan Engelman, *The Second Industrial Revolution, 1870-1914*, U.S. HIST. SCENE, https://perma.cc/ZJ7Y-3Q5P (last visited Apr. 25, 2023).

[67] *Industrial Revolution*, HIST., https://perma.cc/LQR7-Q75P (last updated Nov. 14, 2022); *see also* Louis D. Johnston, *History Lessons: Understanding the Decline in Manufacturing*, MINNPOST (Feb. 22, 2012), https://perma.cc/5KYB-BF4Y (noting the decline of agriculture in the labor force from 70% in 1840 to 10% in 1950).

[68] *See* James Chen, *Industrial Revolution Definition: History and Pros and Cons*, INVESTOPEDIA, https://perma.cc/FN3X-2YNW (last updated Oct. 2, 2022).

[69] James E. Bessen, The Skills of the Unskilled in the American Industrial Revolution 1 (Sept. 2000) (unpublished Research on Innovation Working Paper, Boston University School of Law), https://perma.cc/CT4K-P3B2.

factory work created other issues that prompted the need for government action.[70] Factory workers faced dangerous working conditions, low pay, and long hours of work; as a result, workers formed labor unions to push for more protections.[71] These labor unions put pressure on the government to introduce legislation to regulate working conditions,[72] including national strikes to shorten the work day to eight hours.[73] The initial legislation came from individual states in the form of factory inspections for working conditions, but the lack of uniformity across states led to criticism of the federal government for not stepping in to protect workers.[74] Eventually, the federal government responded to labor union pressure when it passed the Keating-Owen Child Labor Act in 1916 to combat children's exposure to hazardous work environments in factories.[75]

This concept of combating labor issues through the use of legislation is not unique to the Industrial Revolution.[76] During the Great Depression, Franklin D. Roosevelt launched a series of economic relief programs, known as the New Deal, designed to revitalize the economy and combat record unemployment levels.[77] The New Deal legislation included banking reform laws and emergency relief programs,[78] but massive unemployment also reignited pressure seen during the Industrial Revolution to shorten the work week.[79] In fact, a bill was introduced (and eventually passed in the Senate) to temporarily shorten the work week to thirty hours.[80] FDR initially supported the bill, but resistance from businesses allowed him to strike a compromise where businesses would voluntarily shorten the work week

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[70] Judson MacLaury, *Government Regulation of Workers' Safety and Health, 1877–1917*, U.S. DEP'T LAB., https://perma.cc/X672-LRKW (last visited Apr. 25, 2023).

[71] Elias Beck, *Labor Movement in the Industrial Revolution*, HIST. CRUNCH, https://perma.cc/Q7F8-JBSR (last updated Mar. 25, 2022).

[72] MacLaury, *supra* note 70.

[73] *Labor, Recreation, and Rest: The Movement for the Eight-Hour Day*, UNIV. MD., https://perma.cc/KTE3-D9DH (last visited Apr. 25, 2023) [hereinafter *Labor, Recreation, and Rest*].

[74] *See* MacLaury, *supra* note 70, §4. Critique of State Action.

[75] Graham Boone, *Labor Law Highlights, 1915–2015*, U.S. BUREAU LAB. STAT. (Oct. 2015), https://perma.cc/Q3RG-SGVK.

[76] *See Summary of the Major Laws of the Department of Labor*, U.S. DEP'T LAB., https://perma.cc/KJ8E-QTJ8 (last visited Apr. 25, 2023) (listing the major labor and employment laws that protect workers today).

[77] Kimberly Amadeo, *New Deal Summary, Programs, Policies, and Its Success: Four Surprising Ways the New Deal Affects You Today*, THE BALANCE, https://perma.cc/P5FZ-EWRV (last updated Mar. 29, 2022). *See generally Great Depression History*, HIST., https://perma.cc/7ZFZ-GQAN (last updated Jan. 12, 2023) (describing the history of the Great Depression).

[78] *President Franklin Delano Roosevelt and the New Deal*, LIBR. CONG., https://perma.cc/S6JP-CTVX (last visited Apr. 25, 2023).

[79] *Labor, Recreation, and Rest*, *supra* note 73.

[80] Gillian Brockell, *That Time America Almost Had a 30-Hour Workweek*, WASH. POST (Sept. 6, 2021, 9:19 AM EDT), https://perma.cc/8YHR-4WC8.

instead.[81]

Eventually, the federal government rose to the demands of society and passed the Fair Labor Standards Act (FLSA), which regulated the work week by requiring employers to pay an employee overtime if the employee worked over a certain number of hours in a week.[82] When Congress originally enacted the FLSA in 1938, the work week was set at forty-four hours, but Congress later amended it to the current forty-hour work week in 1940.[83] In reality, Congress and the FLSA did little to create a forty-hour work week in the United States.[84] Much like the push from labor unions for better working conditions during the Industrial Revolution, society largely initiated the forty-hour work week through strikes, and companies caved in to the pressure.[85] However, government regulation was a necessary final step in the movement towards a forty-hour work week.[86]

E. *Modern Push for a Shorter Work Week*

The hard-fought push for a forty-hour work week is in the past, and in its place is a similar movement: a four-day work week.[87] While the concept of a four-day work week has been around since the Great Depression,[88] the movement has been gaining traction in the past few years.[89] Since the influx of remote work due to COVID-19 gave employees a taste of the flexible work life, companies have been exploring various work options to increase flexibility and productivity.[90] Labor unions and grassroots organizations alike are pushing for the adoption of a four-day work week,[91] and recent polls show that 70% of workers support reducing the work week to four

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[81] *Id.*

[82] *See* Fair Labor Standards Act of 1938, 29 U.S.C. § 207 (2010).

[83] Shana Lebowitz & Marguerite Ward, *Maryland Considers a Bill Incentivizing the 4-Day Workweek. Here's How the 5-Day Workweek Became So Popular in the First Place.*, BUS. INSIDER (Feb. 2, 2023, 2:10 IST), https://perma.cc/F9ZH-3Y4Y.

[84] *See id.*

[85] *The Five-Day Week in Industry*, CQ PRESS, https://perma.cc/PF62-CLUQ (last visited Apr. 25, 2023); Lebowitz & Ward, *supra* note 83.

[86] *See* Lebowitz & Ward, *supra* note 83.

[87] Kelly, *supra* note 6.

[88] Meisenzahl, *supra* note 6.

[89] *See* Sarah Roach, *Silicon Valley Has a New Recruitment Strategy: The 4-Day Workweek*, PROTOCOL (Aug. 5, 2021), https://perma.cc/F2RL-XP8H.

[90] *Id.*

[91] *See, e.g.*, Alexia Fernández Campbell, *The Case for a 4-Day Workweek*, VOX (Sept. 13, 2019, 2:20 PM EDT), https://perma.cc/2UEF-V45U (noting that unions are proposing decreasing the number of days in a work week from five to four); *The Pilot Results Are Here!*, 4 DAY WK. GLOB., https://perma.cc/P9XF-CNES (last visited Apr. 25, 2023) (showing how a grassroot organization, 4 Day Week Global, is creating a platform for companies to join the four-day work week movement).

days.[92]

With this widespread worker support, several companies have begun testing a four-day work week.[93] In 2019, Microsoft Japan implemented a "Work-Life Choice Challenge," which gave all employees Fridays off without reducing their pay.[94] While the pilot program only lasted five weeks, the experiment was an overwhelming success—productivity increased by 40%, and 92% of employees approved of the shorter work week.[95] This is especially significant given that Japan's work culture is known for being so intense that the Japanese coined the term "karoshi"—death from overwork.[96] Canon UK is another major employer that recently announced a trial of a four-day work week without any pay cuts.[97] US-based companies, while slower to adopt these changes than companies abroad, have also started to jump on the bandwagon: in 2021, Kickstarter announced an experiment with a four-day work week for its employees.[98] US-based company Bolt implemented a four-day work week trial beginning in the fall of 2021, and the company saw so much success that it announced a permanent change to a four-day work week.[99] Due to the success of companies like Bolt, the list of businesses implementing a four-day work week continues to grow.[100]

The private sector's modern push for a four-day work week has also encouraged government action.[101] Representative Mark Takano introduced a bill in 2021 that would create a thirty-two-hour work week by requiring overtime pay after an employee exceeds thirty-two hours of work.[102] While that version of the bill died in Congress in 2023,[103] several countries have

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[92] Jennifer Berg, Chris Jackson & Talia Wiseman, *Two-Thirds of Americans Support Implementing a 4-Day Work Week*, IPSOS (Aug. 11, 2021), https://perma.cc/9TDG-595F.

[93] Amanda Schiavo, *10 Companies That Have Adopted the 4-Day Workweek*, EMP. BEN. NEWS (Jan. 10, 2022, 3:26 PM), https://perma.cc/DH3L-9AAW.

[94] Kari Paul, *Microsoft Japan Tested a Four-Day Work Week and Productivity Jumped by 40%*, THE GUARDIAN (Nov. 4, 2019, 5:14 PM EST), https://perma.cc/CBR4-3C6N.

[95] *Id.*

[96] Danielle Demetriou, *Employees in the Country Whose Brutal Office Culture Has Led to Several Deaths Are Beginning to Rethink the Tradition*, BBC (Jan. 17, 2020), https://perma.cc/VN94-3ZYN.

[97] Jasper Jolly, *Canon's UK Arm to Become Latest Company to Trial Four-Day Week*, THE GUARDIAN (Jan. 16, 2022, 10:49 AM EST), https://perma.cc/94QA-RV8M.

[98] Joe Pinsker, *What It Means That Kickstarter Is Trying a 4-Day Workweek*, THE ATL., https://perma.cc/G24U-QTKS (last updated June 22, 2021, 12:10 PM ET).

[99] Michelle Fox, *This Company Just Decided to Give Employees a 4-Day Workweek Permanently*, CNBC (Jan. 5, 2022, 10:30 AM EST), https://perma.cc/SY55-6PL2.

[100] Henry O'Loughlin, *273 Companies with 4-Day Work Weeks*, BUILD REMOTE (Apr. 1, 2023), https://perma.cc/4HL2-52XR (including a list that is periodically updated with new companies that have implemented a four-day work week).

[101] *See* Irina Ivanova, *Four-Day Workweek Gains Support Among Progressives in Congress*, CBS NEWS (Dec. 8, 2021, 2:17 PM), https://perma.cc/XY4F-XEDG.

[102] Thirty-Two Hour Workweek Act, H.R. 4728, 117th Cong. (2021); Ivanova, *supra* note 101.

[103] *See H.R. 4728: Thirty-Two Hour Workweek Act*, GOVTRACK, https://perma.cc/ET6L-KJDY

introduced legislation to implement a four-day work week.[104] Just like the movement for a shorter work week, these legislative experiments are nothing new.[105] However, the increased pressure on companies and governments to decrease working hours invites the question: "Is the Four-Day Workweek Finally Within Our Grasp?"[106]

II. Importance/Relevance

A. *Without Legislation, AI Could Destroy the Economy*

Imagine a world where instead of FDR's New Deal legislation, the government sat back and allowed businesses to attempt to solve the unprecedented unemployment rates of the Great Depression on their own.[107] In essence, that is exactly what the government is doing by ignoring the need to regulate AI.[108] Predictions of job loss due to the threat of automation range anywhere from 9% to 47%.[109] With the potential that a third of US workers could be unemployed by 2030, the government must take some sort of action to combat the potential mass unemployment rates caused by AI.[110] The effects of mass unemployment—compounded by the speed at which the power and adoption of AI is accelerating[111]—include costs to both the economy and society.[112] High unemployment rates lower the nation's economic output and result in both increased government spending and reduced tax revenue.[113] Socially, high unemployment rates cause decreased consumer spending, lower quality of life, increased homelessness, political instability, and increased crime rates.[114] While many think of the robot revolution as a futuristic tale of exaggerated proportions, the effects of AI, both positive and negative, have already started.[115] The time to regulate is

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(last visited Apr. 25, 2023).

[104] Henry O'Loughlin, *18 Countries with a 4-Day Work Week (Proposed or Law)*, BUILD REMOTE (Feb. 26, 2023), https://perma.cc/DCZ3-L2UE.

[105] *See* Charles S. Catlin, *Four-Day Work Week Improves Environment*, 59 J. ENV'T. HEALTH, Mar. 1997, at 12, 12–15 (demonstrating support for the shorter work week as early as in 1997).

[106] Kevin J. Delaney, *Is the Four-Day Workweek Finally Within Our Grasp?*, N.Y. TIMES (Nov. 23, 2021), https://perma.cc/32FP-K3TG.

[107] *See* David F. Weiman, *Imagining a World Without the New Deal*, WASH. POST (Aug. 12, 2011), https://perma.cc/HRU7-4CMH.

[108] *See* MacCarthy, *supra* note 64.

[109] EXEC. OFF. OF THE PRESIDENT, *supra* note 3, at 2.

[110] Thomas Franck, *McKinsey: One-Third of US Workers Could Be Jobless by 2030 Due to Automation*, CNBC, https://perma.cc/5KC8-BJTT (last updated Nov. 29, 2017, 1:43 PM EST).

[111] *See* Saran, *supra* note 31.

[112] Tejvan Pettinger, *Economic Costs of Unemployment*, ECON. HELP (June 28, 2019), https://perma.cc/JY5A-A39C.

[113] *Id.*

[114] *Id.*

[115] *See* Darina L., *Rise of Robots – Jobs Lost to Automation Statistics in 2022*, LEFTRONIC,

now.[116]

B. *The Benefits of a Shorter Work Week*

Immediate regulation of AI through the implementation of a shorter work week would allow the government to capitalize on the current societal pressures brought forth by the modern push for a four-day work week.[117] Reduction in the work week has proven extremely effective in combating unemployment (one of the major issues associated with increased automation).[118] However, the benefits of a shorter work week go far beyond acting as a counterbalance for the job loss associated with AI.[119] In fact, the vast majority of the four-day work week movement has nothing to do with AI, instead focusing on the proven benefits of a reduced work week.[120] These benefits include higher productivity rates, increased leisure time, employer office cost reductions, decreased commuting time, greater employee satisfaction, and improved mental health.[121] To achieve these benefits it is important to utilize societal pressures before support for the cause diminishes, like has happened to similar movements in the past.[122]

C. *Unlocking the Full Potential of AI*

If government action can minimize the risks of rapid adoption of AI, then AI will greatly improve our quality of life.[123] In the medical field, AI has already proven more effective than humans in aspects of diagnostic medicine, such as the detection of lung cancer.[124] In the education field, AI could assist in creating personalized lesson plans, giving all students equal access to quality education.[125] AI has the ability to improve nearly every

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https://perma.cc/5KSY-CZMB (last updated Jan. 23, 2022) (noting that 1.7 million jobs have been replaced by automation since 2000 alone).

[116] *See* MacCarthy, *supra* note 64.

[117] *See* Kelly, *supra* note 6.

[118] John Henize, *Can a Shorter Workweek Reduce Unemployment?*, 37 SIMULATION 145, 145 (1981).

[119] *See* Jonathan Crane, *Artificial Intelligence Is the Secret to a 4-Day Workweek*, HRTECH SERIES, https://perma.cc/EAZ2-P4XN (last updated Apr. 21, 2020).

[120] *See* Jack Kelly, *Interest and Excitement About the Adoption of a Four-Day Workweek Is Picking up Speed*, FORBES (Oct. 29, 2021, 12:24 PM EDT), https://perma.cc/9QNW-Y6HA.

[121] Janice Neipert Hedges, *A Look at the Four-Day Workweek*, MONTHLY LAB. REV., Oct. 1971, at 33, 34; *The Benefits of a Four-Day Work Week*, IRIS FMP (Oct. 11, 2021), https://perma.cc/7VMX-HDXE.

[122] *See* Claudia N. Lombardo, *Shorter Workweek in a Tough Economy*, HR DAILY ADVISOR, https://perma.cc/7RKQ-5ZQP (last updated Feb. 4, 2010).

[123] *See* Kashyap Vyas, *7 Benefits of AI That Will Help Humanity, Not Harm It*, INTERESTING ENG'G (Apr. 6, 2021), https://perma.cc/TBA9-WAMD.

[124] Ashley Brooks, *The Benefits of AI: 6 Societal Advantages of Automation*, RASMUSSEN UNIV. (Nov. 4, 2019), https://perma.cc/Y3FS-8CMV.

[125] *Id.*

aspect of daily life.[126] "Emerging technology offers the real potential for humans to achieve a post-professional era where we are not defined by our jobs, but a new purpose to enhance the human condition and the world."[127] However, in order to realize the full potential of AI, society and the government must work together to minimize the risks and maximize the benefits of the AI takeover.[128]

ANALYSIS

III. The Government Should Work Together with Companies in a Public-Private Initiative to Combat AI Job Loss Through the Implementation of a Shorter Work Week

A. *A Shorter Work Week Would Be an Effective Way of Increasing Jobs and Reducing Unemployment*

While exact predictions of AI job loss may vary, artificial intelligence has the very real potential of completely decimating the economy.[129] One of the most feared impacts of this rapid workforce automation is the resulting unemployment that accompanies job loss.[130] This "technological unemployment"—a permanent displacement of workers that results from machines replacing human labor—has greater long-term consequences than other forms of unemployment, but the concept of unemployment itself is nothing new.[131] One way governments have reduced unemployment in the past is by implementing programs to reduce the number of hours worked.[132] Analyzing the ways governments have used shorter working hours to reduce unemployment in the past helps to demonstrate how shortening the work week would be an effective tool in minimizing the harm caused by AI-

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[126] *See* Janna Anderson & Lee Rainie, *3. Improvements Ahead: How Humans and AI Might Evolve Together in the Next Decade*, PEW RSCH. CTR. (Dec. 10, 2018), https://perma.cc/9P8J-NJGA.

[127] Cormac Ó Conaire, *Instead of Taking Our Jobs, What If AI Just Lets Us Give Our Lives More Purpose?*, FAST CO. (Dec. 6, 2021), https://perma.cc/2X2Y-YX3E.

[128] *See* Bob Violino, *Government, Private Sector Need to Work Together to Advance Tech Innovation and Enhance Security*, CNBC (Jan. 19, 2022, 2:37 PM EST), https://perma.cc/7LKU-Q65Y.

[129] *See* Morgan R. Frank et al., *Toward Understanding the Impact of Artificial Intelligence on Labor*, 116 PROC. NAT'L ACAD. SCI. U.S. 6531, 6531 (2019).

[130] Darrell M. West, *Will Robots and AI Take Your Job? The Economic and Political Consequences of Automation*, BROOKINGS INST. (Apr. 18, 2018), https://perma.cc/7LKU-Q65Y.

[131] *See* Michael B. Scheler, *Technological Unemployment*, 154 ANNALS AM. ACAD. POL. & SOC. SCI. 17, 18–19 (1931).

[132] *See* Philippe Askenazy, *Work Time Regulation in France from 1996 to 2012*, 37 CAMBRIDGE J. ECON. 323, 323–25 (2013) (discussing France's expansion of employment through the reduction of working time); Jason E. Taylor, *Work-Sharing During the Great Depression: Did the 'President's Reemployment Agreement' Promote Reemployment?*, 78 ECONOMICA 133, 133–37 (2011) (discussing the limitation of working hours during the Great Depression as a means of combating unemployment).

related job loss.[133]

Beginning this analysis with the United States, the Great Depression was easily the worst economic crisis in the nation's history, leaving fifteen million individuals without jobs and elevating unemployment rates to more than 20%.[134] FDR's New Deal legislation is known for being the governmental stimulant that kick-started economic recovery through a wide range of economic and social spending programs.[135] As part of this economic recovery plan, FDR urged for federal legislation to shorten the work week, and a bill passed in the Senate but ultimately failed due to opposition from businesses.[136] While the federal mandate did not succeed, FDR still saw the value of reducing working hours as a means of combating the Depression and decided to implement a voluntary program known as the President's Reemployment Agreement (PRA).[137] In a public letter addressed to "Every Employer" in the country, FDR called on companies to limit working hours as a method of spreading out employment opportunities, thus increasing jobs.[138] This program was completely voluntary, and, instead of government mandates, FDR used notions of patriotism to inspire the nation to comply with the program, calling companies who refuse to do so "selfish."[139] Maximum working hours under the PRA varied by industry, but factory workers in particular had a maximum work week of thirty-five hours.[140] Once a company signed the PRA pledge, the local post office would display the company's name on an "Honor Roll" of complying firms, and the company could receive free "Blue Eagle" posters and stickers to signify their voluntary compliance with the program.[141] Likewise, consumers signed a pledge stating they would "support and patronize" these businesses.[142] In the end, the program was an overwhelming success, with the Roosevelt administration stating that the PRA put four million Americans to work.[143]

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[133] *See* Arvind Ashta, *France Shortens Work-Week Sharing Scarce Jobs*, 35 ECON. & POL. WKLY. 3527, 3527–29 (2000); Taylor, *supra* note 132, at 133–37.

[134] *Great Depression History*, *supra* note 77.

[135] *See Great Depression History*, *supra* note 77.

[136] Brockell, *supra* note 80.

[137] Taylor, *supra* note 132, at 133.

[138] Franklin D. Roosevelt, *The President's Reemployment Agreement* (July 27, 1933) (transcript available at https://perma.cc/YL3X-3ZV3); *see also* Taylor, *supra* note 132, at 133–37 (explaining the effect of the PRA and how the PRA worked to increase jobs through voluntary initiatives by companies).

[139] *See* Franklin D. Roosevelt, President, U.S., Fireside Chat 3: On the National Recovery Administration (July 24, 1933) (transcript at https://perma.cc/FSV8-2L7W); *see also* Taylor, *supra* note 132, at 133–36 (explaining how companies who signed the PRA received paraphernalia from the government as a sign of their patriotism).

[140] Roosevelt, *supra* note 138.

[141] Taylor, *supra* note 132, at 135–36.

[142] Taylor, *supra* note 132, at 135.

[143] Taylor, *supra* note 132, at 133.

Roughly a half century later, a similar situation began to develop in France.[144] Beginning in the 1980s and continuing into the 1990s, unemployment started to rise across Europe.[145] As a result, companies and countries alike began to experiment with work-sharing programs: Germany instituted an early retirement program at the age of fifty-five, and Volkswagen and other companies initiated a four-day work week.[146] With unemployment rates reaching over 10%, France began experimenting with various laws aimed at shortening the work week to limit unemployment.[147] In 1982, France introduced legislation limiting the work week to thirty-nine hours, but the legislation fell short of the thirty-five-hour work week that many were pushing for.[148] As unemployment rates continued to rise over the next decade, the push for a shorter work week reignited and inspired a series of laws that successfully and permanently altered France's employment landscape.[149] In 1996, France passed the Robien Law, which incentivized companies to reduce working hours by 10% to 15% through a government-financed reduction in social insurance contributions.[150] The Robien Law was somewhat successful, and two years later, France passed the first of two Aubry Laws.[151] Aubry I, the first Aubry Law, mandated a 35-hour work week beginning in 2000 or 2002 (depending on a company's size) and introduced financial incentives for immediate compliance.[152] Aubry II, passed in 2000, reaffirmed the requirement of a 35-hour work week for all large employers and made the financial incentives (reducing Social Security benefits) permanent for companies at thirty-five hours, thereby encouraging small employers to reduce hours before the 2002 mandate.[153] France's goal of creating employment and redistributing the share of jobs was successful—by reducing the work week by only four hours, France saw a 6% to 9% increase in jobs.[154]

As the examples in the United States and France demonstrate, combating unemployment through a reduction of working hours is not a new concept.[155] The rationale behind these programs is simple: reducing

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[144] *See* Ashta, *supra* note 133, at 3527.

