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ADMINISTRATIVE LAW REVIEW



Volume 65

Spring 2013

Number 2

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ARTICLES

JUDGING CONGRESSIONAL OVERSIGHT

JAMELLE C. SHARPE*

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* Associate Professor of Law and Richard W. and Marie L. Corman Scholar, University of Illinois College of Law. For their helpful comments, conversations, and suggestions, I thank Amitai Aviram, Jack Beermann, Stuart Benjamin, Guy-Uriel Charles, Charlton Copeland, Michael Green, Bob Lawless, Margaret Lemos, Andrew Morriss, Arden Rowell, Nicola Sharpe, Sandra Sperino, Kevin Stack, Peter Strauss, Suja Thomas, Christopher Tyson, participants in the University of Cincinnati College of Law faculty workshop series, the Duke Law School Culp Colloquium, the John Mercer Langston Writing Workshop, and the AALS New Voices in Administrative Law Workshop. Special thanks to Nicholas Biersbach and Daniel Raymond for excellent research assistance. Of course, any errors are mine alone.

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INTRODUCTION

That Congress may play no role in law administration is an axiom of the Supreme Court’s separation-of-powers jurisprudence.¹ A combination of constitutional clauses and administrative law doctrines ensure that Congress’s involvement in the interpretation and implementation of federal law is kept to an absolute minimum. Some of these limitations—such as the Incompatibility Clause’s categorical prohibition against sitting Senators and Representatives simultaneously serving in either the Executive or Judicial Branches²—are unambiguously imposed by the text of the Constitution. But courts have gone further, reading into other constitutional provisions similarly tight restrictions on Congress’s postlegislative activities. Thus, in *INS v. Chadha*, the Court ruled that the Bicameralism and Presentment Clauses forbid Congress from nullifying agency decisions through the unicameral veto.³ Courts have likewise narrowly construed Congress’s ability to influence administrative decisionmaking outside of the legislative process.⁴ They regard, with

1. See, e.g., *Bowsher v. Synar*, 478 U.S. 714, 726 (1986).

2. U.S. CONST. art. I, § 6, cl. 2; see also Steven G. Calabresi & Joan L. Larsen, *One Person, One Office: Separation of Powers or Separation of Personnel?*, 79 CORNELL L. REV. 1045, 1047 (1994).

3. *INS v. Chadha*, 462 U.S. 919, 949–59 (1983).

4. This Article deals with three related, though distinct, concepts in analyzing how courts regard Congress’s involvement in law administration: oversight, influence, and control. As used here, “oversight” refers broadly to the formal and informal tools—such as hearings, investigations, ex parte contacts including letters or phone calls, etc.—used by federal legislators and their staffs to gather information from or to influence decisions made by agency officials. See also Jack M. Beermann, *Congressional Administration*, 43 SAN DIEGO L. REV. 61, 71–139 (2006) (describing in detail the forms of oversight employed by members of Congress); cf. JOEL D. ABERBACH, *KEEPING A WATCHFUL EYE: THE POLITICS OF CONGRESSIONAL OVERSIGHT* 217 (1990) (defining oversight as “review after the fact, . . . [including] inquiries about policies that are or have been in effect, investigations of past administrative actions, and the calling of executive officers to account for their financial transactions” (alteration in original) (quoting JOSEPH P. HARRIS, *CONGRESSIONAL CONTROL OF ADMINISTRATION* 9 (1964))). The term “influence” refers to oversight behavior by legislators and their staffs, individually or collectively, that results, or is calculated to result, in an impact on agency decisionmaking. Cf. MORRIS S. OGUL, *CONGRESS OVERSEES THE BUREAUCRACY: STUDIES IN LEGISLATIVE SUPERVISION* 11 (1976). The term “control” refers to postenactment activities—particularly the use of oversight tools—to directly or indirectly assume the final policymaking authority that has been statutorily delegated to an administrative agency. The locus of decisional authority distinguishes influence from

substantial suspicion, congressional ex parte contacts with agency officials during the administrative decisionmaking process and are often inclined to invalidate the resulting decisions.

The theme that emerges from these cases is a highly restrictive vision of Congress's proper involvement in administrative affairs, one that can best be described as "complete delegation." Once Congress delegates policymaking authority⁵ to an agency, courts feel that they must aggressively restrict any continuing role played by federal legislators in law administration, apart from what the Constitution explicitly permits.⁶ Accordingly, courts have decided that federal legislators cannot control or heavily influence how agency officials exercise the powers delegated to them. The rationale is that failing to prevent such control or influence invites the congressional parliamentarianism the Founders feared and drafted the Constitution to prevent.⁷

Given the realities of the modern administrative state, it is difficult to justify this fear of expanding congressional power or complete delegation's rigidity. Rather than living in an era of legislative dominance of executive

control. Where federal legislators assume only persuasive power over agencies, they wield influence. Where they assume the power to make, veto, or supplant decisions made by agencies, they wield control.

5. As used in this Article, "policymaking" refers to those decisions, made within the legal limits of an official's discretion, that are governed by what the official believes will be beneficial moral, social, or economic consequences. Cf. Roy L. Brooks, *The Use of Policy in Judicial Reasoning: A Reconceptualization Before and After Bush v. Gore*, 13 STAN. L & POL'Y REV. 33, 40–41 (2002) (comparing different theories of judicial policymaking, all of which involve some measure of political or moral discretion).

6. In reducing congressional power in this way, complete delegation complements the nondelegation doctrine. As currently understood and applied, the nondelegation doctrine allows Congress to give agencies a substantial amount of its policymaking power, provided that Congress clears the minimal hurdle of articulating an "intelligible principle" to guide how the agencies use that power. See *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("[W]e repeatedly have said that when Congress confers decisionmaking authority upon agencies Congress must 'lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform.'" (quoting *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928))). Complete delegation tells Congress what portion of that delegated policymaking power it is permitted to retain after it passes a statute—essentially none. When complete delegation and nondelegation are taken together, they allow Congress to divest itself of policymaking authority while severely restricting the methods available to Congress for calibrating that divestment.

7. The Framers warned against legislative encroachments, to be sure. See, e.g., THE FEDERALIST NO. 48, at 147–48 (James Madison) (Roy P. Fairfield ed., 1981) (observing, "The legislative department is everywhere extending the sphere of its activity, and drawing all power into its impetuous vortex" and warning that the legislature's "constitutional powers being at once more extensive and less susceptible of precise limits" can "mask . . . the encroachments which it makes on the coordinate departments").

functions,⁸ we, instead, live in an era of what then-Professor Elena Kagan aptly termed “presidential administration.”⁹ Broad delegations of substantial governmental power from Congress to the Executive Branch—whether of legislative, executive, or adjudicative power—have become the norm rather than the exception.¹⁰ At least since the Reagan Administration, the White House has grown more assertive in its efforts to control administrative decisionmaking. Courts have also given the President a freer hand in influencing bureaucratic decisionmaking and have justified doing so on both constitutional and pragmatic grounds. The President’s power to develop and implement public policy without any Congressional input has never been greater.¹¹ From mundane tasks such as exempting federal employees from mandatory retirement requirements to unilaterally creating new administrative agencies that wield tremendous policymaking power, the President has numerous tools for bypassing Congress almost entirely free of the fear of judicial rebuke.¹² Given the current state of play, it is highly unlikely that Congress is positioned to

8. The Framers assumed that the executive department would necessarily be weaker than the legislative department in a representative democracy. James Madison freely admitted as much:

[I]n a representative republic, where the executive magistracy is carefully limited, both in the extent and the duration of its power; and where the legislative power is exercised by an assembly, which is inspired, by a supposed influence over the people, with an intrepid confidence in its own strength; which is sufficiently numerous to feel all the passions which actuate a multitude, yet not so numerous as to be incapable of pursuing the objects of its passions, by means which reason prescribes; it is against the enterprising ambition of this department that the people ought to indulge all their jealousy and exhaust all their precautions.

Id. at 147.

9. See Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245, 2246 (2001).

10. The judiciary has actively enabled this transfer of policymaking authority by adopting an essentially toothless version of the nondelegation doctrine. See *Mistretta v. United States*, 488 U.S. 361, 372 (1989) (“[O]ur jurisprudence has been driven by a practical understanding that in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives.”); see also Gary Lawson, *The Rise and Rise of the Administrative State*, 107 HARV. L. REV. 1231, 1237–41 (1994) (“The rationale for [the] virtually complete abandonment of the nondelegation principle is simple: the Court believes—possibly correctly—that the modern administrative state could not function if Congress were actually required to make a significant percentage of the fundamental policy decisions.”).

11. See WILLIAM G. HOWELL, *POWER WITHOUT PERSUASION: THE POLITICS OF DIRECT PRESIDENTIAL ACTION* 15 (2003) (“[P]residents simply set public policy and dare others to counter. For as long as Congress lacks the votes (usually two-thirds of both chambers) to overturn him, the president can be confident that his policy will stand.”).

12. See *id.* at 6–8.

usurp the President's control of the administrative state. Nevertheless, judicial adoption of complete delegation has substantially limited Congress's ability to influence agencies. The result is a judicially reinforced chasm between the President's and Congress's abilities to influence administrative action.

A more pressing concern than whether Congress will dominate the President is whether, between the President and Congress, agencies are subject to sufficient political oversight.¹³ The task of political oversight has been made more challenging by broad legislative delegations to agencies and the sheer size of the administrative state. These and other factors increase the potential for agency slack, defined as the divergence of presidential and congressional policy preferences on the one hand, and administrative policy preferences on the other. Although the White House has become more effective at reducing agency slack, and thus at making agency officials more politically accountable, comprehensive oversight by the President is simply impossible. To some extent, Congress already fills the inevitable gaps left by presidential oversight and thereby increases the overall political accountability of agency officials. Congress as a whole, however, is already plagued by collective action problems, information deficits, and only episodic interest in bureaucratic affairs. Complete delegation, as currently conceived and applied by the courts, makes legislators' task of managing agency slack that much more difficult.

This Article asserts that the complete delegation needs to be scaled back and refocused. Courts should focus less on the fear that Congress will assume control of administrative functions, the animating intuition behind complete delegation—an intuition that is unlikely to be borne out to any significant degree. Rather, they should view Congress's nonlegislative influence over how agencies wield delegated power as necessary to ensuring the political accountability of agency officials and as complementary to the political influence exercised by the President. By finding a way to accommodate legislator influence over administrative decisionmaking, courts could increase the overall political accountability of agencies and reduce the problem of agency slack caused by broad delegations of regulatory power.

The method of accommodation proposed by this Article is “partial

13. James Madison pointed to a related concern regarding the concentration of executive power, though he did not expect it to appertain to a representative republic. *See THE FEDERALIST NO. 48*, at 147 (James Madison) (Roy P. Fairfield ed., 1981) (“In a government where numerous and extensive prerogatives are placed in the hands of an hereditary monarch, the executive department is very justly regarded as the source of danger, and watched with all the jealousy which a zeal for liberty ought to inspire.”).

subdelegation.” In the nonadjudicative context,¹⁴ where agencies are granted a measure of policy discretion by statute or where they must interpret ambiguous statutory language, courts should allow agencies to explicitly account for the policy preferences of the federal legislators overseeing them. So long as the legislators’ influence does not lead agencies to exceed their statutory authority or to otherwise act illegally—by ignoring decisional factors specified by statutes or by formulating policies unsupported by logic or the clear weight of available evidence—their ultimate decisions would not be subject to the judicial invalidation they can currently expect.

Moreover, relaxing complete delegation in this way need not disturb the President’s primacy in influencing administrative affairs. To the extent that courts discern a presidential policy preference that conflicts with that of the congressional oversight committee, the President’s preference would trump. This will leave congressional oversight committees in a supporting role, taking up the political accountability slack left by the White House. Additionally, establishing a judicially enforced hierarchy of oversight responsibility may encourage the political branches to more frequently coordinate their attempts at influence.¹⁵

The Article proceeds as follows. Part I describes how the judiciary addresses congressional and presidential attempts to control or influence bureaucratic decisionmaking. It begins by demonstrating how complete delegation narrowly restricts or completely forbids Congress’s control or influence over bureaucratic decisionmaking. It then describes why courts give the President a comparatively freer hand in controlling and influencing agency officials. Part II explains how complete delegation, by limiting Congress’s ability to influence agency decisionmaking, exacerbates the problem of agency slack and reduces agencies’ overall political accountability. Part III proposes “partial subdelegation” as an alternative to complete delegation, and describes how it can reduce agency slack. Part IV identifies and addresses potential objections to this proposal. A brief conclusion follows.

14. As described in Part I, *infra*, agency adjudications raise due process concerns that make political influence—whether from Congress or the President—problematic. Accordingly, the recommendations made in this Article apply only to nonadjudicative agency decisionmaking.

15. Such a recommendation is not as novel as it may at first seem. The Supreme Court has already shown its willingness to set an institutional interpretive hierarchy between courts and agencies when it comes to statutory interpretation. See *generally* *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984).

I. JUDICIAL CONSTRAINTS ON POLITICAL CONTROL AND INFLUENCE OF AGENCIES

A. Congress and Complete Delegation

Congressional oversight is an implied constitutional power; no constitutional provision expressly empowers Congress to exercise general oversight authority over the administrative state.¹⁶ Despite the Constitution's silence as to the nature and scope of Congress's powers of oversight,¹⁷ the notion that it is a legitimate legislative function has never been seriously questioned. To the contrary, it has been an abiding assumption of democratic governance since before the Founding Era that legislatures have an obligation to oversee the government officials that interpret and implement the law. The idea seems to have been well understood by the British Parliament and by several colonial legislatures prior to the drafting and ratification of the Constitution.¹⁸

Nevertheless, courts have construed the permissible *effects and uses of* legislative oversight narrowly, and in doing so have embraced the view that congressional delegation of policymaking authority to administrative agencies must be complete delegation. While Congress can investigate the activities of federal administrators, it cannot retain direct or indirect control over their policy decisions outside of the legislative process unless the

16. To the extent that the Constitution's text explicitly contemplates a congressional oversight role, it does so in only two specific instances and it supports only Congress's information-gathering authority. Article I, Section Seven requires the President to include with his veto of legislation "objections" to be considered by both houses of Congress. U.S. CONST. art. I, § 7, cl. 2; *see also* Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2181 (1990) ("The Constitution . . . requires that a veto be accompanied by a statement of objections, after which Congress is to reconsider the proposed legislation."). Article II, Section Three requires the President to "from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall judge necessary and expedient." U.S. CONST. art. II, § 3.

17. A reason for this curious omission may be that the Framers considered Congress's possession of such authority so obvious that it did not need to be stated. As one commentator observed, the Framers did not think it necessary to grant Congress explicit oversight powers because they believed "[t]he power to make laws implied the power to see whether they were faithfully executed." Arthur M. Schlesinger Jr., *Introduction Essay to CONGRESS INVESTIGATES: A DOCUMENTED HISTORY 1792-1974*, at xix (Arthur M. Schlesinger Jr. & Roger Bruns eds., 1975).

18. *See* FREDERICK M. KAISER ET AL., CONG. RESEARCH SERV., RL 30240, CONGRESSIONAL OVERSIGHT MANUAL 20 (2011), <http://www.fas.org/sgp/crs/misc/RL30240.pdf>; AKHIL REED AMAR, AMERICA'S CONSTITUTION 111 n.* (2005) (observing that "broad powers of investigation and oversight . . . had historically been exercised by parliaments and legislatures on both sides of the Atlantic").

Constitution specifically provides otherwise. Furthermore, legislators' ability to influence agency officials is heavily circumscribed. Though these limitations can be glimpsed in numerous areas of administrative law, this Part focuses on three categories of cases in which they are most evident. The first category involves legislation in which Congress attempts to preserve for its members or agents an official service role in administrative agencies. The second category involves legislation that gives congressional committees or subgroups veto power over administrative decisions. The third involves the amount of influence members and committees can exert on agency officials through *ex parte* contacts or other oversight tools.

Complete delegation is evident in each category; courts have tightly restricted or altogether forbidden postdelegation involvement of members of Congress and congressional subgroups in the bureaucratic decisionmaking process. The practical effect of complete delegation is to prevent Congress's members or subparts from assuming anything even approaching decisional control over decisions that have been delegated to agencies. Together, these cases reveal a restrictive impulse that creates substantial space for agencies to act independently of Congress.

1. *Congressional Service in Administrative Agencies*

The Incompatibility Clause may be the Constitution's clearest and most categorical expression of the complete delegation idea. It is an absolute ban against members of Congress simultaneously holding an appointed office in either the Executive or Judicial Branch.¹⁹ It provides that "no Person holding any Office under the United States, shall be a Member of either House during his Continuance in Office."²⁰ The original purpose of the Clause was primarily to prevent the Executive from exercising undue influence over legislators.²¹ The Framers were well aware of British problems with "corruption," with the monarchy attempting to influence Parliament by offering its members handsomely compensated executive positions.²² "Joint office holding soon became the mechanism by which

19. See Calabresi & Larsen, *supra* note 2, at 1047.

20. U.S. CONST. art. I, § 6, cl. 2.

21. See THE FEDERALIST NO. 76, at 406 (Alexander Hamilton) (J.R. Pole ed., 2005) (describing the Incompatibility Clause as an "important guard[] against the danger of executive influence upon the legislative body").

22. See Harold H. Bruff, *The Incompatibility Principle*, 59 ADMIN. L. REV. 225, 231 (2007). The Framers' sensitivity to simultaneous legislative-executive office holding seems to have two sources. The first was witnessing the King of England's ability to unduly influence Parliament by offering its members lucrative ministerial positions, pensions, titles of nobility, or other emoluments. See Calabresi & Larsen, *supra* note 2, at 1053-54. The second was dissatisfaction caused by the patronage hiring system, which Royal Governors used to secure

Parliament worked its will with the executive.”²³ By including the Incompatibility Clause in the Constitution, the Framers intended to prevent the President from similarly dominating congressional decisionmaking through the substantial influence that patronage provides. In sum, the Clause was intended to reduce the expansion of presidential power.²⁴

While the Incompatibility Clause may have prevented the President from dominating Congress through patronage hiring, it has almost certainly prevented Congress from dominating the President in ways that directly impact administrative decisionmaking. By forbidding the President from filling agency leadership positions with sitting members of Congress, powerful members have far fewer opportunities to demand appointment to high office in exchange for their compliance with the President’s policy agenda.²⁵ This makes the President’s prospects for political success—and hence for reelection—less dependent on congressional cooperation.²⁶ More importantly, the Incompatibility Clause prevents the formation of *de facto* legislative counsels that partner with (and perhaps dominate) the President in executing the laws.²⁷ Accordingly, one of its practical effects is to prevent legislators from simultaneously creating and enforcing federal law.²⁸ As Professor John Manning has observed, “This provision . . . precludes the development of a parliamentary-style government in which legislators serve as senior executive officers, as well as any system in which legislators play a judicial role, as in the British House of Lords.”²⁹

The principle embodied by the Incompatibility Clause, and the restrictive approach to Congress’s involvement in law administration that

the obedience of legislators and judges. *See id.* at 1056.

23. Bruff, *supra* note 22, at 232.

24. *See* Calabresi & Larsen, *supra* note 2, at 1086.

25. *See id.* at 1080 & n.168 (describing a study that reported the extremely limited frequency with which the President has appointed a member of Congress to an agency leadership position).

26. *Cf. id.* at 1089 (illustrating a scenario in which, without the Incompatibility Clause, the President would likely become dependent on currying Congress’s favor through offering appointments in order to turn Administration policies into law).

27. For example, one could see how the President’s ability to make independent policy judgments with respect to the use of military force would be substantially undermined if he, in capitulating to political pressure, were to appoint as Secretary of Defense the sitting Chair of the Senate or House Armed Services Committee. *Id.*

28. “Hence, the functions of generating and applying the laws would be placed in separate hands, reducing the potential for arbitrary treatment of citizens.” Bruff, *supra* note 22, at 235.

29. John F. Manning, *Separation of Powers as Ordinary Interpretation*, 124 HARV. L. REV. 1939, 1984 (2011); *see also* Calabresi & Larsen, *supra* note 2, at 1062 (“[I]n twenty-one short words . . . an obscure constitutional provision foreclose[s] even the most attenuated forms of parliamentary government in America.” (internal quotation marks omitted)).

animates it, has been extended to federal legislators who attempt to serve on administrative bodies as putatively private citizens. In *Metropolitan Washington Airports Authority v. Citizens for the Abatement of Aircraft Noise, Inc.*,³⁰ the Supreme Court determined the constitutionality of the so-called Transfer Act. The Act transferred operating control of two Washington, D.C., airports—Reagan National Airport and Dulles International Airport—from the Department of Transportation to the Metropolitan Washington Airports Authority (MWAA).³¹ The MWAA was created through a compact between the Commonwealth of Virginia and the District of Columbia and was controlled by them.³² Members of Congress, concerned that the MWAA would reallocate a substantial amount of air traffic from Dulles to Reagan (their preferred airport), provided in the Transfer Act for the creation of a Board of Review to oversee the MWAA’s activities.³³ The nine-member Board of Review would be composed entirely of members of Congress, though they would sit on the Board “in their individual capacities.”³⁴

Relying on “basic separation-of-powers principles”³⁵ rather than specific constitutional provisions, the Court invalidated the part of the Transfer Act providing for MWAA oversight by the Board of Review.³⁶ Acknowledging that the Board’s review “might prove to be innocuous,”³⁷ the Court nevertheless concluded that “Congress could, if this Board of Review were valid, use similar expedients to enable its Members or its agents to retain control, outside the ordinary legislative process,” of administration of the laws.³⁸ Quoting James Madison’s admonition against congressional encroachment on the powers of the coordinate branches, the Court denominated the creation of the Board as such “an impermissible encroachment.”³⁹

Unsurprisingly, courts have also extended this prohibition against administrative service by members of Congress to agents under congressional control. The Supreme Court in *Bowsher v. Synar*⁴⁰ observed, “The Constitution does not contemplate an active role for Congress in the

30. 501 U.S. 252 (1991).

31. *Id.* at 255–56.

32. *Id.* at 257–58.

33. *Id.* at 258–59.

34. *Id.* at 259 & n.5 (citing 49 U.S.C. § 2456(f)(1) (1988)).

35. *Id.* at 277 n.23.

36. *Id.* at 277.

37. *Id.*

38. *Id.*

39. *Id.* (citing THE FEDERALIST NO. 48, at 253 (James Madison) (Ian Shapiro ed., 2009)).

40. 478 U.S. 714 (1986).

supervision of officers charged with the execution of the laws it enacts”;⁴¹ that a “direct congressional role in the removal of officers charged with the execution of the laws [apart from impeachment] is inconsistent with separation of powers”;⁴² and that “[t]he structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.”⁴³ Although framed in terms of presidential power over removals, *Bowsher* is as much a case about Congress’s capacity to retain nonlegislative, postenactment involvement in the administration of federal law. It involved federal legislation, which retained for Congress a measure of decisional authority—specifically the power to remove a federal official charged with implementing federal law. Such legislation is problematic because, the Court concludes, permitting Congress to retain (even limited) removal power over such an official is tantamount to giving Congress control over the decisions made by that official.⁴⁴ Although *Bowsher* involved a form of indirect rather than direct administrative involvement by federal legislators, and thus was not governed by the Incompatibility Clause, the Court nevertheless resorted to the broad proscription against congressional law administration evidenced by the Clause.⁴⁵

2. Congressional Vetoes of Administrative Decisions

Just as the Supreme Court has barred members of Congress from

41. *Id.* at 722.

42. *Id.* at 723.

43. *Id.* at 726.

44. The *Bowsher* Court clearly equated the power to remove with the power to control: To permit the execution of the laws to be vested in an officer answerable only to Congress would, in practical terms, reserve in Congress control over the execution of the laws. . . . Once an officer is appointed, it is only the authority that can remove him, and not the authority that appointed him, that he must fear and, in the performance of his functions, obey. The structure of the Constitution does not permit Congress to execute the laws; it follows that Congress cannot grant to an officer under its control what it does not possess.

Id. (citations omitted) (internal quotation marks omitted). Some scholars have challenged the notion that the Court equates removal and control in all circumstances. See, e.g., Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 709 (2007) (distinguishing, in the context of the President’s removal powers as discussed in *Myers v. United States*, 272 U.S. 52 (1926), between the power to supervise agency officials and the power to control them).

45. The *Bowsher* Court mentioned the Incompatibility Clause in passing, along with other constitutional provisions, when supporting the general proposition that Congress is forbidden from implementing the laws it adopts. *Bowsher*, 478 U.S. at 722–23 (referencing, among other provisions, the Appointments Clause, the Impeachment Clause, and the Incompatibility Clause).

simultaneously holding positions in the Executive Branch and agents of Congress from wielding executive power, it has forbidden subparts of Congress from vetoing agency decisions. In *INS v. Chadha*,⁴⁶ the Supreme Court invalidated § 244(c)(2) of the Immigration and Nationality Act (INA),⁴⁷ which provided either house of Congress with a legislative veto⁴⁸ over deportation suspension orders issued by the Attorney General.⁴⁹ Chadha, a British national who overstayed his nonimmigrant student visa, was ordered to show cause why he should not be deported.⁵⁰ He did not and instead conceded his deportability at his deportation hearing.⁵¹

As part of a complicated procedure established by the INA for suspending, reviewing, and invalidating deportation orders, the immigration judge before whom Chadha appeared adjourned Chadha's hearing to allow Chadha to apply for a suspension of deportation.⁵² INA § 244(a)(1) granted the Attorney General the discretion, upon making specific factual findings enumerated in the statute, to suspend Chadha's deportation.⁵³ Acting on behalf of the Attorney General, an immigration judge ordered Chadha's deportation suspended.⁵⁴ Section 244(c)(1) required that the suspension order be sent to both the House of Representatives and the Senate, whereupon either chamber acting alone could veto it by majority vote.⁵⁵ Had neither chamber acted, Chadha's legal status would have been converted from deportable to legal permanent resident.⁵⁶ The House of Representatives, upon reviewing Chadha's case, voted to veto the immigration judge's suspension order, rendering Chadha deportable.⁵⁷

The underlying purpose of the legislative veto was to accommodate two competing interests. The first was to invest the deportation process with a measure of humanity by allowing the Attorney General to grant a reprieve

46. 462 U.S. 919 (1983).

47. *Id.* at 959.

48. "The term 'legislative veto' describes a variety of mechanisms for requiring the approval of Congress, or some entity within Congress, before a proposed administrative action can become effective." RONALD A. CASS ET AL., *ADMINISTRATIVE LAW CASES AND MATERIALS* 34 (6th ed. 2011).

49. *Chadha*, 462 U.S. at 925.

50. *Id.* at 923.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 924.

55. *Id.* at 924–25.

56. *Id.* at 925–26.

57. *Id.* at 926–27.

to those the Immigration and Naturalization Service ordered deported.⁵⁸ The second was to assert control over administrative decisionmaking by reserving for Congress a low-cost method—a method that is less difficult to execute than the normal legislative process of bicameralism and presentment—for reviewing and invalidating specific suspension orders issued by the Attorney General (or his delegate).⁵⁹

The Court framed the issue in the case as whether § 244's legislative veto allowed Congress to legislate in a manner barred by the Constitution.⁶⁰ The Court approached the question by asking whether the unicameral veto was essentially “legislation,” in the sense that it “had the purpose and effect of altering the legal rights, duties, and relations of persons.”⁶¹ Determining that it was,⁶² the Court invalidated the veto because it failed to follow the exclusive procedures by which the Constitution permits Congress to legislate under Article I—bicameralism and presentment.⁶³

The Court could not have reached this conclusion had it not already determined that Congress delegated to the Attorney General the power to change Chadha's immigration status. Had Congress not delegated that authority to the Attorney General, the House's veto would have merely confirmed that which Chadha had already conceded—his deportability—in which case the veto would have done nothing to alter his immigration status.⁶⁴ In order for the House's veto to be unconstitutional, the Constitution must have required Congress to delegate status-altering authority to the Attorney General, retaining none for itself apart from full legislative override. The Court implicitly acknowledged this point in

58. See *CASS ET AL.*, *supra* note 48, at 35.

59. *Id.*

60. *Chadha*, 462 U.S. at 929.

61. *Id.* at 952.

62. Chadha conceded his deportability in his initial deportation hearing and was ordered deported. *Id.* at 923. His subsequent application for a suspension of that order was granted. *Id.* at 924. The Court interpreted the suspension as changing Chadha's legal status from deportable to not deportable. Accordingly, Chadha's legal status was “not deportable” when his file was sent to Congress, and the House's legislative veto of the suspension order changed Chadha's status back to “deportable.” *Id.* at 926–28.

63. See *id.* at 952–53.

64. The Court stated the point as follows:

It is not disputed that this choice to delegate authority [to alter Chadha's immigration status] is precisely the kind of decision that can be implemented only in accordance with the procedures set out in Art. I. Disagreement with the Attorney General's decision on Chadha's deportation—that is, Congress' decision to deport Chadha—no less than Congress' original choice to delegate to the Attorney General the authority to make that decision, involves determinations of policy that Congress can implement in only one way; bicameral passage followed by presentment to the President.

Id. at 954–55.

explaining that bicameralism and presentment were the exclusive means by which Congress could have invalidated the Attorney General's suspension order: "Congress must abide by its delegation of authority until that delegation is legislatively altered or revoked."⁶⁵ The Court also anticipated that this categorical admonition, if applied too broadly, could substantially undermine congressional-administrative relations. It was therefore quick to clarify that the "Constitution provides Congress with abundant means to oversee and control its administrative creatures."⁶⁶

This implicit distinction between oversight and control warrants closer attention because it evidences the Court's adherence to complete delegation. The Court pointed to three types of legislation to which Congress may resort when supervising administrative agencies: "the legislation that creates [agencies]," "durational limits on authorizations," and "formal reporting requirements."⁶⁷ The first two categories allow Congress to control agency decisionmaking within the constitutional parameters set by *Chadha's* reasoning, which is to say that Congress may only control agency decisionmaking through duly enacted legislation. Neither authorizing legislation nor durational limits (often included in authorizing legislation) involve Congress's invalidation of bureaucratic choices outside of the legislative process. While Congress is free to revisit the policy choices it makes in its authorizing legislation, and while durational limits on that legislation may provide periodic occasions for such review, neither involve a claim that Congress can alter bureaucratic decisions outside of the full legislative process. While "formal reporting requirements" secure a postenactment role for Congress in the administration of the laws, that role does not involve postdelegation decisional control. Rather, the role is limited to gathering information, which is to say that it is limited to monitoring. Reporting requirements do not violate complete delegation precisely because they do not legally bind an agency to new or different congressional policy choices.

This point is illustrated by the Federal Circuit's decision in *City of Alexandria v. United States*.⁶⁸ There the court considered the city's constitutional challenge to a "report and wait" provision, 40 U.S.C. § 484(e)(6), which required the General Services Administration (GSA) to report intended land sales to a congressional oversight committee and to wait for the committee's reaction to the transaction.⁶⁹ While the statute did

65. *Id.* at 955.

66. *Id.* at 955 n.19.

67. *Id.*

68. 737 F.2d 1022 (Fed. Cir. 1984).

69. *Id.* at 1023-25.

not provide oversight committees with any formal veto power, committees could vote their disapproval of disfavored transactions. The Federal Circuit found the provision constitutional, in no small part because heeding or ignoring a committee's disapproval was, legally speaking, within the GSA Administrator's discretion.⁷⁰ Politically speaking, the court believed that bureaucrats would often feel compelled to capitulate to committee disapprovals of similar transactions.⁷¹ Put another way, the court assumed that committees may have de facto veto power over GSA land sales, even if the "report and wait" provision fell short of giving them de jure veto power. Some such instances of control, one could reasonably infer, may be beyond the court's ability to detect and correct.

Importantly, the court did intimate that such influence could cross the line of legality. For example, the court surmised that an oversight committee's de facto control of an agency may be problematic in the atypical case where it claimed more than the "great moral effect" that oversight often has on agency decisionmaking.⁷² In other words, a committee would clearly be overreaching if it were to claim legal authority to veto land sales under 40 U.S.C. § 484(e)(6).⁷³ As discussed in the following subpart, courts have similarly rejected congressional influence when it has led policy-formulating agencies to consider factors other than those required by statute.⁷⁴

3. Congressional Influence Through Ex Parte Contacts

Even though courts have rejected legislation that gives members of Congress or congressional subparts a direct postdelegation policymaking role, they do not expect legislators to limit their involvement in agency decisionmaking solely to the passage of new or amendatory legislation. To the contrary, courts understand that legislators routinely make contact with and attempt to influence agency officials outside of the formal legislative process.⁷⁵ Justice Scalia, for instance, freely acknowledged this in *FCC v.*

70. *Id.* at 1026 ("[N]othing suggests that here a committee vote of disapproval in any way changes the law.").

71. *Id.*

72. *Id.* at 1027.

73. *Id.*

74. *See, e.g.,* D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir. 1971) (rejecting as ultra vires the Secretary of Transportation's consideration of a congressman's threat to withhold funds for an unrelated building project).

75. *See, e.g.,* Gravel v. United States, 408 U.S. 606, 625 (1972):

That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature. Members of Congress are constantly in touch with the Executive Branch of the Government and with

Fox Television Stations, Inc. when he observed that members of Congress and committees routinely attempt to exert influence on agency officials through extralegislative contacts.⁷⁶ He even went so far as to admonish the dissenters—who criticized his explicit acknowledgement of such committee–agency exchanges—for their apparent political prudishness.⁷⁷

Indeed, the reporters are filled with cases in which courts have been asked to assess the legal consequences of *ex parte* congressional–administrative exchanges. These cases differ factually from those already discussed in that they do not involve legislation retraining a postdelegation policymaking role for Congress. Instead the focus in these cases is on whether legislators have, through informal *ex parte* contacts, unduly pressured agency officials into considering extrastatutory political factors during their deliberations. Like the administrative-participation and legislative-veto cases already discussed, the opinions in these “congressional influence” cases evince fidelity to complete delegation; they exhibit an overriding concern that powerful legislators or oversight committees will usurp the delegated policymaking power of administrators absent close judicial monitoring. How courts apply complete delegation to congressional influence cases depends to some extent on the decisionmaking process utilized by the agency, with courts drawing a clear distinction between adjudications and nonadjudications. Legislator involvement in formal and informal adjudications elicits a categorically negative judicial response, whereas courts have developed a more nuanced, though still restrictive, approach to congressional involvement in other proceedings, such as rulemakings.

Courts have developed rules to aggressively prevent congressional involvement in adjudicative administrative proceedings; the mere *appearance* of direct congressional pressure on administrative decisionmakers is sufficient to warrant invalidation of an agency’s judicial or quasi-judicial decisions.⁷⁸ This is the case even if the agency can provide a fully satisfying

administrative agencies—they may cajole, and exhort with respect to the administration of a federal statute—but such conduct, though generally done, is not protected legislative activity.

See also *SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 126 (3d Cir. 1981) (en banc) (“[W]e cannot simply avert our eyes from the realities of the political world: members of Congress are requested to, and do in fact, intrude, in varying degrees, in administrative proceedings.”); *United States v. Mardis*, 670 F. Supp. 2d 696, 702 (W.D. Tenn. 2009) (“Legislators routinely express their opinions to executive branch officials about matters for which their departments or agencies are responsible.”).

76. 556 U.S. 502, 525 (2009).

77. *Id.* at 523–29.

78. See *Lichoulas v. FERC*, 606 F.3d 769, 779–80 (D.C. Cir. 2010) (rejecting a claim of impermissible congressional pressure in absence of evidence that the congressman’s

and independent justification to support its decisions.⁷⁹ Courts are particularly perturbed by congressional oversight that targets agency adjudicators directly or attempts to closely scrutinize the official's step-by-step decisionmaking process.⁸⁰

Although courts are not as strict with respect to nonadjudicative processes, congressional ex parte contacts still elicit substantial judicial suspicion and close scrutiny.⁸¹ Rather than invalidating agency decisions based on nothing more than legislators' ex parte contacts, courts focus on whether those contacts shaped officials' decisions.⁸² Courts have shown their willingness to validate an agency's nonadjudicative decision so long as the substance of legislators' contacts relate to factors agency officials are statutorily permitted to consider.⁸³ At least one court has sought to clarify the applicable review standard by distinguishing between the substance of legislators' contacts and the simple fact of those contacts. In *DCP Farms v.*

correspondence with the agency influenced its decisions); *ATX, Inc. v. U.S. Dep't of Transp.*, 41 F.3d 1522, 1529 (D.C. Cir. 1994) (concluding that "congressional pressure 'sacrifices the appearance of impartiality' and violates due process when it provides 'powerful external influence' on the decisionmaking process of an official exercising a judicial function" (quoting *Pillsbury Co. v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966))).

79. See *ATX*, 41 F.3d at 1530.

80. See, e.g., *Koniag, Inc. v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978) (finding that the Interior Secretary's appearance of impartiality was compromised by a letter he received from Congressman John Dingell days before deciding the eligibility of Alaskan tribes to take land and revenues under the Alaska Native Claims Settlement Act); *Pillsbury Co.*, 354 F.2d at 965 (invalidating a Federal Trade Commission order where a Senate subcommittee aggressively questioned two of four commissioners about a merits of divestiture case before the hearing examiner made an initial decision); *Schaghticoke Tribal Nation v. Kempthorne*, 587 F. Supp. 2d 389, 409 (D. Conn. 2008) (recognizing the general principle that "[c]ongressional interference in the administrative process is of particular concern in a quasi-judicial proceeding").

81. Cf. *DCP Farms v. Yeutter*, 957 F.2d 1183, 1185, 1187–88 (5th Cir. 1992) (declining to apply a stringent "mere appearance of bias" standard to agency decisions made well before adjudicative proceedings were initiated).

82. See, e.g., *Aera Energy LLC v. Salazar*, 642 F.3d 212, 220 (D.C. Cir. 2011) ("[P]olitical pressure invalidates agency action only when it shapes, in whole or in part, the judgment of the ultimate agency decisionmaker."); *Yeutter*, 957 F.2d at 1188 ("Actual bias is ordinarily required to invalidate decisions by federal agencies." (citing *Dirt, Inc. v. Mobile Cnty. Comm'n*, 739 F.2d 1562 (11th Cir. 1984))); *Peter Kiewit Sons' Co. v. U.S. Army Corps of Eng'rs*, 714 F.2d 163, 169–70 (D.C. Cir. 1983) (stating that courts will invalidate an agency's nonadjudicative decisions if "'extraneous factors intruded into the *calculus of consideration*' of the individual decisionmaker" (quoting *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971))).

83. *Peter Kiewit Sons' Co.*, 714 F.2d at 170 (explaining that a court reviewing an agency's nonadjudicative decisions "must consider the decisionmaker's input, not the legislator's output," and that the "test is whether extraneous factors intruded into the *calculus of consideration* of the individual decisionmaker" (internal quotation marks omitted)).

Yeutter, the Fifth Circuit explained:

Congressional “interference” and “political pressure” are loaded terms. We need not attempt a portrait of all their sinister possibilities, even if we were able to do so. We can make plain that the force of logic and ideas [conveyed in legislators’ contacts with agency officials] is not our concern. They carry their own force and exert their own pressure.⁸⁴

To the extent that legislator contacts may permissibly persuade agency officials to change course, that persuasion must be driven by the argumentative and apolitical force of legislators’ arguments. Where the persuasive force of a legislator’s contacts derives from factors extraneous to the statute the agency is tasked with implementing—such as the fact that a legislator has threatened unrelated programs administered by the agency⁸⁵—the agency’s decision invites judicial invalidation. Accordingly, courts adopting this framework have been less inclined to invalidate agency decisions that are independently justified, even where legislators have directly and specifically engaged officials on the substance of pending decisions.⁸⁶

That courts would aggressively protect agency adjudications against political interference is unsurprising. Adjudications—whether undertaken by agencies or courts—raise due process concerns not mirrored in the nonadjudicative context. When individual rights are at stake, or where government action differentiates individuals from the general population, notions of impartiality, notice, and meaningful participation become the *sine qua non* of legitimate judgment.⁸⁷ Aggressive protection against the prejudgment that may result from political influence—whether it comes from the President, members of Congress, or even state officials—is entirely consistent with protecting adjudicative legitimacy. It should therefore come as no surprise that courts tasked with balancing Congress’s interest in swaying agency officials through *ex parte* contacts against an individual’s due process rights routinely privilege the latter over the former, even if

84. *Yeutter*, 957 F.2d at 1188.

85. *See D.C. Fed’n of Civic Ass’ns*, 459 F.2d at 1236, 1245–46.

86. *See, e.g., California ex rel. State Water Res. Control Bd. v. FERC*, 966 F.2d 1541, 1552 (9th Cir. 1992) (finding that two letters from Representative John Dingell to Federal Energy Regulatory Commission commissioners urging a particular interpretation of the Federal Land Policy and Management Act had no apparent impact on the agency’s ultimate interpretation).

87. *See Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385–86 (1908) (holding that due process requires individual taxpayer participation before the imposition of a tax levy that distinguishes certain taxpayers from the general public). *See generally Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (“The fundamental requisite of due process of law is the opportunity to be heard.” (internal quotation marks omitted)).

legislators could provide a useful perspective on fretted questions of interpretation or policy. This is presumably the case even where agencies use adjudication to promulgate broadly applicable prospective rules.

By contrast, the promulgation of prospective and broadly applicable rules—the work product of rulemaking—has not been thought to produce the kind of individualized due process concerns raised by adjudication and thus has not been thought to require the same degree of due process protection.⁸⁸ Courts have therefore struck the balance between congressional oversight and individual procedural fairness in a way that allows agencies to be more solicitous of legislators' views. Nevertheless, agencies are not typically permitted to justify their decisions based on congressional policy concerns—budget priorities, changing constituent preferences, uniformity in regulatory goals and methods of attainment, legislative backlogs, etc.—not contemplated by the statutes the agencies are implementing.

To be clear, courts do not understand complete delegation as barring legislators from *attempting* to influence agency officials in the nonadjudicative decisionmaking process. Such attempts are more accurately regarded as extrajudicial rather than illegal. When reviewing agency decisionmaking, courts have settled on the following unspoken rule: political influence through legislative *ex parte* contacts is not a violation of complete delegation *per se*, but judicial *support for* such influence *would be*. As the nonlegislative actions of congressional members or committees are not legally binding, agencies must give them no special weight when making policy or enforcing the law. Likewise, courts must ensure that agencies do not give member or committee policy preferences dispositive weight when they review the legal validity of agencies' decisions.

These cases also show that courts expect agency officials to resist this pressure to adopt legislator policy preferences not expressed in legislation. Because courts cannot impose consequences for impermissible influence directly on legislators, they do so indirectly by penalizing agencies that fail to resist legislative pressure. Presumably, members and committees will see little benefit in trying to dominate agency officials if courts will invalidate the administrative decisions produced by such domination. As importantly, invalidation provides a disincentive for agency officials to allow themselves to be dominated. Among other things, judicial invalidation thwarts

88. See *Bi-Metallic Inv. Co. v. State Bd. of Equalization*, 239 U.S. 441, 445 (1915) (holding that due process does not require individual taxpayer participation in the decision to increase property taxes on all taxable property within the city); *CASS ET AL.*, *supra* note 48, at 382 (“There is no doubt . . . that the procedures requisite for decisions addressing many members of an affected class on grounds generally applicable classwide are minimal in comparison to the procedures constitutionally required for individualized determinations.”).

realization of the agency's regulatory agenda and may diminish agency credibility with important constituent groups—other courts, other members of Congress, the President, regulated industry, or the public, for example. As is true in the legislative-veto and the Incompatibility Clause cases, complete delegation in the *ex parte* contacts arena encourages agencies to operate independently of their congressional overseers.

B. *Presidential Influence on Agencies*

Presidents have increasingly assumed direct responsibility for, and direct control over, administrative decisionmaking. “Our most recent Presidents, if not their predecessors, seem to have been at pains to convey the impression that they are personally responsible for the conduct of domestic governance, to a degree that extends to the resolution or decision of particular administrative issues”⁸⁹ However, courts have not allowed the President's attempts at increased administrative influence and control to go completely unchallenged. As indicated above,⁹⁰ due process and statutory limits can cabin whether and to what extent the President can direct the actions of his administrative subordinates. Courts have carefully monitored White House interference in agency adjudications and have policed White House *ex parte* contacts with agencies when statutes require their disclosure.⁹¹ More broadly, courts have made clear that “congressional policy announced in a statute necessarily prevails over inconsistent presidential orders.”⁹²

Nevertheless, courts tend to give the President a fairly wide berth in influencing or controlling administrative decisionmaking. For example, the President's right to dictate agency action through executive orders has gone largely unquestioned in the courts,⁹³ and challenges to the substantive

89. Strauss, *supra* note 44, at 702 (footnote omitted).

90. See *supra* note 87 and accompanying text.

91. See, e.g., *Portland Audubon Soc'y v. Endangered Species Comm.*, 984 F.2d 1534, 1541 (9th Cir. 1993) (“Because Committee decisions are adjudicatory in nature, are required to be on the record, and are made after an opportunity for an agency hearing, we conclude that the [Administrative Procedure Act's (APA's)] *ex parte* communication prohibition is applicable [to presidential contacts].”); *id.* at 1546 (concluding that “the President and his staff are covered by [the APA's] prohibition and are not free to attempt to influence the decision-making processes of the Committee through *ex parte* communications”).

92. *LOUIS FISHER, PRESIDENTIAL WAR POWER* 19 (1995); see also *Kendall v. United States*, 37 U.S. 524, 540–41 (1838) (concluding that the President lacked the authority to direct an Executive Branch official to disregard ministerial duties specifically delegated to that official by statute).

93. See Strauss, *supra* note 44, at 708 (“Fortuitously, perhaps, the courts have had few if any occasions to confront directly the question of presidential decisional authority in conventional administrative law contexts.”).

legality of executive orders are overwhelmingly unsuccessful.⁹⁴ Additionally, proponents of the “unitary” executive theory of presidential power assert that Presidents have the authority to directly control all powers delegated by statute to his or her subordinates.⁹⁵

That the judiciary permits the White House greater leeway than Congress in influencing administrative affairs is also clear from the *ex parte* contacts cases analyzed above. Although both presidential and congressional influence can properly be denominated “political,” courts have been much less forgiving when encountering the latter than the former. Courts have justified this more deferential treatment of presidential political pressure from both constitutional and practical perspectives.

In a notable example, the D.C. Circuit has insisted on the “basic need of the President and his White House staff to monitor the consistency of executive agency regulations with Administration policy.”⁹⁶ While Congress’s authority to oversee executive decisionmaking is longstanding and unquestioned, the text of the Constitution vests the execution of federal law solely in the President, including the execution of those laws that administrative agencies were created to implement.⁹⁷ Additionally, the Framers specifically rejected a “plural executive” in favor of a single President, in some measure because of the perceived advantages of “[political] accountability fixed on a single source.”⁹⁸ By contrast, Congress’s fractured composition immunizes it from the laser-like political accountability brought to bear on the Presidency. Congress’s composition also handicaps its capacity to effectively evaluate and coordinate regulatory efforts, impediments not shared by the President.⁹⁹ Courts have pointed to these and other differences between Congress and the President to justify the latter’s assertions of direct control over agency decisionmaking.

II. COMPLETE DELEGATION AND AGENCY SLACK

In an era of broad delegations of economic and social policymaking authority to agencies,¹⁰⁰ complete delegation significantly restricts

94. See HOWELL, *supra* note 11, at 154–55 (reporting that federal courts affirmed the legality of 83% of executive orders issued between 1942 and 1998).

95. See Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263, 266 (2006) (“[D]efenders of a strongly ‘unitary’ executive argue that the Constitution requires that all executive power be vested in the President, and therefore that any agency action should be subject to presidential revision.”).

96. *Sierra Club v. Costle*, 657 F.2d 298, 405 (D.C. Cir. 1981).

97. See *id.*

98. *Id.*

99. *Id.*

100. That Congress delegates a wide range of powers to the Executive Branch is

congressional involvement in bureaucratic activity. It leaves Congress with two viable paths for addressing agency slack, defined as the difference between the policy preferences of agencies and their political overseers. The first option is legislative override, which is the primary means by which Congress can secure judicial support for undoing agency policymaking with which it disagrees. Congress can pass a new statute (subject to the President's veto), clarifying or supplanting an agency's interpretation. Courts will then enforce the new statute against the agency by invalidating interpretations that contradict it.¹⁰¹

The second option is attempting to influence agency interpretation through formal and informal oversight mechanisms (such as *ex parte* contacts). As already explained, courts put members of Congress and committees on a very short leash when it comes to postdelegation participation and influence. Participation is verboten, at least when it is provided for in legislation but not explicitly in the Constitution. Most attempts at influence are heavily discouraged. Where agencies capitulate to informal congressional pressure their decisions are candidates for judicial invalidation. Those contacts the courts do deem innocuous serve little purpose in increasing the political accountability of agencies. While courts will allow federal legislators to raise issues contemplated by statutes—issues that can be raised by those without Congress's unique institutional perspective or those that agencies perhaps should be expected to address anyway¹⁰²—courts forbid agencies from accounting for other “political”

commonly accepted in administrative law circles. *See, e.g.*, Curtis A. Bradley & Trevor W. Morrison, *Historical Gloss and the Separation of Powers*, 126 HARV. L. REV. 411, 444–45 (2012) (“The complexities of the modern economy and administrative state, along with the heightened role of the United States in foreign affairs, have necessitated broad delegations of authority to the executive branch.”); Kagan, *supra* note 9, at 2253 (observing that “as the administrative state grew and then the New Deal emerged, Congress routinely resorted to broad delegations”).

101. This notion assumes, of course, that courts will faithfully interpret the new statute so as to advance congressional policy choices. The likelihood that judicial interpretation will not present equal or greater agency problems than administrative interpretation depends on a host of factors. Some commentators have expressed skepticism as to whether courts can be counted on to act more faithfully than agencies when it comes to interpretation. *See, e.g.*, Beermann, *supra* note 4, at 144 (“Unless someone provides a convincing argument that judges pursue the public good, as embodied in congressional legislation, as opposed to their own private interests, including seeing their own political ideals enacted into law, there is good reason to doubt that judicial review presents the greatest promise for enforcing and enacting Congress's will.”); *cf.* Jamelle C. Sharpe, *Legislating Preemption*, 53 WM. & MARY L. REV. 163, 168–70 (2011) (arguing that, absent clear instructions or a clear sense of how courts are likely to rule, Congress should be reluctant to delegate preemption authority to federal courts rather than agencies).

102. In this regard, the D.C. Circuit has indicated that issues raised by federal legislators

considerations raised by federal legislators, even when agencies are not expressly forbidden by statute to consider them.¹⁰³ Even when courts permit federal legislators to have their say, courts do nothing to ensure that agencies provide reasonable responses to them. This leaves Congress with fewer and less effective opportunities to persuade agencies to account for the bigger regulatory, political, economic, or moral picture, which facilitates an increase in agency slack.

Even if one assumes the President's primacy in overseeing and influencing administrative decisionmaking, it cannot credibly be claimed that the White House is capable of managing the agency slack problem on its own.¹⁰⁴ It is true that Presidents have become increasingly aggressive in their efforts to direct agency policymaking, and that they are most likely to suffer the political consequences for agency missteps. Nevertheless, the President's unique position in federal policy formation and implementation could just as easily be viewed as a hindrance to political accountability. Given the number of policy decisions that must be funneled through the White House, it is highly unlikely that voters will penalize the President for the scores of agency decisions with which they disagree. At best, the President is only somewhat more accountable for the majority of his decisions than his legislative counterparts in Congress, who likewise are unlikely to be penalized for most of the votes they take or legislation they introduce (or fail to introduce). Moreover, the resources that Presidents dedicate to agency oversight are likely insufficient to check most agency policymaking. These already finite resources can be stretched even thinner by the numerous ways in which administrative officials resist presidential influence. As Professor William Howell has explained:

Administrative agencies may read their [presidentially imposed] mandates selectively; they may ignore especially objectionable provisions; they may report false or misleading information about initiatives' success or failures. . . . [T]he executive branch assuredly does not reduce to the

should have no more influence on agencies than issues raised by members of the public. *Cf.*, *e.g.*, *Sierra Club*, 657 F.2d at 409–10 (observing that “administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources”).

103. Of course, an enacting Congress is free to forbid agencies from considering particular factors when exercising delegated discretion. Such a situation arose in *Whitman v. American Trucking Ass'ns*, where both the Environmental Protection Agency (EPA) and the courts had acknowledged that the Clean Air Act prohibited the EPA from considering economic implementation costs when setting ambient air quality standards. 531 U.S. 457, 464–65 (2001).

104. See Peter L. Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM. L. REV. 573, 583 (1984) (observing that agencies “are all subject to presidential direction in significant aspects of their functioning, and [are each] able to resist presidential direction in others” (emphasis added)).

president himself. Bureaucrats enjoy a fair measure of autonomy to do as they please.¹⁰⁵

In sum, it is a mistake to view the President's or Congress's administrative oversight capacities in isolation or as singularly sufficient. Hamstringing Congress's opportunities to influence agencies reduces the overall political accountability of the administrative state. As discussed below, judicial hostility to Congress's influence-driven oversight exacerbates the principal-agent problems Congress already experiences in policing agency slack. If one accepts that overseeing sessions of Congress stand as principals to administrative agents (a supposition the courts have acknowledged to varying degrees), the complete delegation severely restricts the ability of oversight committees to discipline agencies.

This Part relies on a basic principal-agent framework adapted from the political science literature on political control of public bureaucracies.¹⁰⁶ This framework assumes that principals (here Congress and the President, discussed in greater detail below) delegate policymaking power—such as the power to resolve statutory ambiguities—to administrative agencies for a host of practical and political reasons.¹⁰⁷ By virtue of this delegation, agencies are necessarily granted some level of discretion in how they resolve those ambiguities.¹⁰⁸ “Agency slack,” defined here as the gap between the policy preferences of agencies and the initial or evolving preferences of their political principal(s), invariably results from agencies exercising this delegated interpretive discretion. Principals attempt to reduce agency slack in advance through delegation-shaping and agency design; they determine the scope of agency discretion, the operating hierarchy of the agency, and

105. HOWELL, *supra* note 11, at 21.

106. Professor Moe, in a classic political science article on political control of bureaucracies, describes the application of the principal-agent model to representative government as follows:

Democratic politics is easily viewed in principal-agent terms. Citizens are principals, politicians are their agents. Politicians are principals, bureaucrats are their agents. Bureaucratic superiors are principals, bureaucratic subordinates are their agents. The whole of politics is therefore structured by a chain of principal-agent relationships, from citizen to politician to bureaucratic superior to bureaucratic subordinate and on down the hierarchy of government to the lowest-level bureaucrats who actually deliver services directly to citizens.

Terry M. Moe, *The New Economics of Organization*, 28 AM. J. POL. SCI. 739, 765–66 (1984).

107. These reasons include a need to “resolve commitment problems,” “overcome information asymmetries in technical areas of governance,” “enhance the efficiency of rule making,” and “avoid taking blame for unpopular policies.” Mark Thatcher & Alec Stone Sweet, *Theory and Practice of Delegation to Non-Majoritarian Institutions*, in *THE POLITICS OF DELEGATION* 1, 4 (Mark Thatcher & Alec Stone Sweet eds., 2003).

108. *Cf. id.* (contending that giving agents some discretion is necessary for principals to benefit from delegation).

the decisional procedures to be employed by the agency. Afterwards, political principals monitor and nudge agencies according to the principal's policy preferences. Adopting the appropriate mix of restrictions and monitoring mechanisms is crucial because when the opportunity presents itself, agencies may deviate from the policy preferences of their principals in order to maximize their own interests—political protection, budget protection or expansion, and substantive policy advocacy.¹⁰⁹ Additionally, simple defects in the delegation—unclear directions, novel and unanticipated circumstances, or previously unidentified conflicts with other statutory mandates enforced by the agency or other agencies—can increase agency slack even when agencies are actually trying to please their principal(s).

The analysis here focuses on Congress's and the President's ex post control tools. This Part assumes that both Congress and the President, the latter most often through the Executive Office of the President, act as agencies' principals. Treating Congress and the President as dual administrative principals is well-supported by basic tenets of constitutional and administrative law. Congress is an administrative principal because the Article I Vesting Clause grants it the legislative authority to create, eliminate, or shape the powers of agencies.¹¹⁰ Courts have frequently inferred from this general legislative power the additional supervisory power to investigate the activities of Executive Branch officials and to demand explanations from them.¹¹¹ The President acts as a principal because the Article II Vesting Clause invests him with the primary responsibility for faithfully executing laws enacted in conjunction with Congress.¹¹² As described in Part I, Congress and the President share the power to appoint and remove administrative officials, albeit in clearly distinct roles. For instance, agencies derive their powers of law creation, implementation, and interpretation from Congress and the President, both of which have the authority (and many would say the responsibility), to

109. See Moe, *supra* note 106, at 766.

110. See U.S. CONST. art. I, § 1.

111. In *Watkins v. United States*, the Court described Congress's general powers of investigation in sweeping terms:

The power of the Congress to conduct investigations is inherent in the legislative process. That power is broad. It encompasses inquiries concerning the administration of existing laws as well as proposed or possibly needed statutes. It includes surveys of defects . . . for the purpose of enabling the Congress to remedy them. It comprehends probes into departments of the Federal Government to expose corruption, inefficiency or waste.

354 U.S. 178, 187 (1957).

112. See U.S. CONST. art. II, §§ 1, 3.

ensure that agencies use those powers appropriately.¹¹³

Application of the principal–agent framework described above highlights two problems that complete delegation causes for congressional oversight. The first is an enforcement problem where the unavailability of judicial enforcement decreases congressional opportunities for reducing agency slack. The second is a “presidential primacy” in which important constituencies are led to underestimate the importance of congressional oversight because the President also oversees the federal bureaucracy.

The ultimate practical impact of both problems is reduced democratic accountability for agencies. The enforcement problem reduces the credibility of congressional attempts to rein in agency slack and diminishes agency incentives to be responsive to prevailing popular opinions as reflected by election results.¹¹⁴ The presidential primacy problem leads courts, commentators, and voters to rely more heavily on one political agent instead of on two to bring agencies closer in line with popular political sentiment.¹¹⁵ Legislative override, despite its high likelihood of failure, becomes the most viable political recourse where the President proves unresponsive or agencies prove recalcitrant in the face of presidential pressures.¹¹⁶

113. See, e.g., *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3153–54 (2010) (implying that the President has the constitutional power and responsibility to control decisions made by administrative agency officials); cf. AMAR, *supra* note 18, at 111 n.* (observing that “broad powers of investigation and oversight . . . had historically been exercised by parliaments and legislatures on both sides of the Atlantic”).

114. See Beermann, *supra* note 4, at 142 (observing that congressional oversight can reflect prevailing public opinion, particularly after midterm elections which divide Congress and the Presidency between political parties).