[145] Ashta, *supra* note 133, at 3527.

[146] Ashta, *supra* note 133, at 3527.

[147] Askenazy, *supra* note 132, at 324–25.

[148] Askenazy, *supra* note 132, at 324.

[149] Askenazy, *supra* note 132, at 325.

[150] Askenazy, *supra* note 132, at 325.

[151] *See* Ashta, *supra* note 133, at 3528.

[152] Askenazy, *supra* note 132, at 325 (requiring firms with greater than twenty employees to comply by 2000 and firms with less than twenty employees to comply by 2002).

[153] Ashta, *supra* note 133, at 3529.

[154] Askenazy, *supra* note 132, at 338.

[155] *See* Ashta, *supra* note 133, at 3527–29; Taylor, *supra* note 132, at 133–37; *see also Work Less, Recover Better? How a Shorter Working Week Answers Many Post-Pandemic Problems*, RAPID

working hours increases the need for workers, thus creating jobs.[156] "[I]t works because, rather than making workers redundant, firms are able to retain their workforce through sharing out available work by reducing the working week for all employees."[157] Furthermore, shortening working hours increases leisure time, which in turn increases consumption of goods and services in the economy.[158] Individuals with continued employment and greater leisure time will increase aggregate demand for products; as demand for goods and services grows, the need for workers to produce such goods and services increases as well, creating jobs.[159] This economic rationale can also be applied to technological unemployment because "[t]he most probable effect [on the economy of a reduction of standard working hours] is that in a period of rapid technological change and rising productivity, it would minimize the likelihood of large-scale displacement of workers."[160] As AI continues to grow and begins to replace jobs at unprecedented rates, shortening working hours can help distribute work to more people, making it an effective solution in minimizing AI job loss.[161]

B. *Current Circumstances Make a Shorter Work Week Attainable*

The idea of shortening the work week to combat job loss associated with AI is gaining traction in the media,[162] but a shorter work week is not the only plan suggested for combating this impending technological unemployment.[163] Particularly since Andrew Yang's 2020 presidential campaign, the idea of using universal basic income (UBI) to offset increased automation in the workforce has quickly gained support.[164] UBI is the idea that all citizens—regardless of need or income level—receive an

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TRANSITION ALL. (Aug. 2, 2021), https://perma.cc/S3TV-EGLX [hereinafter *Work Less, Recover Better?*] (describing other instances in the Netherlands, Germany, and Utah where governments have implemented shorter work weeks to combat economic downturns).

[156] Nat Goldfinger, *Economic Aspects of Shorter Hours of Work*, 79 MONTHLY LAB. REV. 1274, 1274 (1956).

[157] *Work Less, Recover Better?*, *supra* note 155.

[158] Charles D. Stewart, *A Shorter Workweek as a Factor in Economic Growth*, 79 MONTHLY LAB. REV. 157, 157 (1956).

[159] Ashta, *supra* note 133, at 3527.

[160] Goldfinger, *supra* note 156, at 1274 (brackets in original).

[161] *Otago University Research Looks to Four-Day Work Week for Businesses to Adapt to Increased Artificial Intelligence*, 1NEWS (May 25, 2021), https://perma.cc/8F8Z-Z636.

[162] *See, e.g.*, Michael Savage, *Rise of Robots 'Could See Workers Enjoy Four-Day Weeks,'* THE GUARDIAN (Oct. 13, 2018, 12:02 EDT), https://perma.cc/48NL-D9GX.

[163] *See* Ben Bloch, *Tax Robots and Universal Basic Income*, TECHCRUNCH (July 17, 2018, 4:01 PM EDT), https://perma.cc/6RWB-LG6Q (discussing universal basic income and robot taxes as a means of offsetting AI job loss).

[164] *See generally* Kevin Roose, *His 2020 Campaign Message: The Robots Are Coming*, N.Y. TIMES (Feb. 10, 2018), https://perma.cc/FCZ8-5LGF (discussing Andrew Yang's plan for UBI as part of his 2020 presidential campaign).

unconditioned amount of money on a regular basis.[165] Similar to the economic theories of leisure associated with shortening the work week, UBI is thought to increase spending power, productivity, and overall quality of life.[166] The issue with UBI, aside from the unrealistic cost and unnecessary payments to individuals who do not need supplemental income,[167] is that UBI is incompatible with a productive society.[168] Society is unlikely to give up on the belief that paid work is what entitles someone to economic security, and there are social and economic reasons to keep that mindset the societal norm: "Meaningful and productive work is worth much more to individuals and society than the income it generates."[169] While progressive ideas like UBI can garner public support similar to that seen with the push for a four-day work week, such idealistic programs fall short of targeting the root issue: automation.[170] Rather than combating job loss through the creation of work opportunities, UBI discourages labor supply and treats displaced workers the same as any other member of society by giving the same amount of money to everyone, even those who remain unaffected by AI job loss.[171]

While UBI is not a realistic or attainable solution for AI job loss, the societal support for UBI and a shorter work week represent an important factor in implementing effective change: workers are desperate for better work-life balance.[172] The mass shift to remote work sparked by the COVID-19 pandemic has given workers a taste of flexibility, and now more than ever, workers are realizing they do not want to work as many hours or as frequently as they did pre-COVID.[173] More importantly, the Great Resignation of workers triggered by the pandemic has created a labor shortage, which has increased workers' bargaining power to demand more flexible work.[174] It is no surprise that companies like Microsoft Japan,

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[165] June Javelosa, *Here's Why the Answer to Increasing Automation Could Be Universal Basic Income*, FUTURISM (Jan. 1, 2017), https://perma.cc/WS49-3P8V.

[166] *Id.*

[167] Robert Greenstein, *Commentary: Universal Basic Income May Sound Attractive but, If It Occurred, Would Likelier Increase Poverty than Reduce It*, CTR. ON BUDGET & POL'Y PRIORITIES, https://perma.cc/BX37-E8MD (last updated June 13, 2019).

[168] *See* Cynthia Estlund, *Three Big Ideas for a Future of Less Work and a Three-Dimensional Alternative*, 82 LAW & CONTEMP. PROBS. 1, 16–17 (2019).

[169] *Id.*

[170] Melissa Kearney & Magne Mogstad, *The Math Is Clear: Universal Basic Income Is a Terrible Idea*, BUS. INSIDER (Nov. 23, 2019, 11:17 AM), https://perma.cc/2MFX-FENG.

[171] *Id.*

[172] Juliana Kaplan, *Almost 70% of Workers Want a Career Change. They'd Take Better Work-Life Balance over Higher Pay*, BUS. INSIDER (Aug. 16, 2021, 1:03 PM), https://perma.cc/E3NM-24YE.

[173] Daniel S. Hamermesh, *More Leisure, Less Work: Will the 'COVID Revolution' Last?*, THE HILL (Nov. 28, 2021, 10:30 AM EST), https://perma.cc/6W5S-MZUH.

[174] Robert Maxim et al., *Why the Pandemic's Record-Breaking Quit Rates Are a Boon to Workers*, BROOKINGS (Jan. 12, 2022), https://perma.cc/6U46-PTTE.

Kickstarter, and Bolt are experimenting with and even permanently implementing shorter work weeks—the labor shortage has forced companies to give into the demands for flexible work as a means of retaining and recruiting employees.[175]

While it may seem counterintuitive to focus on creating jobs during a labor shortage, the shortage of workers and supply chain issues associated with the pandemic have rapidly expanded the implementation of automation in the workplace.[176] Faced with both the need to cut costs and the need to produce goods without an adequate supply of workers, companies have been forced to invest in technology to replace human work.[177] AI was always set to replace jobs, but the pandemic greatly sped up this process.[178] The issue with this is that not all workers left the workforce for good; while many blame the labor shortage on the Great Resignation of early retirees, millions of workers who stopped working for reasons such as "long COVID" or childcare costs are set to return to the workforce.[179] Once these workers return, their jobs will no longer be there waiting for them, replaced by robots who cost less and are more efficient than human labor.[180]

Throughout history, major social and economic events have acted as a catalyst for significant shifts in employment—the Great Depression sparked New Deal labor laws like minimum wage and overtime pay, and World War II brought women into the workforce to keep up with the demand for war supplies.[181] The COVID-19 pandemic is set to act as a similar catalyst for

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[175] Fox, *supra* note 99; Paul, *supra* note 94; Pinsker, *supra* note 98; *see also Workers Are Seeking Flexible Hours as Businesses Struggle with Worker Shortage*, FOX BUS. (Oct. 21, 2021, 7:17 AM EDT), https://perma.cc/5V2Z-CFQZ (explaining how employees are demanding more flexible schedules and even changing jobs to gain flexibility).

[176] Don Lee, *As COVID-19 Wanes, Employers Are Accelerating the Use of Robots. Where Does That Leave Workers?*, L.A. TIMES (May 4, 2021, 4:00 AM PT), https://perma.cc/ZQ8R-85RV.

[177] Jonathan Vanian, *The Pandemic Is Speeding up Automation, Putting Jobs in Question*, FORTUNE (Aug. 11, 2020, 12:07 PM EDT), https://perma.cc/SL92-PX87.

[178] Harry J. Holzer, *Automation, Jobs, and Wages: Should Workers Fear the New Automation?*, *in* SHIFTING PARADIGMS: GROWTH, FINANCE, JOBS, AND INEQUALITY IN THE DIGITAL ECONOMY 123, 124 (Zia Qureshi & Cheonsik Woo eds., 2022); Simon Chandler, *Coronavirus Is Forcing Companies to Speed up Automation, for Better and for Worse*, FORBES (May 12, 2020, 9:00 AM EDT), https://perma.cc/BAL3-XU55.

[179] *Economists on Worker Shortage: 'They'll Be Back'*, N.J. BUS. & INDUS. ASS'N (Dec. 17, 2021), https://perma.cc/7BYQ-GLX6 ("Although the 1.5 million early retirees will not likely return, the 2.7 million workers disincentivized by enhanced jobless benefits will be back in the coming months as their savings diminish, and the 2.2 million labor force dropouts (mostly women) will also return by the end of 2022 if schools remain open and childcare is accessible."); Aimee Picchi, *A Cause of America's Labor Shortage: Millions with Long COVID*, CBS NEWS (Feb. 1, 2022, 7:41 AM), https://perma.cc/K2QA-Z4PB.

[180] *See* Alana Semuels, *Millions of Americans Have Lost Jobs in the Pandemic—And Robots and AI Are Replacing Them Faster Than Ever*, TIME (Aug. 6, 2020, 6:22 AM EDT), https://perma.cc/8XFH-3TBL.

[181] *See* Hamermesh, *supra* note 173.

change, making now an ideal time to implement a plan to shorten the work week while similar employment shifts are already happening.[182] Furthermore, the growing support for better work-life balance and flexibility means that the societal pressures that prompted historical changes in working hours have already paved the way to implement this change.[183] Sparked by the pandemic, increased automation of jobs and the push for greater flexibility in the workplace have created a perfect storm of change, making now the ideal time to begin implementing the shift to a shorter work week.[184]

C. *A Cooperative and Targeted Approach Is Necessary for Effective Implementation*

Even if a shorter work week is the perfect solution to combat AI job loss, the question becomes how to implement such change—after all, attempts to permanently shorten the work week in the United States have transpired, and failed, in the past.[185] History has taught us that government mandates to shorten the work week do not work,[186] and recent legislative plans to shorten the work week to thirty-two hours have died in Congress.[187] Yet history has also taught us that certain methods of shortening the work week are successful, such as the President's Reemployment Agreement during the Great Depression and the Aubry Acts in France.[188] A shorter work week may seem idealistic, but if implementation is transitional and matches the rate at which AI takes over, AI could end up paving the way for a permanent switch to a shorter work week.[189]

1. A Public-Private Approach Would Balance the Desire to Encourage Innovation Against the Need to Protect Workers

Both the government and businesses agree that encouraging innovation of AI is important to overall progress.[190] As a result, government funding for

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[182] *See* Hamermesh, *supra* note 173.

[183] *See* Bryan Lufkin & Jessica Mudditt, *The Case for a Shorter Workweek*, BBC (Aug. 24, 2021), https://perma.cc/6829-QHHC.

[184] *See COVID-19 Pandemic Is the 'Perfect Excuse to Adopt Four-Day Work Week'*, EURONEWS, https://perma.cc/556X-RVRB (last updated May 29, 2020).

[185] *See* Robert Whaples, *Hours of Work in U.S. History*, EH.NET, https://perma.cc/5YZE-R2MZ (last updated Aug. 14, 2001).

[186] Brockell, *supra* note 80 (describing the failure of the thirty-hour work week bill during the Great Depression due to push back from businesses).

[187] *H.R. 4728: Thirty-Two Hour Workweek Act*, *supra* note 103.

[188] *See* Ashta, *supra* note 133, at 3527–29; Askenazy, *supra* note 132, at 323–25.

[189] *See* Crane, *supra* note 119.

[190] *See* NAT'L SCI. & TECH. COUNCIL, *supra* note 56, at 16; Julia Hood, *Companies Continue to Prioritize AI and Cloud for Innovation Investment, According to the Latest Transforming Business Poll*, BUS. INSIDER (Apr. 20, 2021, 6:07 PM), https://perma.cc/DW8T-ZH65.

the research and development of AI is continually increasing,[191] and companies are rapidly investing in AI technologies.[192] While encouraging innovation is important, equally important is the development of policy to protect workers and minimize the risks of AI.[193] To this extent, government regulation of AI is necessary to minimize job loss without inhibiting innovation.[194] A policy aimed at shortening the work week would play a significant role in minimizing the negative impact of AI innovation, but in a capitalistic society big businesses have significant power in government action.[195] In fact, this power and push back from businesses is the exact reason why government regulation of a shorter work week failed during the Great Depression.[196] An effective plan to shorten the work week requires a public–private initiative focused on incentivizing compliance with shorter working hours rather than mandating compliance.[197]

An effective public–private approach for shortening the work week would look similar to the adoption of the Robien and Aubry laws in France.[198] To achieve voluntary compliance from businesses, France created an incentive-based program where businesses would earn a tax break for reducing hours worked.[199] In addition to requiring a minimum percentage of hour reduction, France also required a simultaneous increase in job creation within the business, thus forcing companies to hire more individuals rather than cutting costs and workers.[200] These tax breaks make sense—when unemployment rates are high, government spending (funded by taxes) increases as payments for unemployment benefits, food assistance,

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[191] *See* SUBCOMM. ON NETWORKING & INFO. TECH. RSCH. & DEV. ET AL., THE NETWORKING & INFORMATION TECHNOLOGY R&D PROGRAM AND THE NATIONAL ARTIFICIAL INTELLIGENCE INITIATIVE OFFICE: SUPPLEMENT TO THE PRESIDENT'S FY2022 BUDGET 13, 18 (2021), https://perma.cc/KY5D-RUUQ.

[192] *See* Joe McKendrick, *AI Adoption Skyrocketed over the Last 18 Months*, HARV. BUS. REV. (Sept. 27, 2021), https://perma.cc/5YX9-SGEX.

[193] PETER ENGELKE, AI, SOCIETY, AND GOVERNANCE: AN INTRODUCTION 1–2 (Mar. 2020), https://perma.cc/3FYA-DAA2.

[194] *See* Matthew Fenech, *AI and Jobs: 4 Key Steps Governments Can Take to Limit Job Displacement*, ITU (Apr. 29, 2020), https://perma.cc/8QL3-V4R9.

[195] *See* Lee Drutman, *How Corporate Lobbyists Conquered American Democracy*, THE ATL. (Apr. 20, 2015), https://perma.cc/U7NA-4SGP (describing how businesses use lobbying to gain power in Congress).

[196] Brockell, *supra* note 80.

[197] *Compare* Taylor, *supra* note 132, at 133–37 (describing how the President's Reemployment Agreement was successful in incentivizing businesses to voluntarily reduce working hours during the Great Depression), *with* Brockell, *supra* note 80 (describing how the plan for mandating a shorter work week during the Great Depression failed due to pushback from businesses).

[198] *See* Askenazy, *supra* note 132, at 325.

[199] Askenazy, *supra* note 132, at 325.

[200] Ashta, *supra* note 133, at 3528.

and various other welfare increase as well.[201] The proposed tax breaks would be partly "self-financing" through the resulting positive effects on employment and government spending.[202] Additionally, the government finances unemployment benefits through an unemployment insurance tax on businesses, so the businesses that create jobs and reduce unemployment would, effectively, be paying a lower unemployment insurance tax.[203] Much like France's program, these tax breaks are not necessarily permanent but rather designed to incentivize companies to institute change by redirecting governmental cost savings back onto the company for a temporary period of time.[204]

Government tax breaks would highly incentivize businesses to reduce working hours, especially since companies have already started to switch to a four-day work week without such incentives.[205] Additionally, businesses would retain the numerous other benefits associated with a shorter work week, including cost-saving benefits, productivity gains, and even environmental benefits.[206] Much like past social movements, society has already started to shift in the direction of more flexible work, and the government can help push society in the right direction by further incentivizing voluntary change.[207] According to Medeiros,"[p]ublic-private collaboration is essential to creating innovative governance solutions that can be adapted as the technology develops."[208] By incentivizing a shorter work week rather than mandating that companies reduce their hours, the government can work together with businesses to encourage AI innovation while protecting workers from the negative consequences of AI job loss.[209]

2. Gradual Implementation Would Minimize Push Back and Maximize Effectiveness

In addition to increasing private-sector support for a shorter work week,

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[201] *See* Stephen D. Simpson, *The Cost of Unemployment to the Economy*, INVESTOPEDIA, https://perma.cc/6CXC-HQVC (last updated Apr. 14, 2022).

[202] Ludger Linnemann, *Unemployment, Government Spending and the Laffer Effect*, 31 FISCAL STUD. 227, 227–28 (2010).

[203] *See generally Unemployment Insurance Tax Topic*, U.S. DEP'T. LAB. (Mar. 29, 2004), https://perma.cc/RN7S-WCCQ (explaining how unemployment insurance works).

[204] *See* Askenazy, *supra* note 132, at 325 (noting that the Robien Law would only cut social insurance contributions for seven years).

[205] *See* O'Loughlin, *supra* note 100.

[206] *See* Lombardo, *supra* note 122.

[207] *See* Joy Burnford, *Flexible Working: The Way of the Future*, FORBES (May 28, 2019, 10:06 AM EDT), https://perma.cc/LZ9S-3ZQX.

[208] Maya Medeiros, *Public and Private Dimensions of AI Technology and Security*, *in* CTR. FOR INT'L GOVERNANCE & INNOVATION 20, 21 (2020), https://perma.cc/5P84-M67S.

[209] *See id.* at 23(noting that a joint effort between private companies and the government is necessary to develop effective AI policy).

incentivizing rather than mandating businesses to reduce working hours helps spread out implementation, which could minimize the negative effects of such a policy.[210] Critics of a four-day work week have suggested that shortening the work week with a sudden mandate could weaken industry by increasing the cost of labor.[211] However, gradual implementation can accomplish widespread change without these negative effects by slowly transitioning to a shorter work week as the norm: "Changing norms among prominent private firms may eventually lead to a broader transition to a four-day week, . . . much as Henry Ford helped popularize the 40-hour week in the 1920s."[212]

Even though initial steps in implementing a shorter work week should focus on incentivizing rather than mandating, this does not necessarily mean that the government could never attempt to achieve universal compliance through the use of mandates.[213] In fact, the government should lead the movement and set an example by instituting a shorter work week for public employees—much like President Grant did in 1869 when he set an eight-hour workday for all government workers.[214] Once a shorter work week becomes the norm in society, the government could, and should, amend the FLSA by requiring overtime compensation for hours worked over the new norm (most likely thirty-two hours given the push for the four-day work week).[215] This gradual implementation mimics many of the successful labor movements from the past: a push from individuals demanding better rights, companies giving into pressure from workers, and the government stepping in at the end to ensure all workers receive these benefits once they become the norm.[216]

3. Targeting Certain Industries Would Ensure That the Most-Affected Individuals Receive the Benefits of a Shorter Work Week

Gradual implementation of a shorter work week would also allow for a more targeted approach in combating AI job loss by focusing on industries most affected by artificial intelligence.[217] The government is no stranger to

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[210] *See* Jeff Stein, *Thank God It's Thursday: The Four-Day Workweek Some Want to Bring to the U.S.*, WASH. POST (July 11, 2019, 8:04 AM EDT), https://perma.cc/C8ST-JLP6.

[211] *Id.*

[212] *Id.*

[213] *See* Ashta, *supra* note 133, at 3528 (explaining how France initially sought voluntary compliance through tax incentives but eventually mandated a thirty-five-hour work week).

[214] *E.g.*, Lebowitz & Ward, *supra* note 83.

[215] Thirty-Two Hour Workweek Act, H.R. 4728, 117th Cong. § 2(1)(A) (2021).

[216] *See* Lebowitz & Ward, *supra* note 83 (describing the history of the five-day work week, from demands of labor unions to the eventual adoption of the FLSA).

[217] *See generally* Sintia Radu, *Top Industries to Be Changed by Automation*, U.S. NEWS (Nov. 7, 2018, 1:01 PM), https://perma.cc/SM9N-7K9Y (listing the top five industries that will be affected

targeting government benefits towards specific types of businesses or industries; when the COVID-19 pandemic devastated the economy, the government spent billions of dollars bailing out the airline industry alone due to the unique impact the pandemic had on air travel.[218] In the realm of AI, manufacturing, food service, and retail jobs all have a high risk of automation, and governmental incentive programs could reflect this increased impact on these industries by giving greater incentives to shorten the work week and create jobs in the industries most affected.[219] Targeting certain industries would increase demand for workers in that particular industry and would ensure that those impacted by AI job loss would reap the benefits of a shorter work week.[220]

IV. As Companies Begin to Shorten the Work Week, the Legislature Should Adopt a Comprehensive Legislative Framework to Support Workers Most Affected by AI

A. *Implementing a Shorter Work Week to Combat AI Job Loss Would Affect Workers Differently*

On a macroeconomic level, a shorter work week would decrease unemployment caused by increased automation in the workforce through the creation of jobs, spreading out the economic burden of displaced workers.[221] However, as critics have pointed out, a broad plan to shorten the work week does not solve every problem associated with AI job loss and can even worsen existing inequalities.[222] Shortening the work week to minimize AI job loss will inevitably affect certain workers more than others, and it is important to recognize the shortcomings of this solution to figure out how the government can step in to support those workers through a comprehensive legislative framework that complements the transition to a shorter work week.[223]

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by increased automation in the workforce).

[218] Jae Woon Lee, *Government Bailouts of Airlines in the COVID-19 Crisis: Improving Transparency in International Air Transport*, 24 J. INT'L ECON. L. 703, 710–12 (2021).

[219] *See* Radu, *supra* note 217.

[220] *See* Goldfinger, *supra* note 156, at 1274 (noting that reducing working hours would minimize worker displacement from technology).

[221] *See* Goldfinger, *supra* note 156, at 1274.

[222] Estlund, *supra* note 168, at 32; Jake Shepherd, *Without Careful Design, a Four-Day Work Week Could Make Inequality Worse*, INDEP. (July 15, 2021, 10:00 AM), https://perma.cc/T2X7-QBZZ

[223] *See* Allana Akhtar & Caroline Hroncich, *Finland's New Millennial Leader Wants Her Country to Have a Four-Day Workweek. Here's Why the Wildly Beloved Schedule Would Never Work in the U.S.*, BUS. INSIDER (Jan. 6, 2020, 12:12 PM), https://perma.cc/BS82-XQMW (noting that certain forms of workers could be excluded from the benefits of a four-day work week); Peter Dizikes, *Study Finds Stronger Links Between Automation and Inequality*, MIT NEWS (May 5, 2020), https://perma.cc/V45B-QEYF (finding that automation displaces jobs at different rates, increasing inequalities).