115. See *id.*

116. Included with legislative override are other procedures, such as the budgetary process or the expedited joint resolution process provided by the Congressional Review Act of 1996 (CRA), which requires Congress to follow the normal bicameralism and presentment procedures in order to undo administrative actions. In most circumstances, the CRA is a redundant and ineffective tool for overturning agency actions with which Congress disagrees. See Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1717 (2012) (noting that the CRA “has been successfully invoked on exactly one occasion,” and that “it has not proved especially effective”). See generally Note, *The Mysteries of the Congressional Review Act*, 122 HARV. L. REV. 2162 (2009) (arguing that the CRA is little used even in situations in which it could be most effective). It is true that budgetary oversight—such as budget riders—can be effective in preventing agencies from ignoring legislators’ policy preferences. See Beermann, *supra* note 4, at 84–90 (describing how federal legislators use the appropriations process to manage agency decisionmaking). How effectively Congress uses its budget power to manage agency slack is far from clear. Compare Louis Fisher, *War and Spending Prerogatives: Stages of Congressional Abdication*, 19 ST. LOUIS U. PUB. L. REV. 7 (2000) (arguing that Congress has abdicated much of its budgetary responsibilities to the President), with Neal Devins, *Abdication by Another Name:*

A. *The Enforcement Problem*

Complete delegation reduces congressional opportunities for holding wayward agencies accountable through judicial review. As already explained, courts heavily discourage Congress's influence-driven oversight. When agencies capitulate to it, they subject their decisions to judicial invalidation even when federal legislators push agency officials to make policy choices that fall squarely within the agency's statutory mandate.¹¹⁷ From a principal-agent perspective, the absence of positive oversight from courts decreases the likelihood that agencies will exercise their discretion in a manner consistent with congressional preferences. As Professors David Epstein and Sharyn O'Halloran observed, "More aggressive monitoring of agencies by courts can reduce agencies' waywardness, by inducing them to follow the statutes they administer more faithfully than they otherwise might. The idea that judicial review can have this effect is commonplace in classic administrative law theory, as well as [principal-agent] scholarship."¹¹⁸

Moreover, complete delegation has the following and somewhat puzzling practical effect: it places greater emphasis on self-policing by agencies despite the fact that agency slack is an endemic problem of delegation. It shifts the focus of inquiry away from the judiciary's traditionally recognized responsibility to police the separation of powers and toward an extrajudicial space in which agencies are free to negotiate with Congress and the President for the best deal. Of course, courts frame this extrajudicial space not in terms of agency self-policing but in terms of political control.¹¹⁹

The D.C. Circuit, in *Sierra Club v. Costle*, assumed that political pressure from members of Congress or congressional oversight committees was among the "considerations that Congress could not have intended to make relevant" when delegating policymaking authority to an agency official.¹²⁰

An Ode to Lou Fisher, 19 ST. LOUIS U. PUB. L. REV. 65 (2000) (countering that federal legislators are heavily engaged in the budgetary process).

117. Unless, of course, the agency is being pressured to do something contrary to its statutory requirements.

118. Jud Mathews, *Deference Lotteries*, 91 TEXAS L. REV. (forthcoming 2013) (citing LOUIS L. JAFFE, *JUDICIAL CONTROL OF ADMINISTRATIVE ACTION* 320 (1965) and DAVID EPSTEIN & SHARYN O'HALLORAN, *DELEGATING POWERS: A TRANSACTION COST POLITICS APPROACH TO POLICY MAKING UNDER SEPARATE POWERS* 24–25 (1999)). *But see* Charles R. Shipan, *The Legislative Design of Judicial Review: A Formal Analysis*, 12 J. THEORETICAL POL. 269, 274 (2000) (pointing out various ways in which Congress can preclude the courts from reviewing agency action).

119. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009); *City of Alexandria v. United States*, 737 F.2d 1022 (Fed. Cir. 1984).

120. *United States ex rel. Kaloudis v. Shaughnessy*, 180 F.2d 489, 491 (2d Cir. 1950); *see Sierra Club v. Costle*, 657 F.2d 298, 409–10 (D.C. Cir. 1981) ("Where Congressmen keep

Accordingly, the D.C. Circuit indicated that it would have invalidated any agency decision citing congressional pressure—or political considerations important to federal legislators—as a relevant decisional factor, thereby penalizing the agency for capitulating to pressures it presumably should have resisted. Although in a form different from *Costle*, the D.C. Circuit's decision in *District of Columbia Federation of Civic Ass'ns v. Volpe* also turned on the assumption that the enacting Congress would have preferred agencies implementing federal law ignore congressional postdelegation influence.¹²¹ Similarly, a plurality of the Supreme Court in *Fox Television* acknowledged the reality of congressional oversight pressures on agency decisionmaking but scoffed at the notion that such pressures actually determined the Federal Communications Commission's ultimate regulatory position.¹²²

Compare this with the President-regarding assumption adopted by the Federal Circuit in *City of Alexandria*. There, the court surmised that the GSA Administrator would all but certainly capitulate to congressional pressure. The reason it would do so, however, had little to do with the power congressional oversight committees wield over the GSA. As the court readily acknowledged, the Administrator was well within his statutory authority to ignore the oversight committee entirely.¹²³ Rather, the court presumed that the President would not empower the GSA Administrator, a relatively junior official in the Executive Branch hierarchy, to complicate executive–congressional relations by proceeding with land transactions that Congress disapproved.¹²⁴ Irrespective of any discretion enjoyed by the Administrator, the court assumed that he would exercise that discretion in a way that served the President's larger political interests even if that meant capitulating to Congress in individual cases.¹²⁵

Regardless of the political control assumptions adopted by courts, complete delegation can leave Congress in a weakened oversight position.

their comments focused on the substance of the proposed rule—and we have no substantial evidence to cause us to believe Senator [Robert] Byrd did not do so here—administrative agencies are expected to balance Congressional pressure with the pressures emanating from all other sources.” (footnote omitted). *But see* Sharpe, *supra* note 101, at 169–73 (arguing that, all things being equal, Congress may delegate policymaking authority to agencies precisely because it will be able to exercise greater influence over them as compared to courts).

121. *See* D.C. Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231, 1247–49 (D.C. Cir. 1971).

122. *Fox Television*, 556 U.S. at 524–25.

123. *City of Alexandria*, 737 F.2d at 1026.

124. *Id.*

125. *Id.* (“Presidents may at times be at loggerheads with Congress in highly publicized matters, of national significance usually. They do not employ [General Services Administration] Administrators to place themselves at loggerheads likewise, in smaller matters.”).

It funnels congressional responses to agency waywardness into the options of legislative override, which is difficult to coordinate and frequently ineffective, or informal oversight pressures, which are judicially unenforceable and hence easier for agencies to ignore. The result is a greater agency slack problem than would otherwise result from a judicial approach that consciously accounts for principal–agent theory.

B. *The Presidential Primacy Problem*

As compared to Congress, which operates under the restrictions of complete delegation and several institutionally endogenous handicaps, the President has become increasingly effective at using extrastatutory tools to influence administrative behavior.¹²⁶ Generally, observers now accept that the President has gained the upper hand on Congress when it comes to reducing administrative agency slack across the federal bureaucracy.

In her exhaustive study of the Clinton Administration’s supervision of administrative agencies, then-Professor Elena Kagan described how President Clinton significantly increased his influence over agency decisionmaking.¹²⁷ In doing so, he continued a trend of presidential control begun by President Reagan. President Clinton used three nonstatutory control mechanisms: (1) directives issued to agency heads that required them to take particular actions within set time periods, (2) modification of Office of Management and Budget review of agency rulemakings (including those of independent agencies), and (3) taking credit for agency actions through speeches and other public events.¹²⁸

President Obama has gone even further than his predecessors, at least with regard to the first type of influence. Traditionally, the moniker “independent” has been given to those agencies whose organizational features are calculated to insulate them from presidential control. Though their specific structures may vary, these agencies derive their “independence” from one essential feature: “the President lacks authority to remove their heads from office except for cause. Thus, these agencies are independent in the sense that the President cannot fire their leaders for political reasons and, consequently, cannot use this ultimate sanction to back up particular policy recommendations.”¹²⁹ They are, therefore,

126. See generally William D. Araiza, *Judicial and Legislative Checks on Ex Parte OMB Influence Over Rulemaking*, 54 ADMIN. L. REV. 611 (2002) (footnote omitted) (discussing the influence the President exercises on administrative rulemaking through ex parte Office of Management and Budget contacts with agencies).

127. See generally Kagan, *supra* note 9.

128. *Id.* at 2284–3303.

129. Lisa Schultz Bressman & Robert B. Thompson, *The Future of Agency Independence*, 63

distinguishable from “executive” agencies—such as the Department of Justice or the State Department—the heads of which serve in the President’s cabinet and can presumably be fired for any reason or no reason at all.¹³⁰

In Executive Order 13,579, President Obama indicated that independent agencies are expected, perhaps even obligated, to adopt and implement his regulatory goals. Framed in the subjunctive, the order stated, “Independent regulatory agencies, no less than executive agencies” should adopt policies that protect “public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.”¹³¹ The order also directed independent agencies to develop plans to periodically review and analyze their preexisting significant regulations “within 120 days of [the] order.”¹³² This language, though seemingly innocuous, is more assertive than that typically used by Presidents when addressing independent agencies.¹³³

While she does not couch her analysis in such terms, Kagan’s conclusions here are consistent with principal–agent analysis. “Congress’s most potent tools of oversight require collective action (and presidential agreement)”¹³⁴ When Presidents have greater involvement in agency decisionmaking, they are more likely to block legislative efforts to overturn those decisions through legislative override.¹³⁵ Agencies, aware that Congress will encounter substantial difficulties in overriding their decisions because of a potential presidential veto, will have less incentive to appease congressional policy preferences.

Political scientists have come to similar conclusions regarding the efficacy of presidential bureaucratic control efforts as compared to those of Congress. The President has comparative advantages over Congress in addressing the primary causes of agency slack, in terms of information and transaction costs—both of which facilitate a principal’s ability to understand and correct the actions of its agents. Most obviously, the President wields enormous power over the executive departments, the

VAND. L. REV. 599, 610 (2010).

130. See *Myers v. United States*, 272 U.S. 52, 176 (1926).

131. Exec. Order No. 13,579, 3 C.F.R. 256 (2012).

132. *Id.*

133. But see Joshua D. Wright, *The Antitrust/Consumer Protection Paradox: Two Policies at War with Each Other*, 121 YALE L.J. 2216, 2263 n.195 (2012) (“President Obama has indicated a desire for independent agencies to comply with his orders but has not required them to do so.”).

134. Kagan, *supra* note 9, at 2347.

135. *Id.*

heads of which serve in his cabinet and at his pleasure.¹³⁶ Even with respect to independent agencies, over which the President enjoys comparatively weaker influence, he often has access to better information about the activities of administrative agencies than do members of Congress.¹³⁷ The President can also exert influence over the flow of information from agencies to Congress, instructing them to release data slowly, selectively, or not at all.¹³⁸ With regard to transaction costs, Congress is a collective body that often has to coordinate its efforts to effectively address agency waywardness. The President, on the other hand, does not generally suffer from such collective action problems and therefore incurs comparatively miniscule transaction costs when trying to influence administrators.¹³⁹ The President, in sum, is positioned to provide a unified perspective on fretted policy issues handled by agencies, whereas Congress will respond through committees that may not represent the will of Congress or even the preferences of the median legislator within Congress.¹⁴⁰

While the President almost certainly enjoys advantages over federal legislators when it comes to administrative oversight, those advantages

136. Professor David Lewis has made the following constitutionally based claim for presidential control of agencies:

It is not clear in the Constitution what exactly the Founders meant by executive power. They granted presidents the ability to secure in writing the recommendations of their principal officers, the ability to nominate principal officers, and the responsibility to faithfully execute the law. The reasonable interpretation of this grouping of powers, and one generally adopted by presidents, is that presidents are obligated to direct the executive branch of the government. In order for presidents to successfully carry out their oath of office, it is their responsibility to make sure the policies of the U.S. government are implemented effectively. To do so, they need control of the administrative apparatus of government.

DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946–1997* 24 (2003). From this descriptive account of the President's relationship with the administrative state, Professor Lewis draws the following normative inference: "In short, [presidents] need the types of administrative structures that maximize presidential control, and the bureau model fits the bill." *Id.* This Article disagrees with Professor Lewis's conclusion that these constitutional arrangements indicate that presidents should be given *even more* power over administrative decisionmaking. To the contrary, this Article operates from the premise that congressional oversight, properly arranged, can and must provide an important counterbalance to the Presidency's natural tendency toward unilateral bureaucratic action.

137. HOWELL, *supra* note 11, at 101.

138. *See id.* at 101.

139. *See id.* at 107–08.

140. *See, e.g.,* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 *COLUM. L. REV.* 1749, 1814 (2007) (contending that this type of oversight will often result in a reflection of the views of a subset of legislators rather than Congress as a whole).

should not be overstated. As Professor Lisa Schultz Bressman notes, the belief in a single presidential perspective is somewhat dubious, as are the extent of the benefits that are believed to derive from it. Far from applying a unified perspective on administrative matters, the President is rarely involved in directing agency decisions.¹⁴¹ Rather, Executive Branch oversight of bureaucratic decisionmaking is routinely conducted by a variety of officials, such as White House staff members.¹⁴² It is simply implausible that a significant amount of this oversight is ever brought to the President's attention, or even to a single subordinate within the Executive Branch. Additionally, it may be that the President is just as susceptible to factionalism and capture by vociferous or powerful interest groups as are members of Congress.¹⁴³

Complete delegation enhances reliance on presidential oversight by largely restricting effective congressional attempts at influence to the legislative process. As with the enforcement problem, the presidential primacy problem can result in greater agency autonomy where agencies resist both congressional and presidential pressure. Additionally, and perhaps as concerning, complete delegation's enhancement of the presidential primacy problem undermines checks and balances by enabling presidential unilateralism. To the extent either of the political branches can hold agencies to account, the Presidency has many more opportunities to influence or to control their delegated legislative, executive, and adjudicative decisions.

III. RELAXING COMPLETE DELEGATION

As already described in detail, courts have developed and applied complete delegation across multiple areas of administrative law. Moreover, courts have done so where specific constitutional mandates appear to require it, and where no such specific constitutional mandates require its adoption. This significantly limits the ability of Congress to manage the distance between its policy preferences and those of administrative agencies, a problem that is only enhanced by judicial acceptance of the President's dominance in overseeing administrative decisionmaking. It also seems that Congress has internalized complete delegation when it comes to legislative oversight. Several statutes and House and Senate rules

141. *Id.*

142. *Id.*

143. *See id.* at 1815 (citing Jide Nzelibe, *The Fable of the Nationalist President and the Parochial Congress*, 53 UCLA L. REV. 1217, 1231–46 (2006)) (explaining that the President is often motivated to accommodate a more narrow geographical and population constituency due to the effects of the electoral college).

subdelegating oversight authority to committees are carefully worded so as to avoid the investiture of policymaking authority in those committees.¹⁴⁴ Instead, Congress subdelegates “insignificant” authority to the committees, largely encompassed by such activities as investigation and information gathering.¹⁴⁵ While these tools can prove effective in influencing bureaucratic decisionmaking, their numerous deficiencies and lack of judicial enforceability significantly reduce their usefulness in helping Congress manage agency slack.

As discussed above, courts have concluded that they can only recognize congressional involvement in law administration when Congress is legally empowered to control its terms and conditions, and Congress is legally empowered to assert this control only when it acts through legislation.¹⁴⁶ Accordingly, judicial rejection of congressional postdelegation involvement in law administration assumes that, for Congress, it is control or nothing at all.

Courts need not be so severe in their treatment of congressional influence because permitting members or oversight committees a judicially cognizable role in agency policymaking need not result in the parliamentarianism feared by the Founding Era. Indeed, the pooling of

144. See, e.g., SENATE MANUAL, S. DOC. NO. 110-1, at 41 (2008) (“Each standing committee, including any subcommittee of any such committee, is authorized . . . to require by subpoena or otherwise the attendance of such witnesses and the production of such correspondence, books, papers, and documents . . . as may be authorized by resolutions of the Senate.”); JEFFERSON’S CONSTITUTION MANUAL AND RULES OF THE HOUSE OF REPRESENTATIVES, H.R. DOC. NO. 110-162, at 563 (2009) (“For the purpose of carrying out any of its functions and duties . . . a committee or subcommittee is authorized . . . to require, by subpoena or otherwise, the attendance and testimony of such witnesses and the production of such books, records, correspondence, memoranda, papers, and documents as it considers necessary.”).

145. I use the term “insignificant” here not to indicate the practical unimportance of information gathering but to distinguish it from the three categories of “significant authority” the Court has described in its separation-of-powers cases. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 126 (1976) (“We think . . . that any appointee exercising significant authority pursuant to the laws of the United States is an ‘Officer of the United States,’ and must, therefore, be appointed in a manner prescribed by [the Appointments Clause].”). In *Buckley*, the constitutionality of the appointments procedures for the Federal Election Commission commissioners turned on whether the commissioners exercised significant authority, which the Court indicated were executive, legislative, or adjudicative powers. See *id.* at 109–13. Investing the commissioners with recordkeeping, disclosure, and investigative functions did not pose a constitutional problem. *Id.* at 137 (“Insofar as the powers confided in the Commission are essentially of an investigative and informative nature, falling in the same general category as those powers which Congress might delegate to one of its own committees, there can be no question that the Commission as presently constituted may exercise them.”).

146. See *supra* Part I.

significant authority—executive, legislative, or adjudicative—in the administrative state poses graver separation-of-powers concerns than would an increased (though still limited) congressional role in law administration. Properly conceived and structured, a judicial stance that emphasizes *participation in* agency decisionmaking rather than *control of* agency decisionmaking can increase the political accountability of agency policymaking. Moreover, it can do so without unduly increasing congressional power at the expense of the Executive or the Judiciary.

This Part lays out the proposal for “partial subdelegation,” an alternative to complete delegation in the congressional influence context. The difference between complete delegation and partial subdelegation hinges on the frequently overlooked distinction between decisional control and decisional participation in administrative decisionmaking. Whereas complete delegation actively discourages Congress’s postdelegation influence of agency officials due to a fear that congressional subgroups will assume control of bureaucratic decisionmaking, partial subdelegation supports limited congressional subgroup participation in bureaucratic decisionmaking to enhance the political accountability of agency policymakers. At its core, partial subdelegation would lift the specter of judicial invalidation where agencies cite congressional postdelegation policy preferences as a factor in the policy choices they make. Instead, partial subdelegation would make congressional policy preferences a factor, under limited circumstances, in the exercise of delegated agency policymaking discretion. While agencies would not be required to adopt those preferences as their own, they would be required to explain why they chose not to do so. This information forcing would support congressional participation in agency policymaking and make it difficult for bureaucrats to make wholly independent policy judgments outside the supervision of Congress.

Partial subdelegation would only apply where agencies have been delegated some policy discretion (and hence when political views are most relevant), such as when they are required to interpret ambiguous statutory provisions or when they are expressly delegated the authority to make law. Courts would employ partial subdelegation if two showings can be made. First, courts must be satisfied that factoring in congressional policy preferences would not lead the agency to act *ultra vires* or otherwise illegally. Second, courts must be satisfied that other nonpolitical factors do not point clearly in another policy direction. Importantly, partial subdelegation would calibrate congressional influence so as to complement presidential oversight, rather than supplant it. Accordingly, to the extent that evident presidential and congressional policy views conflict, where congressional preferences are a lesser included of presidential preferences,

or vice versa, the President's preferences would trump. Taken together, these features could secure for congressional subgroups (ideally a duly authorized committee overseeing a particular agency) a participatory role in agency policymaking that increases agency political accountability while reducing agency slack.

What follows is an illustration of how partial subdelegation might operate in the *Chevron* context, where *Chevron* requires agencies to make critical policy choices in order to fulfill the regulatory mandates implied by ambiguous statutory provisions. This Part then explains how partial subdelegation would address the specific agency slack problems of enforcement and presidential primacy described in Part II.

A. *Partial Subdelegation: A Chevron-Based Example*

The familiar *Chevron* two-step analysis provides the basic framework by which courts review agencies' interpretations of ambiguous statutes. Under *Chevron* Step One, courts look to the plain language of the statute to determine whether "Congress has directly spoken to the precise question at issue."¹⁴⁷ If it has, "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."¹⁴⁸ If Congress has not spoken clearly on the issue—if the statute is silent or ambiguous—courts proceed to *Chevron* Step Two, which instructs them to defer to an agency's reasonable interpretation of the statute.¹⁴⁹ In essence, *Chevron* Step Two tells courts to test whether an agency's interpretive choices fit within the realm of ambiguity left by the statute. *Chevron* requires courts to accept an agency's choices if within the realm of ambiguity, but to reject the agency's choices if outside the realm of ambiguity; however, *Chevron* does not permit courts to reject an agency's interpretation simply because they *disagree* with an agency's interpretation.¹⁵⁰

At its most basic level, the *Chevron* analysis is equal parts statutory interpretation and institutional choice.¹⁵¹ The statutory interpretation part

147. *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984).

148. *Id.* at 842–43.

149. *Id.* at 843–44.

150. See *Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) ("[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency. . . . *Chevron*'s premise is that it is for agencies, not courts, to fill statutory gaps." (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 742 (1996))).

151. See Jonathan T. Molot, *Ambivalence About Formalism*, 93 VA. L. REV. 1, 22 (2007) ("Yet *Chevron*'s formal rule is geared not just to promote fidelity to [the enacting] Congress—the primary goal in the statutory interpretation literature—but also to limit judicial power

of *Chevron* requires any government entity confronted with ambiguous statutory language to determine Congress's intent with as much certainty as reliable evidentiary sources permit.¹⁵² The purpose of this evidence must always be the same: to aid the interpreter in faithfully identifying and adhering to the enacting Congress's policy choices. This is true whether those sources are limited to statutory text and basic syntactical analyses¹⁵³ or whether they also include such extratextual sources as legislative history and the contemporary legal contexts in which statutes were passed.¹⁵⁴ In this sense, *Chevron* does not ask courts to deviate from standard statutory interpretation.

The institutional choice part of *Chevron* establishes the default rule that agencies, not courts, are the primary interpreters of ambiguous regulatory statutes.¹⁵⁵ Where traditional tools of statutory construction fail to narrow an ambiguous statute's interpretive possibilities to a single "clear" meaning, courts must defer to an agency's reasonable interpretation of the statute.¹⁵⁶

vis-à-vis other constitutional agents.").

152. *Chevron* Step One instructs courts to use "traditional tools of statutory construction" to determine whether "Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842, 843 n.9.

153. "The simplest version of textualism is enforcement of the 'plain meaning' of the statutory provision: that is, given the ordinary meanings of words and accepted precepts of grammar and syntax, what does the provision signify to the reasonable person?" WILLIAM N. ESKRIDGE, JR., DYNAMIC STATUTORY INTERPRETATION 38 (1994).

154. *See id.* at 225–39 (emphasizing that legislative history may be useful as evidence of whether Congress chooses to maintain historical practices or to discontinue them).

155. Some commentators have questioned whether the Supreme Court has adhered to this institutional choice in its post-*Chevron* cases. *See, e.g.*, Beermann, *supra* note 4, at 151 (pointing out that the Court has not been as deferential to agency interpretation as the language of the *Chevron* opinion would otherwise indicate they should be, perhaps because "the Court is an activist institution with final say, and it appears that the Court finds it difficult to step aside and allow an agency to interpret a statute contrary to what the Court believes is the most accurate (in terms of legislative intent) or best (in terms of policy) meaning of the statute").

156. Since ambiguous statutes are susceptible to multiple interpretations of varying plausibility, it is somewhat disingenuous to assert that courts or agencies are actually "interpreting" what an enacting Congress intended the statute to mean. Instead, those charged with resolving the ambiguity must scramble to make what is essentially a policy judgment guided (though not controlled) by evidence of the enacting Congress's motivations, among other things. *See* Jamelle C. Sharpe, *Toward (A) Faithful Agency in the Supreme Court's Preemption Jurisprudence*, 18 GEO. MASON L. REV. 367, 397 n.198 (2011) (arguing that judges are forming policy when they interpret unclear statutes); *see also* Cynthia R. Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452, 525 (1989):

At stake in *Chevron* was the fate of one relatively small but not insignificant slice of the regulatory power pie: the authority to interpret the statutes that define the policy-making universe. The Court's resolution deliberately moves that power squarely into

While this default choice of agencies over courts is derived to some extent from notions of institutional competence, it is also substantially driven by assumptions about political accountability. After determining that the Clean Air Act (CAA) Amendments of 1977 were silent as to whether several pollution-emitting devices at a single industrial location could be grouped under a single “bubble,”¹⁵⁷ the Supreme Court observed that “[i]n contrast [to judges], an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon *the incumbent administration’s* views of wise policy to inform its judgments.”¹⁵⁸ Even more explicitly, the reasons the Court provided for condoning Congress’s implicit delegation choice provides even stronger evidence of the Court’s assumption that Congress’s role in managing statutory ambiguity under *Chevron* ends with the enactment of the statute being interpreted:

While agencies are not directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make . . . policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute¹⁵⁹

Numerous commentators have read this language, and other aspects of the *Chevron* decision, as demonstrating the Court’s endorsement of the “presidential control model” of agency accountability, which emphasizes the primary (some would say exclusive) role the President has in managing bureaucratic drift.¹⁶⁰ The persuasiveness of such a reading is clear: to the

the President’s domain. By relinquishing the authority to determine statutory “meaning” to agencies whenever Congress has failed to speak clearly and precisely, *Chevron* enlarges the quantum of administrative discretion potentially amenable to direction from the White House.

157. *Chevron*, 467 U.S. at 840.

158. *Id.* at 865 (emphasis added).

159. *Id.* at 865–66.

160. See, e.g., Glen Staszewski, *Political Reasons, Deliberative Democracy, and Administrative Law*, 97 IOWA L. REV. 849, 851 (2012) (“The presidential control model of agency legitimacy has been reflected in a number of the Supreme Court’s most important administrative law decisions over the past quarter century, including the *Chevron* decision, which explicitly endorsed the notion that executive branch agencies could ‘properly rely upon the incumbent administration’s views of wise policy to inform its judgments.’” (quoting *Chevron*, 467 U.S. at 865)); Bressman, *supra* note 140, at 1763–65 (“*Chevron*, more than any other case, is responsible for anchoring the presidential control model . . . recogniz[ing] that politics is a permissible basis for agency policymaking.”); Cynthia R. Farina, *The Consent of the Governed: Against Simple Rules for a Complex World*, 72 CHI.-KENT L. REV. 987, 988 (1997) (“Increasingly, scholars (and, at times, the judiciary) look to the President not only to improve the managerial competence and efficiency with which regulation occurs but also, and more

extent that political accountability reduces or prevents agencies from improvidently exercising policymaking discretion, the *Chevron* Court assumed that it would be imposed primarily through the President. Congressional oversight, on the other hand, played no explicit role in the *Chevron* Court's accountability calculus. The Court made no mention of the role federal legislators might play in ensuring that agencies are held politically accountable for their interpretive choices. In this respect the opinion is consistent with complete delegation; it strongly implies that Congress's role in shaping statutory meaning is limited to the passage of amendatory legislation.

Partial subdelegation would change this by making an agency's responsiveness to legislators' policy preferences—and hence an agency's political accountability—a factor in determining whether the agency's Step Two interpretation is reasonable. A showing of responsiveness would support *Chevron* deference, whereas the lack of such a showing would militate against it.¹⁶¹ Take the facts of *Chevron* itself as an example, and assume that the Environmental Protection Agency (EPA) adopts the bubble theory under the following six scenarios: (1) both legislators and the President endorse adoption of the bubble theory, (2) both legislators and the President reject the bubble theory, (3) legislators endorse the bubble theory but the President rejects it, (4) the President endorses the bubble theory but legislators reject it, (5) neither legislators nor the President express any discernible preferences regarding the bubble theory, and (6) legislators reject the bubble theory and the President expresses no discernible preference regarding it.¹⁶² Scenarios (1) and (5) pose easy cases for courts,

deeply, to supply the elusive essence of democratic legitimation.”); Thomas W. Merrill, *The Story of Chevron: The Making of an Accidental Landmark*, in *ADMINISTRATIVE LAW STORIES* 398, 401–02 (Peter L. Strauss ed., 2006) (observing that *Chevron* “broke new ground,” in part, by asserting that agencies are held politically accountable because they are “subject to the general oversight and supervision of the President”).

161. Partial subdelegation is similar to the investigative powers that Congress routinely delegates to its committees in two important ways. First, both force agencies to provide explanations for their decisions at Congress's behest. Second, both permit this explanation-demanding authority to be wielded on Congress's behalf by one of its committees. In *Buckley v. Valeo*, the Court distinguished between Congress's powers of investigation and its powers of legislation. There, it said powers “of an investigative and informative nature” fall into “the same general category as those powers which Congress might delegate to one of its own committees.” *Buckley v. Valeo*, 424 U.S. 1, 137 (1976). Law-altering authority, by contrast, can only be wielded by Congress as a whole. *Id.* at 141. As partial subdelegation is also reason-forcing, as opposed to law-altering, it accords with the intracongressional delegations of power that the Court has already recognized as legally permissible.