1. AI Has a Disproportionate Impact on "Low-Skill" Workers

Ever since the 1970s, the wealth gap between the rich and the poor has accelerated at astonishing rates.[224] On average, over half of increases in national income went to the wealthiest 1% each year, and in the aftermath of the 2008 recession, the top 1% accounted for 95% of total income gains.[225] Even if overall jobs increase and help offset unemployment caused by automation, these jobs tend to require greater skill and education than the displaced workers possess.[226] In fact, "automation technology has been the primary driver in U.S. income inequality over the past 40 years."[227] AI tends to benefit high-skill, high-income workers at the direct expense of low-skill workers,[228] and while gradual implementation of a shorter work week may slow this process down, eventually these highly automated jobs will disappear entirely.[229]

Low skill appears to be the most dominant factor in assessing which workers AI will displace, but automation also affects individuals with lower education levels at greater rates than individuals with advanced degrees.[230] Individuals with lower education levels have a significantly higher risk of automation in their jobs than those workers with higher education levels.[231] Furthermore, as AI's capability develops to include decision-making abilities, the risk of automation spreads to affect even more workers—future predictions of AI job loss include both low-skill workers and mid-skill workers as highly displaced individuals rather than the traditional low-skill worker prediction.[232] AI job loss has a greater impact on individuals who have lower skill and education levels, and solutions to this problem must target those individuals to effectively minimize the negative impacts of artificial intelligence.[233]

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[224] FORD, *supra* note 52, at 46.

[225] FORD, *supra* note 52, at 46.

[226] Seymour L. Wolfbein, *Automation and Skill*, 340 ANNALS AM. ACAD. POL. & SOC. SCI. 53, 53 (1962).

[227] Jack Kelly, *Artificial Intelligence Has Caused a 50% to 70% Decrease in Wages—Creating Income Inequality and Threatening Millions of Jobs*, FORBES (June 18, 2021, 10:34 AM EDT), https://perma.cc/6Q6Z-XHNV.

[228] Dizikes, *supra* note 223.

[229] *See* G. Dautovic, *Automation and Job Loss Statistics: The Robots Are Coming*, FORTUNLY, https://perma.cc/8MGD-KKDG (last updated Mar. 7, 2022).

[230] JOHN HAWKSWORTH, RICHARD BERRIMAN & SALONI GOEL, WILL ROBOTS REALLY STEAL OUR JOBS? AN INTERNATIONAL ANALYSIS OF THE POTENTIAL LONG TERM IMPACT OF AUTOMATION 27 (2018), https://perma.cc/KS2T-DV53.

[231] *Id.* (noting that the risk of automation for individuals with low education levels is 44% compared to the 11% risk for high education levels).

[232] *See* Georgios Petropoulos & Sybrand Brekelmans, *Artificial Intelligence's Great Impact on Low and Middle-Skilled Jobs*, BRUEGAL (June 29, 2020), https://perma.cc/XE6B-8BG.

[233] *See* Jocelyn Maclure & David Rocheleau-Houle, *Will Artificial Intelligence Lead to More*

2. Shortening the Work Week Looks Different for Different Types of Workers

Another critique of a shorter work week is that not all workers will benefit from reduced working hours, particularly wage workers.[234] This argument stems from the notion that low-wage workers do not earn enough working five days a week (sometimes even more), and cutting hours would make these workers earn even less.[235] This is a valid concern when combined with the fact that AI will displace these same low-wage workers at greater rates.[236] However, efforts to reduce working hours without lowering weekly wages have worked in the past—in 1914 and again in 1926, Ford Motor Company reduced weekly hours while giving those same workers pay raises.[237] In fact, nearly every successful attempt to shorten the work week so far has kept take-home pay the same.[238] Nevertheless, the potential effect on wage workers reiterates the importance for legislators to consider these consequences when developing policy, particularly since the only federal legislation proposed thus far fails to mention any wage or salary protections.[239]

B. *A Supportive Legislative Framework Would Minimize AI's Disproportionate Effect on Certain Workers*

A policy to reduce working hours that focuses on voluntary compliance rather than strict mandates requires legislative action to protect workers and mitigate risks.[240] While AI has the potential to cause wealth inequality, a standalone policy to reduce inequality has potential shortcomings that could minimize such policy's effectiveness.[241] A supportive legislative framework that accounts for these potential shortcomings, such as the disproportional impact on certain workers, would ensure that every worker benefits from

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Unfairness?, POL'Y OPTIONS POLITIQUES (Sept. 23, 2021), https://perma.cc/5Q7K-NNVP.

[234] Akhtar & Hroncich, *supra* note 223.

[235] Akhtar & Hroncich, *supra* note 223.

[236] *See* R. Maria del Rio-Chanona et al., *Occupational Mobility and Automation: A Data-Driven Network Model*, 18 J. ROYAL SOC'Y INTERFACE, Jan. 2021, at 1, 1.

[237] Brockell, *supra* note 80; *Ford Factory Workers Get 40-Hour Week*, HIST., https://perma.cc/G93Q-KVBA (last updated Apr. 29, 2020).

[238] *See, e.g.*, *Four-Day Week 'an Overwhelming Success' in Iceland*, BBC (July 6, 2021), https://perma.cc/95DR-ENZY (noting Iceland's success in shortening the work week while keeping pay the same); Guillermo Vega, *How Two Companies in Spain Moved to a Four-Day Week Without Cutting Salaries*, EL PAIS (Jan. 20, 2022, 6:42 AM EST), https://perma.cc/M89W-UJJW (describing Spain's new four-day work week policy, which grants subsidies for companies who implement a four-day work week without pay reductions).

[239] Thirty-Two Hour Workweek Act, H.R. 4728, 117th Cong. (2021).

[240] *See* Medeiros, *supra* note 208.

[241] *See* Maclure & Rocheleau-Houle, *supra* note 233.

the shorter work week movement.[242]

1. Job Retraining Legislation Would Provide Opportunities to Workers Displaced by AI

AI will affect everyone, but the shift to increased automation in the workforce will affect individuals with low-skill jobs and less education at greater rates.[243] Given AI's potential to completely eliminate these jobs, supportive legislative measures must include policy aimed at assisting these displaced workers in finding new job opportunities.[244] One way to accomplish this is through legislation that helps reeducate and retrain individuals who lose their jobs to AI.[245] Current predictions estimate that 70% of displaced workers will have to retrain for a new career.[246] The solution to this is already in Congress's control: amending the Trade Adjustment Assistance Program (TAA).[247]

Congress created the TAA in 1962 as part of the Trade Expansion Act.[248] The purpose of the program was to provide funding for training and reemployment services to workers who lost their jobs to foreign competition.[249] The historical background of the TAA is analogous to the current AI job displacement narrative; the United States' decision to lower trade barriers was beneficial for economic progress—much like AI innovation—but doing so resulted in jobs moving abroad at the expense of American workers.[250] Since 1962, Congress has amended and reauthorized the TAA to meet the needs of society, and Congress should once again amend the TAA to create an avenue for workers displaced by AI and give them similar retraining and education benefits.[251]

In 2019, four senators introduced the idea of amending the TAA to

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[242] *See* Andrew Stettner, *How to Respond to Job Losses from Technology, Trade, and Policy Choices*, CENTURY FOUND. (Oct. 1, 2019), https://perma.cc/2KCH-UN8U.

[243] *See* Maclure & Rocheleau-Houle, *supra* note 233.

[244] *See* Stettner, *supra* note 242.

[245] *See* Pedro Nicolaci da Costa, *We've Been Worried About Technology Stealing Jobs for 200 Years but One Solution Is Plain to See*, BUS. INSIDER (July 17, 2017, 9:33 AM), https://perma.cc/6TJZ-4L6V.

[246] Jamie Condliffe, *Retraining Could Help Most People Avoid Job Loss at the Hands of Automation*, MIT TECH. REV. (Jan. 22, 2018), https://perma.cc/4NJ7-PZX3.

[247] *See generally* CONG. RSCH SERV., R44153: TRADE ADJUSTMENT ASSISTANCE FOR WORKERS AND THE TAA REAUTHORIZATION ACT OF 2015, at 1 (2021), https://perma.cc/HE7D-YZ23 (describing the purpose and history of the TAA).

[248] Katherine Baicker & M. Marit Rehavi, *Policy Watch: Trade Adjustment Assistance*, 18 J. ECON. PERSPS. 239, 240 (2004), https://perma.cc/V47X-YW6T.

[249] CONG. RSCH. SERV., *supra* note 247, at 1.

[250] *See* OFF. TECH. ASSESSMENT, TRADE ADJUSTMENT ASSISTANCE: NEW IDEAS FOR AN OLD PROGRAM 13 (1987), https://perma.cc/4M5Q-LYAJ.

[251] *See* Baicker & Rehavi, *supra* note 248, at 240–45.

minimize the threat of AI.[252] The TAA for Automation Act aimed to provide TAA benefits for workers displaced by automation by helping these workers gain the skills and training necessary for jobs of the future.[253] Unfortunately, the TAA for Automation Act did not receive a vote and ultimately failed in the Senate, but the support for such a policy did not die with the bill.[254] Day One Project, a group dedicated to creating actionable policies in the field of science and technology,[255] recently urged the Biden-Harris administration to amend the TAA to assist workers displaced by technological advancements.[256] The group recommended a three-step plan, known as the Trade and Technology Adjustment Assistance Plan, to expand the TAA to include (1) a centralized infrastructure to administer an amendment, (2) an upskilling platform focused on in-demand jobs, and (3) a fund for temporary worker assistance.[257] Even if past legislation ultimately failed, amending the TAA would provide the means to support workers displaced by AI in a way that complements the macroeconomic policy to reduce unemployment through the implementation of a shorter work week.[258]

2. Protecting Pay Would Further Help Minimize the Wage Gap and Ensure Equality

While amending the TAA would complement a policy to shorten the work week, no legislative plan discussed thus far would protect workers from an employer using reduced working hours as a way to reduce pay.[259] Some companies may not be able to afford to pay workers the same amount for fewer hours worked, and others may simply refuse to do so due to lower profit margins (particularly in situations where companies must increase hourly wages, but overall hours worked across the company cannot be cut).[260] Reducing pay is a significant challenge to the effectiveness of a shorter work week because many of the benefits of a shorter work week would be reduced or even eliminated without pay protections in place.[261]

The gradual implementation and timing of reducing working hours

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[252] TAA for Automation Act of 2019, S. 3034, 116th Cong. (2019).

[253] *Id.*

[254] *S. 3034 (116th): TAA for Automation Act of 2019*, GOVTRACK, https://perma.cc/4KN6-N4M5 (last visited Apr. 25, 2023).

[255] *About Us*, DAY ONE PROJECT, https://perma.cc/Z6DK-GPEW (last visited Apr. 25, 2023).

[256] LEXI CURNIN ET AL., MAKING THE TRADE ADJUSTMENT ASSISTANCE PROGRAM WORK FOR THE NEW ECONOMY, DAY ONE PROJECT 2 (2021), https://perma.cc/9DYM-MPXY.

[257] *Id.* at 4–5.

[258] *See id.* at 2–5.

[259] *See* Heidi Lynne Kurter, *Is Thursday the New Friday? 3 Pros and Cons of Reducing Working Hours*, FORBES (Dec. 30, 2021, 5:46 PM EST), https://perma.cc/GA3F-MH5L.

[260] *Id.*

[261] *See* Stewart, *supra* note 158, at 157 (describing the economic benefits of increased consumption associated with leisure time).

helps make the cost of salary stays and wage increases more realistic; for most companies, reducing hours while keeping pay the same will actually result in cost reductions to the company due to increased productivity and decreased overhead.[262] These cost-benefits, combined with government incentives and improvements in employee morale, mean that companies will want to switch to a four-day work week (like many already are).[263] Once the first phase—centered upon voluntary reduction of working hours through government incentives—meets with success in reducing the average number of working hours, the government should step in to mandate and regulate universal compliance through amending the FLSA.[264] In addition to gradually reducing hours worked (through overtime payments), the legislation should include gradual increases to the minimum wage, a legislative framework that mimics the adoption of the FLSA in 1938.[265] The societal demand for increasing minimum wage already exists for a number of reasons, but including wage increases in a comprehensive legislative plan is necessary to maximize the effectiveness of a shorter work week in combating AI job loss.[266]

CONCLUSION

In a world where the only chauffeur you need is Elon Musk, it is easy to see how robots are the way of the future. The development of artificial intelligence accelerates each day as the fear of a robot revolution echoes throughout society. The rise of AI in the workforce will destroy many jobs, but AI does not have to destroy society too. Shortening the work week has proven effective in creating jobs, and current societal pressure for more flexible work makes now the ideal time to begin implementing such change. First, the government must work together with companies in a voluntary transition to a shorter work week. Once the societal norm has shifted away from a rigid forty-hour week, the legislature must step in and create a comprehensive plan to protect workers and promote equality, targeting workers most affected by AI job loss. Change does not happen at once, but

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[262] Miriam Marra, *Economics of a Four-Day Working Week: Research Shows It Can Save Businesses Money*, THE CONVERSATION (Nov. 11, 2019, 12:01 EST), https://perma.cc/VB5H-GAGF.

[263] *See* Kylie Logan, *A CEO Who Implemented a 4-Day Workweek in July Says Her Company 'Will Never Go Back.' It Boosted Revenue and Morale*, FORTUNE (Dec. 1, 2021, 12:43 PM EST), https://perma.cc/VRQ8-9K5U.

[264] *See* TAA for Automation Act of 2019, S. 3034, 116th Cong. (2019).

[265] *See* Alfred B. Robinson, Jr., *The FLSA After 80 Years, Part II: Eight Decades of the Fair Labor Standards Act*, OGLETREE DEAKINS (July 3, 2018), https://perma.cc/TS4M-BPDM (noting that the FLSA of 1938 provided a gradual increase of minimum wage from twenty-five cents to forty cents over three years).

[266] *See* DAVID COOPER ET AL., RAISING THE FEDERAL MINIMUM WAGE TO $15 BY 2025 WOULD LIFT THE PAY OF 32 MILLION WORKERS (2021), https://perma.cc/TK7W-GWDP (outlining the many reasons why increasing minimum wage would benefit society).

using a shorter work week to minimize the negative impacts of AI allows this change to happen with a purpose. Yes, the robots are coming—but instead of fearing robots taking our jobs, what if we let them?

Animal Victims and the Law: How Massachusetts Can Revise the Courtroom Animal Advocate Program to Better Protect Victims and Defendants

Jane Osick[*]

INTRODUCTION

Sandra was thirty-four before she ever made a friend.[1] Born in Germany in 1986, she was raised by people who did not understand her, and when she became too much trouble, she was shipped off to Argentina.[2] While still in her teens, she gave birth to a son, but with no female role models to follow, she was baffled by motherhood.[3] Eventually, her son was taken from her, and she returned to a life of solitude and boredom.[4] As an orangutan, Sandra should have been living in the treetops of Borneo.[5] But humans had invented zoos, and people were willing to pay money to see a creature like Sandra, who seemed at once so familiar and so foreign.[6] Sandra remained on display for years until a Brazilian animal welfare group managed to get her case before a judge and argued for her release from captivity.[7] In 2015, Judge Elena Liberatori found that Sandra was a "persona no humana" or "non-human person" who was entitled to be

[*] J.D., New England Law | Boston (2023); B.A. and M.A., English, University of California, Irvine. Jane Osick had a rewarding career in education before turning to the study of law. She will begin her second career as a staff attorney for Community Legal Aid's Elder Unit after graduation.

[1] *See Orangutan Granted 'Personhood' Turns 34, Makes New Friend*, AP NEWS (Feb. 16, 2020), https://perma.cc/6WQ6-8XKP.

[2] *See Sandra*, CTR. FOR GREAT APES, https://perma.cc/5EZ2-J84F (last visited Apr. 13, 2023).

[3] *See id.*

[4] *See id.*

[5] *See About Orangutans*, ORANGUTAN OUTREACH, https://perma.cc/VCC8-6PGY (last visited Apr. 13, 2023).

[6] *See id.*

[7] *Orangutan Given Right to Freedom in Argentina*, BBC (Dec. 23, 2014), https://perma.cc/43P9-PMSV.

treated as something more than mere property.[8] To no one's surprise, this apparent leap forward in animal rights was quickly reversed on appeal, and Sandra's liberation was eventually secured under a conventional animal mistreatment statute.[9]

Most animals who generate profit for humans do not get happy endings.[10] Sandra is a rare exception, finding her way back to the trees at Florida's Center for Great Apes, where she and her orangutan friend Jethro now enjoy something like freedom.[11] However, it is unclear how much value the high-profile liberation of a single animal brings to the broader cause of animal rights.[12] On the one hand, Judge Liberatori's decision generated a great deal of publicity, and even the appellate court that overruled her opined that "non-human beings (animals) are entitled to rights, and therefore their protection is required by the corresponding jurisprudence."[13] On the other hand, the Brazilian appellate court's pro-animal position was merely dictum, and the American public's interest in stories of individual rescued animals has yet to translate into a serious reckoning with humans' cruelty towards animals.[14]

Like Argentina, America is not yet ready to grant animals anything

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[8] *See* Shawn Thompson, *Read the Judge's Decision that the Orangutan Sandra is a "Non-Human Person,"* THE INTIMATE APE (Oct. 25, 2015), https://perma.cc/8PLV-4EX3.

[9] *See* Steven Wise, *Sandra: The Plot Thickens*, NONHUMAN RTS. BLOG (Jan. 12, 2015), https://perma.cc/69PY-KRBD.

[10] *See, e.g.*, Jemima Webber, *Landmark Court Case Could Grant 'Happy' the Elephant Human Rights*, PLANT BASED NEWS (May 25, 2022), https://perma.cc/TCE4-AEKB (summarizing the legal fight to liberate an Asian elephant from over forty years of captivity at the Bronx Zoo); *Tilikum: The Whale Who Rebelled*, THE WHALE SANCTUARY PROJECT, https://perma.cc/4JRP-KA6B (last visited Apr. 13, 2023) (recounting Sea World's thirty-four-year exploitation of an orca, which included the animal's killing of its trainer and its eventual death in captivity from persistent lung infections).

[11] *See Sandra*, *supra* note 2.

[12] *Compare* Rachel Fobar, *A Person or a Thing? Inside the Fight for Animal Personhood*, NAT'L GEOGRAPHIC (Aug. 4, 2021), https://perma.cc/H5VL-3TMW (quoting a historian's view that the fight to liberate Happy the Elephant from the Bronx Zoo "is the way ultimately to open the floodgates for all creatures"), *with* Steven Wise, *Update on the Sandra Orangutan Case in Argentina*, NONHUMAN RTS. BLOG (Mar. 6, 2015), https://perma.cc/5SG3-QNCT (noting the Brazilian courts' refusal to grant Sandra the right to habeas corpus even as it appeared to recognize her rights as an individual).

[13] Wise, *supra* note 9.

[14] *See id. See generally* Camila Domonoske, *Jon Stewart and the Runaway Bull: A Tale in 5 Headlines*, NPR (Apr. 2, 2016, 1:57 PM ET), https://perma.cc/3F2M-K3WT (detailing the media's use of excessively humorous language to cover the "adorabull story" of a cow who escaped a slaughterhouse); Julia Shaw, *What the 'Meat Paradox' Reveals About Moral Decision Making*, BBC (Feb. 6, 2019), https://perma.cc/4DCQ-499K (examining how people deal with the "psychological conflict between [their] dietary preference for meat and their moral response to animal suffering" by creating "habits and social structures that make [them] feel better").

approaching legal personhood.[15] It is still true that in every United States jurisdiction, animals are considered property, making them legally more akin to inanimate objects than living beings.[16] However, it is also true that every state has a felony animal cruelty law, and as of 2019, extreme animal cruelty is a federal crime.[17] Connecticut has recently taken a significant step forward in prosecuting animal cruelty with the 2016 passage of Desmond's Law, which allows a court to appoint an "animal advocate" in certain criminal animal abuse cases to advance the "interests of justice."[18] The purpose of the Courtroom Animal Advocate Program ("CAAP") is to educate judges about the damage done to animals and human society by animal abusers.[19] The law arose from a legislative recognition that, despite Connecticut's existing anti-cruelty laws, state courts are ill-equipped to fairly assess all the ramifications of animal abuse.[20]

Part I of this Note will examine Desmond's Law's position in the history of American animal cruelty laws. Part II will identify CAAP's contributions to raising judicial awareness of the dangers of animal abuse, as well as its shortcomings as a judicial tool. Part III will analyze how the compromises required to pass Desmond's Law undermine the goals of animal advocates and endanger a defendant's right to a fair trial. Part IV will propose revisions to CAAP that Massachusetts should consider in adopting the program.

I. Background

A. *History of Animal Cruelty Laws in America*

1. Early Attempts to Address Animal Cruelty

Animal protection laws in America trace their roots to the Massachusetts Bay Colony's 1641 Body of Liberties, which included two provisions preventing animal cruelty.[21] First, the authors created a general prohibition on cruel treatment: "No man shall exercise any Tirranny or Crueltie towards

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[15] *See* Verlyn Klinkenborg, *Animal 'Personhood': Muddled Alternative to Real Protection*, YALE ENV'T 360 (Jan. 30, 2014), https://perma.cc/T7GX-N57W.

[16] *See How Animals Differ from Other Types of "Property" Under the Law*, ANIMAL LEGAL DEF. FUND, https://perma.cc/Z72E-WFXR (last visited Apr. 13, 2023).

[17] *Extreme Animal Cruelty Can Now be Prosecuted as a Federal Crime*, HUMANE SOC'Y LEGIS. FUND (Nov. 5, 2019), https://perma.cc/7M5Z-6LHY.

[18] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[19] *See* Jessica Rubin, *Desmond's Law: Early Impressions of Connecticut's Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. F. 263, 264–65 (2021) [hereinafter Rubin, *Court Advocate Program*].

[20] *See id.* at 264.

[21] NATHANIEL WARD, THE MASSACHUSETTS BODY OF LIBERTIES (1641), *reprinted in* OLD SOUTH LEAFLETS 261, 273 (Boston: Directors of the Old South Work, n.d. 1900), https://perma.cc/GN72-JMLE.

any bruite Creature which are usuallie kept for man's use."[22] Second, the authors created a specific regulation for livestock: "If any man shall have occasion to leade or drive Cattel from place to place that is far off, so that they be weary, or hungry, or fall sick, or lambe, It shall be lawful to rest or refresh them."[23] While it is difficult to know how, or even if, any of the liberties were enforced, the authors clearly intended that the document should govern the colonists: "And such of [the passages] as shall not be altered or repealed they shall stand so ratified, That no man shall infringe them without due punishment."[24]

A strong motivating force behind these provisions was likely the Colony's financial interest in maintaining healthy animals as breeders, both to maintain the food supply and to be used as a trading commodity.[25] Yet the language of both provisions suggests a degree of sympathy for animals, who like the colonists themselves, would not flourish under "tirranny."[26] The states of suffering to which animals' owners must attend—weariness, hunger, illness—are the same that any human colonist might feel.[27] Whatever the economic basis for these two protections, this earliest of Massachusetts laws spoke to an awareness of animals as beings who could suffer and to an acceptance of humans' responsibility to prevent such suffering.[28]

The belief that animals should be legally protected from cruelty was the founding principle of New York's highly influential 1829 animal cruelty statute, which recognized not only cruelty towards another's animal as a property crime, but also cruelty towards any animal, whether owned or not.[29] In 1866, Henry Bergh built on the statute's foundation by chartering the nation's first official animal protection society in New York.[30] Bergh, like many in post-Civil War America, was troubled by the cruelty of which humans were capable, and he saw animal protection as a vehicle for improving Americans' morals.[31] To work towards a better society, Bergh

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[22] *Id.*

[23] *Id.*

[24] *Id.* at 277.

[25] *See* Craig S. Chartier, *Livestock in Plymouth Colony*, PLYMOUTH ARCHEOLOGICAL REDISCOVERY PROJECT, https://perma.cc/36T9-XV3R (last visited Apr. 13, 2023).

[26] *See Do Animals Have Feelings? Examining Empathy in Animals*, UWA ONLINE (Apr. 3, 2019), https://perma.cc/29RE-XZNK.

[27] *See* Fobar, *supra* note 12.

[28] *See* Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 387–88 (2003) (contrasting Immanuel Kant's view of animals as instruments for human use with Jeremy Bentham's position that humans should attend to animals' ability to suffer).

[29] Stephen Iannacone, *Felony Animal Cruelty Laws in New York*, 31 PACE L. REV. 748, 750–51 (2011).

[30] *History of the ASPCA*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, https://perma.cc/PXY5-R6GH (last visited Apr. 13, 2023).

[31] *See* Zach Williams, *The Evolution of Animal Rights*, CITY & ST. N.Y. (Aug. 1, 2019),

lobbied for two key changes in New York's 1829 statute, adding in a negligence component and a prohibition against abandonment of animals.[32]

Two years after Bergh, George Angell and Emily Appleton formed the Massachusetts Society for the Prevention of Cruelty to Animals (MSPCA).[33] Like Bergh, Angell and Appleton saw animal welfare as a key element in improving human morality and lobbied the Massachusetts General Court to pass the Commonwealth's first animal cruelty statute.[34] They also reached out to ordinary citizens, with a particular focus on children, by publishing the magazine *Our Dumb Animals*, as a way "to speak for those who cannot speak for themselves."[35] The MSPCA also adopted a British invention, the "Bands of Mercy," which were groups of schoolchildren who met regularly to sing songs and hear stories celebrating kindness to animals.[36] Among the texts read to the children was George Angell's *Twelve Lessons on Kindness to Animals*, which explicitly linked humans' care for animals to God's love for all creation: "If God *made* the cattle, and *remembers* the cattle, and *causeth the grass to grow* for the cattle, . . . will He not remember those who cruelly treat the cattle, . . . those who, to save the cost of hay, give their cattle so little food in winter that they are half starved[?]"[37] Angell's lessons were meant not only to inspire empathy for animals, but also to motivate children to act as advocates, as the words of the group's pledge reflect: "I will try to be kind to all living creatures, and try to protect them from cruel usage."[38] The Bands of Mercy grew in popularity throughout the late 19th century, expanding beyond simple meetings to include merit awards, essay contests with cash prizes, and public recognition of individual children in their schools and communities.[39] By the early 20th century, the Bands of Mercy numbered nearly 30,000 nationwide.[40]

John Locke articulated this same need to educate children in morality in his 1693 treatise on education, in which he identified the particular problem

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https://perma.cc/D8QY-WTTZ.

[32] *See* Iannacone, *supra* note 29, at 750–52.

[33] *See Historical Timeline*, MSPCA-ANGELL, https://perma.cc/ER6A-4WPJ (last visited Apr. 13, 2023).

[34] *See* Claire Priest, *Enforcing Sympathy: Animal Cruelty Doctrine After the Civil War*, 44 LAW & SOC. INQUIRY 136, 137 (2019); Janet M. Davis, *The History of Animal Protection in the United States*, ORG. OF AM. HISTORIANS, https://perma.cc/77UF-8R87 (last visited Apr. 13, 2023); *see also Historical Timeline*, *supra* note 33.

[35] *Historical Timeline*, *supra* note 33.

[36] *Bands of Mercy - Be Kind: A Visual History of Humane Education*, BE KIND EXHIBIT, https://perma.cc/D8DU-8DVA (last visited Apr. 13, 2023) [hereinafter *Bands of Mercy*].

[37] GEO. T. ANGELL, TWELVE LESSONS ON KINDNESS TO ANIMALS 6 (1889).

[38] *Bands of Mercy*, *supra* note 36.

[39] *See* BERNARD UNTI & BILL DEROSA, *Humane Education Past, Present, and Future*, *in* THE STATE OF THE ANIMALS II: 2003 27, 29 (D.J. Salem & A.N. Rowan eds., 2003).

[40] *Bands of Mercy*, *supra* note 36.

of children's cruelty towards animals.[41] He argued that any child "incline[d] to any such cruelty . . . should be taught the contrary usage."[42] In post-Civil War America, humane societies joined temperance and child protection movements to reframe the education of children as a long-term response to the effects of "cruelty and violence [on] individuals, the family, and the social order."[43] By the late 19th century, as common schools and compulsory education laws spread across America, schools became the best place to deploy "humane education's utility for ensuring public order, suppressing anarchy and radicalism, smoothing relations between the classes, and reducing crime."[44] Thanks to the lobbying of George Angell, Massachusetts passed the first humane instruction mandate in 1886 as part of its existing moral education statute requiring "the teaching of humanity [and] universal benevolence."[45] By 1920, twenty states had humane education requirements, with three imposing sanctions on non-compliant schools.[46]

The combined work of lawmakers and private organizations characterized America's early attempts to deal with animal cruelty.[47] Whether the motivation for awakening human sympathy for animal suffering was economic welfare or broad social improvement, both strains encouraged understanding animals as individuals who could be "learn[ed] about, watched and known for [their] own sake."[48] As the animal rights movement began to emerge in the later twentieth century, private groups' efforts to influence legislatures became more grounded in arguments of animal sentience and the push for animal legal personhood.[49]

2. Modern Attempts to Address Animal Cruelty

Today, every state has a felony animal cruelty statute, but the specifics of what counts as cruelty and what punishments are available vary widely, from incarceration to diversionary programs.[50] Massachusetts has one of the nation's most comprehensive definitions of animal cruelty, covering not only general acts of cruelty to animals, but also specific types of conduct

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[41] *See* UNTI & DEROSA, *supra* note 39, at 27.

[42] UNTI & DEROSA, *supra* note 39, at 27.

[43] UNTI & DEROSA, *supra* note 39, at 29.

[44] UNTI & DEROSA, *supra* note 39, at 28.

[45] MASS. GEN. LAWS ch. 71 § 30 (2022); UNTI & DEROSA, *supra* note 39, at 29.

[46] UNTI & DEROSA, *supra* note 39, at 30.

[47] *See* UNTI & DEROSA, *supra* note 39, at 30.

[48] UNTI & DEROSA, *supra* note 39, at 32.

[49] *See, e.g.*, Nicole Pallotta, *Spain Poised to Recognize Animal Sentience Within Civil Code, Clarifying Animals Are Not "Things,"* ANIMAL LEGAL DEF. FUND (Aug. 18, 2021), https://perma.cc/M73E-AY2Y; *How Animals Differ from Other Types of "Property" Under the Law*, *supra* note 16.

[50] *See* ALLIE PHILLIPS & RANDALL LOCKWOOD, INVESTIGATING & PROSECUTING ANIMAL ABUSE 1, 7 (2013), https://perma.cc/4SV6-WKTB.

(e.g., live animals used as bait, abandonment of live animals) and conduct against specific kinds of animals (e.g., police dogs and horses, wild animals exhibited for profit).[51] The statute provides for up to seven years in state prison and/or a fine of not more than $5,000 for a first offense, and up to ten years in state prison and/or a fine of not more than $10,000 for a second offense.[52] Connecticut's statute addresses many of these same acts; however, convicted animal abusers face up to only one year in prison and/or a fine of up to $1,000 for a first offense, and up to five years and/or a fine of up to $5,000 for a second offense.[53]

Connecticut is far ahead of the curve when it comes to animal advocacy in the courtroom.[54] In 2016, Connecticut passed Desmond's Law, becoming the first state "to give animals a voice [in the courtroom] and . . . provide courts with tools" to make informed rulings in criminal animal abuse cases.[55] The most significant of these tools is the power to appoint an "animal advocate" who represents "the interests of justice" in dog- or cat-abuse cases.[56] The advocate's role is to: (1) monitor the case; (2) provide information that could aid the fact finder and review records relating to the animal victim; (3) attend hearings; and (4) present recommendations to the court.[57] As the model for what is now known as the Courtroom Animal Advocate Program, Desmond's Law has drawn the outlines for an advocate who speaks for animal victims' unique needs, such as the need to foster offspring of an animal held as evidence or the need to find specialty rehabilitation facilities for dogs used in dog fighting.[58] The advocate's contributions help courts reach "fair and specific outcomes that focus on the defendant's accountability and the animal victim's experience."[59] Following the passage of Desmond's Law, Maine enacted its version called Franky's Law in 2019, which is nearly identical to Connecticut's law.[60] In New Jersey, a similar bill passed the Senate in February 2021 and is currently in Assembly.[61]

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[51] MASS. GEN. LAWS ch. 272 §§ 77, 77A, 77B (2018).

[52] *Id.* § 77.

[53] CONN. GEN. STAT. § 53-247(a)–(e) (2016).

[54] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 264.

[55] Rubin, *Court Advocate Program*, *supra* note 19, at 264.

[56] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30(a) (codified as CONN. GEN. STAT. § 54-86n (2018)).

[57] *Id.*

[58] *See Courtroom Animal Advocate Programs (CAAP)*, ANIMAL LEGAL DEF. FUND, https://perma.cc/N9BM-8XZY (last visited Apr. 13, 2023) [hereinafter *CAAP*].

[59] Rubin, *Court Advocate Program*, *supra* note 19, at 267.

[60] *See* ME. REV. STAT. ANN. 7 § 4016 (2019).

[61] *See Courtroom Animal Advocate Bill Passes New Jersey Senate*, ANIMAL LEGAL DEF. FUND (Feb. 19, 2021), https://perma.cc/UA39-8P5S.

II. While CAAP Raises Judicial Awareness of the Specific Social Threat of Animal Abuse, its Vague Outlines Undermine its Effectiveness

The last few decades have seen a growing awareness of the need for more thorough prosecution of animal abuse because of its demonstrated link to interpersonal violence.[62] A 1997 study done by MSPCA found that "animal abusers are in fact five times as likely to also harm other humans."[63] More recently, scholarly attention has turned to how abusers use animal cruelty as a way to control intimate partners and children.[64] As more and more studies have demonstrated these links, law enforcement has responded with better crime tracking and improved officer training on both the state and federal levels.[65]

Adoption of CAAP keeps the courts in step with this trend.[66] Beyond merely ensuring that courts acknowledge an animal victim's interests, CAAP advocates contribute legal analysis of a case's specific facts that the prosecutor may not understand or have the resources to investigate.[67] Desmond's Law requires that Connecticut's Department of Agriculture "maintain a list of attorneys with knowledge of animal issues and the legal system," as well as a list of law schools with students interested in animal law who would serve on a voluntary basis.[68] As a result, CAAP has the added practical benefit of providing "meaningful work and training for lawyers and law students who serve as [a]dvocates."[69] Finally, courts' use of CAAP advocates brings the topic of animal sentience into the discussion of animals' legal status.[70] While legal personhood is still a very far-off goal, expanding the courts' understanding of animal abuse as more than just a property crime is an important first step in changing legal attitudes.[71]

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[62] *See* NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, RESOLUTION REGARDING ANIMAL CRUELTY AND ITS LINKS TO OTHER FORMS OF VIOLENCE (2019), https://perma.cc/72P4-WF5E.

[63] *The Link Between Cruelty to Animals and Violence Toward Humans*, ANIMAL LEGAL DEF. FUND, https://perma.cc/X628-27X9 (last visited Apr. 13, 2023); *see* Phillips & Lockwood, *supra* note 50, at 9.

[64] *See* BATTERED WOMEN'S JUST. PROJECT, UNDERSTANDING ANIMAL ABUSE AS INTIMATE PARTNER VIOLENCE (2017), https://perma.cc/H932-UW55 .

[65] *See* NAT'L SHERIFFS' ASS'N, ANIMAL CRUELTY AS A GATEWAY CRIME 21–22 (2018), https://perma.cc/U4YQ-W4MN; *Tracking Animal Cruelty: FBI Collecting Data on Crimes Against Animals*, FED. BUREAU OF INVESTIGATION (Feb. 1, 2016), https://perma.cc/A2XJ-JCTU.

[66] *See* CAAP, *supra* note 58.

[67] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 265–66; Phillips & Lockwood, *supra* note 50, at 36.

[68] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30(c) (codified as CONN. GEN. STAT. § 54-86n (2018)).

[69] Rubin, *Court Advocate Program*, *supra* note 19, at 265.

[70] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 265.

[71] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 265.

For all its potential benefits, Desmond's Law is not without its critics.[72] Beyond the obvious—advocates are available only for cases involving abuse of dogs and cats—the law's language has carved out a dangerously imprecise space for advocates.[73] Speaking neither for the state nor for the animal as an individual victim, the advocates of Desmond's Law represent the ill-defined "interests of justice."[74] Critics have argued that such a vague definition of the advocate's role actually suggests a reluctance to recognize animals as having their own legal interests, even as CAAP as a whole tries to protect animals and hold abusers accountable.[75] Much like the story of Sandra the orangutan, CAAP may make people feel better about even fatal outcomes for animals in abuse cases, but it may not provide any significant advances for animals' legal status.[76]

A second problem resulting from the advocate's unusual position as a general voice of justice is the danger such a voice poses to the defendant.[77] The advocate provides information to the judge in open court (and to the prosecutors in preparation for trial) but is not subject to cross examination by the defense.[78] Thus, the advocate has the potential to create another level of unconscious bias against the defendant.[79] In a system that still sees animals as property, framing them as crime victims may do nothing to advance their legal standing but may do quite a lot to contribute to more policing, felony convictions, and incarceration.[80]

While Desmond's Law, and the Maine and New Jersey versions that followed, mark an important judicial step towards recognizing the unique legal position of sentient nonhuman animals—not fully legal "persons" but something more than mere property—any subsequent adoption of CAAP must grapple with the law's shortcomings if further progress is to be made.[81] As the state historically positioned to build on Desmond's Law, Massachusetts must confront two problems of the current version of CAAP: (1) the limitation of CAAP representation to abuse cases involving dogs and

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[72] *See, e.g.*, JUSTIN MARCEAU, BEYOND CAGES: ANIMAL LAW & CRIMINAL PUNISHMENT 25–26 (2019) (arguing that the modern animal rights movement has adopted criminal punishment as the cornerstone of its philosophy).

[73] *See* Nila Bala, *Desmond's Law: Imprecise Language Makes for Inadequate Advocacy*, HARV. J. ON LEGIS. (2018), https://perma.cc/ZJ9V-HCM2.

[74] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[75] *See* Bala, *supra* note 73.

[76] *See* Bala, *supra* note 73.

[77] *See* Elaine S. Povich, *Advocates Stand Up in Court for Abused Animals*, PEW CHARITABLE TRUSTS: STATELINE, https://perma.cc/2MFF-YBQH (last updated Feb. 25, 2019).

[78] *See id.*

[79] *See id.*

[80] *See* Justin Marceau, *Animal Rights and the Victimhood Trap*, 63 ARIZ. L. REV. 731, 734 (2021).

[81] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 274–75.

cats; and (2) the dangers posed to both animal victims and human defendants by the advocate's uncertain position in legal proceedings.[82]

ANALYSIS

III. The Passage of Desmond's Law Required Compromises that Limit CAAP's Effectiveness at Protecting Animals and Endanger Defendants' Rights to a Fair Trial

A. *The Exclusion of Farmed Animals from CAAP Eligibility Excludes the Largest Group of Animals Subject to Wide-Scale Abuse*

In its initial form, Desmond's Law permitted the appointment of a CAAP advocate in cases involving abuse of any animal.[83] As the original bill progressed through the legislature, however, lawmakers from Connecticut's rural areas raised concerns about its broad scope.[84] The main concern was the impact Desmond's Law could have on animal agriculture, specifically the operations of Connecticut's dairy industry whose 2020 cash receipts totaled over $70 million.[85] The dairy industry has long been a target of animal advocates who see it as among the most unnatural and abusive of all forms of animal farming.[86] Nearly wholly dependent on artificial insemination and selective breeding, dairy farms routinely treat cows like machines and newborn calves as impediments to a higher per-cow milk yield.[87] To protect the interests of dairy farmers and other producers of animal products in the state, legislators dramatically limited the eligibility for CAAP to abuse cases involving only dogs and cats.[88]

Jessica Rubin, the Director of the University of Connecticut Law School's Animal Law Clinic and the driving force behind Desmond's Law, characterizes this limitation as a "frustrating shortcoming."[89] Frustrating indeed, as this limitation means that the animals most likely to be openly (and secretly) abused are those most openly excluded from even the limited legal voice granted by CAAP advocates.[90] This exclusion of farm animals

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[82] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 274–75.

[83] Jessica Rubin, *Desmond's Law: A Novel Approach to Animal Advocacy*, 24 ANIMAL L. 243, 253 (2018) [hereinafter Rubin, *Animal Advocacy*].

[84] *Id.* at 253–54.

[85] *Cash Receipts by Commodity State Ranking: 2020*, U.S. DEP'T OF AGRIC., https://perma.cc/3UHC-MNHB (last updated Feb. 7, 2023).

[86] *See, e.g.*, Deidre Wicks, *Demystifying Dairy*, 7 ANIMAL STUD. J. 45, 46 (2018).

[87] *Animal Legal Defense Fund Sues Tillamook for Deceptive Advertising*, ANIMAL LEGAL DEF. FUND (Aug. 19, 2019), https://perma.cc/WA88-ZYEZ.

[88] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[89] Rubin, *Animal Advocacy*, *supra* note 83, at 254.

[90] *Farmed Animals: Farmed Animals and the Law*, ANIMAL LEGAL DEF. FUND,

from CAAP eligibility has the same goal as traditional "ag-gag" laws that punish animal activists who go undercover on factory farms: to keep the public in the dark about the realities of animal agriculture.[91] Had Desmond's Law passed without an exemption for livestock, the number of lawsuits against dairy farms (or any animal product producer in Connecticut) would not have increased since CAAP does not change federal or state laws governing animal agriculture.[92] Rather, CAAP's danger to animal agriculture lies simply in what it suggests about animals' status as victims.[93] If the legislature grants *every* animal the right to an advocate, society has moved one step closer to reassessing what is permissible treatment for livestock, and thus one step closer to rethinking current animal agriculture legislation.[94]

That rethinking is already happening.[95] For example, California and New York City have passed bans on the sale of foie gras, which is made from the liver of geese or ducks that have been cruelly force-fed.[96] Ten states have passed laws banning the use of extreme confinement crates for pigs and hens, and Massachusetts and California now prohibit the sale of eggs and meat from animals held in extreme confinement, including products shipped from other states.[97] And perhaps most concerning to animal producers, the market for plant-based meats is only increasing in popularity, with nearly eighty million Americans purchasing meat alternatives in 2020.[98] The growing interest in animal welfare and the push to strengthen laws governing farmed animals' living conditions are significant threats to animal agriculture; the explicit exclusion of livestock from Desmond's Law is an attempt to keep those threats at bay by limiting judicial understanding of farmed animals as victims of abuse.[99]

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https://perma.cc/BF37-72M7 (last visited Apr. 13, 2023).

[91] *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, https://perma.cc/3VNE-28XQ (last visited Apr. 13, 2023).

[92] *See, e.g.*, Humane Methods, 7 U.S.C. § 1902 (amended 1978) (requiring the complete sedation of a non-poultry animal prior to slaughter as a means of decreasing suffering).

[93] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 266–67.

[94] *See, e.g.*, *Farm Animal Confinement Bans by State*, ASPCA, https://perma.cc/MK4B-TR82 (last visited Apr. 13, 2023).

[95] *See id.*

[96] Josh Voorhees, *The Final Days of Foie Gras?*, MOD. FARMER (June 11, 2021), https://perma.cc/4GC2-NQMS.

[97] Kenny Torrella, *The Fight Over Cage-Free Eggs and Bacon in California, Explained*, VOX (Aug. 10, 2021, 8:10 AM EDT), https://perma.cc/4J9W-AXJF; Christian M. Wade, *Baker Signs Tweaked Voter-Approved Chicken Cage Law*, GLOUCESTER DAILY TIMES (Dec. 22, 2021), https://perma.cc/H2F4-3EZK.

[98] Nils-Gerrit Wunsch, *Meat Substitutes Market in the U.S. - Statistics and Facts*, STATISTA (Nov. 29, 2021), https://perma.cc/V8MQ-Q2LV.

[99] *See, e.g.*, *USDA to Proactively Post Slaughter Records to Settle Lawsuit by AWI, Farm Sanctuary*, FARM SANCTUARY (Jan. 4, 2022), https://perma.cc/7D7P-WFM4 (summarizing a legal victory for

B. *The Limitation of CAAP Eligibility to Dogs and Cats Excludes Animals Used in Businesses Other Than Animal Agriculture*

The 2013 documentary *Blackfish* chronicled SeaWorld's practice of capturing orcas in the wild and the animals' subsequent cruel confinement that led to the deaths of several people, including an experienced SeaWorld trainer.[100] According to PETA, which has waged a years-long campaign against the company, "SeaWorld teaches the public the wrong lesson: that animals are ours to do with as we please."[101] Of course, SeaWorld is not alone in teaching this lesson about captive animals forced to perform for human enjoyment.[102] Rodeos are enormously popular in many states, with more than 600 rodeos recognized by the Professional Rodeo Cowboys Association.[103] Carriage horse rides are a staple of tourist entertainment in many cities.[104] More than 700 million people worldwide visit zoos and aquariums every year.[105]

However, unlike livestock, some animals used in entertainment are protected by the federal Animal Welfare Act, which establishes minimal requirements for housing, food and sanitation.[106] In addition, states have created their own protections for animals used or exhibited for profit, such as New York's law prohibiting the use of carriage horses when the temperature exceeds ninety degrees Fahrenheit.[107] Despite these existing legal protections, Desmond's Law explicitly excludes captive animals and animals used or exhibited for profit from CAAP eligibility.[108]

The reason for this exclusion is the same as that which motivated the livestock exclusion—the fear of judicial awareness of animal suffering—but the arguments are more nuanced.[109] Take for example the situation of New

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animal advocates regarding transparency of inhumane conditions at U.S. slaughterhouses).

[100] BLACKFISH (CNN Films 2013).

[101] *About PETA's Campaign to Save the Whales and Dolphins at SeaWorld*, PETA, https://perma.cc/9F7V-NTJ6 (last visited Apr. 13, 2023).

[102] *See, e.g.*, Ron Beadle, *Why America's Most Famous Circus Was Destined to Fail*, THE CONVERSATION (Jan. 18, 2017, 7:21 AM EST), https://perma.cc/HK3A-CE4J (summarizing the history of Ringling Bros. and Barnum & Bailey and its reliance on exotic animal acts).

[103] JHREA, *The Economy of Rodeo*, W. RANCHES (Aug. 8, 2019), https://perma.cc/6L9B-536Q.

[104] Holly Cheever, *The Urban Carriage Horse Ride: A 21st Century Anachronism*, HUMANE SOC'Y VETERINARY MED. ASS'N (Feb. 19, 2014), https://perma.cc/6YN6-VU5Z.