162. I have purposely omitted the scenario in which the President speaks to the EPA's interpretation in the face of congressional silence. Given the framework laid out here, whether the EPA has an easier or a harder time getting *Chevron* deference would depend on

as neither presents serious political accountability concerns. Under Scenario (1), the EPA has done the very thing that its political principals prefer and so no agency slack issue is raised. Likewise under Scenario (5), the political branches have either failed to make their preferences discernible or chosen not to involve themselves in the EPA's policy decision. Either way, courts could reasonably construe their silence as ratification. For different accountability reasons, Scenarios (2), (3), and (4) also present easy cases for courts. Each scenario would be resolved by partial subdelegation's subsidiarity principle, under which congressional influence is supplemental to that of the President. Where the EPA is already following a presidential policy preference that falls within the scope of the CAA's ambiguity (Scenario (4)), courts should be inclined to grant *Chevron* deference even though legislators disagree. Where the EPA has rejected the President's rejection (Scenario (3)), courts should be disinclined to grant *Chevron* deference, even though legislators agree with the EPA. Courts should be similarly disinclined to grant deference where both the President and legislators disagree with the EPA (Scenario (2)). Of course, courts should ignore either the President, the legislators, or both if their preferences fall outside the scope of the CAA's interpretive ambiguity or would otherwise cause the EPA to act illegally.¹⁶³

The most interesting partial subdelegation cases, and the ones that most clearly present a break from current law, would arise under Scenario (6), which is based on a conflict between the EPA and federal legislators without the President to serve as a tie-breaker.¹⁶⁴ Here, disinclination toward *Chevron* deference could support legislators' efforts to manage agency slack. Unlike the current state of play in which courts meet

whether it agrees or disagrees with the President's policy preferences, provided those preferences are legally permissible.

163. The partial subdelegation approach outlined here is distinguishable from those situations in which an agency simply capitulated to congressional pressure with no independent analysis or reasoning of its own. "Cases involving documented congressional, rather than presidential, interference in agency decisionmaking confirm that political preferences simpliciter will not suffice to support decisions subject to judicial review." Strauss, *supra* note 44, at 711. In the *Chevron* context, partial subdelegation would require the agency to reach a reasoned decision that explains its agreement or disagreement with its legislative overseers. It would accordingly avoid giving legislators impermissible control over agency decisionmaking while also giving legislators more consideration than any other member of the public. *But cf.* Hazardous Waste Treatment Council v. EPA, 886 F.2d 355, 365 (D.C. Cir. 1989) (invalidating an agency decision conforming to legislators' policy preferences where the agency had indicated that the policy preferences were based on inaccurate premises).

164. This scenario could also apply to independent agencies that, because of their structure, are heavily insulated from presidential political pressure.

legislators' policy views with suspicion or hostility,¹⁶⁵ partial subdelegation would create a legal space in which courts could consider those views without giving them dispositive weight in agency interpretation. As with the other scenarios already discussed, whether courts ultimately grant deference would depend on the other factors that make an agency interpretation reasonable, such as its fidelity to the discernible intent of the enacting Congress, changes in factual circumstances or the regulatory environment, and the scientific judgment of the EPA's experts.¹⁶⁶

Perhaps the biggest challenge for courts applying partial subdelegation would be discerning legislators' and the President's policy preferences. Returning to the *Chevron*-based example, partial subdelegation would require courts to figure out whether federal legislators had expressed concerns regarding the "bubble theory" and what the content of those concerns are before figuring out whether the EPA had addressed them. As other commentators have pointed out, there are several sources from which courts could glean the policy preferences of the political branches. On the Executive side, courts could look to executive orders, presidential directives, and other more informal presidential communications like campaign issues or perceived electoral mandates.¹⁶⁷

On the congressional side, courts could look to the history of congressional–agency interactions to determine whether the agency has been responsive to legislators' views. A potential model for evaluating this back-and-forth—particularly where Congress has been legislatively active—would be the Court's use of subsequent legislative history in *FDA v. Brown & Williamson Tobacco Corp.*¹⁶⁸ There the Court reviewed Congress's history of legislating in the area of tobacco regulation to determine whether the Food and Drug Administration (FDA) had properly interpreted the term "drug" in the Food, Drug, and Cosmetic Act (FDCA)¹⁶⁹ to include tobacco products.¹⁷⁰ In rejecting the FDA's interpretation, the Court looked to Congress's history of tobacco regulation, concluding that "[t]aken together, these actions by Congress over the past 35 years preclude an interpretation of the FDCA that grants the FDA jurisdiction to regulate

165. See *supra* Part I.A.3.

166. See *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 981–82 (2005) (listing changes in prevailing factual circumstances or in administration as a reasonable basis for agencies changing their interpretations of ambiguous statutes).

167. See Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 *YALE L.J.* 2, 58–62 (2009).

168. 529 U.S. 120 (2000).

169. See 21 U.S.C. § 321(g)(1) (1994) (defining the term "drug" for purposes of the statute).

170. *Brown & Williamson*, 529 U.S. at 125–36, 153–56, 159–61.

tobacco products.”¹⁷¹ The Court also emphasized that the FDA had disavowed the statutory authority to regulate those products during that period.¹⁷² From this the Court reconstructed a dialogue of sorts between Congress and the FDA on the interpretive issue at the heart of the case. “This attention to subsequent congressional action, over and even against a textual reading of the statute, shows the Court looking to actions of contemporary institutions to gain purchase on the meaning of the statutory question before it.”¹⁷³

Where Congress has not been as legislatively active, courts could look to written comments filed by legislators during notice-and-comment rulemaking, questions asked and statements made during oversight hearings, or minutes taken from *ex parte* meetings with agency officials.¹⁷⁴ To be sure, resorting to these materials would impose on courts the potentially daunting task of determining which are sufficiently representative of Congress’s policy views to be given due consideration.

Although this might sound like a difficult task to impose on the courts, it is not all that different from how courts currently give different weight to different types of legislative history when construing statutes—giving more weight, for example, to committee reports than to other types of legislative history.¹⁷⁵

Moreover, Congress could resolve this problem by statute. Instead of leaving courts to discern from cacophony what Congress’s policy views are on a given interpretive issues, Congress could statutorily subdelegate to an oversight committee (for example, the U.S. Senate Committee on Environment and Public Works, which oversees the EPA) responsibility for speaking on its behalf. Legislators who wish their policy views to be given a chance at judicial recognition would then be required to funnel them through the process adopted by the committee. This procedure would have beneficial signaling effects for courts. Where legislator comments do not come from the committee, courts could grant them less weight in determining their representativeness. Where legislator comments do come from the duly designated committee, courts could have far more confidence that they reflect Congress’s current views on administrative interpretation.

At this point it may be helpful to distinguish partial subdelegation from two other recent and very insightful proposals relating to the political

171. *Id.* at 155.

172. *Id.* at 145–46.

173. Kevin M. Stack, *The Divergence of Constitutional and Statutory Interpretation*, 75 U. COLO. L. REV. 1, 46–47 (2004).

174. See Beermann, *supra* note 4, at 121–39; Watts, *supra* note 167, at 63.

175. Watts, *supra* note 167, at 65 n.283.

accountability of agencies. Professor Jack Beermann has suggested that courts base the availability of *Chevron* deference on how responsive agencies are to their congressional overseers.¹⁷⁶ In the related context of “arbitrary and capricious” review, Professor Kathryn Watts has suggested that courts permit agencies to explicitly account for presidential policy preferences when making policy choices reviewable under the *State Farm* “arbitrary and capricious” standard.¹⁷⁷ Like partial subdelegation, these proposals would task courts with accounting for political influence in agency decisionmaking in ways that increase agencies’ political accountability. Partial subdelegation, however, differs from Professor Beermann’s and Professor Watts’ proposals in several important respects.

Professor Watts suggests, in the context of arbitrary and capricious review, that courts should permit both the President and Congress to play a greater role in ensuring the political accountability of agencies.¹⁷⁸ By contrast, and as explained above, this Article places comparatively greater emphasis on how the judiciary can and should allow federal legislators (particularly duly appointed oversight committees)¹⁷⁹ to play a greater role in supporting federal legislators’ efforts to manage agency slack. The President currently has robust tools of influence at his disposal, and courts are more inclined to recognize his powers of administrative influence and control than they are those of federal legislators. To the extent partial subdelegation provides a more defined role for the President in how courts address political efforts at managing agency slack, it does so primarily to properly contextualize the increased role that courts should allow federal legislators to play.

Professor Beermann has approached the question of political accountability by asking whether courts or agencies are better positioned to understand congressional intent.¹⁸⁰ A proponent of what he terms “congressional administration”—substantial congressional involvement in law administration—would support a highly deferential vision of *Chevron*, one that reduces judicial interpretive involvement in favor of greater interpretive independence for agencies.¹⁸¹ Provision of *Chevron* deference would depend on whether “there are likely to be good channels of communication between Congress and the agency,” with a withholding of

176. Beermann, *supra* note 4, at 151.

177. Watts, *supra* note 167, at 8–9.

178. *Id.* at 57 (“Ultimately, this Section concludes that—if fully disclosed in the rulemaking record—all [enumerated presidential and congressional] sources of political influences serve as potentially valid sources.”).

179. *See infra* Part IV.A.

180. Beermann, *supra* note 4, at 152.

181. *Id.*

Chevron deference when there are not.¹⁸²

While the partial subdelegation proposal advanced in this Part accords with Professor Beerermann's suggestion that courts should formally acknowledge Congress's present role in how agencies conduct statutory interpretation, it parts ways with that suggestion in one significant respect. It is not clear that increasing the level of *Chevron* deference courts accord agency interpretation will necessarily increase Congress's ability to rein in agency slack. As already described, the President has developed nimble, effective tools for overseeing and influencing agency decisionmaking, including decisions made by independent agencies.¹⁸³ Additionally, Presidents have been using those tools more aggressively with each succeeding administration.¹⁸⁴ Insulating these decisions from judicial scrutiny, the practical effect of the *Chevron* Step Two analysis, without more, could have little impact on how effectively federal legislators solicit responsive agency decisionmaking relative to the President. Assuming that the President already enjoys a "home court" supervision advantage over Congress,¹⁸⁵ targeted applications of the current *Chevron* analysis without also increasing judicial receptivity to legislator influence could result in greater agency *independence* from Congress (or greater dependence on presidential oversight) where legislators have the greatest interest in influencing agency interpretation. By contrast, partial subdelegation would give policy considerations important to legislators—particularly duly appointed oversight committees—a more direct impact on the deference question, and thus calibrate the level of judicial scrutiny in a way that is more responsive to the agency slack concerns raised in Part II.

B. *Partial Subdelegation and Agency Slack*

Partial subdelegation has the potential to significantly increase Congress's ability to influence agency interpretation and, hence, to resolve the enforcement and dual-principal problems identified in Part II. First, partial subdelegation addresses the enforcement problem by giving overseeing legislators a judicially supported voice in bureaucratic decisionmaking. Second, partial subdelegation addresses the presidential primacy problem by giving voters and other interested constituencies an additional and more robust political recourse for addressing their concerns

182. *Id.*

183. *See supra* Part II.B.

184. *See supra* Part II.B.

185. *See, e.g.*, Jonathan Macey, Essay, *Executive Branch Usurpation of Power: Corporations and Capital Markets*, 115 YALE L.J. 2416, 2421–22 (2006) (describing the President's capacity for unilateral administrative action).

regarding bureaucratic policymaking.

With respect to the enforcement problem, partial subdelegation provides legislators with a method for securing judicial assistance without resorting to the cumbersome and likely ineffective path of legislative override. Agencies would be aware that their path to *Chevron* deference would be made more difficult if they fail to listen to legislators' concerns and take those concerns into account. The strategic question for agencies would then be the likelihood of deference refusal or remand in addition to the likelihood of legislative override. Though the issue is not beyond doubt, the chances of deference refusal or remand are likely higher than those of a corrective bill successfully navigating the process of bicameralism and presentment. Of course, agencies would still have to balance this increased congressional pressure against any pressure that they receive from the President. Nevertheless, partial subdelegation should give agencies greater incentive to make policy choices that more closely align with those of legislators because of the increased risk of being denied *Chevron* deference in a court challenge. In sum, partial subdelegation would ensure that agencies not only hear oversight committees but also *listen* to them.

Additionally, partial subdelegation would directly address the presidential primacy problem, which arises from asymmetrical reliance on the President's comparatively more effective oversight capabilities. Where Congress statutorily delegates to particular committees the task of expressing Congress's policy views, partial subdelegation provides a streamlined method for addressing Congress's collective action problem, which, again, does not similarly hinder the speed and effectiveness of presidential decisionmaking.¹⁸⁶ Instead of securing the agreement of a majority of the members of Congress and overcoming the numerous veto gates and supermajority voting rules required to pass legislation, partial subdelegation could more effectively facilitate agreement by permitting a handful of members to speak on behalf of the body as a whole.¹⁸⁷ Even where Congress decides not to provide for such explicit and exclusive committee delegations, partial subdelegation would commit courts to finding representative legislative oversight concerns in a manner they already employ when reading legislative history.¹⁸⁸ Moreover, partial

186. *See supra* Part II.B.

187. *Cf.* Amitai Aviram, Path Dependence in the Development of Private Legal Systems 12–13 (April 17, 2012) (unpublished manuscript), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1998991 (citing Andrew R. Dick, *When Are Cartels Stable Contracts?*, 39 J.L. & ECON. 241 (1996); George J. Stigler, *A Theory of Oligopoly*, 72 POL. ECON. 44 (1964) (describing how, in the context of cartels, collective action becomes more difficult as the number of cartel members increases)).

188. *See supra* notes 174–175 and accompanying text.

subdelegation should cause agencies to be more willing to divulge information to committees and to thoroughly explain how they have used that information. Committee votes of disapproval would be based largely on the information agencies provide to members and on the members' judgments about agency responsiveness, policy and strategic motivations, and decisional thoroughness. Accordingly, agencies would have a powerful incentive to ensure that committees do not misapprehend the basis for their decisions and should therefore be expected to err on the side of disclosure as opposed to secrecy. Finally, and perhaps most importantly, partial subdelegation could operate to make independent agencies, which are well insulated from presidential influence, more responsive to political concerns.

IV. OBJECTIONS

What follows is an attempt to anticipate and address important objections to partial subdelegation. To be sure, partial subdelegation has its downsides; it was not conceived as part of a Panglossian delusion. The primary potential objections to partial subdelegation discussed here fall into three categories: (1) its practicality given the dysfunction often thought to define congressional decisionmaking, (2) its constitutionality given the Supreme Court's decision in *INS v. Chadha*, and (3) its necessity given Congress's existing methods of oversight and influence.

A. Practicality

A critic of partial subdelegation could argue that the committee system within Congress is ill-suited to wielding the power that partial subdelegation provides. Powerful chairs and ranking members control the issues on which their oversight committees focus. Even if partial subdelegation does have the effect of improving the tools of congressional oversight, one could assert that it would also exacerbate the problem of politically motivated investigation of administrative decisionmaking. Because members of Congress pay closest attention to those issues from which they can garner political advantage and far less to those issues that promote civic values, such as reasoned decisionmaking and public accountability, partial subdelegation would give committees expanded opportunities for wasting finite resources on counterproductive political grandstanding or on catering to powerful interest groups that have "captured" politicians. These concerns echo others frequently expressed by critics who regard congressional oversight as generally ineffective or counterproductive.

Partial subdelegation is not calculated to remedy the structural decisionmaking and access problems inherent in the congressional committee system. Instead, partial subdelegation focuses on how Congress

can exercise greater influence over agency interpretation in a manner consistent with existing constitutional limitations and accepted modes of oversight. It is not directed at who within Congress would be most likely to wield that power, or the subjects to which that power would be applied.

Nevertheless, courts and legislators could deploy partial subdelegation in ways that make it easier for courts and agencies to discern and characterize legislators' concerns about agency policies, while minimizing the potential for procedural abuse. Although courts are certainly adept at sifting through Congress's nonstatutory work product to discern congressional intentions and views¹⁸⁹—the method that would have to be employed under the individual legislator-based model of partial subdelegation—more attention within Congress to providing clear lines of communication to courts and agencies would better address abuse and coordination concerns.

For example, legislators could structure committee-based partial subdelegation to require bicameral bipartisan support before communicating concerns to agencies. A single joint oversight committee for a single agency, manned by members of both houses and both parties, could be statutorily invested with partial subdelegation responsibility. Presumably, this bicameral/bipartisan structure would significantly increase the costs of reaching a disapproving “congressional” view on agency policy. By increasing these costs, such a structure would likely reduce the instances in which federal legislators signal their expectation that agency officials explicitly account for their views on agency policy and, hence, the instances in which courts reviewing those policies would expect that agency officials provide legislator-regarding explanations. The single committee partial subdelegation structure could also reduce the coordination and competition problems among oversight committees that otherwise arise when multiple committees communicate their policy concerns to agencies. Because courts would expect agencies to specifically account only for the views of a committee given partial subdelegation responsibility, agencies would be able to prioritize their solicitousness of legislators' views based on those judicial expectations. Such a structure could also promote partial subdelegation's legitimacy within Congress and with the public, as deference could only be eliminated where there is substantial agreement among members. While providing a structure for bicameral, bipartisan participation, the joint committee form of partial subdelegation would still provide substantial logistical improvements over other mechanisms—such as the Congressional Review Act of 1996's joint resolution procedure—which generate all of the coordination problems

189. See *supra* notes 174–175 and accompanying text.

caused by normal bicameralism and presentment.¹⁹⁰

Another practical concern relates to the comparative competencies of oversight committees and agencies. One could argue that an agency's expertise—scientific, technical, familiarity with the statutory scheme, familiarity with regulated entities, etc.—so far outstrips that of a member of Congress as to make partial subdelegation a poor policy choice.¹⁹¹ Allowing too much congressional interference will reduce regulatory effectiveness to an intolerable degree. As an initial matter, the disparities between legislative and agency expertise may not be as great as critics might believe. The congressional committee system has developed, at least in part, to allow members to develop expertise in substantive regulatory areas over their years of service. A committee chairperson, for example, is almost invariably a senior member of her party and has served on her oversight committee for many years. While she is unlikely to have the same degree of expertise as civil service employees in the agency she oversees, she is no novice either. Additionally, administrative procedures force agencies to provide information to members, which reduces these asymmetries.¹⁹² Finally, commitment to agency expertise is a *congressional choice*, not a constitutional requirement. The Constitution does not require courts to promote technical expertise to the exclusion of all other values. Accordingly, an enacting Congress is free to determine the mix of political influence and technical expertise that goes into agency decisionmaking processes.

A final practical concern relates to how partial subdelegation would affect the stability of agency decisionmaking. Returning to the *Chevron*-based example from Part III, would the reasonableness of an agency's interpretation be in doubt until legislators or oversight committees gave the interpretation their blessing? In brief, the answer to this question is “no.” Partial subdelegation's effect would be to add legislators' policy views to the considerations agencies may take into account (and courts may accept) when they formulate their policies. The mechanics of the *Chevron* inquiry, and the effect that inquiry has on settling agency expectations, would not change. Under *National Cable & Telecommunication Ass'n v. Brand X Internet Services*, the Supreme Court has already acknowledged that agencies can change their interpretive positions, so long as those new positions and the justifications supporting them are reasonable.¹⁹³ Apart from adding

190. See *supra* note 116.

191. See Bressman, *supra* note 140, at 1767–71 (describing informational asymmetries between Congress and agencies).

192. See *id.* at 1769–70 (arguing that this policy allows Congress to increase the probability that agency policies will mirror the preferences of their constituents).

193. 545 U.S. 967, 1001 n.4 (2005).

legislators' views to the reasonableness calculation as described in Part III, partial subdelegation would do nothing to disturb this arrangement.

Assume, for instance, that federal legislators change their views regarding an agency's interpretation of an ambiguous statute after a court has approved that interpretation under *Chevron*. The fact that legislators have changed their views would not be enough to warrant another round of judicial review. As is currently the case, courts would be required to revisit an agency's statutory interpretation if the *agency* changed its position. Partial subdelegation would again obligate the agency to explain how it has responded to legislators' concerns, those concerns being identified by the court at the time of the subsequent judicial review.

While the opposite system—one in which judicial review would be triggered by a change in legislators' views rather than a change in the agency's views—would arguably do more to facilitate the management of agency slack, it would also raise substantial predictability and constitutionality concerns. With respect to predictability, legislators may change their interpretive views more frequently than agencies are inclined to and so frequently that it would be very difficult for agencies to know the reasonableness of their interpretations at any given moment. Relatedly, courts may find many “false positives,” concluding that legislators have changed their views when in fact they have not. With respect to constitutionality, a system that permits Congress to “veto” an agency's interpretation—by allowing legislators to determine when the reasonableness of an agency's interpretation is placed in jeopardy—may run afoul of *Chadha's* admonition that Congress not alter legal arrangements and obligations outside of the formal legislative process. Taken together, these predictability and constitutionality concerns militate against a legislator-initiated judicial review system, and in favor of an agency-initiated system, despite any attendant decrease in agency slack management and political accountability.

B. *Constitutionality*

A critic of partial subdelegation could argue that the Supreme Court's decision in *INS v. Chadha* precludes Congress's postenactment involvement in shaping statutory meaning and therefore precludes partial subdelegation. By providing federal legislators with a judicially supported role in agency policymaking—for example, in interpreting ambiguous statutes—partial subdelegation would facilitate that which *Chadha* categorically disallowed. An alternative framing would argue that Congress is constitutionally incapable of speaking with one voice through delegation, at least not in a way that courts are obliged to recognize. Because doing so would

undermine the constitutional limitations on congressional policymaking codified in the Constitution,¹⁹⁴ Congress simply cannot delegate to a subpart of itself that which the Constitution requires Congress to do as a whole.¹⁹⁵

This criticism can be addressed by distinguishing between partial subdelegation and “full” subdelegation. As explained in Part III, partial subdelegation suggests that courts ensure that agencies have accounted for legislators’ policy views. Agencies are not required to accept legislators’ positions, just to explain their reasons for doing so or not.

Partial subdelegation hinges not on control but on voice and participation. It gives federal legislators a voice in agency policy formation without giving them any control over it. Accordingly, there is no danger that legislators are acting legislatively (in the *Chadha* sense) because legislators are in no way claiming or exercising the power to make arbitrary policy choices that have the force of law.

By contrast, decisional control would be a hallmark of “full” subdelegation, and would give ambiguity-*resolving* authority to congressional oversight committees. Congress’s desired result under full subdelegation would be for courts to defer to legislators’ interpretation under *Chevron*, instead of instructing courts to make their independent determinations. Accordingly, full subdelegation would have to overcome several constitutional and theoretical difficulties to be a viable alternative to complete delegation. First and foremost, it would have to be established that congressional retention of the power to make interpretive choices is somehow distinct from retaining the power to alter legal rights and obligations outside of the constitutionally prescribed legislative process. Stated differently, it would have to be clear that the “interpretation” that full subdelegation permits could be convincingly differentiated from the “legislation” to which *Chadha* applies. This Article does not claim that such a distinction is possible.

A different formulation of this claim could assert that congressional

194. See John F. Manning, *Nonlegislative Rules*, 72 GEO. WASH. L. REV. 893, 899–900 (2004) (describing the intended effects of Article I, Section Seven).

195. Professor Manning has forcefully made this argument in the context of textualist rejections of legislative history. See, e.g., John F. Manning, *Textualism as a Nondelegation Doctrine*, 97 COLUM. L. REV. 673, 698 (1997) (“If Congress effectively relies on its components to speak for the institution—to express *Congress’s* detailed intent—the practice offends the Lockean injunction against the delegation of legislative authority.”); *id.* at 706 (“When a court assigns legislative history decisive weight because of the speaker’s legislative status, it permits a committee or sponsor to interpret a law on Congress’s behalf.”); *id.* at 723 (“Lawmaking would surely be cheaper and more efficient if Congress could assign committees authority to interpret laws *conclusively*.” (emphasis added)).

interpretation of ambiguous federal laws unconstitutionally infringes on the President's responsibility to "take care that the laws be faithfully executed."¹⁹⁶ The Take Care Clause is directed at the President and no one else. In order for the President to implement federal law, it is first necessary for him to interpret the laws he implements. The fact that the Take Care Clause is directed solely at the President, and makes no mention of Congress, indicates that he must interpret federal law free from congressional interference. There are at least two responses to this argument. First, it may prove too much. To argue that the Take Care Clause gives the President such expansive province over the laws he is tasked with interpreting would invalidate many laws in which Congress has given interpretive responsibility to either Congress or the Judiciary. At least one federal court, writing after *Bowsher v. Synar*, has considered and rejected this possible interpretation of the Clause.¹⁹⁷ Second, partial subdelegation reconciles with the Take Care Clause by accounting for the differing relationships that agencies have with the President and federal legislators. While both the President and Congress are political principals to the agencies,¹⁹⁸ the President is *primus inter pares* when it comes to oversight. Partial subdelegation acknowledges the President's superior position by directing courts to defer to him when his policy views conflict with those of federal legislators.¹⁹⁹

It is possible that partial subdelegation would lower the costs of legislation so significantly that Congress would have less incentive to go through the legislative process. When given the option of delegating policymaking authority to bureaucrats it cannot control or to themselves, the choice is obvious.²⁰⁰ Allowing such a choice would also allow Congress to systematically circumvent the procedural controls the Framers deemed critical to securing checks and balances.

This concern is a serious one; partial subdelegation is calculated, in part, to give legislators a judicially cognizable tool for managing agency slack other than legislative override. That being said, it is not entirely clear that partial subdelegation would result in an overall reduction of legislation (and

196. See U.S. CONST. art. II, § 3.

197. See *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 809 F.2d 979, 990 (3d Cir. 1986) (observing that "[t]he mere fact that a non-executive government official interprets the law . . . does not in and of itself mean that this official infringes on the President's authority to execute the law" and that "many laws specifically delegate authority either to the judiciary or to Congress, in the administration of which these branches must interpret the law and may even make binding decisions").

198. See *supra* Part II.

199. See *supra* Part III.A.

200. See Manning, *supra* note 195, at 718–20.

the procedural restrictions that accompany it), so much as it would shift the focus of legislation to other topics. Unlike subdelegation of direct interpretive authority—the type of full subdelegation this Article rejects—partial subdelegation just introduces an additional factor to judicial review of agency policymaking.

C. *Necessity*

Critics of partial subdelegation could argue that it is unnecessary given that Congress already has a plethora of oversight-oriented control methods at its disposal which together are sufficiently effective at managing administrative agency slack. Hearings, investigations, and control over the budgetary process already provide Congress with substantial influence (some would say *de facto* control) over administrative decisionmaking, including agency statutory interpretation. This is in addition to the *ex ante* control Congress exercises by shaping agency delegations in the first place. Accordingly, partial subdelegation would add only complexity and redundancy to an already complex and redundant system. An alternative form of this criticism would point out that Congress is free to make difficult policy decisions itself, even if it does so poorly; Congress only has itself to blame for the dramatic increase in executive delegations over the past several decades, and it could stop delegating so much policymaking authority to the Executive Branch any time it chooses.

While these substantial critiques cut against the necessity of partial subdelegation, they are also founded on contestable factual premises. To be sure, Congress exercises far greater control over administrative agencies than it ever will over judicial decisionmaking because the latter is largely immune to the coercive effects of legislative oversight.²⁰¹ That does not necessarily mean, however, that Congress systematically dominates administrative decisionmaking. Professor Douglas Kriner succinctly summarized the prevailing criticisms of the “congressional dominance” model as follows:

[T]he precise mechanisms through which oversight alone can influence executive behavior and the course of policymaking are frequently ignored. Recommendations by oversight committees are nonbinding and have no force of law. Congress does have budgetary control over executive departments and agencies, an important means of leverage. However, as noted by skeptics of congressional dominance theories in the literature on bureaucratic control, budgetary tools are somewhat clumsy instruments for encouraging greater executive compliance with legislative intent. Moreover, oversight committees themselves normally lack appropriations authority,

201. See Sharpe, *supra* note 101.

which diminishes the credibility of any threatened committee sanctions for noncompliance. Indeed, in most situations an oversight committee's only formal recourse is to propose new legislation that would legally compel a change in course. However, such efforts are subject to the collective action dilemma and intricate procedures riddled with transaction costs and super-majoritarian requirements, not to mention a presidential veto.²⁰²

Given the realities of congressional oversight as it currently is practiced, one should pause before concluding that Congress already has all of the postenactment influence over bureaucratic decisions that it needs.

Critics of partial subdelegation could also argue that the reason-forcing function served by partial subdelegation is already fulfilled by the record requirements imposed by § 553 of the Administrative Procedure Act (APA). As construed by the Supreme Court and the D.C. Circuit, agencies engaged in notice-and-comment rulemaking are already required to respond to the significant comments submitted to them by members of the public and members of Congress alike.²⁰³ Partial subdelegation would only duplicate the reason-forcing mechanism the APA already provides.

It is true that both partial subdelegation and notice-and-comment rulemaking could force an agency to explain its policy choices. Both permit members of Congress to formally question how agencies interpret the statutes on which their proposed rules are based. Both place on agencies receiving such inquiries the obligation of providing responsive answers. The difference between the two lies in their respective communicative clarity and in their scopes of applicability. Partial subdelegation could also

202. Douglas Kriner, *Can Enhanced Oversight Repair "the Broken Branch"?*, 89 B.U. L. REV. 765, 784–85 (2009) (footnotes omitted). See generally Terry M. Moe, *An Assessment of the Positive Theory of "Congressional Dominance,"* 12 LEG. STUD. Q. 475 (1987) (setting forth the foundation behind "congressional dominance" and contending that it is inappropriately applied to an analysis of bureaucratic control). One could argue that the difficulties endemic to the legislative process would also undermine the representational legitimacy of the partial subdelegation process. If Congress as a whole cannot agree on legislation to override an agency's statutory interpretation, would not an oversight committee's voting disapproval demonstrate slack between the committee and congressional policy preferences? There may be merit to this criticism in some cases; slack is inevitable in a system of nested delegations. One cannot, however, conclusively infer from Congress's and its committees' responses to a wayward agency's interpretation of a statute a difference in their views on that interpretation. As mentioned earlier in this Article, the legislative process (through which Congress as whole speaks) is marked by numerous pitfalls that do not similarly hinder committee decisionmaking. Accordingly, Congress's inability to override agency interpretation may in no way be tied to its approval or disapproval of it.

203. Ass'n of Private Sector Colls. & Univs. v. Duncan, 681 F.3d 427, 441 (D.C. Cir. 2012) (citing PPL Wallingford Energy LLC v. FERC, 419 F.3d 1194, 1198 (D.C. Cir. 2005)) ("A regulation will be deemed arbitrary and capricious, if the issuing agency failed to address significant comments raised during the rulemaking.").

be helpful in addressing some of the deficiencies others have identified in the notice-and-comment rulemaking process.

Unlike comments submitted by members during notice-and-comment rulemaking, partial subdelegation can be structured to systematically funnel congressional opinion into a single, clear statement. This level of communicative clarity is not typically matched in the notice-and-comment process, in which members of Congress enter (sometimes contradictory) comments in the formal rulemaking record or choose to informally communicate their views to agency officials through *ex parte* contacts anyway.

CONCLUSION

Congress does not receive much sympathy these days. Indeed, it may not deserve any. With the institution suffering from all-time lows in its approval rating,²⁰⁴ it may seem particularly odd to advocate for *greater* congressional control over bureaucratic decisionmaking. Nevertheless, this Article does exactly that. The reason is not that Congress is “misunderstood” by the public or by the press; members’ current inability to compromise on issues of national importance²⁰⁵ provide a reasonable basis for disapprobation.

The reason, rather, is that empowering Congress as an institution is still necessary to uphold the Constitution’s structural protections preventing governmental overreaching. As this Article has shown, courts systematically adopt the complete delegation doctrine, which restricts Congress’s capacity to influence bureaucratic decisionmaking. When coupled with the President’s natural advantages in policing administrative conduct, complete delegation puts Congress at a substantial disadvantage when it comes to managing agency slack. Concentrating too much oversight control in either of the political branches undermines the separation of powers and checks and balances that the Framers believed to

204. In a recent survey, Gallup pegged the 112th Congress’s October 2011 approval rating at 9%, which was lower than that of the IRS (40%), lawyers (29%), Richard Nixon during Watergate (24%), British Petroleum during the Gulf Coast Oil Spill (16%), and Paris Hilton (15%). Congress did manage to tie Hugo Chavez (9%), and to beat out Fidel Castro (5%). Chris Cillizza, *Congress’ Approval Problem in One Chart*, WASH. POST, Nov. 15, 2011, http://www.washingtonpost.com/blogs/the-fix/post/congress-approval-problem-in-one-chart/2011/11/15/gIQAkHmtON_blog.html.

205. See Ezra Klein, *14 Reasons Why This Is the Worst Congress Ever*, WASH. POST, July 13, 2012, <http://www.washingtonpost.com/blogs/ezra-klein/wp/2012/07/13/13-reasons-why-this-is-the-worst-congress-ever/> (reporting that the 112th Congress passed roughly half as many public bills into law as the next least productive Congress on record).

be critical in preventing governmental tyranny.²⁰⁶

Accordingly, this Article identifies a novel method for facilitating more effective bureaucratic oversight: give Congress a judicially enforceable voice in how courts review agency policymaking. From a practical perspective, partial subdelegation would force agencies to provide considered justifications for accepting or rejecting legislators' policy views. This increased responsiveness to Congress would serve as a more useful complement to the influence wielded by the President.

206. THE FEDERALIST NO. 47, at 324 (James Madison) (Jacob E. Cooke ed., 1977) (observing that the accumulation of legislative, executive, and judicial power in one organ of government "may justly be pronounced the very definition of tyranny").

REGULATING THE PRODUCTION OF KNOWLEDGE: RESEARCH RISK–BENEFIT ANALYSIS AND THE HETEROGENEITY PROBLEM

MICHELLE N. MEYER*

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The perception that agencies are out of control arises from the fact that in being called on to make fundamental value judgments they have moved outside their accustomed sphere of activity, outside their expertise, and outside the established system of controls. This perturbation of the regulatory process will not be corrected until the regulatory agencies are relieved of the necessity of making judgments they are not equipped to make.

—Richard M. Cooper, Food and Drug Administration (FDA) Chief Counsel, 1978¹

INTRODUCTION

Scholars and lawmakers expend considerable effort determining optimal incentives for innovation.² They expend similar effort ensuring that socially useful knowledge, once produced, is widely³ and accurately⁴ disseminated and implemented.⁵ Yet, if knowledge-producing activities themselves are suboptimally regulated, neither upstream incentives to engage in them nor downstream mechanisms to disseminate their fruits will fully achieve their desired effects. And so it is both curious and problematic that the optimal regulation of knowledge-producing activities themselves is almost entirely neglected in this literature.

This Article critically examines the regulation of those knowledge-producing activities with the greatest potential to affect human welfare: research involving human beings, or “human subjects research” (HSR).⁶ A single, neglected regulatory framework adopted by more than one dozen federal agencies⁷ governs the production of the vast majority of our most important knowledge—from drug trials, to quality improvement

1. Richard M. Cooper, *The Role of Regulatory Agencies in Risk-Benefit Decision-Making*, 33 FOOD DRUG COSM. L.J. 755, 772 (1978).

2. In legal scholarship, innovation policy is virtually synonymous with intellectual property law in general, and with patents in particular. Other incentives include market exclusivity, trade secrets, prizes, research grants, and subsidized education.

3. For example, First Amendment law and free speech norms, education law, mandatory disclosure rules, data sharing rules and open source norms, patent and copyright limits and reversion to the public domain, patent disclosure, compulsory licenses, and fair use.

4. For example, prohibitions on false or misleading information, regulation of labeling, and libel and defamation law.

5. For example, direct funding of translational science and subsidized education in translation-relevant sciences.

6. Although an individual about whom research is conducted is traditionally called a “subject,” I follow more recent usage and refer to research “participants.” I revert to “subject” only when quoting other sources, when use of “participant” would be ambiguous, or when referring to “human subject research” (HSR), a locution that has not evolved to reflect the change from “subject” to “participant.”

7. See *infra* note 26.

studies designed to reduce medical errors, to policy experiments that test the effectiveness and efficiency of governmental programs and regulations, to studies of the causes and effects of cognitive biases and implicit bias. Although this Article refers to U.S. regulations for convenience, its argument is equally applicable to the research governance of most other industrialized (and, increasingly, developing) countries.⁸ As a result, the heterogeneity problem is equally applicable to these governance systems.⁹

The Article focuses, furthermore, on the primary actors in the regulation of HSR—licensing committees called Institutional Review Boards (IRBs), which, pursuant to federal statutes and regulations, review and must approve each study before it may proceed. Although the regulation of HSR is largely overlooked by scholars of innovation policy, this Article is hardly the first to critique IRBs. For decades, critics of IRBs have tended to fall within one of two broad camps.¹⁰ One camp, comprised chiefly of bioethicists¹¹ who, in this context, appeal to deontological norms such as justice and anti-exploitation, charges IRBs with *underregulating* research. Whether the culprit in their eyes is institutional capture, conflicts of interest, or insufficient expertise, training, and material resources, these critics argue that IRBs are prone to Type I errors, which allow unreasonably risky research to proceed.¹² By contrast, a much smaller camp, comprised chiefly of scholars of regulation, governance, and bureaucracy,¹³ appeals largely to economic efficiency in arguing that IRBs *overregulate* by rejecting, altering, and delaying reasonable research. Critics say these Type II errors impose administrative, opportunity, and academic freedom¹⁴ costs to

8. See *infra* text accompanying notes 169–71.

9. See H.E.M. van Luijn et al., *The Evaluation of the Risks and Benefits of Phase II Cancer Clinical Trials by Institutional Review Board (IRB) Members: A Case Study*, 32 J. INST. MED. ETHICS 170, 174 (2006) (“[T]he structure, objectives, and procedures of IRBs are similar, regardless of whether they are American or European.”). Not surprisingly, then, numerous other countries have reported similar problems with their research ethics review systems, including costs, delays, inconsistency, lack of transparency, and disproportionate regulation relative to risk.

10. See Ezekiel J. Emanuel & Jerry Menikoff, *Reforming the Regulations Governing Research with Human Subjects*, 365 NEW ENG. J. MED. 1145 (2011).

11. I include here those who approach HSR from the perspective of law and bioethics.

12. See, e.g., Carl H. Coleman, *Rationalizing Risk Assessment in Human Subject Research*, 46 ARIZ. L. REV. 1, 2 (2004) (noting cases where otherwise healthy individuals died during HSR, which “turned out to be symptoms of deep and pervasive problems” and an “unprecedented crisis” in “our system of protecting human subjects”).

13. These scholars are joined by some First Amendment scholars, see *infra* note 14, and by legions of disgruntled researchers.

14. See, e.g., Philip Hamburger, *Getting Permission*, 101 NW. U. L. REV. 405 (2007). But see Richard A. Epstein, *Defanging IRBs: Replacing Coercion with Information*, 101 NW. U. L. REV. 735 (2007) (IRBs are constitutional); John A. Robertson, *The Social Scientist’s Right to Research and*

researchers and institutions, as well as health and other costs to society from delayed, blocked, or foregone knowledge production, all of which far outweigh any benefits to participants of IRB review.¹⁵

IRBs are legally required to approve only those studies whose “[r]isks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result.”¹⁶ This risk–benefit analysis is therefore critical to the goals of both camps of critics—that is, to preventing reasonable research from being blocked, altered, or delayed, and to preventing unreasonable research from proceeding.¹⁷ Yet “determining risk–benefit ratios is one of the most important but least developed areas of determining the ethics of research trials.”¹⁸ To the extent that both camps indirectly address IRBs’ risk–benefit standard, they assume the very premise that this Article argues is unsound. Charges of both Type I and Type II errors, as well as the most popular and seemingly promising proposals to correct these errors, assume that IRBs, regulators, and their critics are capable of correctly determining the single risk–benefit profile of each study for each and every potential participant. This Article argues that what it calls the “heterogeneity problem” renders IRBs intrinsically incapable of meaningfully performing the risk–benefit analysis the regulations demand of them.

The heterogeneity problem has two facets. The first is informational. Both the probability and magnitude of risks and expected benefits—as well as the “reasonableness” of assuming a particular bundle of risks in pursuit

the IRB System, in *ETHICAL ISSUES IN SOCIAL SCIENCE RESEARCH* 356 (Tom L. Beauchamp et al. eds., 1982) (same); James Weinstein, *Institutional Review Boards and the Constitution*, 101 NW. U. L. REV. 493 (2007) (same).

15. See, e.g., Scott Burris, *Regulatory Innovation in the Governance of Human Subjects Research: A Cautionary Tale and Some Modest Proposals*, 2 REG. & GOVERNANCE 65, 67–68 (2008); Scott Burris & Jen Welsh, *Regulatory Paradox: A Review of Enforcement Letters Issued by the Office for Human Research Protection*, 101 NW. U. L. REV. 643, 645 (2007); David A. Hyman, *Institutional Review Boards: Is This the Least Worst We Can Do?*, 101 NW. U. L. REV. 749, 753, 756 (2007); Todd J. Zywicki, *Institutional Review Boards as Academic Bureaucracies: An Economic and Experiential Analysis*, 101 NW. U. L. REV. 861, 866, 875, 883 (2007).

16. 45 C.F.R. § 46.111(a)(2) (2012).

17. Not surprisingly, an IRB’s risk–benefit analysis correlates strongly with its ultimate decision as to the acceptability of the research. van Luijn et al., *supra* note 9, at 172.

18. Manish Agrawal & Ezekiel J. Emanuel, *Ethics of Phase I Oncology Studies: Reexamining the Arguments and Data*, 290 J. AM. MED. ASS’N 1075, 1077 (2003); see also Coleman, *supra* note 12, at 4 & n.16; C. Lenk et al., *Non-Therapeutic Research with Minors: How Do Chairpersons of German Research Committees Decide?*, 30 J. INST. MED. ETHICS 85, 85–86 (2004); Annette Rid & David Wendler, *Risk-Benefit Assessment in Medical Research—Critical Review and Open Questions*, 9 L. PROBABILITY & RISK 151, 174 (2010); Douglas K. Martin et al., *The Incommensurability of Research Risks and Benefits: Practical Help for Research Ethics Committees*, IRB: ETHICS & HUM. RES., Mar.–Apr. 1995, at 8.

of a particular bundle of potential benefits for oneself or others—depend significantly (though not exclusively) on the preferences and other personal circumstances of individual prospective participants. Because IRBs assess risks and benefits before individual prospective participants are even identified, they lack access to these critical inputs. IRBs thus face a classic “central planner’s problem”: they are charged with making decisions about the acceptability of research based largely on participants’ welfare, yet much of the information necessary to meaningfully predict the extent to which research participation would further or set back participants’ interests is local information that resides with prospective participants, not IRBs.

Moreover, even if IRBs could solve their information problem, they face a second problem: aggregation. Because of prospective participant-will heterogeneity, a study that imposes a “low” risk on one participant will likely impose a “high” risk on another—and an expected benefit on still another. Finally, even if all prospective participants could expect the same costs and benefits from participating in a study, they are very likely to differ in their willingness to assume those risks in pursuit of those benefits. Yet IRBs must assign a single risk–benefit profile to each study, and then determine, for all prospective participants, whether that risk–benefit profile is “reasonable.”

This Article proceeds in four parts. Part I offers a brief overview of the procedural and substantive rules that govern HSR and of the surprisingly broad range of actors and activities to which they apply. Part II shows how participant heterogeneity renders impossible the well-intentioned attempts of IRBs to determine, for each and every potential participant, a study’s risks, its expected benefits, and the “reasonableness” of the former relative to the latter. This Part draws on empirical research in several fields that finds considerable individual differences in susceptibility to a variety of research-related harms and in benefits and risk–benefit tradeoff preferences.

Although regulators, no less than academic commentators, generally fail to acknowledge participant heterogeneity, the IRB system has developed strategies for assessing risks and expected benefits that implicitly respond to participant heterogeneity, and take very different forms in the risk and benefit contexts. Part III articulates these strategies and argues that their net effect is significant IRB risk aversion relative to the preferences of many—and in the case of some studies, likely most—prospective participants. This Part then describes some of the costs of this risk aversion.

Part IV considers several popular, seemingly promising proposed reforms of IRBs, many of which are designed to address perceived “errors” in IRB risk–benefit analysis. It argues that none would significantly

mitigate, much less solve, the heterogeneity problem, and that some would exacerbate it. The Article concludes by sketching the broad policy choices we face in light of the intractability of the heterogeneity problem.

I. BACKGROUND

A. *Statutory Basis for IRB Review*

Title II of the National Research Act of 1974,¹⁹ Protection of Human Subjects of Biomedical and Behavioral Research, covers any entity applying for a grant or contract to conduct research involving humans under the Public Health Services Act. It requires those entities to provide “assurances satisfactory to the Secretary” of the (then) Department of Health, Education and Welfare that the entity has established an IRB to review that research “in order to protect the rights of the human subjects.”²⁰ The Act directed the Secretary to promulgate within 240 days regulations pertaining to IRBs and assurances,²¹ and established the Office for Protection from Research Risks (OPRR), an agency within the National Institutes of Health, to oversee assurances and IRBs. In 2000, OPRR was renamed the Office for Human Research Protections (OHRP) and relocated to a more prominent, less capture-prone position within the Office of the Secretary of the Department of Health and Human Services (HHS).

The Act also established a powerful ad hoc commission, the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research (Commission), to which Congress delegated most substantive policy questions regarding IRB review.²² Among the items the Act directed the Commission to consider was the “role of assessment of risk–benefit criteria in the determination of the appropriateness of research involving human subjects.”²³ Between 1975 and 1978, the Commission published a series of reports²⁴ that, with only modest changes, formed the

19. Pub. L. 93–348, 88 Stat. 342 (1974).

20. *Id.* § 212(a), 88 Stat. at 352–53.

21. *Id.* § 212(b), 88 Stat. at 353.

22. *Id.* § 201(a)–(b)(1), 88 Stat. at 348. For more on Congress’s delegation to the Commission, see Michelle N. Meyer, Research Contracts: Towards a Paternalistic Market in Research Risks and Benefits (Aug. 29, 2012) (unpublished manuscript) (on file with author) (detailing Congress’s delegation to the Commission).

23. §§ 202(a)(1)(B)(i)–(v), 202(a)(1)(C), 88 Stat. at 349; *see also* Meyer, *supra* note 22 (arguing that regulations requiring prospective third-party risk–benefit analysis was not responsive to the abuses in HSR that Congress had identified).

24. The most well-known of these is NAT’L COMM’N FOR THE PROT. OF HUM. SUBJECTS OF BIOMED. & BEHAVIORAL RES., THE PROTECTION OF HUMAN SUBJECTS OF

basis for HHS's 1981 regulations.²⁵ In 1991, in order to achieve a consistent federal policy on HSR, virtually every federal department and agency that conducts or funds HSR adopted HHS's regulations.²⁶ Officially entitled *The Federal Policy for the Protection of Human Subjects*, the regulations have, since their widespread adoption, been better known as the "Common Rule." At the same time, the FDA amended its regulations to conform as closely as possible to the Common Rule, commensurate with its enabling statute.²⁷

RESEARCH: THE BELMONT REPORT (1978) [hereinafter BELMONT REPORT], but the Common Rule is essentially a codification of NAT'L COMM'N FOR THE PROT. OF HUM. SUBJECTS OF BIOMED. & BEHAVIORAL RES., INSTITUTIONAL REVIEW BOARDS: REPORT AND RECOMMENDATIONS (1978) [hereinafter NAT'L COMM'N, IRBs].

25. The Department of Health, Education and Welfare (HEW) promulgated the first federal regulations for the protection of subjects on May 30, 1974, just weeks before Congress passed the National Research Act, and codified them at 45 C.F.R. pt. 46 (1975). *See* Protection of Human Subjects, 39 Fed. Reg. 18,913 (May 30, 1974). In 1981, it revised them in light of the Commission's work. *See* 45 C.F.R. pt. 46 (1981).

26. *See* Federal Policy for the Protection of Human Subjects, 56 Fed. Reg. 28,003 (June 18, 1991), codified at 7 C.F.R. pt. 1c (2013) (Department of Agriculture); 10 C.F.R. pt. 745 (2013) (Department of Energy); 14 C.F.R. pt. 1230 (2013) (National Aeronautics and Space Administration); 15 C.F.R. pt. 27 (2013) (Department of Commerce); 16 C.F.R. pt. 1028 (2012) (Consumer Product Safety Commission); 22 C.F.R. pt. 225 (2012) (Agency for International Development); 24 C.F.R. pt. 60 (2012) (Department of Housing and Urban Development); 28 C.F.R. pt. 46 (2012) (Department of Justice); 32 CFR pt. 219 (2012) (Department of Defense); 34 CFR pt. 97 (2012) (Department of Education); 38 C.F.R. pt. 16 (2012) (Department of Veterans Affairs); 40 C.F.R. pt. 26 (2011) (Environmental Protection Agency); 45 C.F.R. pt. 46(A) (2011) (Department of Health and Human Services (HHS)); 45 C.F.R. pt. 690 (2011) (National Science Foundation); 49 C.F.R. pt. 11 (2011) (Department of Transportation); *see also* NAT'L BIOETHICS ADVISORY COMM'N, 2 ETHICAL AND POLICY ISSUES IN RESEARCH INVOLVING HUMAN PARTICIPANTS J-23 (2001) [hereinafter NBAC] (the Office of Science and Technology Policy has adopted the Common Rule but has not codified it in regulations); Social Security Independence and Program Improvements Act of 1994, Pub. L. No. 103-296, § 106(b), 108 Stat. 1464, 1474-76 (1994) (providing that the Common Rule continues to apply to the Social Security Administration after its 1995 secession from HHS); Exec. Order No. 12,333, 46 Fed. Reg. 59,941, 59,941 (1981) (making the Common Rule applicable to the Central Intelligence Agency). This Article cites the HHS regulations for simplicity. Other federal agencies and departments have adopted their own HSR regulations. *See* 34 C.F.R. § 356.3(c)(1) (2012) (Office of Special Education and Rehabilitation Services); 28 C.F.R. § 512.10 (Bureau of Prisons). A few states have statutes or regulations that govern HSR, either in general, *see, e.g.,* CAL. HEALTH & SAFETY CODE §§ 24170-24181 (West 2012); N.Y. PUB. HEALTH LAW §§ 2440-2446. (McKinney 2012); Va. Code Ann. §§ 32.1-162.16. (2011); FLA. STAT. ANN. § 381.85 (West 2007) (repealed 2010), or in specific research contexts, *see, e.g.,* CAL. HEALTH & SAFETY CODE §§ 24185-24189 (West 2012) (cloning research); OR. REV. STAT. §§ 431.805-431.815. (2011) (genetic research). Following convention, when referring to the Common Rule, this Article will henceforth cite to the HHS regulations.

27. *See* 21 C.F.R. pts. 50, 56 (2012).

B. Regulations Governing IRB Review

IRB review is designed to protect research participants, and IRBs approve, disapprove, or require changes to each study accordingly.²⁸ Before researchers recruit a single participant, IRBs review their recruitment plans, the detailed information disclosures that form the basis of participants' voluntary, informed consent, and the protocol itself. They ensure that these materials fully, accurately, and in "understandable" language disclose to prospective participants, *inter alia*, "any reasonably foreseeable risks or discomforts to [them]" and "any benefits to [them] or to others which may reasonably be expected from the research."²⁹ They then consider these risks and expected benefits themselves, and approve only those studies whose "[r]isks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result."³⁰

Although many associate IRBs with biomedical research, in the United States, much industry and almost all academic HSR is subject to IRB review, either directly, through federal statute and regulations, or indirectly, through contract. Thus, IRBs license everything from Phase I trials of investigational new drugs to quality improvement activities and experimental economics and philosophy, to sociology surveys, oral history, and the studies that form the basis of the burgeoning empirical legal studies movement. Suboptimal regulation of HSR by IRBs thus has a substantial impact on knowledge production and participant welfare.

1. Covered Actors

By their terms, both the National Research Act and the Common Rule require IRB approval only of HSR conducted, funded, or otherwise subject to regulation by any Common Rule agency or department. In practice, however, a web of contractual relationships ensures that most HSR, including virtually all HSR conducted by academics and their students, is subject to IRB review³¹ regardless of the source of funding.

The Act requires each institution engaged in federally funded HSR (for example, a university or academic medical center) to provide assurance that it will adhere to the regulations. The regulations implement this directive

28. 45 C.F.R. §§ 46.109(a), 46.116(a) (2012).

29. *Id.* § 46.116.

30. *Id.* § 46.111(a)(2); *see also* 21 C.F.R. § 56.111(a)(2) (2012) (same IRB risk-benefit requirement applicable to HSR subject to Food and Drug Administration (FDA) jurisdiction).

31. Whether every researcher whose work is *subject* to IRB review in fact submits it to an IRB is a separate matter.

by requiring that each institution file a standard form contract between the institution and OHRP called a Federal Wide Assurance (FWA). The standard FWA invites the institution to apply the regulations to *all* HSR in which the institution is “engaged,” regardless of whether that research receives federal funding or not.³² This generally has been interpreted to extend to all HSR conducted by any of the institution’s faculty or students. Historically, between 74% and 90% of institutions have agreed to this condition.³³ Since someone at virtually every academic institution receives federal funding for research, and since the vast majority of institutions agree to apply the regulations throughout their campuses, the overwhelming majority of HSR conducted in academic settings is subject to IRB review. Federal regulators are currently considering proposed reforms of the Common Rule under which federal funding of any investigator’s research would be conditioned upon her institution extending IRB review to all HSR in which it is engaged.³⁴

Even of those few institutions that do not contract with OHRP to extend IRB review, “many” nevertheless have adopted a policy under which they extend IRB review to all faculty HSR, student HSR, or both.³⁵ Similarly, many journals require that research submitted for publication be approved by an IRB.³⁶ Thus, if a researcher is not subject to IRB review directly through a federal grant or contract, she will likely be subject to it indirectly,

32. 45 C.F.R. § 46.103. The current version of the Federal Wide Assurance form is available at <http://www.hhs.gov/ohrp/assurances/assurances/fwaformpdf.pdf> (last visited May 7, 2013). As David Hyman points out, “This mismatch is non-trivial; . . . nearly 80 [percent] of all research projects reviewed by the University of Chicago’s Social Science IRB are either personally funded, privately funded, or unfunded.” Hyman, *supra* note 15, at 752.

33. Carol Weil et al., *OHRP Compliance Oversight Letters: An Update*, IRB: ETHICS & HUM. RES., Mar.–Apr. 2010, at 1, 5 (finding, based on “informal review of a sample of institutions,” that in 2000, over 90% of domestic institutions had agreed to extend the regulations, compared to 74% in 2010); *see also* AM. ASS’N OF UNIV. PROFESSORS, INSTITUTIONAL REVIEW BOARDS AND SOCIAL SCIENCE RESEARCH 5 (2001), available at <http://www.aaup.org/report/institutional-review-boards-and-social-science-research> (about 75% “of the largest American research institutions” have voluntarily extended IRB review).

34. Human Subject Research Protections, 76 Fed. Reg. 44,512, 44,528 (July 26, 2011) [hereinafter ANPRM].

35. Judith Jarvis Thomson et al., *Research on Human Subjects: Academic Freedom and the Institutional Review Board*, ACADEME, Sept.–Oct. 2006, at 95, 99.

36. *See* INT’L COMM. OF MED. JOURNAL EDITORS, *Uniform Requirements for Manuscripts Submitted to Biomedical Journals: Writing and Editing for Biomedical Publication*, 6 (2010), available at http://www.icmje.org/urm_full.pdf. Of 103 major U.S., U.K., and Canadian biomedical journals, the proportion requiring IRB approval for publication increased from 42% in 1995 to 76% in 2005. A. Rowan-Legg et al., *A Comparison of Journal Instructions Regarding Institutional Review Board Approval and Conflict-of-Interest Disclosure Between 1995 and 2005*, 35 J. INST. MED. ETHICS 74, 75 (2009).

through her institution's contract with OHRP, her employment contract, or her publishing contract.

In addition, U.S. regulations have considerable global reach. They apply directly to research conducted or funded by a Common Rule agency that takes place outside the U.S. Foreign researchers who wish to market drugs, devices, or biologicals in the U.S., which is a leading consumer of these products, must comply with the FDA's essentially identical regulations, as do foreign researchers who wish to publish in many U.S. journals or who conduct HSR in one of the many countries that have modeled their own HSR protections on U.S. regulations.³⁷

2. Covered Activities

The regulations thus cover a perhaps surprising number of actors. Due to a broad definition of "research," they apply to a similarly broad range of studies. For instance, IRBs review not only biomedicine and psychological research, but also research from virtually every social science, humanities, and professional discipline, including sociology, anthropology, history, economics, philosophy, memoir and biography, and classics. IRBs also review public policy "experiments" and research conducted in professional schools of law, business, education, and journalism. Additionally, they review research using virtually every methodology, from pharmacology and safety studies of investigational new drugs, to research on existing data and tissue, to surveys, interviews, and observation.

An activity is covered by the regulations if it (1) constitutes *research*: "a systematic investigation . . . designed to develop or contribute to generalizable knowledge;"³⁸ and (2) involves a *human subject*: "a living individual about whom an investigator (whether professional or student) . . . obtains [either] [d]ata through intervention or interaction with the individual, or . . . [i]dentifiable private information."³⁹ Formally, the Common Rule categorizes HSR into three levels of regulation: research that is subject to review by a fully convened IRB (the default), ten categories of research eligible for expedited IRB review, and six categories of HSR

37. See Maureen H. Fitzgerald et al., *The Research Ethics Review Process and Ethics Review Narratives*, 16 ETHICS & BEHAV. 377, 378–79 (2006) (observing "remarkable commonality" among Australian, Canadian, U.K., and U.S. review boards); Kevin D. Haggerty, *Ethics Creep: Governing Social Science Research in the Name of Ethics*, 27 QUALITATIVE SOC. 391, 393 (2004) (finding that U.S. and Canadian review boards are "comparable").

38. 45 C.F.R. § 46.102(d) (2012).

39. *Id.* § 46.102(f). *Intervention* "includes both physical procedures by which data are gathered . . . and manipulations of the subject or the subject's environment that are performed for research purposes," while *interaction* "includes communication or interpersonal contact." *Id.*

that are “exempt” from review.

In practice, however, the second and third of these levels tend to collapse into the first.⁴⁰ Although the regulations exempt six categories of research from IRB review,⁴¹ they do not specify who determines whether a research proposal falls within one of these categories. In 1995, (then) OPRR issued guidance advising that “investigators should not have the authority” to make this decision and “should be cautioned to check with the IRB or other designated authorities.”⁴² By 1998, not surprisingly, nearly three-quarters of surveyed IRB administrators reported routine involvement in exemption determinations. And by 2003, most institutions had formally contracted with OHRP (via the FWA) to require researchers to submit protocols to the IRB to determine their exemption status.⁴³ Thus, most researchers must submit both exempt and non-exempt research to the IRB.