[105] *WAZA Members*, WORLD ASS'N OF ZOOS & AQUARIUMS, https://perma.cc/C4F3-7TEQ (last visited Apr. 13, 2023).

[106] Animal Welfare Act, Pub. L. No. 89-544, 80 Stat. 350 (2018).

[107] *NYC Passes PETA-Backed Law That Protects Horses from Deadly Summer Heat*, PETA, https://perma.cc/JRU8-JSNE (last updated Nov. 30, 2022).

[108] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[109] *See Captive Animals*, ANIMAL LEGAL DEF. FUND, https://perma.cc/42XM-H7SV (last visited Apr. 13, 2023).

York City carriage horses, who are already protected by a number of specific regulations.[110] In addition to general requirements for adequate food and water, the horses must be registered with the city and seen twice a year by a vet; their stalls must be at least sixty square feet so that the horses can safely turn around; they cannot work for more than nine hours a day; and they must get at least five weeks of furlough every year.[111] Yet, animal advocates argue that laws governing the physical care of carriage horses have no impact on the animals' psychological suffering.[112] For all their strength, horses are prey animals with a "highly developed and effective flight drive triggered when startled by an unexpected or threatening stimulus," such as loud traffic noises common in urban settings.[113] Unlike police horses, who have large exercise rings, carriage horses are stabled individually and are not required to be turned out for relaxation periods with other horses.[114] To provide CAAP protection for horses, or for any of the many kinds of animals that humans exploit for economic gain, is to prod people to think about animals as sentient beings who can suffer physical *and* psychological harms.[115] A road that begins with understanding that some animals would never choose the life humans have created for them ends with people having to find new ways of earning a living.[116]

C. *The Limitation of CAAP Eligibility to Dogs and Cats Excludes Animals Routinely Kept as Pets Who Are Equally Likely to be Victims of Abuse*

The most nonsensical exclusion from CAAP eligibility is animals other than dogs and cats kept as pets in American homes.[117] One reason for this exclusion could be that Desmond's Law always had the narrow goal of responding to the abuse and killing of a dog.[118]

Desmond was a boxer/pit bull mix who was surrendered to a Connecticut animal shelter in 2011 when his owner feared he might be

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[110] *See* N.Y.C. Admin. Code §§ 17-326–334.1 (2020).

[111] *Id.*; *see also* Natasha Daly, *The Bitter Controversy Surrounding NYC's Carriage Horse Industry*, NAT'L GEOGRAPHIC (Mar. 26, 2020), https://perma.cc/2VRW-HQ2U.

[112] *See* Daly, *supra* note 111.

[113] Cheever, *supra* note 104.

[114] Cheever, *supra* note 104; Daly, *supra* note 111; Anna Haines, *Why Should You Keep Your Horse in a Herd?*, HORSE & RIDER, https://perma.cc/GA29-U3XV (last visited Apr. 13, 2023).

[115] *See, e.g.*, Commonwealth v. Duncan, 467 Mass. 746, 747 (2014) (holding that "animals, like humans" deserve protection of emergency aid exception to constitutional warrant requirement).

[116] *See, e.g.*, Gordon Atkins, *22 Profitable Animals You Should Raise*, NEW LIFE ON A HOMESTEAD (Mar. 8, 2023), https://perma.cc/WU7F-ZG2X ("Alligators are super cute when tiny, so there's a hefty profit to be made by breeding them for this market. The animal meat, though, is where the real profit is.").

[117] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[118] Rubin, *Court Advocate Program*, *supra* note 19, at 263.

dangerous to her newborn baby.[119] While she and the baby's father, Alex Wullaert, were fighting over custody and support, Wullaert found Desmond at the shelter and adopted him.[120] A year later, Desmond's body was discovered stuffed in a trash bag, with clear signs of long-term neglect and extreme physical abuse.[121] Despite overwhelming evidence (including a confession) that Wullaert had tortured and killed Desmond, as well as abused his ex-girlfriend, the court ignored the prosecutor's request for jail time and sentenced him to a diversionary program.[122] This light sentence was no fluke; "between 2008 and 2018, only one in five of those charged with animal cruelty in Connecticut had their cases prosecuted to a conclusion."[123] Desmond's Law was the first attempt in the nation to respond to the under-enforcement of anti-cruelty laws in general, but it arose out of the specifics of Wullaert's intentional and extreme abuse of an individual dog.[124]

The limitation of CAAP to dogs and cats also could make sense given that dogs and cats are by far the most common household pets, with a 2017 survey estimating that American households kept over seventy million dogs and nearly sixty million cats as companion animals.[125] However, Americans are nothing if not adventurous in their pet possibilities; one recent survey reported ownership of huge numbers of pet fish (11.8 million), birds (9.9 million), small animals (6.2 million), reptiles (5.7 million), and horses (3.5 million).[126] There is no reason to assume that these types of animals would not equally be victims of the same kind of abuse as dogs and cats, and in fact they may be even more commonly abused because of their unique needs.[127] Dogs and cats have been living domesticated lives among humans for at least ten thousand years.[128] In that time, humans have learned how to feed and care for them in ways that extend their lifespans, and have even intentionally altered their very bodies and personalities to better suit human needs and preferences.[129] However, non-traditional pets, such as reptiles and

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[119] *The Story of Desmond and His Army*, DESMOND'S ARMY ANIMAL L. ADVOCS., https://perma.cc/4P5K-7UNT (last visited Apr. 13, 2023).

[120] *Id.*

[121] *Id.*

[122] Rubin, *Court Advocate Program*, *supra* note 19, at 263.

[123] Rubin, *Court Advocate Program*, *supra* note 19, at 263.

[124] Rubin, *Animal Advocacy*, *supra* note 83, at 244–45.

[125] *U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS'N, https://perma.cc/2WXM-8L9X (last visited Apr. 13, 2023).

[126] *Facts + Statistics: Pet Ownership and Insurance*, INS. INFO. INST., https://perma.cc/D82T-G44Y (last visited Apr. 13, 2023).

[127] *See* Allison Matyus, *Exotic Pets Require Different Types of Care*, CHI. TRIB. (July 1, 2015, 4:16 PM), https://perma.cc/4P8X-AKUU.

[128] Ed Yong, *A New Origin Story for Dogs*, THE ATL. (June 2, 2016), https://perma.cc/R2YS-Q3EY; David Zax, *A Brief History of House Cats*, SMITHSONIAN MAG. (June 30, 2007), https://perma.cc/TUV9-6WSF.

[129] Malcolm Weir & Lynn Buzhardt, *Designer Dog Breeds*, VCA ANIMAL HOSP.,

birds, often require more expensive and elaborate support, as well as vet care that can be hard to find.[130] Failing to provide an animal the conditions it needs to flourish does not rise to the level of intentional harm that prompted the passage of Desmond's Law, but it could result in the same kind of physical and psychological damage to the animal victim.[131]

Without the economic pressures that accompany treatment of livestock or entertainment-use animals, extending CAAP eligibility to non-traditional pets is an effective way of encouraging owners to educate themselves about what their particular pets need.[132] However, extending that protection would require society to decide which companion animals it believes deserve inclusion.[133] Arguably, the more unusual the pet, the more useful the CAAP advocate would be to a court likely unfamiliar with the animal's unique needs.[134] At the same time, opening up eligibility to all of the many animals that could legally be owned as pets might drive courts down a rabbit hole of more and more specialized situations.[135] Nevertheless, there is simply no logical reason for CAAP to include cats but exclude ferrets; if a CAAP state permits a resident to keep both as a pet, it must also be willing to give both animals the same access to CAAP representation.[136]

D. *The Imprecise Definition of the CAAP Advocate's Position Hinders Advancement of Animals' Legal Status*

Although Desmond's Law does not require the appointment of a CAAP advocate in eligible cases, it appears to be a popular choice for courts.[137] As

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https://perma.cc/7D3X-ULV2 (last visited Apr. 13, 2023) ("Intentional mixing of breeds optimizes the best characteristics of each parent.").

[130] *Caring for Reptiles and Other Exotic Pets*, RSPCA, https://perma.cc/75GV-GENZ (last visited Apr. 13, 2023).

[131] *See* Laurie Hess, *10 Things You Should Know Before Getting a Ferret*, VETSTREET (Mar. 1, 2015), https://perma.cc/VH6Z-YP83 (noting the extreme exercise and social needs of ferrets).

[132] *See Which Animals Are Hardest to Treat?*, TUTTNAUER (Sept. 23, 2018), https://perma.cc/PN4T-H9Y6.

[133] *See The Animal Welfare Act: What It Does and Who It Protects*, THE HUMANE LEAGUE (Jan. 21, 2021), https://perma.cc/TZF6-2GV2 (noting the many animals excluded from federal protections against inhumane treatment); *see also* Nicole Pallotta, *Animal Cruelty Charges Dropped Because Fish Are Not "Animals" Under North Carolina Law*, ANIMAL LEGAL DEF. FUND (June 11, 2019), https://perma.cc/S652-B4RV.

[134] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 267 (explaining "[a]dvocates contribute expertise to recommend fair and specific outcomes").

[135] *See, e.g.*, Pet Ownership in Public Housing, PIH 3 (HUD Dec. 2020), https://perma.cc/4KLU-4DAG ("[S]ome PHAs have defined common household pets to include domesticated animals such as a dog, cat, bird, rodent (including a rabbit), fish, or turtle, that is traditionally kept in the home for pleasure rather than for commercial purposes.").

[136] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 254 (arguing that the limitation of Desmond's Law to dogs and cats is a "frustrating shortcoming").

[137] Rubin, *Animal Advocacy*, *supra* note 83, at 254.

of November 2020, student advocates from the University of Connecticut's Animal Law Clinic alone have appeared in forty animal abuse cases, and statewide, only one court to date has declined to appoint an advocate in a case where a party made the request.[138] It is certainly a law that would appeal to busy courts and prosecutors as it permits advocates to "consult any individual with information that could aid the judge," including "animal control officers, veterinarians[,] and police officers."[139] Advocates perform research, present written recommendations to the court, and appear in court to explain their findings, all at no cost to the state.[140]

In its initial form, Desmond's Law precisely defined the advocate's job as representing the animal victim, but this wording was soon changed to representing the "interests of justice."[141] The change was necessary to avoid creating legal standing for the animal victim, something no American court has ever permitted.[142] Indeed, the Connecticut Veterinary Medical Association and the Connecticut Federation of Dog Clubs and Responsible Dog Owners strongly opposed the original wording.[143] These groups argued that allowing animals their own advocate would fundamentally change the relationship between pets and their owners, and potentially dilute humans' property rights over their pets.[144] Supporters of Desmond's Law dismiss worries about the changed wording and focus instead on how the law supports "vigorous enforcement of anti-cruelty statutes," regardless of the legal particularities of who represents whom and how far that representation extends.[145] In their view, "the interests of justice" phrasing may result in even more successful outcomes because it "allows an advocate and a court to consider a broader range of interests, including those of community safety and other potential victims."[146]

Critics of Desmond's Law's compromised language argue that the imprecise definition of the advocate's role in legal proceedings undermines the larger project of securing animals' legal rights.[147] Framing the advocate's relationship to the animal victim in terms that elide the very presence of the victim reflects not an improvement to what can be accomplished for animals

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[138] Rubin, *Court Advocate Program*, *supra* note 19, at 268; Rubin, *Animal Advocacy*, *supra* note 83, at 254.

[139] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[140] Rubin, *Animal Advocacy*, *supra* note 83, at 257.

[141] Rubin, *Animal Advocacy*, *supra* note 83, at 254.

[142] Rubin, *Animal Advocacy*, *supra* note 83, at 254.

[143] Bala, *supra* note 73.

[144] Jessica Rubin, *How Dogs and Cats Can Get Their Day in Court*, THE CONVERSATION (Nov. 2, 2017, 7:39 PM EDT), https://perma.cc/2X22-N4F3.

[145] *Id.*

[146] Rubin, *Animal Advocacy*, *supra* note 83, at 254.

[147] Bala, *supra* note 73.

but rather an "underlying fear of giving animals too much of a voice."[148] In so doing, Desmond's Law made a fatal compromise that has only strengthened the judicial perception of animals as a type of property.[149] While the animal victim's interests may be intertwined to some degree with humans' interests, it is the latter that governs.[150] The CAAP advocate represents the "interests of justice" in a case against a human being, and the animal's suffering is relevant insofar as it helps a court determine what justice demands as punishment for the human defendant.[151] This derivative value system, in which the animal's value is tied to what it can do for people, may indeed result in more convictions and longer sentences for animal abusers, but it does little to advance a judicial valuing of an animal's independent interests.[152]

The criticism of Desmond's Law's limitations may be misplaced given the law's purpose as an animal welfare statute rather than an animal rights statute.[153] In other words, it advocates for the humane treatment of animals without trying to convince courts that animals have "inherent, legal rights that are equal to humans' legal rights."[154] While the advocate's work may raise judicial awareness of animals' individual suffering, CAAP aims to increase convictions for abusers and fix sentencing imbalances.[155]

There is an intermediate step that the authors of Desmond's Law could have pursued to advance the goals of both animal rights and animal welfare groups: the creation of a guardian ad litem ("GAL") for an animal victim.[156] While many news reports about Desmond's Law initially defined CAAP advocates as guardians, the positions are not identical.[157] Both a CAAP advocate and a GAL can be appointed by the court to gather and report facts

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[148] Bala, *supra* note 73.

[149] See Amie J. Dryden, Comment, *Overcoming the Inadequacies of Animal Cruelty Statutes and the Property-Based View of Animals*, 38 IDAHO L. REV. 177, 181 (2001).

[150] *See id.* at 191–92 (noting the many exemptions from cruelty statutes for types of animals or types of activities associated with animals).

[151] *See* Kelsey Kobil, Comment, *When It Comes to Standing, Two Legs are Better Than Four*, 120 PENN ST. L. REV. 621, 626 (2015) ("Courts and lawmakers alike have long recognized that animals should be treated as property in accordance with the law.").

[152] *See* MARCEAU, *supra* note 72, at 79 ("[It] seems very likely that the presence of skilled . . . attorneys . . . will impact the disposition of many cruelty cases, if for no other reason than that the judge is forced to understand that members of the community, and even parties in addition to the prosecutor's office, desire incarceration.").

[153] *See* Kobil, *supra* note 151, at 623.

[154] Kobil, *supra* note 151, at 623.

[155] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 245.

[156] *See* Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. 69, 70 (2008).

[157] *See* Nicole Pallotta, *Unique Connecticut Law Allows Court-Appointed Advocates to Represent Animals*, ANIMAL LEGAL DEF. FUND, https://perma.cc/5VMD-G42K (last visited Apr. 13, 2023).

and research relevant to the case.[158] However, unlike a CAAP advocate, a GAL appointed as a "next friend," can actually represent the interests of the protected person; for example, a GAL would represent the interests of a minor child in a custody or adoption case, reporting to the court on the advantages and disadvantages of courses of action affecting the child.[159] The standard in such cases is the best interests of the protected person.[160] The CAAP advocate, on the other hand, can never represent the animal victim's interests, even if that animal has survived the abuse.[161] Representing instead the "interests of justice" and speaking as a supposed neutral party, the CAAP advocate's purpose is limited to helping the court decide what will happen to the human defendant.[162]

This difference in neutrality between the GAL and the CAAP advocate is important because it maintains animals' status as quasi property rather than legal persons.[163] However, there is a well-known and highly successful precedent for something like the GAL option in animal abuse cases: the appointment of a guardian/special master for the approximately fifty pit bulls seized in 2007 from Michael Vick's Bad Newz Kennels.[164] Because of the case's high profile and extremely disturbing facts, the dogs' situation drew nationwide attention from respected animal organizations such as the American Society for the Protection of Cruelty to Animals (ASPCA) and Best Friends Animal Sanctuary; this attention, combined with the complexity of the federal criminal and civil charges, resulted in the unusual appointment of Rebecca Huss as the dogs' guardian.[165] Huss's goal was to ensure that "each dog be considered as an individual" and that each dog be matched with a rescue organization that fit the dog's particular needs.[166] The court's willingness to appoint a guardian in such a case suggested a concomitant willingness to see the dogs as individual victims with unique injuries that the court needed help to understand.[167]

Had Desmond's Law built on this precedent and framed the CAAP

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[158] *See* SEAN M. DUNPHY, STANDARDS FOR CATEGORY F GUARDIAN AD LITEM INVESTIGATORS 2–3 (2005), https://perma.cc/W87U-EXLJ.

[159] MASS. GEN. LAWS ch. 190B, § 1-404 (2012); *see also* COURTNEY M. HOSTETLER & JAMIE A. SABINO, *Guardian Ad Litem*, *in* FAMILY LAW ADVOCACY FOR LOW AND MODERATE INCOME LITIGANTS 305, 306 (3rd ed. 2018).

[160] *See* HOSTETLER & SABINO, *supra* note 159, at 306.

[161] *See* Pallotta, *supra* note 157.

[162] *See* MARCEAU, *supra* note 72, at 80 ("[I]t is not clear whether the system entrenches greater respect for animal autonomy, or merely a greater likelihood of incarceration.").

[163] *See* David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747, 775 (1995) ("[O]ur legal system simply was not designed to resolve interspecies disputes.").

[164] Huss, *supra* note 156, at 70.

[165] Huss, *supra* note 156, at 82–83.

[166] Huss, *supra* note 156, at 78.

[167] *See* Pallotta, *supra* note 157.

advocate in traditional judicial terms, it might have done more to "specifically position the advocates as prioritizing the needs of animal victims."[168] Instead, the CAAP advocate inhabits an uncertain middle ground, "shar[ing] the same responsibility as prosecutors" without the prosecutor's defined relationship to the proceedings.[169] This strange position results in part from the fact that the law generally does not recognize animals as victims since they are not legal persons.[170] A recent Washington case, *State v. Abdi-Issa*, illustrates the confusing effects of this exclusion.[171] In that case, Abdi-Issa was charged with animal cruelty for abusing and killing his girlfriend's dog, a chiweenie named Mona, during a violent argument in public.[172] The vicious attack, which involved beating and kicking, was witnessed by a third party who was traumatized by the event.[173] The jury found that (1) both Mona and her owner were victims and (2) the foreseeable impact on someone other than the victim (i.e., the witness) permitted a sentencing enhancement under the state's Sentencing Reform Act ("SRA").[174] Abdi-Issa was convicted of first-degree animal cruelty and sentenced to eighteen months of confinement.[175] In addition, the judge found that the conviction could be assigned a domestic violence designation, which allowed the judge to issue a protection order for the owner.[176]

The Appellate Court reversed, concluding that because state law defined "victim" as a "person," Mona—despite having received the actual beating and kicking and having died as a result—could not be a victim.[177] The Court also concluded that the owner was not a victim of animal cruelty, since she had only a property interest in Mona and the state had not charged Abdi-Issa with destruction of personal property.[178] Since Mona, although quite dead, could not be a victim, and her owner could not be a victim under the applicable animal cruelty statute, Abdi-Issa's contention that this was a

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[168] Pallotta, *supra* note 157.

[169] Pallotta, *supra* note 157.

[170] *Contra* People v. Harris, 405 P.3d 361, 372 (Colo. App. 2016) (noting that the "unit of prosecution" in animal cruelty statutes is each individual animal victim); State v. Fessenden, 333 P.3d 278, 286 (Or. 2014) (concluding animals are victims under animal welfare statutes).

[171] State v. Abdi-Issa, No. 80024-8-1, 2021 WL 595085, at *3, 5 (Wash. Ct. App. Feb. 16, 2021).

[172] *Id.* at *1–2.

[173] *Id.* at *1.

[174] *Washington State Supreme Court Rules Animal Cruelty Can Be a Crime of Domestic Violence*, ANIMAL LEGAL DEF. FUND (Mar. 9, 2022), https://perma.cc/8VGG-M76Q [hereinafter *Domestic Violence*].

[175] *Abdi-Issa*, 2021 WL 595085 at *2.

[176] *Id.*; WASH. REV. CODE § 10.99.040 (1979).

[177] *Abdi-Issa*, 2021 WL 595085 at *3; s*ee also* WASH. REV. CODE § 9.94A.030 (2021) (confining definition of "victim" to "any person").

[178] *Abdi-Issa*, 2021 WL 595085 at *4 ("[W]e consider pets personal property as a matter of law.").

"victimless crime[]" appeared to have prevailed.[179] In addition, since there was no victim, no sentencing enhancement was allowed under the SRA.[180] In February 2022, the Washington Supreme Court reversed in part, concluding that Mona's owner and the witness were indeed victims who suffered "emotional, psychological, physical, or financial injury to person or property as a direct result of the crime charged."[181] Mona herself remained just as dead and just as unrecognized as a victim.[182]

The back-and-forth of the Washington courts reveals an uncertainty among lawmakers and judges over how to deal with people who harm or kill animals and how to compensate others harmed by animal abuse.[183] It seems absurd to conclude that a dead dog cannot be a victim of a human's cruel acts, especially when there are statutes that define corporations or governmental agencies as victims.[184] Yet, without that legally recognized status, a CAAP advocate cannot fully represent an animal, a defendant cannot fully take responsibility, and a court cannot fully adjudicate all the genuine interests at issue.[185] Until state legislatures confront the irrational results their statutory exclusion of animals produces, the CAAP advocate's full value to animal cruelty proceedings will remain untapped.[186]

E. *The Imprecise Definition of the CAAP Advocate's Position Threatens the Defendant's Right to a Fair Trial*

The CAAP advocate's charge to represent the "interests of justice" may, as its supporters claim, allow a court to examine a broader range of interests, but it also comes up against a tenet of the American legal system: the prosecutor in a criminal animal abuse trial already represents the interests of justice.[187] The prosecutor can function as an impartial advocate for the concept of justice precisely because the prosecutor does not represent the victim, but rather the state's interest in addressing a violation of the law.[188]

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[179] *Id.* at *2.

[180] *Id.* at *3.

[181] *Domestic Violence*, *supra* note 174.

[182] *See Domestic Violence*, *supra* note 174 ("The issue of whether or not an animal could ever be considered a victim was not an issue the Washington Supreme Court addressed in this case.").

[183] *See Domestic Violence*, *supra* note 174 (noting the Washington Appellate Court's "convoluted . . . line of logic").

[184] *See, e.g.*, DEL. CODE ANN. TIT. 11, § 9401(7) (2005).

[185] *See* Andrew N. Ireland Moore, *Defining Animals as Crime Victims*, 1 J. ANIMAL L. 91, 97 (2005) ("[T]he definition of a crime victim varies and is not solely limited to human beings. There is precedent for entities, other than natural persons, to be considered victims. This flexible approach leaves room for animals to be considered crime victims as well.").

[186] *See id.* at 102–03 ("If animals are considered crime victims, animal advocates may pursue participation in plea bargains between the state and the defendant . . . . [and have] the opportunity to oppose [a] plea bargain in front of the judge.").

[187] Bala, *supra* note 73.

[188] Bala, *supra* note 73.