Moreover, because the regulations constitute a floor, not a ceiling,⁴⁴ even if an IRB determines that a protocol is exempt, it is not required to refrain from reviewing it. IRBs may—and regularly do—subject what are more accurately called *exemptible* proposals to expedited or even full IRB review. The *Bell Report* found, for instance, that 15% of IRB-reviewed proposals were exemptible,⁴⁵ and that fewer than half of responding IRBs regularly exempted from review such exemptible research as analysis of existing data, interviews, and surveys.⁴⁶ Indeed, some IRBs, by policy, simply subject all protocols to full review.⁴⁷ As one commentator, himself an IRB member,

40. For a more detailed explanation of why IRBs tend to “define up” research into higher strata requiring more extensive review, thereby thwarting efforts at risk-based research regulation, see Michelle N. Meyer, *Three Challenges for Risk-Based (Research) Regulation: Heterogeneity Among Regulated Activities, Regulator Bias, and Stakeholder Heterogeneity*, in THE FUTURE OF HUMAN SUBJECTS RESEARCH REGULATION 8–10, 11 (I Glenn Cohen & Holly Fernandez Lynch eds., forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2218549.

41. See 45 C.F.R. § 46.101(b).

42. OFFICE FOR PROTECTION FROM RESEARCH RISKS (OPRR), OPRR REPS. 95-02: EXEMPT RESEARCH AND RESEARCH THAT MAY UNDERGO EXPEDITED REVIEW (May 5, 1995), available at <http://www.hhs.gov/ohrp/policy/hcdc95-02.html>.

43. NAT’L RESEARCH COUNCIL, PROTECTING PARTICIPANTS AND FACILITATING SOCIAL AND BEHAVIORAL SCIENCES RESEARCH, 71–78 (Constance F. Citro et al. eds., 2003).

44. 45 C.F.R. § 46.112 (providing that research “may be subject to further appropriate review and approval or disapproval” by institutional officials).

45. JAMES BELL ET AL., FINAL REPORT: EVALUATION OF NIH IMPLEMENTATION OF SECTION 491 OF THE PUBLIC HEALTH SERVICE ACT, MANDATING A PROGRAM OF PROTECTION FOR RESEARCH SUBJECTS 9 (1998).

46. *Id.* at 27–30.

47. See Michael J. Meehan & Marleina Thomas Davis, *Key Compliance Issues for*

put it: “There is no great gain in seeking [exempt] status”⁴⁸

Those studies eligible for expedited review fare similarly. Proposed research that imposes “no more than minimal risk” on participants and also falls within one of ten categories specified by the Secretary of HHS is eligible for expedited review.⁴⁹ Under expedited review, the IRB chairperson or her designate can review the research proposal alone,⁵⁰ which is often, but not always, faster than full review. But, as with exemptible research, the IRB determines both whether proposed research falls within an expeditable category and whether it involves “no more than minimal risk.” And, as with exemptible research, IRBs “may,” but need not, expedite review of expeditable research.⁵¹ As a result, much expeditable research, like much exemptible research, receives full IRB review. The *Bell Report* found, for instance, that of those high-volume IRBs surveyed, only 52% regularly conducted expedited review of studies involving a simple blood draw, and only 60% did so for studies involving non-invasive data collection from adults.⁵²

A final factor that contributes to the regulations’ broad scope is the considerable vagueness of key regulatory language,⁵³ which, when

Institutional Review Boards, in CLINICAL RESEARCH LAW AND COMPLIANCE HANDBOOK 299, 309 (John E. Steiner, Jr. ed., 2006).

48. J. Michael Oakes, *Risks and Wrongs in Social Science Research: An Evaluator’s Guide to the IRB*, 26 EVALUATION REV. 443, 457 (2002).

49. 45 C.F.R. § 46.110(a)–(b)(1) (2012).

50. *Id.* § 46.110(b). The reviewer may approve or require changes to a proposal, but must send the proposal to the full IRB for a determination that the proposal should be rejected. *Id.*

51. *Id.*

52. BELLE ET AL., *supra* note 45, at 29–30, fig. 16.

53. For example, the Common Rule’s definition of “research”—“a systematic investigation . . . designed to develop or contribute to generalizable knowledge,” 45 C.F.R. § 46.102(d)—has caused considerable consternation among researchers, IRBs, and federal regulators about when investigations are sufficiently “systematic” and “generalizable.” It is often unclear whether planning activities prefatory to a study, such as informal “piloting” of a survey instrument, might themselves constitute a “systematic investigation.” NAT’L RESEARCH COUNCIL, *supra* note 43, at 147. Case studies also fall into a grey area with respect to whether they constitute a “systemic investigation.” See, e.g., UNIVERSITY OF MICHIGAN HUMAN RESEARCH PROTECTION PROGRAM, ACTIVITIES SUBJECT TO THE HRPP, OPERATIONS MANUAL—PART 4 (2012), available at <http://www.hrpp.umich.edu/om/Part4.html> (defining case studies as not exempt from IRB review, and, as such, not “systemic investigation”).

As for generalizability, this criterion of “research” is both undefined in the *Belmont Report* and the Common Rule and yet is also the “cornerstone” of these moral and legal frameworks for regulating HSR. Tom L. Beauchamp & Yashar Saghai, *The Historical Foundations of the Research-Practice Distinction in Bioethics*, 33 THEORETICAL MED. & BIOETHICS 45, 52 (2012). When students conduct research primarily as a learning experience rather

combined with IRBs' risk aversion,⁵⁴ tends to lead IRBs to err on the side of more, rather than less, review.

II. THE HETEROGENEITY PROBLEM

There is no reason that all human existences should be construed on some one, or some small number of patterns. . . . The same things which are helps to one person towards the cultivation of his higher nature, are hindrances to another. The same mode of life is a healthy excitement to one, . . . while to another it is a distracting burden Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies, that unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable.

—John Stuart Mill, *On Liberty*⁵⁵

In determining whether a research project's "[r]isks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result,"⁵⁶ an IRB must (1) determine the magnitude of research-related harms and benefits to participants as well as the value of the resulting knowledge; (2) discount these (dis)utilities by the probability that they will occur;⁵⁷ and (3) determine whether the resulting risks to participants are "reasonable in relation to" the project's aggregate expected benefits to participants and

than in an attempt to produce generalizable knowledge, is their work subject to IRB review? See NAT'L RESEARCH COUNCIL, *supra* note 43, at 147–48. Whether the lessons learned from quality improvement and quality assurance activities are sufficiently "generalizable" beyond the institutions in which they are conducted to bring these activities within the IRB system is also a perennial problem. See David Casarett, Jason H.T. Karlawish & Jeremy Sugarman, *Determining When Quality Improvement Initiatives Should Be Considered Research: Proposed Criteria and Potential Implications*, 283 J. AM. MED. ASS'N 2275 (2000).

Whether a study is "minimal risk" often plays a critical role in the kind of review it receives, and in some cases whether it is permissible at all, *see infra* notes 114–26 and accompanying text, yet the regulatory definition of "minimal risk" is notoriously ambiguous. NAT'L RESEARCH COUNCIL, *supra* note 43, at 32–34. Even knowing when a study involves "human subjects" is "not always straightforward." *Id.* at 149.

54. *See infra* Part III.

55. JOHN STUART MILL, *On Liberty*, in UTILITARIANISM 126, 197–98 (Mary Warnock ed., Fontana 1972) (1962).

56. 45 C.F.R. § 46.111(a)(2) (2012).

57. Technically, the regulatory language suggests that IRBs catalog *all* relevant harms and benefits to participants, without regard to their probability, and then discount their (dis)utility accordingly. In assessing the value of the knowledge to be produced, by contrast, IRBs are to employ a threshold of probability, counting 100% of the value only of that knowledge that is "reasonably expected" to result.

society. This Part argues that IRBs lack information about prospective participants' preferences necessary to determine these inputs.⁵⁸ Even if IRBs could overcome this *information problem*, prospective participant heterogeneity would present them with an *aggregation problem*; IRBs must make a single determination, applicable to all prospective participants, as to a study's risks, expected benefits, and the reasonableness of the ratio between these.

A. *Heterogeneity in Research Risks*

Research participants can and sometimes do suffer various psychosocial, economic, legal, and physical harms. But what amounts to a serious risk for one prospective participant will often pose a far more modest risk to a second prospective participant, and may even constitute an expected benefit for a third. Consider several common research-related risks.

1. *Psychological Risks*

a. *Trauma Research and the Risk of Revictimization*

Studies of sexual abuse and assault, grief, war, terrorism, natural disasters, and various other traumatic experiences are critical to gaining a better understanding of and addressing these phenomena. But exposure to trauma—whether as a survivor or as a first responder or other third party—often causes substantial psychological morbidity.⁵⁹ A meta-review of fifty-seven studies of natural disasters and their impacts on mental health, for instance, found that 74% of the victims sampled suffered post-traumatic stress and 39% were depressed.⁶⁰ Moreover, participants in trauma research may be struggling with medical, economic, or social difficulties secondary to the trauma.⁶¹

Given their potentially fragile state, IRBs understandably worry that “questioning [or otherwise studying] individuals who have experienced distressing events or who have been victimized in any number of ways . . . might rekindle disturbing memories, producing a form of re-

58. This Article considers only two of these inputs: risks and expected benefits to research participants. In future work, I plan to consider the third input—“the importance of the knowledge that may reasonably be expected to result” from research—which, I argue, involves a similar heterogeneity problem. 45 C.F.R. § 46.111(a)(2).

59. Sandro Galea et al., *Participant Reactions to Survey Research in the General Population After Terrorist Attacks*, 18 J. TRAUMATIC STRESS 461, 461 (2005).

60. FRAN H. NORRIS, RANGE, MAGNITUDE, AND DURATION OF THE EFFECTS OF DISASTERS ON MENTAL HEALTH: REVIEW UPDATE 2005 3 fig. 1 (2005).

61. Galea et al., *supra* note 59, at 461.

victimization.”⁶² In one proposed study, for instance, adults were to be asked to anonymously complete an online survey in which they would recall childhood memories of the death of a family member. Although this study was exemptible, the reviewing IRB member sent the application to full board review, finding that “subjects were at severe psychological risk of experiencing post-traumatic stress disorder.”⁶³ The full IRB agreed, and required the researcher to provide participants with access to on-site psychological counseling. However, this meant that the online survey had to be administered locally, which severely limited the generalizability of the results.⁶⁴

Revictimization and similar risks are sometimes dismissed by critics of IRBs as trivial, if not wholly imagined. IRB review, they say, should be reserved for biomedical research or studies that pose risks of physical harm.⁶⁵ Among the general population of trauma-exposed individuals, concerns about revictimization are not borne out; a majority of studies finds that trauma-exposed individuals do not experience severe or lasting distress associated with participation in trauma-focused research.

But there is little doubt that *some* individuals *will* fare worse for having recalled traumatic events. As such, these studies cannot be dismissed as per se “low-risk.” Yet, while there is little doubt that participation will harm some significantly, there is equally little doubt that it will harm others only modestly, and benefit still others.

Consider one study involving three surveys of randomly selected residents of New York City conducted 1–2 months, 4–5 months, and 6–9 months after the September 11, 2001 terrorist attacks. Participants were asked about their exposure to the attacks and assessed for probable depression and post-traumatic stress disorder (PTSD). At the end of each interview, participants were asked whether they found any of the questions emotionally upsetting and, if so, whether they were still upset or were “okay now.” Those who reported still being upset were asked if they would like a

62. Haggerty, *supra* note 37, at 400.

63. Nat'l Comm'n Ass'n, *Communication Scholars' Narratives of IRB Experiences*, 33 J. APPLIED COMM. RES. 204, 214 (2005) (anonymous narrative #18); *see also* Wynn W. Gadar-Wilcox Comment to *IRBs and Clean Secrets*, A THAUMATURGICAL COMPENDIUM, (Dec. 9, 2011, 1:01 PM), <http://alex.halavais.net/irbs-clean-secrets> (IRB rejected study of war veterans' opinions of Bush Administration foreign policy “because of fears that the question might trigger [post-traumatic stress disorder (PTSD)]”); Oakes, *supra* note 48, at 446 (IRB questioned risk/benefit ratio of prisoner survey eliciting “memories of freedom”).

64. In addition, requiring an on-site counselor and similar risk management techniques, as IRBs often do, entail nontrivial costs that effectively kill such research for researchers who lack outside funding, such as graduate students and many non-biomedical researchers.

65. These two categories are overlapping, but hardly coextensive.

counselor to call them. Of the 5,774 total participants surveyed in the three surveys, 13% said that the questions were upsetting, 1% were still upset at the end of the interview, and 0.3% were still upset and accepted the offer of counseling.⁶⁶ Those who were aged 45–64, female, single, lacked health insurance or a regular health care provider, were directly affected by the attacks, had current probable PTSD or depression or probable PTSD or depression since the attacks, or reported previous mental health problems in the year prior to the attacks were more likely to find the survey questions emotionally upsetting.⁶⁷ Significant participant heterogeneity remained even within these categories.⁶⁸

Thus, although many scholars note that “[IRB] members differ on how they evaluate the seriousness of the harms associated with upsetting or traumatizing a research participant,”⁶⁹ as if this were evidence of errors in IRB risk–benefit analysis, heterogeneity in IRB risk assessment is more likely to reflect a significant degree of arbitrariness in IRB decisionmaking, given prospective participants themselves would likely differ on this question.

b. Sensitive Topics

Many studies ask participants to discuss socially disfavored behavior and other potentially “sensitive” topics such as drug use, gambling, risky or unconventional sexual behavior, HIV seropositivity, criminal behavior, and sexual assault and victimization. IRBs worry that such research will be emotionally arousing for participants, causing them embarrassment, fear, or general discomfort. As a result, a survey of the 450 members of the American Sociological Association Section on Sexualities found, “IRBs routinely block[] research on adult sexual minorities, particularly LGBTQ communities, because of their alleged vulnerability.”⁷⁰ Of those who had submitted sexuality-related proposals to an IRB, 45% reported difficulty getting approval, and 41% reported that other sexuality researchers at their

66. Galea et al., *supra* note 59, at 461. Ninety-six percent of those who began the survey completed it. *Id.* at 462. In addition to the 0.3% of those who completed the survey and requested counseling (nineteen participants), ten participants “who were emotionally upset early in the interview” did not finish the survey, and received counseling. *Id.* at 463.

67. *Id.* at 463.

68. For instance, 45% and 27% of respondents with current probable PTSD or depression, respectively, reported that the survey questions were emotionally upsetting, compared to 12% and 11% of those deemed unlikely to currently suffer from these conditions. *Id.* at 464.

69. Haggerty, *supra* note 37, at 400.

70. Janice M. Irvine, *Can't Ask, Can't Tell: How Institutional Review Boards Keep Sex in the Closet*, CONTEXTS, Spring 2012, at 28, 30, 32 (response rate: around 40%).

university had also had IRB difficulties. Some were merely slowed down in their research, while others yielded to conditions that reduced the value of that research, such as IRB demands that interview tapes be destroyed, which precludes longitudinal follow-ups and use by future historians. Still others reported abandoning research on these topics and counseling students to do likewise.⁷¹ IRBs have responded similarly to other studies involving sensitive topics.⁷²

Again, however, these IRB concerns are not unfounded. One survey asked two groups of men—those in the general population and men who have sex with men (MSM)—to report their level of discomfort after being asked questions about illicit drug use. Although the mean level of discomfort reported by both groups was relatively low (1.78 and 1.66 out of 7 for the general population and MSM samples, respectively), some respondents reported greater discomfort than others.⁷³ Non-white respondents and those who reported having used illicit drugs within the past year, for instance, reported more discomfort than did white respondents and those who did not report having used illicit drugs within the prior year.⁷⁴ Similarly, when researchers asked female undergraduates about various sensitive topics, those who had experienced child abuse were more likely to report distress due to remembering the past than were other respondents.⁷⁵

Again, such participant heterogeneity may be reflected in the lack of consensus among IRBs regarding the level of risk posed by sensitive topics.

71. *Id.* at 30.

72. In one study, an IRB effectively forced an undergraduate under a graduation deadline conducting survey research for her thesis to abandon a question on undergraduates' views of reparations after the IRB decided the study required full review due to the "sensitive" nature of that question. Ross Cheit, Comment to *Outside of Biomed Research, IRBs are Essentially Censorship Agencies*, EMPIRICAL LEGAL STUD. BLOG (July 9, 2006, 9:25 PM), http://www.elsblog.org/the_empirical_legal_studi/2006/03/outside_of_biom.html. Another IRB prohibited a Caucasian graduate student from asking African-American graduate students about their career expectations for fear that the experience might "be traumatic" for them. Thomson et al., *supra* note 35, at 96. Indeed, researchers who submitted to different IRBs proposals that were identical except for the political significance of the propositions they proposed to test found that IRB decisions varied considerably depending on the presence or absence of political controversy. Stephen J. Ceci et al., *Human Subjects Review, Personal Values, and the Regulation of Social Science Research*, 40 AM. PSYCHOLOGIST 994, 994–95 (1985).

73. See Michael Fendrich et al., *Respondent Reactions to Sensitive Questions*, J. EMPIRICAL RES. ON HUM. RES. ETHICS, Sept. 2007, at 31, 32 & tbl.1.

74. *Id.* at 32.

75. Suzanne E. Decker et al., *Ethical Issues in Research on Sensitive Topics: Participants' Experiences of Distress and Benefit*, J. EMPIRICAL RES. ON HUM. RES. ETHICS, Sept. 2011, at 55, 55.

A survey of 188 randomly selected IRB chairpersons found that while 44% considered a confidential survey of healthy eleven-year-olds about sexual behavior to pose minimal risk, 29% considered it a minor increase over minimal risk, and 19% considered it more than a minor increase over minimal risk.⁷⁶ Under federal regulations governing research with minors,⁷⁷ research that does not “hold out the prospect of direct benefit for the individual” participant⁷⁸ and is deemed to pose more than minimal risk is usually unapprovable under HHS regulations.

c. Unpleasant Self-Knowledge

Or consider research in which participants may learn something unpleasant about themselves. In order to test the hypothesis that children of alcoholics who are resilient are less likely to become alcoholics than are those who are less resilient, a researcher proposed to survey college students about their alcohol use and measure their resiliency. Although the consent form identified the risk that participants might learn that they may have a drinking problem and provided participants with referral information, the IRB rejected the study because of this risk.⁷⁹

A college student may well respond negatively to this information, or may reap a net benefit. The information might lead him to pursue formal treatment, obtain a second opinion, increase his self-monitoring, or limit his drinking. Some research even suggests that those with relatively little resilience can increase it through deliberate effort.⁸⁰ Conversely, of those participants who score “normally” on the alcoholism screening test, some may benefit from being relieved of a fear that their family history destined them to alcoholism, while others may gain a false sense of security that

76. Seema Shah et al., *How Do Institutional Review Boards Apply the Federal Risk and Benefit Standards for Pediatric Research?*, 291 J. AM. MED. ASS'N 476, 479 & tbl.2 (2004).

77. See *infra* note 114.

78. Such research is approvable under HHS regulations only if it, *inter alia*, poses “a minor increase over minimal risk” and is “likely to yield generalizable knowledge about the subject’s disorder or condition,” 45 C.F.R. § 46.406 (2012), or, *inter alia*, the IRB finds that it “presents a reasonable opportunity to further the understanding, prevention, or alleviation of a serious problem affecting the health or welfare of children” and a panel specially convened by the Secretary approves it after opportunity for public review and comment. *Id.* § 46.407. Federal regulations governing research with prisoners, see 45 C.F.R. 46 subpart C, are even more stringent, and typically permit such research only if it poses “no more than minimal risk and no more than inconvenience to the subjects.” *Id.* § 46.306.

79. *Telling People What They Already Know Can Hurt Them*, IRBWATCH (on file with author).

80. See DENNIS S. CHARNEY & CHARLES B. NEMEROFF, *THE PEACE OF MIND PRESCRIPTION* 18 (2004) (citing research from multiple disciplines showing that resilience can be improved with intentional effort).

emboldens them to abuse alcohol.

In another study, a researcher proposed anonymously surveying college students about their experiences of what the consent materials called “sexual aggression victimization.” She deliberately avoided the term “rape” because “*inform*[ing] respondents currently unaware of their rape victim status that indeed they are rape victims may actually instigate trauma rather than prevent it.” She also argued that the alteration “could significantly diminish the validity of the results” because “[m]any rape victims may refuse to admit to their victim status, thereby excluding themselves from the study altogether.” As a result, the study would “fail to produce findings of potential assistance to the very victims the IRB apparently wants to assist.” But the IRB disagreed and required her to refer specifically to “rape” because (in the researcher’s words) “victims of rape ‘need to know’ they are victims of rape.”⁸¹ As with the alcoholism study, however, different participants will likely have a wide range of reactions to learning that they are rape victims.

The risk of potentially unpleasant self-knowledge is also posed by a growing body of research that many legal academics deem critical to issues as varied as employment discrimination and affirmative action,⁸² legal decisionmaking,⁸³ and health disparities.⁸⁴ Implicit bias research uses an interactive, computer-based test in which participants quickly categorize words or images that appear on the screen by pressing a key corresponding to a given category.⁸⁵ Millions of people have participated in this research online,⁸⁶ and most were told that, whatever they might previously have thought, their “data suggest” that they harbor biased associations about people on the basis of sex, race, or other categories. Like other forms of

81. Nat’l Comm’n Ass’n, *supra* note 63, at 208–09 (anonymous narrative #7).

82. See Samuel R. Bagenstos, *Implicit Bias, “Science,” and Antidiscrimination Law*, 1 HARV. L. & POL’Y REV. 477, 477–78 (2007) (citing empirical research on implicit bias).

83. See Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1197 (2009) (finding that trial judges hold implicit racial biases that may influence their judgment); Theodore Eisenberg & Sheri Lynn Johnson, *Implicit Racial Attitudes of Death Penalty Lawyers*, 53 DEPAUL L. REV. 1539, 1542 (2004) (suggesting that defense counsel hold implicit racial biases); Reshma M. Saujani, “*The Implicit Association Test*: A Measure of Unconscious Racism in Legislative Decision-Making”, 8 MICH. J. RACE & L. 395, 396 (2003) (arguing that the current legal discrimination framework does not reach unconscious discrimination).

84. See Michael S. Shin, *Redressing Wounds: Finding a Legal Framework to Remedy Racial Disparities in Medical Care*, 90 CALIF. L. REV. 2047, 2049 (2002) (asserting that implicit racial bias is a leading cause of medical treatment disparities).

85. This description is based on the Implicit Association Test (IAT), which is the basis for most implicit bias research cited in the legal academic literature. *Id.* at 2066–67.

86. See, e.g., Rachlinski et al., *supra* note 83, at 1198 (“More than four and a half million people have taken the IAT.”).

risky self-knowledge, learning that one is implicitly biased is likely to produce negative emotions in many participants. They may feel significant shame and powerlessness to change or otherwise respond constructively. Others, however, may dismiss the results as pseudo-science or the result of a bad test day. Still others may have a net positive reaction: though unsettling, the results may prompt them to learn more about implicit bias, to try to debias themselves through increased contact with “the other,”⁸⁷ or to rethink their positions on issues like affirmative action.⁸⁸

2. *Informational Privacy Risks*

Research often poses risks of personally identifiable information being disclosed. Although estimating the likelihood of inadvertent disclosure will typically be a matter of technical expertise—albeit not the variety that IRBs usually possess⁸⁹—the likelihood that disclosure will harm the participant and the magnitude of that harm depend on individual preferences and circumstances.

Individuals differ widely in their attitudes toward informational privacy. Researchers have found that these differences correlate with gender,⁹⁰ age, and extensiveness of social media use.⁹¹ Privacy preferences are even heterogeneous *within* individuals; like many other preferences, they tend to be unstable or context-dependent. For instance, individuals’ privacy concerns tend to decrease with more experience.⁹² They may also vary depending on the kind of personal information at issue,⁹³ the perceived

87. See, e.g., Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 201–04 (2006) (asserting that debiasing through law could allow people to change their own behavior).

88. Another example of self-knowledge that gives regulators and commentators pause is the individual results of research, especially genetic research. See generally NAT’L INSTS. OF HEALTH, GENOME-WIDE ASSOCIATION STUDIES (GWAS): NIH POINTS TO CONSIDER (2011), gwas.nih.gov/pdf/PTC_for_IRBs_and_Institutions_revised5-31-11.pdf.

89. ANPRM, *supra* note 34, at 44,516. For this reason, one proposed amendment to the regulations would take assessment of informational risks away from IRBs and require all researchers to comply with Health Insurance Portability and Accountability Act data-security standards. *Id.* at 44,515.

90. For instance, not surprisingly, girls are more concerned than boys about disclosing information pertaining to their physical location. See Ian Brown, *Privacy Attitudes, Incentives and Behaviours* 2–3 (June 17, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1866299>.

91. See Alice E. Marwick et al., *Youth, Privacy and Reputation* 4, 7, 65 (Harvard Law Sch. Pub. Law & Legal Theory Working Paper Series, Paper No. 10-29, 2010), available at <http://ssrn.com/abstract=1588163>.

92. Brown, *supra* note 90, at 3–4.

93. See Steve Jones et al., *Everyday Life, Online: U.S. College Students’ Use of the Internet*, FIRST MONDAY (Oct. 5, 2009), <http://firstmonday.org/ojs/index.php/fm/article/view/2649/>

tradeoffs involved,⁹⁴ the intended use of the information,⁹⁵ the voluntariness of the disclosure, and the perceived trustworthiness of the recipient.

For one dramatic example of individual differences in privacy preferences, consider the Personal Genome Project (PGP), run by Harvard geneticist George Church. Many view genetic and medical information as among the most private kinds of information that exist. Yet, participants in the PGP agree to have their entire genome sequenced and, along with detailed medical and other personal information, *posted on the Internet* for anyone to see, download, and analyze. The first ten participants are identified by name and photograph, and the profiles of most other participants are so rich that they can be easily identified through data mining.⁹⁶

3. *Physical Risks*

To date, there has been only one serious attempt to develop a disciplined method of assessing research risks that improves upon IRB (and regulator) intuition. The Systematic Evaluation of Research Risks (SERR) limits itself to physical risks “due to the [] strong context dependence” of economic and social harms.⁹⁷ Indeed, those who would concede participant heterogeneity in psychological and social risks may be more skeptical of the existence of significant heterogeneity in seemingly more objective physical risks.⁹⁸ But,

2301 (finding few students at forty U.S. colleges (n=7,421) were concerned about disclosure of personal information on social networking sites but nearly 75% concerned about security of passwords and social security and credit card numbers).

94. See, e.g., Seounmi Youn, *Teenagers' Perceptions of Online Privacy and Coping Behaviors: A Risk-Benefit Appraisal Approach*, 49 J. BROADCASTING & ELECTRONIC MEDIA 86, 100–01 (2005).

95. See, e.g., *Havasupai Tribe v. Ariz. Bd. of Regents*, 204 P.3d 1063, 1066–67 (Ariz. Ct. App. 2008) (members of a Native American tribe who provided tissue samples to researchers to study the tribe's diabetes epidemic objected when researchers investigated tribal ancestry and prevalence of schizophrenia and inbreeding); Anne Adams & Martina Angela Sasse, *Privacy in Multimedia Communications: Protecting Users, Not Just Data*, in 49 PEOPLE AND COMPUTER XV—INTERACTION WITHOUT FRONTIERS: JOINT PROCEEDINGS OF HCI2001 AND ICM2001 49, 57 (A. Blandford et al. eds., 2001) (describing how some individuals were willing to permit videoconferencing recordings to be shared for purposes of evaluating the technology, but not in order to evaluate the technology's effects on different ethnic groups).

96. Participants' profiles are available at http://www.personalgenomes.org/consent/whitepaper_consent_04302007.pdf. The first ten participants were required to hold an M.A. in genetics or its equivalent. The detailed informed consent process for later participants includes a requirement that enrollees receive a perfect score on a genetics exam.

97. Annette Rid et al., *Evaluating the Risks of Clinical Research*, 304 J. AM. MED. ASS'N 1472, 1473–74 (2010).

98. Legal and economic risks, too, might seem to be the province of technocrats. For

in fact, physical risks—no less than psychological, social, legal, and economic risks—depend on preferences and other individual circumstances. Despite a clear role for expertise in assessing physical risks, then, much critical information regarding these risks, too, remains privately held by prospective participants.⁹⁹

a. Pain Heterogeneity

Of the seven dimensions that SERR uses to assess the riskiness of research, the first—“experience, such as pain, associated with the harm”¹⁰⁰—would seem to vary the least among individuals. Yet “[o]ne of the most striking features of pain is the large range of variation in response to identical stimuli.”¹⁰¹ The magnitude of pain caused by an identical stimulus can vary within the same individual over time.¹⁰² It can also vary among individuals. The same injury or disease process, for instance, can result in chronic pain for one individual but minimal deficits for another

an argument that legal decisions mirror medical treatment (and research participation) decisions in combining expert and individual lay knowledge, see Note, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 HARV. L. REV. 1510, 1511–12 (2006).

99. Bioethics emerged as a field during the anti-authoritarian 1960s, largely in opposition to medicine’s paternalistic Hippocratic tradition. Bioethicists rightly pointed out that although patients rely on experts to tell them the relative “success” of, say, mastectomy versus lumpectomy with radiation in shrinking tumors, they rely on their own knowledge of their values, preferences, and circumstances to decide which of these (or neither) is most likely to be “successful” for them within the broader context of their lives. Given a choice between mastectomy or lumpectomy with radiation, some women may choose the latter because they feel that their breasts are integral to their identity or because they value the experience or option of breastfeeding children, while others may choose the former if it carries even a small relative increase in life expectancy. Bioethicists should be the last to express surprise, then, that IRBs vary markedly in their assessments not only of psychosocial risks but also of physical risks, and it is ironic that this lesson seems to have been largely forgotten in the domain of research. For a history of bioethics, see generally Daniel Callahan, *Bioethics and Policy—A History*, in FROM BIRTH TO DEATH AND BENCH TO CLINIC: THE HASTINGS CENTER BIOETHICS BRIEFING BOOK FOR JOURNALISTS, POLICYMAKERS, AND CAMPAIGNS ix (Mary Crowley ed., 2008), available at <http://www.thehastingscenter.org/Publications/BriefingBook/Detail.aspx?id=2412>.

100. Rid et al., *supra* note 97, at 1473.

101. Christopher S. Nielsen et al., *Characterizing Individual Differences in Heat-Pain Sensitivity*, 119 PAIN 65, 65 (2005).

102. An individual’s subjective experience of pain can vary substantially from day to day, despite being evoked by an identical stimulus. See Robert C. Coghill et al., *Neural Correlates of Interindividual Differences in the Subjective Experience of Pain*, 100 PNAS 8538, 8538 (2003). This is likely to be due to modulating factors such as anxiety. See Allan Jones et al., *Dispositional Anxiety and the Experience of Pain: Gender-Specific Effects*, 7 EURO. J. PAIN 387, 388, 393 (2003).

(interindividual differences), likely due to a combination of genetic and environmental factors.¹⁰³

It is not uncommon to hear individuals describe themselves as particularly sensitive to, or tolerant of, pain. Studies have lent credence to such statements, finding that individuals' subjective pain ratings correlate with activity levels in the relevant areas of the brain,¹⁰⁴ thereby providing "crucial evidence that individual differences in *reported* pain reflect actual differences in *experienced* pain."¹⁰⁵

Researchers have found individual differences in how individuals perceive both the intensity and the unpleasantness of pain to be "remarkably large."¹⁰⁶ Indeed, pain ratings of identical noxious stimuli can cover the entire scale from "no pain" to "the most intense pain [imaginable]."¹⁰⁷ And in heat pain and cold-pressure pain studies, researchers have found "no temperature that is painful to all subjects and at the same time tolerable to all subjects."¹⁰⁸

In one small study that used brain imaging to try to identify objective neural correlates of subjective experiences of pain, individuals' reports of pain intensity evoked by the same 49°C noxious stimulus delivered to each participant's lower right leg ranged, on a ten-point scale, from 1.05 to 8.9. Moreover, the distribution of these results was remarkably uniform: rather than forming a bell curve of typical individuals, with relatively pain-sensitive and pain-insensitive outliers on each end, the scatter plot "curve" was actually a straight, diagonal line. In other words, the odds of randomly selecting a pain-sensitive and pain-insensitive participant are about the same, according to the study.¹⁰⁹

In another study, investigators subjected 175 healthy participants to tests of heat-induced pain in both ascending and random series over three and one-half hours. Immediately following each stimulus, participants were asked to rate both its pain intensity and its discomfort on a scale that ranged from none to the worst intensity or discomfort they could imagine. Their ratings were then converted to a scale of 1 to 100, as is conventional in such studies. Investigators found that individual differences in pain

103. Nielsen et al., *supra* note 101, at 66; *see also* Amanda C. Pustilnik, *Pain as Fact and Heuristic: How Pain Neuroimaging Illuminates Moral Dimensions of Law*, 97 CORNELL L. REV. 801, 810–11 (2012) (pain is "inherently variable, subjective, and individual").

104. Coghill et al., *supra* note 102, at 8538, 8541.

105. Nielsen et al., *supra* note 101, at 66.

106. *Id.* at 68; *see also* Christopher S. Nielsen et al., *Individual Differences in Pain Sensitivity: Genetic and Environmental Contributions*, 136 PAIN 21, 27 (2008).

107. Nielsen et al., *supra* note 101, at 66.

108. *Id.* at 73.

109. Coghill et al., *supra* note 102, at 8539 & fig. 1.

sensitivity accounted for more of the total variance in the study (60%) than did the different temperatures of various stimuli themselves (40%).¹¹⁰ Moreover, these individual differences in pain sensitivity and intensity are not stable or, put another way, “pain” is not a monolithic phenomenon. Investigators estimated that genetics accounts for 26% of the individual differences in sensitivity to heat pain, and researchers found no correlation with gender. When the same researchers investigated cold-pressor pain, however, although they found a similarly large amount of individual variation in pain sensitivity, they estimated that genetics accounted for 60% of this variation, and reported “significant” gender differences, with women reporting more pain than men.¹¹¹

b. Heterogeneity in Other Aspects of Physical Risk

It is even easier to see that the remaining aspects of harm SERR uses to classify degrees of risk—the “burden of efforts, including treatment, to mitigate the harm,” the “effects on an individual’s ability to perform the activities of daily life” and to “pursue life goals,” the “extent to which an individual can adapt to the new circumstances,” and the “burden imposed by the process of adaptation”—will also vary considerably among prospective participants.¹¹² This is because even when individuals experience the same degree of pain or disability, identical hedonic experiences often have different *meanings* and *consequences* for different individuals (or for the same individual at different times). Some kinds of physical harms will be more significant for some than for others.¹¹³ For athletes and musicians, for instance, physical disability may be significantly more harmful (where harm entails a setting back of one’s interests) than pain, whereas for lawyers, scholars, business executives, and others who must be able to think clearly, pain or cognitive or psychological disabilities might be far worse than many physical disabilities. Even the same injury may have markedly different effects on the ability of different people to pursue *their* life goals and to perform *their* daily life activities. The efforts involved in treating that injury may be more or less burdensome, depending on each individual’s access to treatment. And should the injury result in permanent disability, individuals may differ in the extent to which they can adapt to this new circumstance and, if so, in the burdens they would bear in so doing.

110. Nielsen et al., *supra* note 101, at 74.

111. Nielsen et al., *supra* note 106, at 25–26.

112. The seventh aspect of Systematic Evaluation of Research Risks (SERR) is duration of harm. Rid et al., *supra* note 97, at 1473.

113. See *supra* note 99.

It therefore should not be surprising that IRBs vary widely in their assessments of the riskiness of studies and common research procedures. IRBs vary in applying the regulatory distinctions, critical in the U.S.¹¹⁴ and other jurisdictions,¹¹⁵ among research that entails “minimal risk,” research that entails a “minor increase over minimal risk,” and research that entails more than a minor increase over minimal risk.¹¹⁶ In one study, 188 IRB chairs were asked to determine into which of these three regulatory categories several procedures routinely used in biomedical research fall, assuming that participants were healthy eleven-year-olds. The results revealed “substantial”—and, according to the study authors, “unjustified”—variability in risk assessment. Twenty-three percent of chairs categorized allergy skin testing as minimal risk, while 43% categorized it as a minor increase over minimal risk and 27% categorized it as more than a minor increase over minimal risk.¹¹⁷ On the other hand, most (81%) thought a one-time blood draw constituted minimal risk,¹¹⁸ but one can easily imagine that for many, genetic privacy concerns would render such a procedure “risky.”

Another study of IRB chairs in Germany similarly found a “disturbingly high degree” of variation in the assessment of physical risks. Twenty-nine

114. In the U.S., whether research poses “no more than minimal risk” determines whether it is eligible for expedited review, whether minors may participate in nontherapeutic research, and whether informed consent requirements may be altered or waived. *See* 45 C.F.R. § 46.110 (2012) (expedited review); *id.* §§ 46.116(a)(6), (d)(1), 46.117(c)(2) (informed consent); *id.* § 46.204(b), (d) (pregnant women and fetuses); *id.* § 46.306(a)(2)(i), (ii) (prisoners); *id.* § 46.404 (children). “Minimal risk” research is defined for most of these purposes as research whose anticipated “probability and magnitude of harm or discomfort . . . are not greater in and of themselves than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.” *Id.* § 46.102(i). The regulations define minimal risk slightly differently—expressly adopting an absolute rather than relative standard—in the context of research with prisoners. *See id.* § 46.303(d) (“Minimal risk is the probability and magnitude of physical or psychological harm that is normally encountered in the daily lives, or in the routine medical, dental, or psychological examination of healthy persons.”).

115. *See* Loretta M. Kopelman, *Minimal Risk as an International Ethical Standard in Research*, 29 J. MED. & PHIL. 351 (2004) (explaining the role of “minimal risk” in other countries and in international codes and guidelines).

116. HHS regulations governing research with minors adds to “minimal risk” research the categories of research that involves a “minor increase over minimal risk” and, by implication, research that involves more than a minor increase over minimal risk, neither of which the regulations or HHS further defines. 45 C.F.R. § 46.406.

117. *See* Shah et al., *supra* note 76, at 476.

118. *Id.* at 476, 478. The percentage of IRB chairs who classified the following procedures as minimal risk were as follows: sex surveys (44%), MRI (48%), one blood draw per week for 24 weeks (15%), electromyogram (8.5%), pharmacokinetic testing (7.5%), lumbar punctures (2%). *Id.* at 479 tbl. 2.

chairs were given five hypothetical, but realistic, biomedical studies involving children and asked to state for each whether they would approve it with or without “restrictions,” would approve it “under no circumstances,” or were unsure what they would do.¹¹⁹ The authors intentionally chose the five protocols to reflect a range of risk from least risky (Study 1) to most risky (Study 5).

The chairs’ decisions regarding what the authors describe as the three “highest-risk” protocols varied markedly. Study 4, for instance, called for an additional six bone marrow biopsies in leukemia patients already receiving four biopsies for therapeutic purposes. About 58% of chairs said they would not permit the study under any circumstances, with one characterizing the additional biopsies as “a kind of child abuse.”¹²⁰ But 41% of chairs would have approved the study—half without restrictions.¹²¹ Similarly, 48% of chairs would have approved Study 5, supposedly the riskiest study—again, half of them without restrictions—while 41% would have rejected it, and the remaining 10% or so were uncertain.¹²²

This variation is not likely explained by disparities in the chairs’ experience or expertise, however measured.¹²³ Just under 90% were physicians. Although only about 20% specialized in pediatrics, 93% had children of their own. About three-quarters had participated in more than fifty committee meetings, while the remainder had participated in ten to fifty meetings.¹²⁴

Moreover, although there was broad consensus among the chairs about the acceptability of the two “least risky” protocols (all chairs would have approved both studies, although some would have required “restrictions” in one or both cases), this consensus contrasts sharply with the attitudes of the German public. As the authors note, Study 1, the “least risky” of the five, “strongly resembled” a 1997 case that sparked considerable outrage among Germans. In that case, a doctoral candidate had taken blood samples from residents of a home for the “mentally handicapped,” for the purpose of doing genetic research. Although he informed neither the residents’ guardians nor the residents themselves about his research, public criticism

119. C. Lenk et al., *Non-Therapeutic Research with Minors: How Do Chairpersons of German Research Ethics Committees Decide?*, 30 J. INST. MED. ETHICS 85, 86 (2004).

120. *Id.*

121. *Id.*

122. *Id.* at 86–87. Study 3 yielded similarly divergent results, with a full 20% of chairs unable to make any decision. *Id.* at 86 fig. 1.

123. Except, of course, as measured by the chairs’ knowledge, or lack thereof, regarding the preferences of hypothetical individual research participants and, in this case, their proxy decisionmakers.

124. Lenk et al., *supra* note 119, at 86.

focused “predominantly[] on the alleged immorality of research without potential direct benefit.”¹²⁵ Largely on the basis of this case, Germans successfully objected to their government ratifying the European Convention on Human Rights and Biomedicine, which permits minimal risk but nontherapeutic research on individuals unable to give consent.¹²⁶ Study 1 similarly proposed that researchers draw a small additional amount of blood from children who were already undergoing blood draws for therapeutic purposes. All twenty-nine chairs said they would approve the study, and only one would have required restrictions.¹²⁷

B. Heterogeneity in Research Benefits

Participants choose to enroll in research for a range of reasons as broad as the range of risks they thereby assume.

1. Altruism and Pro-Sociality

Although neoclassical economics models individual behavior as motivated by the self-interested pursuit of extrinsic, material benefits,¹²⁸ an ample literature from multiple disciplines,¹²⁹ as well as data tracking donations of time and money,¹³⁰ suggests that human beings are motivated

125. *Id.* at 85–86.

126. *Id.* at 85.

127. *Id.* at 86.

128. See, e.g., Oliver E. Williamson, *Transaction Cost Economics: How It Works; Where It is Headed*, 146 DE ECONOMIST 23, 31 (1998); William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1401 (1993).

129. See, e.g., Yochai Benkler, *The Unselfish Gene*, HARV. BUS. REV., July–Aug. 2011, at 77, 77 (discussing how fields as diverse as evolutionary biology, psychology, sociology, political science, and experimental economics “are tracing a new intellectual arc in the disciplines concerned with human action and motivation” that undercuts the “deep-rooted belief about human selfishness”); see also YOCHAI BENKLER, *THE PENGUIN AND THE LEVIATHAN: HOW COOPERATION TRIUMPHS OVER SELF-INTEREST* (2011); Colin Camerer & Richard H. Thaler, *Anomalies: Ultimatums, Dictators and Manners*, J. ECON. PERSP., Spring 1995, at 209 (reporting evidence of other-regarding behavior from experiments with ultimatum and dictator games).

130. In the U.S., 93 million volunteers donate more than 20.3 billion hours every year to nonprofit organizations. Mary Bridgman, *Volunteers Answer Call Without Calling Attention to Themselves*, COLUMBUS DISPATCH, Nov. 29, 1998, at 1G, 8G. Theories of the determinants of volunteering for nonprofit organizations “are so varied and contradictory that no single conceptual model has received general support.” Janet C. Winniford et al., *Motivations of College Student Volunteers: A Review*, 34 J. STUDENT AFF. RES. & PRAC. 135 (1997). In 2009, charitable giving in the U.S. totaled \$303.75 billion, 75% of which came from individuals (or 88%, counting charitable bequests and estimated family foundation grants). Total giving has increased in current dollars every year but in 1987 and 2009. Between 1969 and 2009, annual total giving ranged from 1.7% to 2.2% of GDP, with 90% of people giving money to

by many factors, including those that are intrinsic, intangible, other-regarding and duty-driven. We are, in other words, only “boundedly self-interested.”¹³¹

Much of the utility of altruistic participation in research may be already accounted for when IRBs weigh “the importance of the knowledge that may reasonably be expected to result”¹³² from a study. But evidence suggests that those who engage in prosocial activities, including serving as research participants, often themselves thereby receive “warm glow utility.”¹³³ Therapists successfully advise those who are grieving or depressed to take their minds off their own problems by focusing on the problems of others. Elderly individuals who volunteer report greater quality of life than those who do not volunteer.¹³⁴ And a large and growing body of empirical research finds strong associations between prosocial behavior and mental and physical health and well-being.¹³⁵ In one study, for example, about half of participants who helped others in modest ways—for example, by working at a soup kitchen for a few hours—reported a feeling of elation, or a sense of significance or meaning in life, while 13% reported a reduction in their chronic aches and pains.¹³⁶ Another study suggests a possible physiological basis for warm glow utility. Subjects positioned in a functional magnetic resonance imaging (fMRI) machine were asked to contemplate a menu of possible charities to which they might like to contribute. Researchers found that when subjects checked a box next to their preferred charity, the mesolimbic pathway, which is associated with dopamine, was activated.¹³⁷

at least one charity. CTR. ON PHILANTHROPY AT IND. UNIV., GIVING USA 2010: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 2009 5, 11 (2009).

131. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1545 (1998) (people’s utility function includes concern “about the well-being of others, even strangers in some circumstances”).

132. 45 CFR 46.111(a)(2) (2012).

133. See Peter A. Diamond & Jerry A. Hausman, *On Contingent Valuation Measurement of Nonuse Values*, in CONTINGENT VALUATION: A CRITICAL ASSESSMENT 3, 27 (Jerry A. Hausman ed., 1993) (describing warm glow valuation as the moral satisfaction individuals obtain when supporting good causes).

134. Morris A. Okun & Josef Michel, *Sense of Community and Being a Volunteer Among the Young-Old*, 25 J. APPLIED GERONTOLOGY 173, 186 (2006).

135. See Stephen G. Post, *Altruism, Happiness, and Health: It’s Good to Be Good*, 12 INT’L J. BEHAV. MED. 66 (2005).

136. Allan Luks, *Helper’s High*, PSYCHOL. TODAY, Oct. 1988, at 39.

137. Jorge Moll et al., *Human Fronto-Mesolimbic Networks Guide Decisions About Charitable Donation*, 103 PNAS 15,623 (2006). The researchers speculated that since merely contemplating money donation triggered this effect, actual donation of money (or other resources) would trigger an effect at least as great. However, it is also possible that individuals donating actual money (or other resources) might experience disutility associated

But warm glow utility is difficult to measure—especially in a metric that renders it commensurable with other utilities and disutilities and allows meaningful trade-offs to be made among these.¹³⁸ More to the present point, even if participants' warm glow utility could be measured and monetized, not all participants can be expected to receive equal, or any, warm glow utility. Individuals are heterogeneous in their preferences for prosociality.¹³⁹ Experiments testing cooperative behavior have found that while about 30% of individuals behave more or less like *homo economicus*, more of them—some 50%—behave cooperatively, either contingent on another's cooperative behavior or unconditionally. The remaining 20% of individuals behave unpredictably, sometimes cooperating and sometimes not.¹⁴⁰ IRBs, of course, have no method of discerning which prospective subjects would derive warm glow utility from their participation and which would not.

2. Compensation

Research participants are sometimes motivated, in full or in part, by money they receive. Some participate only once or occasionally to secure pocket change. For others, participating in research constitutes part- or even full-time employment.¹⁴¹ Needless to say, the same amount of compensation will be more or less attractive to different prospective participants according to such individualized factors as their socioeconomic status, whether they currently have any pressing need for money, their taste for expensive goods, and so on.

In one study of participant perceptions of research compensation, sixty individuals who had previously received payment for participating as a

with that sacrifice that is equal to or greater than this warm glow utility.

138. Cf. Matthew D. Adler & Eric A. Posner, *Rethinking Cost-Benefit Analysis*, 109 YALE L.J. 165, 175 (1999) (“[Cost-benefit analysis (CBA)] is frequently hampered by a lack of data or by the difficulty of estimating valuations. A striking example is a CBA that attempted to monetize the aesthetic value that people attach to clear air over the Grand Canyon.”).

139. Similarly, there is evidence of individual differences in risk perception along dimensions of socio-demographics, religion, general trust level, cultural factors, personal facets, and experience or information learning process. See Jan Urban & Milan Ščasný, *Determinants of Risk Perception Bias: An Empirical Study of Economically Active Population of the CR*, Paper presented at the “World of Labour and Quality of Life in Globalized Economy” Conference at the University of Economics at Prague 8 (Sept. 2007).

140. Benkler, *supra* note 129, at 79.

141. See ROBERTO ABADIE, *THE PROFESSIONAL GUINEA PIG: BIG PHARMA AND THE RISKY WORLD OF HUMAN SUBJECTS* 5 (2010) (ethnography of self-defined “professional guinea pigs” who earn around \$15,000 to \$20,000 (in 2002 dollars) by participating as healthy controls in five to eight drug trials per year); James A. Anderson & Charles Weijer, *The Research Subject as Wage Earner*, 23 THEORETICAL MED. 359, 361 (2002).

healthy volunteer in at least one clinical trial were asked to state the appropriate amount that participants should be offered in each of four hypothetical clinical trials, and whether they would be willing to participate. The monetary amounts given varied more from participant to participant than it did from hypothetical to hypothetical. That is, respondents had individualized, but consistent methods of arriving at estimates of payments for participating in clinical studies based on each individual's perception of study burden and associated risk.¹⁴²

3. *Beyond "For Love or Money": Other Benefits*

Research can benefit participants in myriad ways beyond warm glow utility and compensation. Research participation can serve as the means for satisfying many of the "basic human goods" in which some theorists say welfare inheres. According to John Finnis's natural law theory, the "basic human goods" are life, knowledge, play, aesthetic experience, friendship or sociality, practical reasonableness, and religion.¹⁴³ Martha Nussbaum's "capabilities approach" proposes a similar list of "human capabilities" or "substantive freedoms" central to human flourishing: life; bodily health; bodily integrity; senses, imagination, and thought; emotions; practical reason; affiliation; other species; play; and control over one's environment.¹⁴⁴ And hundreds of motivational studies conducted under the rubric of self-determination theory¹⁴⁵ suggest that human beings are intrinsically motivated by their drive to satisfy three basic psychological needs: competence,¹⁴⁶ relatedness,¹⁴⁷ and autonomy and

142. M.J. Czarny et al., *Assessing Payment to Healthy Volunteers in Clinical Research: The Research Subject's Perspective*, 87 *CLINICAL PHARMACOLOGY & THERAPEUTICS* 286 (2010).

143. See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 90 (1980).

144. Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273, 287–88 (1997).

145. A theory under which the individual neglects the other half emphasized by existentialists—namely, that we have psychological needs to experience ourselves not only as autonomous but also, in different circumstances, as determined by forces outside our control (thus avoiding the unpleasant burden of responsibility).

146. In this context, competence refers to the need to experience oneself as capable and competent in controlling the environment and being able to reliably predict outcomes and belief that you can do something well. Edward L. Deci & Maarten Vansteenkiste, *Self-Determination Theory and Basic Need Satisfaction: Understanding Human Development in Positive Psychology*, 27 *RICERCHE DI PSICOLOGIA* 23, 25 (2004).

147. Relatedness is the need to believe that you matter and that others matter to you, to care for and be related to others, including the need to experience authentic relatedness from others and to experience satisfaction in participation and involvement with the social world. See Roy F. Baumeister & Mark R. Leary, *The Need to Belong: Desire for Interpersonal Attachments as a Fundamental Human Motivation*, 117 *PSYCHOL. BULL.* 497 (1995).

self-determination.¹⁴⁸

Research participation can serve several of these ends. For instance, participants may receive many of the same psychic benefits that drive researchers to conduct research, such as the satisfaction of intellectual curiosity and of gaining a sense of control through prediction. Women who had recently experienced intimate partner abuse were asked to list the reasons they had decided to participate in a longitudinal study of such abuse. The most common reason—cited by 66.9% of respondents as one of the top three reasons they enrolled—was curiosity.¹⁴⁹

As for control, recall the earlier discussion of research on sensitive topics, where IRBs (accurately) worried particularly about the risk of retraumatizing participants by asking them to recall painful pasts.¹⁵⁰ Researchers have found that, although participants who have experienced painful pasts—for instance, child abuse—are more likely (compared to other participants) to report distress when asked by researchers to remember those pasts, these participants are also more likely to report that participation *benefitted* them.¹⁵¹ On reflection, this is not all that surprising. Many people find it therapeutic to discuss painful experiences. A participant's particular painful experience may be viewed skeptically by laypersons or even mainstream experts, and so they may feel validated by professional research interest in those experiences. Or they may have experienced something, such as an assault, that left them feeling disempowered, and so contributing to attempts to better understand the causes and effects of that assault may provide them with a sense of empowerment.

C. Reasonableness of Risk–Benefit Tradeoffs

The final step in research risk–benefit analysis is determining whether a research project's “[r]isks to subjects are reasonable in relation to anticipated benefits, if any, to subjects, and the importance of the knowledge that may reasonably be expected to result.”¹⁵² What does it

148. Autonomy is the need to actively participate in determining one's own behavior, including the need to experience one's actions as the result of autonomous choice without external interference, the need to believe that you have a say in how you live. See Edward L. Deci & Richard M. Ryan, *Human Autonomy: The Basis for True Self-Esteem*, in EFFICACY, AGENCY, AND SELF-ESTEEM 31–49 (Michael H. Kernis ed., 1995).

149. Claire L. Hebenstreit & Anne P. DePrince, *Perceptions of Participating in Longitudinal Trauma Research Among Women Exposed to Intimate Partner Abuse*, J. EMPIRICAL RES. ON HUM. RES. ETHICS, April 2012, at 60, 64.

150. See *supra* Part II.A.1.a.

151. Decker et al., *supra* note 75, at 62.

152. 45 C.F.R. § 46.111(a)(2) (2012).

mean to find that a study's risk–benefit ratio is “reasonable”?

1. *What Risk–Benefit “Reasonableness” in HSR Is Not*

Many have rightly noted the vagueness of this federal research risk–benefit reasonableness standard,¹⁵³ which is more or less the same in the regulatory frameworks of other countries and in international codes of research ethics.¹⁵⁴ The regulatory standard tells IRBs which components to include in its risk–benefit calculus—risks to participants, expected benefits to participants, and the importance of the knowledge reasonably expected to result from the research—but not the relative weights that IRBs should assign to each of these components. Still, we can eliminate two seemingly plausible reasonableness standards.

a. *Reasonableness as Social Welfare Maximization*

One possibility is that HSR risk–benefit analysis should be understood to refer to the standard cost-benefit analysis (CBA) that is ubiquitous in the regulatory state. Indeed, some scholars, especially those from the “overregulation camp,” assume that maximizing overall social welfare is the goal of the current system of research governance, or should be, without grappling with the fairly radical normative shift this would entail.¹⁵⁵

153. See Coleman, *supra* note 12, at 14 (“Each [IRB] member is free to interpret this reasonableness standard as he or she sees fit.”); *id.* at 20 (arguing that the “reasonable risk” standard is “inherently amorphous” and “susceptible to a virtually limitless range of possible interpretations”).

154. See *infra* text accompanying notes 169–71.

155. See, e.g., Carl H. Coleman, *Vulnerability as a Regulatory Category in Human Subject Research*, 37 J.L. MED. & ETHICS 12, 15 (2009) (according to “the basic ‘deal’ that underlies society’s regulation of human subject research,” research need not be in a participant’s best interests, but a study’s “objective risk–benefit ratio” must yield a “net social benefit”); *id.* at 16 (“[Risks] need not be an absolute barrier to proceeding with research, as long as the expected benefits of the study outweigh the study’s overall risks.”); see also Ernest D. Prentice & Dean L. Antonson, *A Protocol Review Guide To Reduce IRB Inconsistency*, IRB: ETHICS & HUM. RES., Jan.–Feb. 1987, at 9 (IRBs should ask whether risks are “balanced or outweighed” by benefits); Zywicki, *supra* note 15, at 865 (assuming, “[f]or purposes of this Article,” that the regulatory goal “is to maximize the net social benefits of the governance of academic research by minimizing the costs of Type I and Type II errors and administrative costs”); *id.* at 883 (“Like governmental safety regulations, the objective function of IRBs is to minimize the costs of the IRB system through the minimization of Type I and Type II errors as well as administrative costs.”); Hyman, *supra* note 15, at 753 (“The goal for any system of research oversight is to maximize the number of true positives and negatives . . . , and minimize the number of false positives and false negatives . . . , and the costs of research oversight. These costs include the transaction costs of operating the system . . . , and the costs of erroneous decisions and delay.”); Hamburger, *supra* note 14, at 469 (arguing that “the loss to humanity over the decades” from IRB alterations of research “almost certainly exceeds the loss from

Let us assume, *arguendo*, that IRBs are capable of developing a risk–benefit profile for each study that accurately reflects the expected costs and benefits of participation for all prospective participants. Interpreting risk–benefit reasonableness as CBA would mean that research is “reasonable” whenever its expected benefits to society and to participants, “if any,” *outweigh* its risks to participants.¹⁵⁶ This regulatory construction would limit the heterogeneity problem to earlier stages of risk–benefit analysis. IRBs would still suffer from an information problem at the level of risk and benefit assessment, since the social welfare function is merely the aggregation of the individual welfare functions of all members of society. But, having aggregated risks to participants on one side and expected benefits to them and society on the other, “reasonableness” would become a simple matter of math: the regulations, so constructed, would direct the IRB to choose whichever alternative—approving or disapproving the study—maximizes net social welfare, regardless of¹⁵⁷ the distribution of the costs and benefits of that choice.

But risk–benefit analysis in HSR is not, and is not intended to be, standard CBA. For one thing, HSR risk–benefit analysis is not a plenary assessment of the expected costs and benefits of research.¹⁵⁸ More importantly, the governance of HSR is decidedly non-utilitarian. The primary problem with the research abuses that prompted the National Research Act was not their disproportionate distribution of risks and expected benefits. Research by definition¹⁵⁹ entails participants assuming

the research by a very substantial factor”).

156. Rather than a purely utilitarian governance scheme marked by conscription into research, social welfare maximization through research might be subject to an (almost) absolute side constraint of voluntary, informed consent.

157. Or at least separate from this distribution; in theory, welfare economics is not indifferent to the distribution of costs and benefits, but sees merit in separating the economic task of maximizing surplus value from the political task of redistributing the resulting wealth. *See* Adler & Posner, *supra* note 138, at 185–86.

158. Standard CBA considers the welfare of all individuals affected by a decision and seeks to maximize net aggregate welfare. HSR regulations direct IRBs to consider more or less immediate risks to participants, benefits to participants, and benefits to society in the form of knowledge production. But IRBs are implicitly or explicitly directed to ignore costs to any party other than participants, long-term risks to participants from the potential policy implications of the knowledge gained through research, and benefits to nonparticipants such as academic freedom or employment for researchers. Even as to the category of expected benefits to participants, IRBs are directed not to count the vast majority of benefits to participants. *See infra* Part III.B.