In the case of animal abuse, society has decided that the actual harm to animals and the potential harm to humans warrant legal punishment.[189] However, just as happens with human victims, the prosecutor's decision to proceed is obviously not dependent on the wishes of the animal victim.[190]

It is not clear that the CAAP advocate is in the same impartial position.[191] While the advocate's duties appear objectively neutral (e.g., investigating facts, reviewing records), the position itself is called an "animal advocate," and those who serve as advocates are all volunteers, motivated presumably by a desire to help animals get justice for their suffering.[192] Desmond's Law itself was grounded in the public lobbying of Desmond's Army, a group of vocal animal law advocates who have pledged to appear in "every animal abuse court case" throughout Connecticut and to fundraise for an animal victim's medical needs or reward fund.[193] This lack of impartiality is built into the very foundations of CAAP; when faced with a need to help courts adjudicate animal abuse cases more effectively, "lawmakers did not provide an investigator, special prosecutor, or additional funding mechanism for the prosecutor's office; [they] created a separate advocate."[194]

The CAAP advocate's status as a reporting voice but not a witness subject to cross- examination results in criticism that the advocate is, in truth, simply another arm of the prosecution seeking to punish the defendant.[195] Even if the advocate is accepted as an accurate interpreter of the animal victim's experience and needs, the advocate's under-defined role within the system feeds the suspicion that the advocate is "actually just a judicially sanctioned opportunity to advocate for the thoroughly human interest in maximal punishment."[196] While no data are yet available on the rate at which advocates recommend incarceration over diversionary programs for animal abusers, CAAP insists its advocates are "neutral resource[s] for the court."[197] However, in a promotional video for the program posted on the Animal Legal Defense Fund's website, supporters of the program encourage viewers to advocate for animals, and the interviews are interspersed with images of

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[189] *See* Nancy Perry, *A Quarter of a Century of Animal Law: Our Roots, Our Growth, and Our Stretch Toward the Sun*, 25 ANIMAL L. 395, 398 (2019).

[190] *See* MARCEAU, *supra* note 72, at 80 (questioning whether humans can legitimately speak for nonhuman animals, who may "prefer forgiveness" to incarceration).

[191] *See* Bala, *supra* note 73.

[192] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 257.

[193] *About*, DESMOND'S ARMY ANIMAL L. ADVOCS., https://perma.cc/RY7P-K9JQ (last visited Apr. 13, 2023).

[194] Bala, *supra* note 73.

[195] *See* MARCEAU, *supra* note 72, at 82 ("It would be a terrible irony if by inserting a human 'voice' to speak for the animals, courtroom advocates would once again be using animals to serve characteristically human interests in revenge or in the name of preventing future violence against humans.").

[196] MARCEAU, *supra* note 72, at 81.

[197] Rubin, *Court Advocate Program*, *supra* note 19, at 268.

adorable dogs and cats set to melancholy music and footage of Desmond's abuser walking to court through a crowd of Desmond's Army supporters.[198] The student advocate who unsuccessfully argued for incarceration for Desmond's abuser remarked after the hearing that the CAAP's very presence "showed the animals do have a voice."[199] A third-year student advocate created the same level of suspicion about the advocates when she described having "jumped into the program because she has always been passionate about animal advocacy."[200]

It is difficult to imagine that lawyers and law students who want to *decrease* the severity of animal abusers' sentences would be volunteering for this program, especially given the program's initial impetus to address the dearth of prosecutions in animal abuse cases and its touting of research that ties animal abuse to later interpersonal violence.[201] That is not to say that advocates are, as one critic has suggested, part of a larger animal protection movement to "influence and infiltrate the prosecutorial ranks" in order to ensure harsher punishments.[202] In fact, both Connecticut's and Maine's CAAP statutes allow either party to request the appointment of an advocate.[203] The threat to a fair trial does not result from which side requests an advocate since the court itself selects the advocate from a pre-approved list, and because the advocate is not called as a witness, no cross-examination by the opposing party is allowed.[204] Rather, fairness to both sides is undermined by the advocate's murky relationship to the proceedings.[205] Working under the imprecise "interests of justice" banner, CAAP advocates are a strange hybrid of neutral advocacy: they do not, because they legally cannot, actually advocate for the victim whose interests they legally cannot, but seem to, represent.[206]

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[198] *CAAP*, *supra* note 58.

[199] Laurel Wamsley, *In a First, Connecticut's Animals Get Advocates in the Courtroom*, NPR (June 2, 2017, 5:46 PM ET), https://perma.cc/T9PF-4SW7 (quoting Taylor Hansen).

[200] Jeanne Leblanc, *UConn Law Team Pioneers Courtroom Advocacy for Animals*, UCONN TODAY (Sept. 15, 2017), https://perma.cc/45XB-R2X5.

[201] *See* Rubin, *Court Advocate Program*, *supra* note 19, at 264.

[202] MARCEAU, *supra* note 72, at 85.

[203] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)); ME. STAT. TIT. 7 § 4016 (2019).

[204] 2016 Conn. Pub. Acts No. 16-30.

[205] *Compare* MARCEAU, *supra* note 72, at 78–79 ("[Desmond's Law] treats animal advocates as official parties to a criminal case."), *with* Rubin, *Court Advocate Program*, *supra* note 19, at 268 ("[Advocates serve] as a resource not affiliated with either prosecution or defense.").

[206] *See* Bala, *supra* note 73 ("The language of Desmond's Law demonstrates the continuing ambivalence in framing the status of animals in the law.").

IV. The Next Iteration of Desmond's Law Must Redefine CAAP's Two Key Provisions

A. *Massachusetts Must Extend CAAP to Include Pets Other than Dogs and Cats*

The most obvious flaw in Desmond's Law—the limitation of CAAP coverage to cases involving only dogs and cats—is the easiest to fix, since it does not involve extending any additional legal rights to animals.[207] It merely requires a legislature to review its regulations on pet ownership and write that coverage into its CAAP statute.[208] For example, Massachusetts, like every state, already restricts the kind and number of animals that residents can legally own as domestic pets.[209] These include both animals that can be purchased from merchants (ferrets, koi, pythons, toucans) and those that can be taken directly from the wild (certain species of toads and frogs).[210] The Commonwealth places strict bans on ownership and possession of certain dangerous animals, such as crocodiles and wolf/dog hybrids, and on animals considered wild by nature, such as migratory birds.[211] While the lists of permissible pets have lengthened as people have become more interested in keeping exotic animals, allowing CAAP advocates to appear in all cases involving legally-owned animals appears to demand nothing more than checking those lists, with no need for any legal hand-wringing over animal sentience and the legal rights it might confer.[212]

For animal advocates working to extend legal rights to animals, expanding CAAP to animals that can be legally owned, but with whom people may have had little personal experience, functions as the sort of public outreach that farm animal sanctuaries have been doing for years.[213] A visit to any such sanctuary will likely offer a tour allowing direct physical contact with cows, sheep, and pigs, accompanied by a narrative of the animals' daily lives in sanctuary contrasted with the lives they would have faced on a factory farm.[214] Such experiences attempt to increase people's

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[207] *See generally* Schmahmann & Polacheck, *supra* note 163, at 747 ("[W]hat 'rights' for animals unavoidably entails as a matter of constitutional and civil law—raises issues that go to the core of our assumptions about ourselves and about the nature, aims, and limits of our institutions.").

[208] *See, e.g.*, MASS. GEN. LAWS ch. 131, § 23 (2022) (outlining the procedure for establishing a special exemption list of "fish, birds, mammals, reptiles and amphibians" that may be owned).

[209] *See Wildlife as Pets*, MASS.GOV, https://perma.cc/H5E2-9WDL (last visited Apr. 13, 2023).

[210] *Id.*

[211] *Id.*

[212] *See, e.g.*, *Exotic Animal Laws by State*, FINDLAW, https://perma.cc/6Y3F-ADQZ (last updated May 21, 2021).

[213] *See About Us*, FARM SANCTUARY, https://perma.cc/6WR8-ZFWM (last visited Apr. 13, 2023).

[214] *See The Power of Sanctuary*, FARM SANCTUARY, https://perma.cc/DA3G-3NXV (last visited Apr. 13, 2023).

empathy for all animals as individuals, and thus lead people to question their choices about what they eat, what they wear, and what they do for fun.[215] Similarly, allowing CAAP advocates to inform the courts about the abuse of bullfrogs and ostriches, as well as of dogs and cats—all of which Massachusetts allows to be kept as pets—has the potential to change how judges understand the broad reach of animal abuse and the specific damage done to animal victims.[216]

The case of Claire Bilida's pet raccoon illustrates that judges may be open to such a change in attitude.[217] Bilida had found an orphaned baby raccoon in the wild and had raised it uneventfully as a pet for seven years until it was seized by the Warwick police (without a warrant) and destroyed by the Rhode Island Department of Environmental Management.[218] The First Circuit Court of Appeals rejected Bilida's § 1983 claim against the police for violation of due process, concluding that Bilida had no property interest in an animal she was not legally allowed to own under Rhode Island law.[219] However, the Court devoted a paragraph to its displeasure with the state's decision to euthanize the raccoon, allegedly for rabies testing, without providing Bilida an opportunity to object.[220] Concluding that no state law required immediate euthanasia and no genuine emergency existed regarding that specific animal's behavior, the Court closed its opinion this way: "It need hardly be said that [the ruling against Bilida] is not an endorsement of the state's procedures for treatment of pet raccoons."[221]

If Massachusetts elects to follow New Jersey and Maine in adopting a version of Desmond's Law, basic fairness and a recognition of the Commonwealth's statutes on pet ownership demand an extension of CAAP protection to all animals allowed as pets.[222] Building on its long history of recognizing people's ethical obligation to the animals over which they have dominion, Massachusetts is uniquely positioned among the states to take this logical step forward in animal protection.[223]

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[215] *See, e.g.*, Emily Scott, *8 Ethical Travel Tips for Your Next Vacation*, TWO DUSTY TRAVELERS, https://perma.cc/Q6PF-8CQF (last visited Apr. 13, 2023) (rejecting tourist activities that exploit wildlife, such as riding an elephant or swimming with captive dolphins).

[216] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 245 ("Understanding animal sentience informs our treatment of animals, including the protections that we afford them and the concept of justice in cases where they have been harmed by humans.").

[217] *See* Bilida v. McCleod, 211 F.3d 166, 173 (1st Cir. 2000).

[218] *Id.* at 169.

[219] *Id.* at 173.

[220] *Id.*

[221] *Id.* at 175.

[222] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 254 (expressing frustration at the law's limitation to dogs and cats).

[223] *See* WARD, *supra* note 21, at 273.

B. *Massachusetts Must Restructure CAAP to Increase Public Trust in the Program and Ensure Fairness to the Defendant*

Under the language of Desmond's Law, either party has the right to request the appointment of a CAAP advocate, and as a neutral party, the advocate is ethically bound not to favor either side.[224] If, after researching the facts and circumstances of a case, the CAAP advocate determines that a diversionary program is the appropriate sentence, the advocate is ethically bound to make that recommendation to the court.[225] Such a disinterested response is certainly possible.[226] If, for example, a defendant is charged with leaving an animal in a hot car believing that the car was a safer place for the animal at the moment, education on the dangers of such behavior would seem to be a better alternative to incarceration.[227] Even for cases where there was some level of intentional abuse, diversionary programs that give offenders insight into their behavior and the damage they have caused have the potential to protect people and animals from future abuse in ways that incarceration, with its narrower punitive scope, may not.[228]

Indeed, in cases requiring only better education or some cognitive behavioral therapy, the CAAP advocate's job to represent the "interests of justice" rather than the interests of the animal victim may be a benefit to the defendant.[229] When the details of a particular instance of animal abuse evoke significant community outrage, as was the case with Desmond's torture and killing, a prosecutor may face considerable public pressure to overcharge or stretch the facts of a case to qualify for longer incarceration periods.[230] As a volunteer who is neither paid by the state nor functions as the public face of the criminal justice system's response to animal abuse, the CAAP advocate may feel freer to recommend sentences that do not involve jail time.[231]

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[224] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)) (allowing also for the court to appoint the advocate *sua sponte*).

[225] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 259 ("[I]t is imperative that the advocate consider whether the charges are appropriate for the conduct alleged.").

[226] *Contra* Marceau, *supra* note 80, at 774 (arguing that the history of Desmond's Law suggests that CAAP was never meant to benefit the defense and prosecution equally).

[227] *See Animal Cruelty Diversion Programs - SAGE Counseling*, KNOW YOUR RIGHTS, at 17:40–18:10 (Know Your Rights podcast Nov. 22, 2021), https://perma.cc/8C59-H6R9 (podcast).

[228] *See, e.g.*, *BARK: Behavior, Accountability, Responsibility, and Knowledge: An Intervention Program for Animal Maltreatment Offenders*, ANIMALS & SOC'Y INST., https://perma.cc/8GGP-RZUL (last visited Apr. 13, 2023).

[229] *See* Marceau, *supra* note 80, at 776 (positing that Desmond's Law may actually have prompted more serious study of the need for rehabilitative sentences).

[230] *See* AM. PROSECUTORS RSCH. INST., ANIMAL CRUELTY PROSECUTION: OPPORTUNITIES FOR EARLY RESPONSE TO CRIME & INTERPERSONAL VIOLENCE 32 (2006).

[231] *See* Marceau, *supra* note 80, at 776 ("[I]t is . . . possible that sentences are materially increasing . . . because of a more general awareness of the significance of animal abuse based on the media surrounding Desmond's Law.").

However, it is precisely this status as a volunteer, rather than as an expert witness or GAL, that raises questions about the CAAP advocate's impartiality.[232] Desmond's Law arose out of a case involving the extreme intentional abuse, torture, and killing of a dog.[233] Despite the violence of the crime, Desmond's abuser was sentenced to the state's two-year "accelerated rehabilitation" program, which is usually available to defendants who have committed "certain non-serious crimes and who the court does not think are likely to offend again in the future."[234] If Desmond's abuser completed the program, his conviction would be expunged.[235] It is difficult to read the details of Desmond's death and believe that such a sentence served the interests of justice.[236] Desmond's Law and the CAAP advocates grew out of a desire to ensure that courts would handle "animal cruelty cases more thoroughly and vigorously" than had happened in Desmond's case.[237] State Representative Diana Urban and Professor Jessica Rubin collaborated for years prior to the law's passage studying statistics they believed proved that "the vast majority of cruelty cases [in Connecticut] were dismissed or not prosecuted."[238] In addition, the University of Connecticut ensured that CAAP "would be sustainable because the law school would build an animal advocacy program to implement Desmond's Law."[239] It is possible to understand this origin story as synonymous with the disinterested desire to ensure proper sentences for all defendants, but the more likely perception is that CAAP volunteers (many of whom are students in the University of Connecticut's Animal Law Clinic) are at best antagonistic to the defendant, and at worst working with the prosecutor to convey one message: "The more prison, the better."[240]

In adopting CAAP, Massachusetts must restructure the advocate's role to counter this perception of an unfair two-pronged prosecution.[241] Ideally,

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[232] *See* Pat Eaton-Robb, *In One State, Abused Animals Get a Legal Voice in Court*, DENVER POST (June 3, 2017, 1:25 AM), https://perma.cc/UPF6-2T67 (quoting a prosecutor on a CAAP advocate's work: "It has really assisted me in doing my job.").

[233] Rubin, *Animal Advocacy*, *supra* note 83, at 250.

[234] Rubin, *Animal Advocacy*, *supra* note 83, at 251.

[235] Rubin, *Animal Advocacy*, *supra* note 83, at 251.

[236] *See, e.g.*, Suzana Gartner, *Desmond's Law: Giving a Voice for Abused Animals in Court*, ANIMAL ADVOC. - VOICE FOR THE VOICELESS (Feb. 22, 2019), https://perma.cc/BS64-5Y3G ("Desmond was brutally murdered . . . and did not deserve to die . . . . Desmond was a loving sentient being that needed a voice.").

[237] Rubin, *Animal Advocacy*, *supra* note 83, at 250.

[238] Rubin, *Animal Advocacy*, *supra* note 83, at 250. *But see* Marceau, *supra* note 80, at 775 (arguing that 80% of animal cruelty cases dismissed in Connecticut from 2007 to 2017 were dismissed only after the defendant successfully completed a diversionary program).

[239] Rubin, *Animal Advocacy*, *supra* note 83, at 252.

[240] MARCEAU, *supra* note 72, at 80.

[241] *See* Marceau, *supra* note 80, at 771 (arguing that modern animal advocacy does not help animals or people because it defines progress solely in terms of higher rates of prosecution,

the first step in delivering on the program's promise of a neutral advocate would be to establish public funding for the position.[242] Doing so would ensure that all eligible animal abuse cases would receive the same quality of input on the issues Desmond's Law has highlighted as unique to animal victims, such as veterinary care and foster placement.[243] Unlike a GAL, who is paid by the Commonwealth only if a party meets indigency requirements, the CAAP advocate should be available in all cases so that the animal's interests, although not directly represented, are not undermined because of the defendant's financial situation.[244]

Alternatively, if funding is unavailable, Massachusetts could address the issue of potential bias by creating a more detailed screening process for volunteers.[245] Under Desmond's Law, CAAP advocates can be drawn from a wide pool, as the law requires merely that attorneys and law students have knowledge of and interest in animal issues.[246] Theoretically, this minimal standard should produce a group of advocates with a variety of legal philosophies about sentencing in animal abuse cases.[247] However, as the history of Desmond's Law suggests, the nature of CAAP will likely always attract a majority of volunteers from animal rights groups or law school animal law clinics.[248] To avoid such an imbalance, Massachusetts should actively encourage participation by the defense bar by developing a robust outreach program that educates defense attorneys on a CAAP advocate's potential contributions to a defendant's case (e.g., creating arguments based on relevant mitigating factors, such as the defendant's own history as an abuse victim or struggles with mental illness).[249] In the absence of more active involvement by defense attorneys (in Connecticut at least) identifying volunteer advocates has fallen to decidedly non-neutral groups—such as

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conviction and incarceration for animal abusers).

[242] *See e.g.*, CT. APPOINTED SPECIAL ADVOC. FOR CHILD. BOSTON, https://perma.cc/9XXV-L6KS (last visited Apr. 13, 2023) (providing an example of a volunteer organization whose members advocate directly for the interests of children in the foster care system).

[243] Rubin, *Court Advocate Program*, *supra* note 19, at 268.

[244] *See* HOSTETLER & SABINO, *supra* note 159, at 308.

[245] *See* Marceau, *supra* note 80, at 774 (describing CAAP advocates as acting more like "a party to the proceeding than a traditional victim advocate").

[246] Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[247] *See* Phillips & Lockwood, *supra* note 50, at 53 (urging prosecutors to avoid seeking animal abuse convictions via no contest pleas when securing mental health treatment is appropriate).

[248] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 244 (noting the factors that led to Desmond's Law, such as under-enforcement of anti-cruelty laws and need for experiential opportunities for law students).

[249] *See, e.g.*, VOLUNTEER LAWS. PROJECT, https://perma.cc/L6UM-FNBN (last visited Apr. 13, 2023); *see also* Rubin, *Animal Advocacy*, *supra* note 83, at 258 (advising authors of future statutes modeled on Desmond's Law to "determine the best methods to enlist volunteer advocates").

animal law clinics and private citizen organizations like Desmond's Army.[250]

Second, to ensure a fair trial, Massachusetts should require the CAAP advocate to submit to cross-examination, as do traditional GALs.[251] Desmond's Law makes no provision for such questioning, or even for prior disclosure of the advocate's findings to the defendant.[252] As a result, the CAAP advocate functions like an expert witness without having to answer questions from the opposing party.[253] Explicitly defining the advocate as an expert can begin with what Desmond's Law has already mandated, namely a "knowledge of animal issues," and can additionally require the advocate to demonstrate some degree of training or education in the specific details of a case.[254] The real value of officially designating advocates as "experts" will be to enfold them into the traditional roles of an adversarial proceeding.[255] Massachusetts courts already make widespread use of court-appointed experts to assist in determining a variety of issues, from a party's competency, to a corporation's value, to an electronic communication's reliability.[256] Moreover, Massachusetts case law is clear that "a judge has broad discretion with respect to the admission of expert testimony."[257] Promoting the CAAP advocate from a generalized voice, which too easily can become an echo of the prosecutor, to a full member of the proceeding better protects the defendant's due process rights to confront his or her accusers.[258]

CONCLUSION

CAAP is a novel and aggressive approach to exposing the ethical and environmental impact of humans' use and abuse of animals. However,

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[250] *See* Rubin, *Animal Advocacy*, *supra* note 83, at 258.

[251] *See* MASS. GEN. LAWS ch. 190B, § 5-106 (specifying that a protected person has the right to cross-examine any GAL).

[252] *See* Desmond's Law, 2016 Conn. Pub. Acts No. 16-30 (codified as CONN. GEN. STAT. § 54-86n (2018)).

[253] *See, e.g.*, *Guidelines for Judicial Practice: Abuse Prevention Proceedings* (Oct. 2021), § 1:02 (f) ("[To satisfy due process, each] party must be given a meaningful opportunity to challenge the other party's evidence in any contested hearing.").

[254] 2016 Conn. Pub. Acts No. 16-30.

[255] *See* THE MASS. GUIDE TO EVIDENCE, art. VII, § 702–706.

[256] *See* MASS. GEN. LAWS ch. 123, § 15(c) (requiring a court-appointed physician to report on clinical findings regarding defendant's competency to stand trial); Brodie v. Jordan, 447 Mass. 866, 867 (2006) (relying on court-appointed expert's valuation of plaintiff's shares in a corporation); Munshani v. Signal Lake Venture Fund II, LP, 60 Mass. App. Ct. 714, 717 (2004) (relying on the report of a neutral expert as to an email's authenticity).

[257] Commonwealth v. O'Brien, 423 Mass. 841, 853 (1996).

[258] *See* MASS. DECLARATION OF RIGHTS art. 12, https://perma.cc/EG2F-YK8Z (last visited Apr. 13, 2023) ("[E]very subject shall have a right to produce all proofs, that may be favorable to him [and] to meet the witnesses against him face to face.").

because animals in America remain a type of quasi-property, even a dedicated advocate cannot represent the animal as an individual victim. In order to make progress towards greater judicial appreciation of animals as legal persons, as well as to maintain due process protections for defendants in criminal animal abuse cases, Massachusetts should adopt a version of Desmond's Law that addresses the current law's shortcomings. By expanding the scope of animals eligible for CAAP representation to—at a minimum—all those the Commonwealth allows as pets, and by reframing the CAAP advocate's role as separate from the prosecutor's, Massachusetts can deliver on Desmond's Law's promise of justice for all animals, human and nonhuman alike.

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Jury of Your Peers, Not Your Parents: Abolishing Age-Based Peremptory Challenges in Massachusetts Juvenile Jury Trials

Marissa Palladini[*]

INTRODUCTION

Both state and federal jurisprudence recognize and distinguish juveniles in the criminal justice system based on age-related characteristics.[1] However, the Massachusetts Supreme Judicial Court ("SJC" or "Court") has refused to acknowledge age in the context of juvenile criminal jury trials, specifically with regard to the age of the jurors who decide whether to convict a juvenile defendant.[2]

Although both the prosecution and the defense can exercise peremptory challenges to remove potentially biased jurors, they may not do so for a discriminatory purpose.[3] In *Commonwealth v. Fernandes*, Joshua Fernandes ("Joshua"), age sixteen at the time of his offense, was convicted of first-degree murder and sentenced to life in prison without parole.[4] At trial, the prosecution used 71.8% of its peremptory challenges to remove jurors under the age of twenty-five and 81% of its peremptory challenges to remove jurors under the age of thirty.[5] On appeal, the Court rejected Joshua's argument that the prosecution's use of its peremptory challenges to specifically

[*] J.D., New England Law | Boston (2023). B.S., Criminal Justice and minor in Legal Studies, Endicott College (2018).

[1] *Youth in the Justice System: An Overview*, JUV. L. CTR., https://perma.cc/72ST-AT2P (last visited Apr. 12, 2023).

[2] *See, e.g.*, Commonwealth v. Lopes, 91 N.E.3d. 1126, 1131 (Mass. 2018); Commonwealth. v. Oberle, 69 N.E.3d 993, 999 (Mass. 2017); Commonwealth v. Evans, 778 N.E.2d 885, 893 (Mass. 2002); Commonwealth v. Samuel, 495 N.E.2d 279, 281 (Mass. 1986).

[3] Batson v. Kentucky, 476 U.S. 79, 107–08 (1986); Commonwealth v. Soares, 387 N.E.2d 499, 510–11, 513 (Mass. 1979).

[4] 170 N.E.3d 286, 295 (Mass. 2021).

[5] Appellant's Brief at 14–15, *Commonwealth v. Fernandes*, 170 N.E.3d 286 (Mass. 2021), (No. SJC-11586).

remove young members of the jury violated his Due Process Rights under the Sixth Amendment.[6]

This Comment will illustrate that the SJC improperly decided *Fernandes* because it failed to recognize age as a protected class when reviewing the prosecution's discriminatory use of its age-based peremptory challenges at trial. Although the SJC has rejected the argument in the past, age-based peremptory challenges violate a juvenile defendant's constitutional rights because they deny the juvenile the right to a fair trial by an impartial jury of his or her peers. Part I discusses relevant state and federal precedent surrounding jury selection, peremptory challenges, and protections against discriminatory peremptory challenges. Part II discusses the relevant facts, procedural history, and the SJC's holding in *Commonwealth v. Fernandes*. Part III argues that the SJC denied Joshua his constitutional rights because he did not receive a trial by a jury composed of a fair cross section of his community nor his peers. Finally, Part IV argues that as a matter of public policy, the SJC should recognize age as a discrete group when reviewing discriminatory peremptory challenges in juvenile trials because doing so will uphold the integrity of the juvenile justice system and maintain consistency in other aspects of the law.

I. Background

A. *The Constitutional Right to a Trial by a Jury of Your Peers*

The Sixth Amendment of the United States Constitution guarantees a criminal defendant the right to a trial by an impartial jury consisting of "a fair cross section of the community."[7] Similarly, the Massachusetts Constitution provides for the right to a trial by a jury of one's peers.[8] During jury selection, the prosecution may exercise its peremptory challenges to remove jurors from the venire for any reason at all, as long as the reason is somehow related to the outcome of the trial.[9] For instance, the prosecution may remove jurors based on the attorney's instinct, the juror's actions, the juror's group membership, or any other indications that may lead the prosecution to believe that the juror would favor one side.[10]

Across federal and state jurisdictions, including Massachusetts, peremptory challenges may not be used to remove jurors from the venire for a discriminatory purpose, as this practice violates the Equal Protection Clause.[11] In *Batson v. Kentucky*, the U.S. Supreme Court outlined a three-part

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[6] *Fernandes*, 170 N.E.3d at 298.

[7] U.S. CONST. amend. VI; Taylor v. Louisiana, 419 U.S. 522, 527 (1975).

[8] MASS. CONST. pt. 1, art. XII.

[9] Batson v. Kentucky, 476 U.S. 79, 89 (1986).

[10] Maggie Elise O'Grady, *A Jury of Your Skinny Peers: Weight-Based Peremptory Challenges and the Culture of Fat Bias*, 7 STAN. J. C.R. & C.L. 47, 51 (2011).

[11] *See Batson*, 476 U.S. at 79–100; Commonwealth v. Soares, 387 N.E.2d 499, 509–11, 515–16

test for determining whether a peremptory challenge is discriminatory.[12] The defendant must first demonstrate membership of a cognizable racial group and show that the prosecution exercised its peremptory challenges to remove members of the defendant's racial group from the venire based on race.[13] The prosecution must then present a race-neutral explanation for challenging the jurors in the defendant's racial group.[14] Thereafter, the trial court will decide if the defendant established "purposeful discrimination."[15]

In *Commonwealth v. Soares*, the SJC narrowed restrictions on peremptory challenges, holding that the challenges may not be used to exclude members of "discrete groups" solely based on the assumption that certain biases will arise due to the juror's membership in the discrete group.[16] Relying on the Equal Rights Amendment to the Massachusetts Constitution as "definitive" authority, the Court identified the discrete groups as sex, race, color, creed, or national origin.[17] However, the SJC has not strictly limited challenges to these specific groups in the past.[18] For instance, in *Commonwealth v. Obi*, the SJC upheld the trial court's finding that the defense's peremptory challenge against a juror wearing a headscarf was improper because it discriminated on the basis of the juror's religion, although religion is not specifically named in the Equal Rights Amendment.[19] Furthermore, the Court has not "entirely foreclosed" possible reexamination of what constitutes a "discrete group" under Article 1 of the Massachusetts Constitution.[20] In fact, the Court recently held that sexual orientation constitutes a protected class for the purposes of a *Batson-Soares* challenge.[21]

Although the Court presumes peremptory challenges are properly made, either party may rebut the presumption of a proper peremptory challenge upon a showing of: (1) a pattern of conduct of challenging jurors that are members of a discrete group; and (2) a likelihood that the challenged jurors were excluded based on their membership in the discrete group.[22]

In *Commonwealth v. Sanchez*, the SJC further defined the factors that judges should consider in determining whether jurors have been excluded for discriminatory purposes.[23] Although not exhaustive nor mandatory,

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(Mass. 1979).

[12] 476 U.S. at 96.

[13] *Id.*

[14] *Id.* at 97.

[15] *Id.* at 98.

[16] 387 N.E.2d 499, 516 (Mass. 1979).

[17] *Id.*

[18] *See, e.g.*, Commonwealth v. Obi, 58 N.E.3d 1014, 1023 (Mass. 2016).

[19] *Id.* at 1023–24; Appellant's Brief, *supra* note 5, at 31.

[20] Commonwealth v. Fernandes, 170 N.E.3d 286, 295 (Mass. 2021).

[21] Commonwealth v. Carter, 172 N.E.3d 367, 380 (Mass. 2021).

[22] *Obi*, 58 N.E.3d at 1023; *Soares*, 387 N.E.2d at 517.

[23] 151 N.E.3d 404, 424 (Mass. 2020).

such factors include the following: (1) the number and percentage of jurors excluded by peremptory challenge; (2) evidence of disparate investigation of the jurors; (3) similarities and/or differences between the excluded jurors, those who have not been challenged, and those who are not members of the protected group; (4) whether the defendant or victim is a member of the same protected group; and (5) the composition of the final seated jury.[24] Since this list is not exhaustive, a reviewing court should still consider "all [other] relevant circumstances."[25]

B. *Challenges to the Age-Based Peremptory Challenge*

Since *Soares*, the SJC has consistently declined to recognize age as a protected discrete group in the context of peremptory challenges.[26] In support thereof, the Court reasons that age is not a protected group recognized by the Constitution and thus is not considered a discrete group for the purposes of exercising peremptory challenges.[27] The issue of age-based peremptory challenges has not yet reached the U.S. Supreme Court, but several federal appellate courts have rejected the argument that age should be a protected class for the purposes of peremptory challenges.[28]

C. *The Court's Consideration of Age in Other Aspects of Criminal Prosecution*

Although age has not yet been recognized as a protected class in the context of peremptory challenges, both state and federal tribunals have historically distinguished juvenile offenders from adult offenders due to their age and developmental differences.[29] More recently, courts are focusing on the science behind juvenile brain development and examining how it sets juveniles apart from adults in the criminal justice system.[30] For instance, courts now recognize that juvenile offenders have developmentally different maturity levels, reactions to peer influence, and the capacity for

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[24] *Id.* at 424–25.

[25] *Id.* at 425 (quoting Commonwealth v. Jones, 77 N.E.3d 278, 293 n.24 (Mass. 2017)).

[26] *See, e.g.*, Commonwealth v. Lopes, 91 N.E.3d 1126, 1131 (Mass. 2018); Commonwealth v. Oberle, 69 N.E.3d 993, 999 (Mass. 2017); Commonwealth v. Evans, 778 N.E.2d 885, 885 (Mass. 2002); Commonwealth v. Samuel, 495 N.E.2d 279, 281 (Mass. 1986).

[27] *Oberle*, 69 N.E.3d at 999.

[28] *Lopes*, 91 N.E.3d at 1131–32; *see, e.g.*, United States v. Pichay, 986 F.2d 1259, 1260 (9th Cir. 1993) (holding that "young adults do not constitute a cognizable group for purposes of an equal protection challenge" to the jury composition); United States v. Cresta, 825 F.2d 538, 544–45 (1st Cir. 1987) (holding that the prosecution's systematic exclusion of jurors did not violate equal protection); United States v. Greene, 489 F.2d 1145, 1149 (D.C. Cir. 1973) (holding that "'young persons' is not a cognizable class").

[29] *See Youth in the Justice System: An Overview*, *supra* note 1.

[30] *See Youth in the Justice System: An Overview*, *supra* note 1.

rehabilitation.[31]

Notably, the U.S. Supreme Court emphasized these differences when it re-assessed the constitutionality of certain juvenile sentencing practices.[32] In *Miller v. Alabama*, for instance, the Supreme Court held that mandatory life sentences without the possibility of parole for juveniles under the age of eighteen violated Eighth Amendment protections against cruel and unusual punishment.[33] The *Miller* Court noted that juveniles are constitutionally different from adults for the purposes of sentencing because they have diminished culpability and greater capacity for rehabilitation.[34] In Massachusetts, the SJC imposed even more enhanced protections than *Miller*, holding that both mandatory *and* discretionary juvenile life sentences without parole violate constitutional protections against cruel and unusual punishment.[35] Similar to the U.S. Supreme Court, the *Diatchenko* Court also cited juvenile brain development factors in support of its holding.[36]

In addition to sentencing restrictions, courts treat juvenile offenders differently in other aspects of the criminal justice system as well.[37] For instance, juvenile hearings are typically closed to the public; juveniles serve their sentences in different facilities; and juveniles often face alternatives to incarceration, such as probation, rehabilitative programs, or both.[38]

D. *Age as a Protected Class in Other Areas of the Law*

The law also recognizes age as a protected class in other contexts, including employment, federal financial assistance, and housing.[39] For instance, the Age Discrimination Act of 1975 prohibits age discrimination against applicants and employees that are forty years of age and older "in programs and activities receiving federal financial assistance."[40] The Act prohibits age discrimination in the "hiring, promotion, discharge, compensation, [or] terms [and] conditions of employment" for such individuals.[41] Similarly, Massachusetts law protects prospective tenants and

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[31] *Youth in the Justice System: An Overview*, *supra* note 1.

[32] Miller v. Alabama, 567 U.S. 460, 471–72 (2012).

[33] *Id.* at 479.

[34] *Id.* at 471.

[35] Diatchenko v. D.A. for Suffolk Dist., 1 N.E.3d 270, 283 (Mass. 2013).

[36] *Id.* at 283–84.

[37] *What Is Juvenile Justice?*, THE ANNIE E. CASEY FOUND. (Dec. 12, 2020), https://perma.cc/4VCQ-R472; *Youth in the Justice System: An Overview*, *supra* note 1.

[38] *What Is Juvenile Justice?*, *supra* note 37; *Youth in the Justice System: An Overview*, *supra* note 1.

[39] Appellant's Brief, *supra* note 5, at 30; *Age Discrimination*, U.S. DEP'T OF LAB., https://perma.cc/M6B7-9P2L (last visited Apr. 12, 2023).

[40] *Age Discrimination*, *supra* note 39.

[41] *Age Discrimination*, *supra* note 39.

homebuyers from discrimination on the basis of age.[42]

II. The Court's Opinion

A. *Factual & Procedural History*

On May 10, 2010, fourteen-year-old Nathan Fomby-Davis rode around a Boston neighborhood on the back of his older brother's scooter, when his brother almost collided with a man on a bicycle, twenty-year-old Crisostomo Lopes.[43] The near-collision, which occurred close to an intersection, caused Lopes to ride off the sidewalk and into the street.[44] Shortly thereafter, Fomby-Davis and his brother returned home to pick up cash for food.[45] While waiting for his brother, Fomby-Davis put on his brother's helmet and decided to take the scooter for another ride around the block.[46]

Meanwhile, Lopes left the area to retrieve both a gun and the defendant, sixteen-year-old Joshua Fernandes.[47] He and Joshua returned to the intersection, crouched down, and waited.[48] When Fomby-Davis rode by on the scooter, Lopes jumped into the street, grabbed him, and signaled to Joshua.[49] Joshua approached, removed a gun from his pocket, and fired three to four shots into Fomby-Davis' chest, left armpit, and right thigh.[50] Fomby-Davis stumbled into a nearby store and fell to the ground.[51] Despite rescue efforts, he was pronounced deceased upon arrival at the hospital.[52] Anthony Williams, an off-duty Boston police officer, witnessed the events from inside his personal vehicle.[53] After the shooting, Officer Williams pursued Joshua and placed him under arrest.[54] Lopes then appeared and was also arrested.[55]

At the police station, Lopes yelled to Joshua in Creole and told him to "take the blame" several times.[56] During interrogation, Joshua denied knowing the details of the incident.[57] He claimed he was alone when the

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[42] *Overview of Fair Housing Law*, COMMONWEALTH OF MASS., https://perma.cc/B26R-YQDJ (last visited Apr. 12, 2023).

[43] Appellant's Brief, *supra* note 5, at 7–8.

[44] Commonwealth v. Fernandes, 170 N.E.3d 286, 295 (Mass. 2021).

[45] *Id.*

[46] *Id.*

[47] Appellant's Brief, *supra* note 5, at 8.

[48] *Fernandes*, 170 N.E.3d at 295.

[49] *Id.*

[50] *Id.* at 295–96.

[51] *Id.* at 296.

[52] *Id.*

[53] *Id.* at 295.

[54] *Fernandes*, 170 N.E.3d at 296.

[55] *Id.*

[56] Appellant's Brief, *supra* note 5, at 8.

[57] Appellant's Brief, *supra* note 5, at 7.

scooter approached him, then he "just blacked out."[58]

At trial, the prosecution posited the theory that Lopes, a twenty-year-old Homes Ave gang member, recruited sixteen-year-old Joshua as his "assassin" and encouraged him to commit the crime.[59] During jury selection, the Commonwealth used twenty-three of its thirty-two available challenges (71.8%) to remove jurors under the age of twenty-five.[60] They used an additional three challenges on jurors under the age of thirty.[61] In support of its exclusions, the Commonwealth stated:

> [T]he Commonwealth has tried to exclude or to use challenges on the individuals who are less than [twenty-five] or college students. It is the Commonwealth's position, based upon experience, that individuals who are in college, not to disparage, but they often times have difficulties in deciding what classes to take, never mind whether or not somebody is guilty of first-degree murder.[62]

Defense counsel repeatedly objected to the prosecution's use of its peremptory challenges, arguing Joshua was entitled to a jury of his peers.[63] However, counsel's motion for a mistrial was denied.[64] At the conclusion of voir dire, only one college student sat on the jury after the prosecution had exhausted its remaining challenges.[65]

At the conclusion of the trial, the jury found Joshua guilty of firearm possession and first-degree murder on theories of premeditation and extreme atrocity or cruelty.[66] Joshua was sentenced to life imprisonment without the possibility of parole.[67] His murder conviction arrived at the SJC on direct appeal.[68]

B. *Court's Holding & Analysis*

On appeal, defense counsel presented seven arguments for the Court's consideration: (1) that the prosecution's use of peremptory challenges to remove young people from the jury violated Joshua's Sixth Amendment Rights; (2) that trying Joshua, a juvenile, in adult court was unconstitutional; (3) that the lower court improperly excluded the defense's expert testimony regarding juvenile brain development; (4) that the jury should not have been

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[58] *Fernandes*, 170 N.E.3d at 296.

[59] Appellant's Brief, *supra* note 5, at 7–11.

[60] Appellant's Brief, *supra* note 5, at 14–15.

[61] Appellant's Brief, *supra* note 5, at 15.

[62] *Fernandes*, 170 N.E.3d at 297.

[63] *Id.*; Appellant's Brief, *supra* note 5, at 15–16.

[64] Appellant's Brief, *supra* note 5, at 15.

[65] *Fernandes*, 170 N.E.3d at 297.

[66] *Id.* at 296.

[67] *Id.* at 295.

[68] *Id.*

instructed on the theory of extreme atrocity or cruelty; (5) that Joshua's statements to the police should have been suppressed; (6) that Joshua should have been tried separately from his co-defendant, Lopes; and (7) that the prosecution's closing argument was improper.[69] For the purposes of this Comment, the present analysis will focus on the defense's first challenge: that the prosecution's use of the majority of its peremptory challenges to remove younger members of the venire from the jury violated Joshua's constitutional right to a trial by a jury of his peers.[70]

On review, the SJC declined to recognize age as a protected class for the purposes of jury empanelment.[71] In support of its decision, the SJC cited *Commonwealth v. Jones*, noting that a defendant has the right to be tried by a fairly drawn jury of his or her peers.[72] The Court also acknowledged that peremptory challenges may not be used against members of "discrete groups" on the sole basis of bias toward members of that discrete group.[73] However, the Court refused to expand the holding in *Obi*, which limited the protected "discrete groups" to "sex, race, color, creed, or national origin."[74] Relying on these groups as definitive authority, the Court held that age is not considered a protected class in the context of discriminatory peremptory challenges.[75]

The Court also relied on federal constitutional jurisprudence in arriving at its conclusion, noting that the Equal Protection Clause requires "jury selection procedures that are free from [S]tate-sponsored group stereotypes rooted in, and reflective of, historical prejudice."[76] This protection applies not only to criminal defendants, but to the excluded jurors as well.[77]

In analyzing this matter, the Court repeatedly referred to its decision in the co-defendant's appeal, *Commonwealth v. Lopes*, where it also struck down constitutional claims pertaining to the jury selection process.[78] In *Lopes*, the Court similarly held that the prosecution's use of age-based peremptory challenges did not violate the defendant's constitutional rights and that age was not considered a protected discrete group for the purposes of disputing peremptory challenges.[79] Although prior SJC opinions and courts of other jurisdictions also support this decision, the Court in *Lopes* noted that the U.S.

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[69] *Id.* at 295–310.

[70] MASS. CONST. art. XII; *Id.* at 297–98.

[71] *Fernandes*, 170 N.E.3d at 298.

[72] *Id.* at 297 (citing Commonwealth v. Jones, 77 N.E.3d 278, 290 (Mass. 2017)).

[73] *Id.* (quoting Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979)).

[74] *Id.* (quoting Commonwealth v. Obi, 58 N.E.3d 1014, 1023 (Mass. 2016)).

[75] *Id.* at 298.

[76] *Id.* (quoting J.E.B. v. Alabama *ex rel.* T.B., 511 U.S. 127, 128 (1994)).

[77] *Fernandes*, 170 N.E.3d at 298.

[78] *Id.*

[79] Commonwealth v. Lopes, 91 N.E.3d. 1126, 1131 (Mass. 2018).

Supreme Court had not yet opined on the issue.[80] Relying on past cases, the Court concluded that age was not considered a protected group for the purposes of Joshua's constitutional challenges.[81] However, the Court commented that it has not "entirely foreclosed" a re-examination of what is considered a "distinctive" group under Article 1 of the Massachusetts Declaration of Rights.[82]

As for Joshua's remaining arguments, the Court held: Joshua's trial in Superior Court did not violate his constitutional rights; the exclusion of expert testimony was proper; the jury instruction did not disturb the verdict, as Joshua was convicted on the theory of premeditation as well; Joshua's statements to the police were properly admitted; Joshua was not prejudiced in any meaningful way by the joint trial; and the prosecution's closing argument was not extreme enough to taint the results of the trial.[83] The Court thus affirmed Joshua's conviction, but vacated his life sentence and remanded the matter for resentencing in accordance with *Diatchenko*.[84]

ANALYSIS

III. The SJC Violated Joshua's Constitutional Rights by Permitting the Prosecution's Age-Based Peremptory Challenges at Trial

A. *The Prosecution's Peremptory Challenges Violated Joshua's Sixth Amendment Rights Because the Jury Was Not Composed of a Fair Cross Section of His Community*

By using its peremptory challenges to eliminate the majority of young jurors from the venire, the prosecution denied Joshua his constitutional right to a trial by an impartial jury composed of his peers.[85] Moreover, the resulting jury did not represent a fair cross-section of Joshua's community.[86] In *Taylor v. Louisiana*, the U.S. Supreme Court held that jury selection from a representative cross-section of the community is an "essential component" of a fair jury trial under the Sixth Amendment.[87] The purpose of seating a jury selected from a fair cross-section of the community serves as a check on governmental power; it is designed to "guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased

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[80] *Id.*

[81] *Fernandes*, 170 N.E.3d at 298.

[82] *Id.*

[83] *Id.* at 299–310.

[84] *Id.* at 311.

[85] MASS. CONST. art. XII; Appellant's Brief, *supra* note 5, at 14–15.

[86] U.S. CONST. amend. VI; Taylor v. Louisiana, 419 U.S. 522, 528 (1975).

[87] *Taylor*, 419 U.S. at 528.

response of a judge."[88] Such interests cannot be served if the jury is composed of only certain portions of the population, "or if large, distinctive groups are excluded."[89] A representative jury also creates an assurance of impartiality, thus further safeguarding an individual's constitutional rights under the Sixth Amendment.[90]

At Joshua's trial, the prosecution used twenty-three of its thirty-two available challenges (71.8%) to remove all jurors under the age of twenty-five.[91] They used an additional three challenges on all jurors under the age of thirty.[92] At the conclusion of voir dire, only one college student sat on the jury, as the prosecution had run out of its available challenges.[93] Joshua was sixteen years old at the time of the offense and eighteen years old at the time of trial.[94] Based on the numbers alone, the resulting jury was not composed of Joshua's peers, nor was it representative of his community in Boston.[95] In 2018, young Boston residents between the ages of eighteen and thirty-four comprised 39.1% of Boston's total population.[96] This particular statistic has remained fairly steady since 1980.[97] With Joshua's trial taking place in the city that is home to the highest concentration of millennials amongst the twenty-five largest cities in the United States, one might assume that a fairly selected jury would be representative of the same.[98] However, the prosecution attempted to remove almost all jurors under the age of thirty from Joshua's jury, which suggests that Joshua was not tried by a jury representing a fair cross-section of his community in Boston under the holding in *Taylor*.[99] From the state level, a jury mostly composed of jurors over the age of thirty is certainly not a jury of eighteen-year-old Joshua's "peers" within the meaning of Article XII of the Massachusetts Constitution.[100]

Aside from numerical concerns, a jury largely composed of older adults

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[88] *Id.* at 530.

[89] *Id.*

[90] U.S. CONST. amend. VI; *Id.* at 530–31.

[91] Appellant's Brief, *supra* note 5, at 14.

[92] Appellant's Brief, *supra* note 5, at 15.

[93] Commonwealth v. Fernandes, 170 N.E.3d 286, 297 (Mass. 2021).

[94] Appellant's Reply Brief at 9, *Commonwealth v. Fernandes*, 170 N.E.3d 286 (Mass. 2021), (No. SJC-11586) https://perma.cc/L2YU-P2ST.

[95] *See* BOS. PLAN. & DEV. AGENCY, RSCH. DIV., BOS. BY THE NUMBERS 2020 at 20 (2020), https://perma.cc/5AQ4-SNKM.

[96] *Id.*

[97] *Id.*

[98] Appellant's Brief, *supra* note 5, at 23; ANISE VANCE & PETER CIURCZAK, CITY OF MILLENNIALS: IMPROVING THE FUTURE PROSPECTS OF OUR REGION AND ITS YOUNG ADULTS 5 (Luc Schuster et al. eds., 2017), https://perma.cc/5AQ4-SNKM.

[99] Commonwealth v. Fernandes, 170 N.E.3d 286, 297 (Mass. 2021); *see* Taylor v. Louisiana, 419 U.S. 522, 526–28 (1975).

[100] *See* MASS. CONST., art. XII.

does not serve the goal of checking arbitrary governmental power that *Taylor* intended.[101] By excluding jurors who come from one of the largest portions of society for reasons unrelated to their ability to serve as jurors, the prosecution created the possibility that the resulting jury would be arbitrarily skewed and lacking the "common sense judgment of the community."[102] Moreover, a jury that is not composed of a fair cross-section of its community affects public confidence in the criminal justice system by creating an appearance of unfairness.[103] The exclusion of young jury members creates an appearance of unfairness because the exclusion is based on a characteristic over which young people have no control: their age.[104] Like other traditionally excluded groups, young adults are categorized together due to their age, an attribute beyond each member's personal control.[105] Because of young adults' lack of control over their group membership, their exclusion on the basis of their age undermines "public confidence in the fairness of the criminal justice system."[106]

B. *The Prosecution's Peremptory Challenges Violated Joshua's Fourteenth Amendment Rights Because They Discriminated on the Basis of Age, a Class That Should Be Considered a Discrete Group Under Massachusetts Jurisprudence*

The SJC previously stated that "the right to use peremptory challenges . . . is not absolute."[107] During jury selection, the prosecution may not use its peremptory challenges to remove jurors solely on the basis of their membership in a "particular, defined grouping[] in the community," as this practice would violate both Article XII of the Massachusetts Constitution and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[108] The issue in *Fernandes*, however, is that the SJC has consistently refused to recognize age as a "particular, defined grouping" in the context of jury selection because age is not a protected class under Article I of the Massachusetts Constitution.[109] As a result, the issue of

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[101] 419 U.S. at 530; Bryan D. Smith, *Young Adults: A Distinctive Group under the Sixth Amendment's Fair Cross-Section Requirement*, 19 PAC. L.J. 1519, 1537 (1988).

[102] Smith, *supra* note 101, at 1537–38.

[103] Smith, *supra* note 101, at 1538–39.

[104] Smith, *supra* note 101, at 1539.

[105] Smith, *supra* note 101, at 1539.

[106] Commonwealth v. Prunty, 968 N.E.2d 361, 373 (Mass. 2012) (quoting Commonwealth v. Soares, 387 N.E.2d 499, 512 (Mass. 1979)); Smith, *supra* note 101, at 1539–40.

[107] *Prunty*, 968 N.E.2d at 370.

[108] *Id.* at 370–71 (quoting *Soares*, 387 N.E.2d at 515–16).

[109] *See, e.g.*, Commonwealth v. Lopes, 91 N.E.3d 1126, 1131 (Mass. 2018); Commonwealth v. Oberle, 69 N.E.3d 993, 999 (Mass. 2017); Commonwealth v. Evans, 778 N.E.2d 885, 893 (Mass. 2002); Commonwealth v. Samuel, 495 N.E.2d 279, 281 (Mass. 1986).

underrepresentation of young jurors remains unchallenged.[110]

In determining whether a peremptory challenge is discriminatory under *Batson*, the court considers whether the defendant is a member of a cognizable group and whether the prosecution exercised its peremptory challenges to remove members of the defendant's cognizable group from the jury based on their membership in that particular group.[111] The prosecution must then present a neutral explanation for challenging the jurors in the defendant's group.[112] Thereafter, the trial court will decide if the defendant established "purposeful discrimination."[113] Similarly, the State rule under *Soares* provides that peremptory challenges may not be used "to exclude members of discrete groups" based on an assumption that bias will occur because of the juror's membership in the group.[114]

Here, the Court failed to recognize age as a discrete or cognizable group when it permitted the prosecution to use its peremptory challenges in a discriminatory manner.[115] Had the Court considered age as a cognizable group when it reviewed the peremptory challenges used at Joshua's trial, it would have found that the prosecution engaged in purposeful discrimination under *Batson*, as the prosecution removed the young jurors solely on the basis of their membership to a particular age group.[116] Similarly, under *Soares*, the Court would have found that the prosecution excluded young jurors solely based on the assumption that bias would result due to their membership in the young adult grouping.[117]

When the defense challenged the age-based peremptory challenges at trial, the prosecution explicitly stated that it tried to remove jurors under the age of twenty-five from the jury because they "often times have difficulties in deciding what classes to take, never mind whether or not somebody is guilty."[118] This explanation for challenging jurors in the defendant's age group was not only non-neutral under *Batson*, it was blatantly discriminatory.[119] The prosecution made a stereotypical assumption about the jurors in the defendant's age group, then proceeded to remove them from the jury on the basis of that assumption.[120] With this statement, the

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[110] Donald H. Zeigler, *Young Adults as a Cognizable Group in Jury Selection*, 76 MICH. L. REV. 1045, 1047 (1978).

[111] Batson v. Kentucky, 476 U.S. 79, 96 (1986).

[112] *Id.* at 97.

[113] *Id.* at 96.

[114] Commonwealth v. Soares, 387 N.E.2d 499, 516 (Mass. 1979).

[115] Commonwealth v. Fernandes, 170 N.E.3d 286, 298 (Mass. 2021).

[116] 476 U.S. at 96; Appellant's Brief, *supra* note 5, at 14–15.

[117] *See* 387 N.E.2d at 516.

[118] *Id.*; *Fernandes*, 170 N.E.3d at 297.

[119] *See generally* 476 U.S. at 96.

[120] *See generally* Kendra Cherry, *What Is Ageism?*, VERYWELL MIND (May 2, 2022), https://perma.cc/7QHM-W2YR.

prosecution carelessly admitted that it engaged in a systemic pattern of excluding jurors solely based on their membership in a particular group.[121] The prosecution's statement ultimately rebutted any presumption of properly used challenges under *Soares*.[122] Regardless, the Court still permitted the prosecution to use those challenges because the Court definitively relies on the Equal Rights Amendment to define discrete groups when reviewing peremptory challenges.[123] As a result, the Court once again limited itself to the following protected groups: sex, race, color, creed, and national origin.[124] Despite the Court's overall decision in *Fernandes*, it still acknowledged the possibility of expanding upon this definition of protected groups, and has actually done so recently.[125]

In a 2021 appeal, *Carter*, the SJC expanded the scope of constitutionally protected classes by holding that a juror's sexual orientation is a protected status for the purposes of *Batson-Soares* challenges.[126] The court considered three factors in arriving at this conclusion: (1) that gay individuals have historically suffered discrimination on the basis of their sexual orientation; (2) that sexual orientation is inherently intertwined with an individual's sex, which is already considered a protected class; and (3) that one's sexual orientation is not relevant to their ability to serve as an impartial juror.[127] Although young adults have not nearly suffered the same type nor severity of discrimination as gay individuals, they are subjected to age-based stereotypes in matters of everyday life, most prominently in the workplace.[128] Even at Joshua's trial, the prosecution purposefully ejected young jurors on the basis of the stereotypical assumption that college-aged students are incapable of making important decisions.[129] Further, like sexual orientation, a juror's young age has no relevance to the juror's ability to serve impartially.[130] If anything, a juror's old age may have more of an influence on the juror's impartiality toward a juvenile defendant.[131] Under the analysis set forth in *Carter*, the SJC thus should further expand its consideration of constitutionally protected groups to include young adults.[132]

Even if the prosecution had not admitted to engaging in a specific pattern of juror exclusion, the Court still should have found a pattern of

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[121] *See Fernandes*, 170 N.E.3d at 297.

[122] *Id.*; 387 N.E.2d at 516.

[123] *Soares*, 387 N.E.2d at 516.

[124] *Id.*

[125] Commonwealth v. Carter, 172 N.E.3d 367, 380 (Mass. 2021); *Fernandes*, 170 N.E.3d at 295.

[126] 172 N.E.3d at 380.

[127] *Id.* at 379–80.

[128] *See infra* Part IV(B).

[129] *Fernandes*, 170 N.E.3d at 297.

[130] *Cf. Carter*, 172 N.E.3d at 380.

[131] *See infra* Part IV(A).

[132] *See* 172 N.E.3d at 379–80.

improper exclusion under the *Sanchez* factors.[133] Such factors, though non-exhaustive, include:

> (1) the number and percentage of [jurors] who have been excluded from jury service due to the exercise of a peremptory challenge; (2) any evidence of disparate questioning or investigation of prospective jurors; (3) any similarities and differences between excluded jurors and those, not members of the protected group, who have not been challenged (for example, age, educational level, occupation, or previous interactions with the criminal justice system); (4) whether the defendant or the victim are members of the same protected group; and (5) the composition of the seated jury.[134]

At Joshua's trial, the prosecution used twenty-three of its thirty-two available challenges (71.8%) to remove jurors under the age of twenty-five, and three challenges against jurors under the age of thirty.[135] In total, the Commonwealth used 81% of its total peremptory challenges to remove jurors under the age of thirty.[136] These numbers undoubtedly represent the vast majority of the exclusions made by the prosecution's peremptory challenges.[137] It is likely that these figures alone would create a presumption of improper exclusion under *Sanchez*.[138] Further, Joshua, an eighteen-year-old at the time of trial, was a member of the same age group as the excluded jurors, and the excluded jurors were removed solely on the basis of their young age.[139] At the conclusion of voir dire, only one college student sat on the jury, likely to the dissatisfaction of the prosecution, who admittedly removed college-aged students on the assumption that they were incapable of making decisions.[140] By intentionally removing almost all jurors of the same age group as Joshua, the prosecution unquestionably surpassed the aforementioned *Sanchez* factors.[141] As a result, the Court should have found that the prosecution engaged in discriminatory exclusion of young jurors, and thus violated Joshua's constitutional rights.[142]

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[133] *See* 151 N.E.3d 404, 424–25 (Mass. 2020).

[134] *Id.*

[135] Appellant's Brief, *supra* note 5, at 14–15.

[136] Appellant's Reply Brief, *supra* note 94, at 9.

[137] *See* Appellant's Reply Brief, *supra* note 94, at 9.

[138] *See* 151 N.E.3d at 424–25.

[139] Appellant's Reply Brief, *supra* note 94, at 9.

[140] *See* Commonwealth v. Fernandes, 170 N.E.3d 286, 297 (Mass. 2021).

[141] *See* 151 N.E.3d at 424–25.

[142] *See* MASS. CONST., art. XII; *Fernandes*, 170 N.E.3d at 297–98; *Sanchez*, 151 N.E.3d at 424–25.

IV. The SJC Should Recognize Young Adults as a Discrete Group for the Purposes of Peremptory Challenges in Juvenile Jury Trials as a Matter of Public Policy

Although the SJC has declined to do so in the past, it should reconsider the impact of discriminatory age-based peremptory challenges in juvenile trials, if not for constitutional concerns then as a matter of public policy.[143] Prosecutors are systematically more likely to exclude younger members of the jury.[144] Current jurisprudence allows them to do so without explanation.[145] In a juvenile jury trial, this practice automatically eliminates the defendant's peers from the jury, and thus violates the defendant's constitutional rights.[146] In addition to constitutional concerns, this practice may have actual influence on a criminal defendant's chances of conviction.[147] Further, both the Court and the legislature recognize age in other aspects of the law, as well as in other aspects of juvenile adjudication.[148] In order to uphold the integrity of the juvenile criminal justice system and to maintain consistency with other areas of the law, the Court should recognize age as a discrete group in the context of peremptory challenges in juvenile jury trials.[149]

A. *The Age of the Jury Has an Impact on Deliberation and Trial Outcomes*

Attitudes of young adults are "so different from those of the rest of the population that the quality of a jury's deliberation would be significantly affected by the absence of the young."[150] Older adults and younger adults commonly differ in their views, opinions, and feelings related to major areas of life including health, personal issues, and death.[151] Moreover, older adults tend to be "more politically conservative, more resistant to change, and less tolerant of political and social nonconformists than the young."[152] Thus, each age group has its own "distinctive subculture" that is essential to an effective jury deliberation.[153]

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[143] *See infra* Part IV(A)–(C).

[144] Shamena Anwar et al., *The Role of Age in Jury Selection and Trial Outcomes*, 57 J.L. & ECON. 1001, 1003 (2014).

[145] *See, e.g.*, Commonwealth v. Lopes, 91 N.E.3d 1126, 1131 (Mass. 2018); Commonwealth v. Oberle, 69 N.E.3d 993, 999–1000 (Mass. 2017); Commonwealth v. Evans, 778 N.E.2d 885, 893 (Mass. 2002); Commonwealth v. Samuel, 495 N.E.2d 279, 281 (Mass. 1986).

[146] *See* Appellant's Brief, *supra* note 5, at 16.

[147] *See infra* Part IV(A).

[148] *See infra* Part IV(B)–(C).

[149] *See infra* Part IV(A)–(C).

[150] Zeigler, *supra* note 110, at 1076–77.

[151] Zeigler, *supra* note 110, at 1075.

[152] Zeigler, *supra* note 110, at 1075.

[153] *See* Zeigler, *supra* note 110, at 1075–76.

Both the prosecution and the defense use age as a tactical advantage during jury selection.[154] Specifically, the prosecution is more likely to use its peremptory challenges against younger jurors, while the defense is more likely to use its peremptory challenges against older jurors.[155] This pattern occurs due to potential selection bias: the prosecution is more likely to assume that younger jurors will not convict, while the defense is more likely to assume that older jurors will convict.[156] As a result, the jury typically consists of jurors from the middle-aged distribution.[157] The average age of the jury pool has a striking effect on conviction rates: when the average age of the jury pool is around fifty years old, defendants are convicted about 79% of the time.[158] This pattern occurs in about 50% of criminal trials.[159] Conversely, jury pools that are under the age of fifty only convict about 68% of the time.[160] For comparison, the 2009 criminal conviction rate in Suffolk County and Middlesex County, regardless of jury age, was 62%.[161] A possible explanation for higher conviction rates amongst older jurors is that older jurors are generally more conservative than younger jurors, either because they were born into a more conservative generation or because they become more conservative as they age.[162]

By systemically removing younger jurors from the jury, especially in juvenile trials, the prosecution invites the risk of diminished viewpoints, higher conviction rates, and underrepresentation of the young.[163] As stated above, the disproportionate treatment of younger jurors also increases the chances of unchecked governmental power, lack of impartiality, and an assumption of unfairness.[164] Moreover, young jurors bring perspectives and opinions to deliberations that older jurors cannot adequately represent.[165] In other words, "'a flavor, a distinct quality is lost' if young adults are seriously underrepresented on jury rolls."[166] In order to maintain the integrity and fairness of juvenile jury trials, the SJC should reconsider its classification of young adults as a discrete group for the purposes of preventing

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[154] *See* Anwar et al., *supra* note 144, at 1003.

[155] Anwar et al., *supra* note 144, at 1003.

[156] *See* Anwar et al., *supra* note 144, at 1013.

[157] Anwar et al., *supra* note 144, at 1003.

[158] Anwar et al., *supra* note 144, at 1004.

[159] Anwar et al., *supra* note 144, at 1004.

[160] Anwar et al., *supra* note 144, at 1004.

[161] Lefteris K. Travayiakis, *Massachusetts Criminal Conviction Rates in Suffolk, Middlesex, Norfolk & Worcester Counties Released*, BOS. CRIM. LAWS. BLOG (Mar. 16, 2010), https://perma.cc/AJK4-Z4FB.

[162] Anwar et al., *supra* note 144, at 1022–23.

[163] *See* Anwar et al., *supra* note 144, at 1004; Zeigler, *supra* note 110, at 1076.

[164] *See* Smith, *supra* note 101, at 1537.

[165] *See* Zeigler, *supra* note 110, at 1076.

[166] Zeigler, *supra* note 110, at 1076 (quoting Ballard v. United States, 329 U.S. 187, 194 (1946)).

discriminatory peremptory challenges.[167]

B. *Age is Recognized as a Distinct Group in Other Aspects of Life*

Ageism occurs in various realms of daily life, including education, employment, and residency.[168] Both the courts and the legislature recognize age as protected class in these areas.[169] For instance, Massachusetts' fair housing law prohibits discrimination by housing providers in the sale and rental of housing against current or prospective tenants on the basis of age.[170] Notably, Massachusetts specifically refers to age as a "protected characteristic" for the purposes of regulating housing discrimination practices.[171] As a result, landlords may not refuse to rent to tenants based on age nor increase rental prices based on age nor steer tenants away from potential rental properties based on age.[172]

State and federal legislative enactments also protect adults from age discrimination in hiring, promotion, discharge, compensation, and terms of employment.[173] With regard to age discrimination in the workplace, young adults are actually more likely than their older peers to experience or witness some form of discrimination at work, a phenomenon dubbed "reverse ageism."[174] However, the federal protections for age discrimination typically apply to older workers above the age of forty.[175] Interestingly, younger people tend to have greater exposure to all forms of discrimination than their older counterparts, including racism, sexism, and ageism.[176] In the workplace specifically, younger employees are targeted with stereotypical age-related assumptions.[177] For example, older colleagues may assume their younger colleagues cannot handle important tasks or may overlook

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[167] *See* Anwar et al., *supra* note 144, at 1004; Zeigler, *supra* note 110, at 1076.

[168] Zeigler, *supra* note 110, at 1076.

[169] *See, e.g.*, Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 134–36 (2000) (finding sufficient evidence of age discrimination against the employee under the Age Discrimination in Employment Act); Bloom v. City of Worcester, 293 N.E.2d 268, 285 (Mass. 1973) (upholding a city ordinance that guaranteed equal access to employment, housing, education, recreation, and public accommodations regardless of race, color, religious creed, national origin, sex, age, or ancestry); *see Age Discrimination*, *supra* note 39; *Overview of Fair Housing Law*, *supra* note 42.

[170] *Overview of Fair Housing Law*, *supra* note 42.

[171] *Overview of Fair Housing Law*, *supra* note 42.

[172] *Overview of Fair Housing Law*, *supra* note 42.

[173] *Age Discrimination*, *supra* note 39; Mass. Comm'n Against Discrimination, *Age Discrimination in the Workplace*, MASS.GOV, https://perma.cc/B4Q2-BNXE (last visited Apr. 12, 2023).

[174] Emma Waldman, *Am I Old Enough to Be Taken Seriously?*, HARV. BUS. REV. (Nov. 25, 2020), https://perma.cc/6PVM-TXGX.

[175] *See Age Discrimination*, *supra* note 39; Waldman, *supra* note 174.

[176] Waldman, *supra* note 174.

[177] Waldman, *supra* note 174.

feedback from their younger counterparts on projects.[178]

Here, the prosecution specifically targeted all young jurors by using the majority of its peremptory challenges to eliminate them from the jury.[179] When challenged on the systematic removal of the jurors, the prosecution blatantly indicated that it wanted to remove jurors under the age of twenty-five due to the assumption that college-aged students are unable to make important decisions.[180] If employers and housing providers cannot deny individuals certain experiences and responsibilities on the basis of age, then the government—here, the prosecution—should not be able to either.[181] Notably, population statistics for the City of Boston, the area from which Joshua's jury pool was drawn, show that 70.6% of young adults ages twenty-five to thirty-four have a bachelor's degree or higher, compared to 41.8% of adults over the age of thirty-five.[182] In order to prevent arbitrary peremptory challenges that discriminate on the basis of age-related stereotypes, the SJC needs to recognize age as a discrete group when reviewing peremptory challenges in juvenile trials.[183]

C. *The Court Recognizes Age-Related Factors in Other Aspects of Juvenile Adjudication*

Massachusetts laws regarding juvenile adjudication specifically require that juvenile delinquents "shall be treated, not as criminals, but as children in need of aid, encouragement and guidance."[184] In both state and federal courts, juveniles receive specialized treatment throughout the adjudication process as well as in sentencing consideration due to their youthful age and ongoing brain development.[185] For instance, the Court previously validated youth offender statutes that require the government to prove certain elements and the judge to provide certain jury instructions in juvenile cases.[186] In addition, the general public is excluded from various juvenile proceedings except where the prosecution is proceeding with indictment.[187] With regard to juvenile sentencing, the SJC considered juvenile brain

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[178] Waldman, *supra* note 174.

[179] Appellant's Brief, *supra* note 5, at 14–15.

[180] Commonwealth v. Fernandes, 170 N.E.3d 286, 297 (Mass. 2021).

[181] *See Age Discrimination*, *supra* note 39; *Overview of Fair Housing Law*, *supra* note 42.

[182] BOS. PLAN. & DEV. AGENCY, RSCH. DIV., *supra* note 95, at 21.

[183] *See Fernandes*, 170 N.E.3d at 297; Waldman, *supra* note 174.

[184] MASS. GEN. LAWS ANN. ch. 119, § 53 (West 2021).

[185] *See, e.g.*, Diatchenko v. D.A. for Suffolk Dist., 1 N.E.3d 270, 283–84 (Mass. 2013); *see What Is Juvenile Justice?*, *supra* note 37; *Youth in the Justice System: An Overview*, *supra* note 1.

[186] *See, e.g.*, Commonwealth v. Quincy Q., 753 N.E.2d 781, 789–90 (Mass. 2001) (explaining that in a juvenile criminal proceeding, the prosecution must prove: (1) the elements of the criminal offense; *and* (2) the elements of Mass. Gen. Laws. ch.119 § 54, which are specific to youthful offenders, and the judge must instruct the jury of the same).

[187] MASS. GEN. LAWS ANN. ch. 119, § 65 (West 2021).

development in its decision to protect juvenile offenders from both mandatory and discretionary life sentences without parole.[188] Currently, the Court is considering whether to extend this holding to "emerging adults" who are ages eighteen to twenty and have been convicted of first-degree murder.[189] Since the Court has historically considered a juvenile's age in other aspects of the juvenile trial process, it should do so here by preventing the government from exercising peremptory challenges against young adults on the jury in a discriminatory manner, thus guaranteeing a juvenile defendant the right to a trial by a jury of their peers.[190]

CONCLUSION

The Massachusetts Supreme Judicial Court denied Joshua Fernandes his constitutional right to a fair and impartial jury of his peers when it refused to recognize age as a discrete group when reviewing the prosecution's peremptory challenges at trial. Instead, the Court permitted the prosecution to use the bulk of its peremptory challenges to remove young jurors from the jury panel even though the prosecution admitted to removing young jurors on the assumption that the jurors had a diminished ability to make important decisions because of their age. The discriminatory manner in which the prosecution exercised its challenges would be barred by state and federal precedent but for the SJC's refusal to identify age as a discrete group in the Commonwealth of Massachusetts.

As argued above, the SJC should reconsider its classification of young adults as a discrete group, because young adults bring unique opinions to the deliberation room that may influence conviction rates. Moreover, the Court has already begun expanding the "definitive" list of protected groups under Article I of the Constitution, so it should continue to do so here. In addition, Massachusetts jurisprudence recognizes and protects age in other aspects of everyday life, including housing and employment. The trend should continue into criminal adjudication of juveniles as well. Finally, both state and federal courts consider age-related characteristics when reviewing juvenile criminal procedure and sentencing. By including age as a protected group for the purposes of peremptory challenges in juvenile jury trials, the Court will guarantee that a juvenile defendant receives a fair trial by an impartial jury composed of his peers, not his parents.

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[188] *Diatchenko*, 1 N.E.3d at 283–84.

[189] *See* Ella Fassler, *Massachusetts Could Loosen Life Without Parole Restrictions for Young People*, THE APPEAL (Jun. 30, 2021), https://perma.cc/6W4W-FGFR.

[190] *See supra* Part IV(C).

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