159. *See* BELMONT REPORT, *supra* note 24, at 2–3 (“[P]ractice’ refers to interventions that are designed solely to enhance the well-being of an individual patient or client and that have a reasonable expectation of success. . . . By contrast, the term ‘research’ designates an activity designed to test an hypothesis, permit conclusions to be drawn, and thereby to

the risks of activities whose resulting benefits in the form of the public good of knowledge will necessarily be largely (in the case of therapeutic research) or completely (in the case of nontherapeutic research) externalized on others. Rather, the fundamental problem with these studies was that they *conscripted unwitting* individuals into research, thus making the classic utilitarian mistake of subsuming their individual preferences to the pursuit of socially useful knowledge.¹⁶⁰ Individuals can and do assume risks despite the fact that they themselves are not expected to benefit from that activity, or that they are expected to benefit far less than others. The voluntary, informed consent of that individual transforms a utilitarian decision imposed upon them into one that continues to be expected to maximize social welfare, but does so through a process in which the risk-assuming individual adopts that end as her own.¹⁶¹

Finally, if the regulations intended for any research that maximizes social welfare to be approved, IRBs risk-benefit analysis would hardly be necessary. The aggregation across all members of society of even very modest welfare gains from the production of useful knowledge will easily outweigh even devastating setbacks to the welfare of a relative few participants, especially if one counts the benefits of knowledge production to future generations. Although much research produces *de minimus* social value, much more produces modest benefits and some fraction produces almost incalculable social benefits. Because it is difficult, if not impossible, to determine *ex ante* which research will be wildly beneficial, which will fail

develop or contribute to generalizable knowledge”); 45 C.F.R. § 46.102(d) (2012) (defining *research* as activities that are, *inter alia*, “designed to develop or contribute to generalizable knowledge”); *id.* § 46.111(a)(2) (implying a narrow understanding of expected benefits to participants, for risk-benefit analysis purposes, by qualifying it with “if any”). The current system of research governance was premised on an explicit distinction between research and professional practice. According to this distinction, professional practice involves the single-minded pursuit of the individual patient’s (or client’s) best interests. Research, by contrast, aims to produce generalizable knowledge that is primarily of value to society and future patients (or clients); any direct benefit to subjects is merely a happy coincidence.

160. In “adopt[ing] for society as a whole the principle of rational choice for one man,” utilitarianism fails to “take seriously the distinction between persons.” JOHN RAWLS, *A THEORY OF JUSTICE* 26–27 (1971) (drawing on Kant’s notion of respect for persons); see Alexander Volokh, Commentary, *Rationality or Rationalism? The Positive and Normative Flaws of Cost-Benefit Analysis*, 48 HOUS. L. REV. 79, 90 (2011) (noting “how seamlessly one slips from the *we* who pay and receive to the *we* who receive and forego. But these are different groups, and there is neither a common pocketbook nor a common valuing mind”).

161. “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.” IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 36 (James W. Ellington trans., 3d ed. 1993) (1785) (Second Formulation of the categorical imperative).

entirely, and which will fall somewhere in between, the anticipated benefits of research must be viewed in the aggregate, across all protocols (at least within broad categories of research).

b. Reasonableness as Participant Welfare Maximization

At the other extreme, we could imagine a world in which a decision to participate in research is “reasonable”—that is, neoclassically “rational”—only when enrollment is expected to be in the participant’s “best interests”—that is, to maximize her welfare relative to her alternatives. Indeed, some scholars, especially those from the “underregulation camp,”¹⁶² some international codes of research ethics,¹⁶³ and much of the conventional wisdom of research ethics,¹⁶⁴ imply that the participant—

162. See, e.g., Tsiao Yi Yap et al., *Both Sides of the Coin: Randomization from the Perspectives of Physician-Investigators and Patient-Subjects*, 20 ETHICS & BEHAV. 380, 384 (2010) (“By reassuring patients explicitly and directly that their own well-being will *always* come before the scientific goals of the research, physician investigators can build trust in the context of the [randomized controlled trial (RCT)].”).

163. See, e.g., INT’L CONFERENCE ON HARMONIZATION OF TECHNICAL REQUIREMENTS FOR REGISTRATION OF PHARM. FOR HUMAN USE, ICH HARMONIZED TRIPARTITE GUIDELINE: GUIDELINE FOR GOOD CLINICAL PRACTICE E6(R1), princ. 2.3 (1996) [hereinafter ICH] (“The rights, safety, and well-being of the trial subjects are the most important considerations and should prevail over interests of science and society.”).

164. For instance, it has long been orthodoxy in research ethics that RCTs are acceptable only if the relevant expert community is in “ equipoise ” regarding both (1) the value to the participant of being randomized into the treatment arm versus the control arm of the study (internal equipoise); and (2) the value to the participant of being enrolled in either of these research arms versus the value of the alternatives available to her outside of the study (external equipoise). See CHARLES FRIED, MEDICAL EXPERIMENTATION: PERSONAL INTEGRITY AND SOCIAL POLICY 51 (1974) (recognizing that the RCT presents the physician–researcher with a conflict of interest, and coining the term “equipoise” to refer to situations when the investigator has no professional reason to prefer one treatment to another); Benjamin Freedman, *Equipoise and the Ethics of Clinical Research*, 317 NEW ENG. J. MED. 141, 141 (1987) (coining “clinical equipoise” as the requirement that the “expert medical community,” rather than the individual professional, be indifferent between treatments and that the absence of clinical equipoise renders an RCT unethical). Thus, research participation need not be the superior option for participants, but it must not be, to the best knowledge of experts, an inferior option. As some scholars have begun to note, such a standard is difficult to square with the *Belmont Report’s* view of participants as volunteers, and converts research into quasi-therapy. See, e.g., Steven Joffe & Franklin G. Miller, *Bench to Bedside: Mapping the Moral Terrain of Clinical Research*, HASTINGS CTR. REP., Mar.–Apr. 2008, at 30, 31 (“[R]esearch ethics is characterized by a basic incoherence: on one hand, clinical research is seen as ethically distinct from medical care; on the other hand, the obligations of investigators, especially in clinical trials, are thought to be grounded in the ethics of the doctor-patient relationship.”); see also Franklin G. Miller & Howard Brody, *A Critique of Clinical Equipoise: Therapeutic Misconception in the Ethics of Clinical Trials*, HASTINGS CTR. REP., May–June 2003, at 19. In the context of research in developing countries, similar proposals

researcher relationship is fiduciary.¹⁶⁵ As such, reasonable research is that which meets a “best-interests-of-the-participant” standard, where a study’s expected benefits to participants match or exceed its risks to them, or where its risk–benefit profile is at least as favorable as participants’ alternatives.

But if this were the criterion of research reasonableness, then—at least on the current account of research-related benefits, which essentially recognizes only direct clinical benefit to participants as benefits¹⁶⁶—only relatively rare “therapeutic” research (often involving experimental interventions to address conditions for which no standard treatment exists) would be reasonable. This standard would preclude the altruism that both the *Belmont Report* and the regulations strongly associate with research participation.¹⁶⁷

This standard of participant welfare maximization, under which virtually no research is reasonable, is thus just as implausible an interpretation of the regulations’ requirement of risk–benefit “reasonableness” as is a social welfare maximization standard, under which virtually *all* research is reasonable. Both make IRB risk–benefit analysis superfluous.

2. *Heterogeneity in Risk–Benefit Tradeoff Preferences*

The Commission may have recognized the implausibility of both of the above criteria for reasonableness, under which research is acceptable only if its expected benefits (whether for participants and society, or solely for participants) outweigh its risks. HHS’s earlier regulations had in fact required IRBs to find that “[t]he risks to the subject are *so outweighed* by the sum of the benefit to the subject and the importance of the knowledge to be gained as to warrant a decision to allow the subject to accept these risks.”¹⁶⁸ Various codes of the 1960s and 1970s similarly required that research benefits outweigh risks.¹⁶⁹ But the Commission recommended that this rule

include those that would require researchers to provide participants with medical care that is ancillary to the trial, or with post-trial access to an experimental drug.

165. For rejection of the fiduciary view of the participant–researcher relationship, see Michelle N. Meyer, *The Subject–Researcher Relationship: In Defense of Contracting Around Default Rules*, *AM. J. BIOETHICS*, Apr. 2011, at 27.

166. See *infra* Part III.B.

167. See *supra* text accompanying note 156.

168. 45 C.F.R. § 46.102(b)(1) (1978) (emphasis added).

169. See BELMONT REPORT, *supra* note 24, at 16. For instance, the Declaration of Helsinki provides that medical research should be conducted only if “the importance of the objective outweighs the inherent risks and burdens to the research subjects,” and halted “if the risks are found to outweigh the potential benefits.” World Med. Ass’n, *Declaration of Helsinki: Ethical Principles for Research Involving Human Subjects*, ¶¶ 20, 21 (Oct. 2008). Principle 6 of the Nuremberg Code of 1947 similarly requires social benefits to be equal to or greater than risks to participants: “The degree of risk to be taken should never exceed that

be replaced with the current “reasonableness” standard.¹⁷⁰ Today, other regulatory and ethical guidelines around the globe similarly call for risk–benefit ratios to be “proportionate,”¹⁷¹ “favorable,”¹⁷² or “justified.”¹⁷³ These standards set no cap on the amount of risk that (nonvulnerable) participants are allowed to assume. In theory, at least, very large risks could be “reasonable in relation to” expected benefits so long as a study has great social promise.

Such standards—when employed by central actors such as IRBs—filter on the shores of participant heterogeneity. To say that something is “reasonable” entails a claim that it is reasonable *to* someone; like the proverbial tree that falls silently in the forest, things are not reasonable in the abstract. The question is: *To whom* must they be reasonable? Given the analysis in Section C.1 above, the reasonableness of research risk–benefit profiles presumably should be determined not from society’s perspective, but from the individual participant’s perspective. But, except for extreme cases of disproportionate risks and benefits (which competent prospective participants are extremely unlikely to accept), individuals will reasonably disagree about the “reasonableness” of assuming some quantity and kind of risk in pursuit of some quantity and kind of benefit for themselves or others. Let us stipulate that a study offers two prospective participants an identical risk–benefit profile. We can easily imagine that one finds this distribution of risks and benefits to be reasonable while the other does not. Prospective participants will almost certainly be heterogeneous with respect to how much benefit must be expected, and in what proportion of benefits to themselves versus benefits to society, before the risks on the other side of the

determined by the humanitarian importance of the problem to be solved by the experiment.” 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, 181–82 (U.S. Gov’t Printing Off. 1946–1949). Principle 10, however, caps acceptable risk by requiring termination of a study that it is “likely to result in injury, disability, or death” to the participant. *Id.* at 182.

170. See NAT’L COMM’N, IRBS, *supra* note 254, at 20; 45 C.F.R. § 46.111(a)(2) (2012); see also COUNCIL FOR INT’L ORGS. OF MED. SCIS. (CIOMS), INTERNATIONAL ETHICAL GUIDELINES FOR BIOMEDICAL RESEARCH INVOLVING HUMAN SUBJECTS, 47 (3d ed. 2002) [hereinafter CIOMS] (risk–benefit ratio should be “reasonable”).

171. World Med. Ass’n, *Declaration of Helsinki, Recommendations Guiding Physicians In Biomedical Research Involving Human Subjects*, princ. 4 (Sept. 1989); Convention for the Protection of Human Rights and Dignity of the Human Being with Regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, art. 16, *opened for signature* Apr. 4, 1997, E.T.S. No. 164 (entered into force Dec. 1, 1999) (ratified by twenty-nine countries).

172. See ROBERT J. LEVINE, ETHICS AND REGULATION OF CLINICAL RESEARCH 63 (2d ed. 1986); MED. RESEARCH COUNCIL OF CAN., GUIDELINES FOR RESEARCH INVOLVING HUMAN SUBJECTS 12 (1987).

173. ICH, *supra* note 1633, princ. 2.2.

ledger become “reasonable” to them.¹⁷⁴ This is because even if risk assessment is the province of fact, risk *acceptability* is the province of value.¹⁷⁵ But IRBs lack access to such private information and, in any case, would be unable to make more than a single reasonableness determination that would be binding on all prospective participants.

Empirical research, not surprisingly, bears this out. For example, one study found that cancer patients were willing to undergo chemotherapy for a mere 1% chance of cure, while doctors would need a 10% chance, and both oncology nurses and members of the general public would require a 50% chance.¹⁷⁶ Notice that these differences cannot be explained by whether the respondents had been exposed to the effects of chemotherapy; both those who required the greatest probability of benefit—cancer nurses—and those who required the least—cancer patients—have almost certainly had considerable exposure to the side effects of chemotherapy. Moreover, cancer nurses and members of the general public—groups that presumably have, on average, very different levels of exposure to chemotherapy’s effects—gave identical answers.

In a Canadian study, forty-four biomedical IRBs reviewed a hypothetical protocol in which participants would be studied using fMRI in order to identify the neurobiological correlates of social behavior.¹⁷⁷ Participants would be scanned, and their brain activity observed, while they were in three “states”: an ordinary state, in which participants would be asked to think about everyday things such as grocery lists; a meditation state, in which they would be asked to introspect; and a violent state, in which they would view photographs showing “extreme violence.” Of the forty-four IRBs, three (7%) would have approved the study unconditionally, ten (22.7%) would have done so conditionally (requiring alterations of greater or lesser significance to the protocol), twenty-three (52%) would have given the study a qualified rejection, and seven (16%) would have given it an unqualified rejection.¹⁷⁸ As the authors of the study observe, the “concerns

174. Heterogeneity in other meta-preferences is also likely to be relevant to research participation. For instance, individuals have different discount rates: even assuming that everyone equally values immediate outcome X, they will often differ as to how much they discount that value when X is not immediate but is more or less delayed. See GEORGE AINSLIE, *PICOECONOMICS: THE STRATEGIC INTERACTION OF SUCCESSIVE MOTIVATIONAL STATES WITHIN THE PERSON* 363–64 (1992).

175. See, e.g., NAT’L RES. COUNCIL, *TECHNICAL BASES FOR YUCCA MOUNTAIN STANDARDS* 5 (1995) (“[D]etermining what risk level is acceptable is not ultimately a question of science but of public policy.”).

176. Agrawal & Emanuel, *supra* note 18, at 1077–78.

177. J. de Champlain & J. Patenaude, *Review of a Mock Research Protocol in Functional Neuroimaging by Canadian Research Ethics Boards*, 32 *J. INST. MED. ETHICS* 530 (2006).

178. *Id.* at 532 tbl. 5.

raised by 23 of the 30 rejecting [IRBs] resembled, overall, the concerns mentioned by the 10 [IRBs] that handed down conditional approvals. Thus, certain [IRBs] shared a set of concerns; yet, some approved the project and others rejected it.”¹⁷⁹ A more plausible explanation for this outcome than IRB incompetence is variation among IRB members in risk–benefit tradeoff preferences.

In a Netherlands study, forty-three IRB members were asked to assess the risks and expected benefits of a hypothetical breast cancer study. Thirty percent said that the risks outweighed the expected benefits. Twenty-one percent said that the expected benefits outweighed the risks. Thirty-five percent said the risks and expected benefits were about equal.¹⁸⁰

III. IRB RESPONSES TO THE HETEROGENEITY PROBLEM AND THEIR COSTS: THE EGGSHELL PARTICIPANT

Although IRBs, regulators, and research ethicists rarely, if ever, acknowledge the heterogeneity problem, they have developed ways of assessing research risks and expected benefits that, I argue, are implicit responses to participant heterogeneity. This Part details these responses and their costs.

A. Responses to Risk Heterogeneity

IRBs are directed to consider risks of virtually every nature, including (but not limited to) those that are physical, psychological, social, economic and legal,¹⁸¹ posed by any aspect of the research protocol.¹⁸² They consider risks of *de minimis* harm, including *discomfort*—“unpleasant sensations or emotions of short duration and minimum to moderate severity,” such as “shortness of breath in a study of maximal exercise tolerance or the anxiety associated with being stuck with a needle”;¹⁸³ *inconvenience*—“any interference with the subject’s ability to carry out usual activities,” such as

179. *Id.* at 533. One board (2.3%) did not answer. *Id.* at 532 tbl. 5.

180. van Luijn et al., *supra* note 9, at 170, 172.

181. See, e.g., N.Y. STATE DEP’T OF HEALTH, SAFEGUARDING HEALTHY RESEARCH SUBJECTS: PROTECTING VOLUNTEERS FROM HARM 7 (1999) [hereinafter N.Y. IRB Guidelines] (“[R]isk refers to any physical, psychological, economic, social, or other harm associated with the research. In assessing risk, the IRB should consider . . . any harm that subjects might experience . . .” (emphases added) (footnote omitted)). The only risks to participants that IRBs are directed to ignore are the “possible long-range effects of applying knowledge gained in the research (for example, the possible effects of the research on public policy).” 45 C.F.R. § 46.111(a)(2) (2012).

182. See N.Y. IRB Guidelines, *supra* note 181, at 8 (“All elements of the protocol should be subjected to risk analysis.”).

183. *Id.* at 9.

“time spent travelling to the research facility or the need to get up in the middle of the night to take a pill”;¹⁸⁴ and mere “boredom.”¹⁸⁵ As such, there is effectively no such thing as no-risk research.

IRBs consider any conceivable risk faced by any conceivable prospective participant. IRBs rarely rely on data regarding the population frequency of these harms, but instead tend to proceed as if the risk faced by this “eggshell” participant were the risk faced by all (or even the modal) prospective participants. IRBs tend to speculate about the likelihood and magnitude of research-related harms and, in many cases, the data suggest that the risks IRBs take very seriously are visited upon relatively few research participants.

B. Responses to Benefit Heterogeneity

IRBs deal very differently with participant heterogeneity in the context of expected benefits. The *Belmont Report* admonishes that “[m]any kinds of possible harms *and benefits* need to be taken into account. There are, for example, risks of psychological harm, physical harm, legal harm, social harm and economic harm *and the corresponding benefits*.”¹⁸⁶ The *IRB Guidebook*, moreover, reasonably defines “benefit” as any “valued or desired outcome; an advantage.”¹⁸⁷ Yet other agency guidance, as well as the canonical norms of research ethics, direct IRBs not to count the vast majority of what in fact motivates participants to enroll in research, including compensation (both monetary and in-kind), altruism (both “pure,” disinterested altruism and warm glow utility), other forms of psychic income (e.g., curiosity, empowerment), and even medical benefits that are ancillary to the research (e.g., diagnostics, examinations, consults). Essentially, IRBs systematically count only expected medical benefits to participants in their risk–benefit analysis (which are obviously not a possibility in the vast majority of regulated HSR that is not biomedical in

184. *Id.*

185. *See also* Haggerty, *supra* note 37, at 400 (“The range of potential research related harms envisioned by [Canadian IRBs] at times seems to be limited only by the imagination of different reviewers. Any change in a research participant’s condition or disruption of their routine can be conceived of as a potential harm . . . [including] such things as the possibility that a research participant might be embarrassed by personal questions or that they might experience disruption in their family routine or a loss of respect by others.”).

186. BELMONT REPORT, *supra* note 24, at 15 (emphases added).

187. OFFICE FOR HUMAN RESOURCE PROTECTION (OHRP), IRB GUIDEBOOK ch. III.A (1993) [hereinafter IRB GUIDEBOOK]; *see also* BELMONT REPORT, *supra* note 24, at 15 (“The term ‘benefit’ is used in the research context to refer to something of positive value related to health or welfare.”).

nature) and the system tends to undercount even these.¹⁸⁸ This impoverished view of human benefit is consistent with the neglect of research benefits relative to research risks.¹⁸⁹

New York State's guidelines for conducting HSR with healthy volunteers makes particularly explicit the conventional wisdom:

[In HSR,] 'benefit' . . . refers to two distinct factors: (1) any direct enhancement to the health and well-being of the individual subject (not at issue in [research involving healthy volunteers]); and (2) the prospect of increasing knowledge of benefit to society. For research not designed to provide a direct benefit to the individual subjects, the only relevant benefit is the prospect of increasing knowledge.

IRBs should recognize that there are certain aspects of research that subjects are likely to perceive as benefits but that do not fall within the definition of 'benefit' set forth above. For example, subjects may derive altruistic satisfaction from the expectation that others, including family and friends, may benefit from the knowledge that might be gained from the study. In addition, subjects may benefit financially from participating in the research. While some subjects may attach considerable importance to these factors, they do not constitute the type of 'benefit' that IRBs should consider in evaluating the risk-benefit ratio of a protocol.¹⁹⁰

1. *Altruism and Other Intangible Benefits*

Many research participants cite the desire to help others as among the reasons they participate in research. The concept of altruism has, moreover, played a substantial role in the development of research governance. The *Belmont Report* characterizes each research participant as, "in essence a volunteer."¹⁹¹ Research ethicists, similarly, have tended to insist that participants should be motivated by altruism, rather than by either compensation or anticipation of direct therapeutic benefit.

Yet, like many other social systems, our research governance system is

188. See *infra* subpart III.B.3.

189. See Nancy M.P. King, *Defining and Describing Benefit Appropriately in Clinical Trials*, 28 J.L. MED. & ETHICS 332, 332 (2000) ("Everyone on an IRB has probably spent time . . . arguing over whether a three-page bulleted list of risk description is helpful or overkill Yet only a small fraction of [that] time . . . has been devoted to discussing whether and when potential benefit to subjects can reasonably be claimed and, if so, how it should be described"); Larry R. Churchill et al., *Assessing Benefits in Clinical Research: Why Diversity in Benefit Assessment Can Be Risky*, IRB: ETHICS & HUM. RES., May-June 2003, at 1, 1 ("Despite its importance, this topic has received little attention in the bioethics literature. . . . [A]ttention to risks typically overshadows discussion of benefits.").

190. N.Y. IRB Guidelines, *supra* note 181, at 10 (footnote omitted).

191. See BELMONT REPORT, *supra* note 24, at 11.

poorly designed to accommodate pro-sociality.¹⁹² In their risk–benefit analysis, IRBs do not count participants’ preferences for altruism. A policy not to count “pure,” other-regarding altruism might otherwise be explained by a desire to avoid “double-counting” research benefits to society.¹⁹³ But IRBs also decline to count the warm glow utility research participants often receive. Nor do IRBs count other intangible benefits to participants, such as satisfaction of intellectual curiosity and increased sense of self-respect or empowerment.

2. *Payment and Compensation In-Kind*

In other employment contexts, when individuals agree to perform risky tasks in order to benefit others (namely, their employer), the terms of their employment contract will, barring market failure, reflect some sort of “compensating differentials” (wage premiums or nonmonetary benefits). In the U.S., this hazard pay costs employers an estimated \$245 billion each year (in 2004 dollars)—over 2% of the gross domestic product and 5% of total wages.¹⁹⁴ Yet any payment that research participants receive does not count as a benefit to them in IRB risk–benefit analysis. According to OHRP’s *IRB Guidebook*, “Direct payments or other forms of remuneration offered to potential subjects as an incentive or reward for participation should not be considered a ‘benefit’ to be gained from research.”¹⁹⁵

Indeed, IRBs often view payment as an undue inducement,¹⁹⁶ or coercive,¹⁹⁷ and thus as a risk, of sorts. For instance, many IRBs and

192. See generally BENKLER, *supra* note 129 (arguing that the “myth” of unbounded self-interest has shaped the design of social systems, which should be redesigned according to the reality of pro-sociality, as demonstrated by research in neuroscience, evolutionary biology, business and engineering that finds substantial cooperation among humans).

193. Cf. MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 133–36 (2006) (arguing that all “disinterested preferences,” including altruism, should be excluded from cost–benefit analysis).

194. And that does not include additional “risk costs” to employers in the form of nonmonetary benefits, or higher worker’s compensation premiums. See generally W. Kip Viscusi, *Job Safety*, in *THE CONCISE ENCYCLOPEDIA OF ECONOMICS* (2d ed. 2008), available at <http://www.econlib.org/library/Enc/JobSafety.html>.

195. *IRB Guidebook*, *supra* note 1877 at ch. III.A; see also FDA, *INFORMATION SHEET GUIDANCE FOR INSTITUTIONAL REVIEW BOARDS (IRBs), CLINICAL INVESTIGATORS, AND SPONSORS: PAYMENT TO RESEARCH SUBJECTS* (1998), available at <http://www.fda.gov/RegulatoryInformation/Guidances/ucm126429.htm>.

196. See, e.g., CIOMS, *supra* note 170, at 45; BELMONT REPORT, *supra* note 24, at 10–14.

197. For example, one IRB determined that paying undergraduates \$25 per quarter to fill out interview forms would be “coercive” for financially squeezed students who would not feel free to refuse the offer. “The IRB insisted that the payment be reduced to \$10 a quarter, thus protecting a bunch of students from making a little bit of pocket money while destroying the utility of the survey by causing a sufficiently high non-response rate to cast

research ethicists deem the healthy volunteers who participate in first-in-human and other Phase I drug trials to be vulnerable to undue inducement because they are presumably motivated solely by payment.

Payment in kind, too, is not counted as a benefit to participants and is often considered borderline coercive. For instance, IRBs frequently express concern that offering students an opportunity to earn extra credit by participating in research would constitute the proverbial offer they can't refuse.¹⁹⁸

3. *Medical Benefits*

The one category of benefits to participants that IRBs *are* often willing to “count,” at least in theory, is medical benefits. But the extent to which IRBs count even these benefits is significantly limited by at least two factors. First, research regulators and ethicists tend to downplay the extent to which research carries the prospect for medically benefitting participants. And so, even when medical benefits technically count, they are often underweighted, sometimes to the point of rating a “zero” on the utility scale. The notion that research is not designed to benefit participants is built into the very regulatory definition of “research.” Research ethicists and regulators have long worried that participants in medical research suffer from the “therapeutic misconception,” in which they confuse research and the practice of medicine, and as a result “deny the possibility that there may be major disadvantages to participating in clinical research that stem from the nature of the research process itself.”¹⁹⁹ To offset this possibility, IRBs downplay the possible clinical benefits of biomedical research to prospective participants, and even seem to internalize this thinking themselves.

For instance, IRBs and research ethicists often claim that there is “no reasonable probability” that participation in a Phase I oncology trial will benefit cancer patients. This, combined with a 0.5% risk of toxicity-induced death, sometimes leads commentators to conclude that the risk-benefit profile of such trials is so unfavorable that the trial “may not be

doubt on whether the respondents were representative of the original sample. All this despite the fact that the proposed study *posed no risk whatever to its subjects.*” Mark Kleiman, *Bleg: IRB Horror Stories*, THE REALITY-BASED COMMUNITY BLOG, (Apr. 14, 2009, 7:14 PM) <http://www.samefacts.com/2009/04/science-and-its-methods/bleg-irb-horror-stories/>.

198. See IRB GUIDEBOOK, *supra* note 187, at ch. VI.J (noting that “[r]equiring participation in research for course credit (or extra credit) is . . . controversial” and suggesting “mechanisms . . . for diminishing or eliminating the coercive aspect of student participation for course credit that IRBs might find useful”).

199. Paul S. Appelbaum et al., *False Hopes and Best Data: Consent to Research and the Therapeutic Misconception*, HASTINGS CENTER REP., Apr. 1987, at 20, 20.

performed.”²⁰⁰ If they consider benefits at all, IRBs are likely to turn to oft-cited meta-analyses of Phase 1 oncology studies that show that 5% of patient-participants respond to the investigational drug. But “such aggregate data conceal important information”: More than 60% of the compounds tested had at least one “objective response” (i.e., tumor shrinkage of more than 50%), more than 30% of experimental drugs had greater than a 5% response rate and, in some cases, “substantial clinical benefits and even cures have been achieved.”²⁰¹ For example, in the 1970s, cisplatin for testicular cancer “had a response rate of more than 50%, and in a quarter of cases the tumor completely disappeared and was probably cured.”²⁰² And, more recently, imatinib mesylate for chronic myeloid leukemia “demonstrated complete hematologic response rates of 98%, of which 96% lasted beyond 1 year.”²⁰³

Second, research regulators and ethicists tend to count only “direct,” and not “indirect,” benefits of all kinds, including medical benefits. Direct benefits are those that derive from the research procedures themselves. Indirect benefits, by contrast, are ancillary to a study, and include not only payment and compensation in-kind but also medical examinations, medicines, and psychological counseling. Thus, in a survey of IRB chairpersons, only 51% thought that added medical examinations and medicines offered the prospect of direct benefit to participants, and only 60% thought that added psychological counseling did so. These already relatively low percentages flout the regulations’ definition of “direct benefit,” OHRP’s interpretation of the regulations in its *IRB Guidebook*, and the view of “most commentators.”²⁰⁴

C. *IRB Risk-Aversion and Its Costs*

One possible implicit rationale for the twin practices of overemphasizing risks and undercounting expected benefits to participants is that participant heterogeneity, as we have seen, makes it inappropriate for IRBs to assume that all participants would receive the same (or any) benefit. But this “solves” the heterogeneity problem by assigning *no* utility to, say, compensation or altruism for *any* participant and by assigning to *all* prospective participants the disutility of *every* conceivable cost to *any*

200. Agrawal & Emanuel, *supra* note 18, at 1076 (quoting George J. Annas, *The Changing Landscape of Human Experimentation: Nuremberg, Helsinki, and Beyond*, 2 HEALTH MATRIX 119 (1992)).

201. *Id.*

202. *Id.*

203. *Id.*

204. See Shah et al., *supra* note 76, at 478, 480.

conceivable participant. The net effect is that IRB risk–benefit decisionmaking is systematically risk-averse relative to the utility that at least some, and very often most, prospective participants could expect from enrolling in a study.

The costs of this risk aversion are hardly trivial. Although IRBs do not often reject research proposals outright, the most comprehensive data available²⁰⁵ suggest that IRBs require alterations to over 80% of the submissions they eventually approve—about 100,000 altered proposals each year.²⁰⁶ The data do not indicate the nature of these alterations, and most are likely designed to enhance the informed consent process or minimize gratuitous risks, rather than to alter the risk–benefit profile of the study.²⁰⁷ Yet IRBs do sometimes require substantive alterations that render research less valuable, more costly, or more difficult (or practically impossible) to conduct.²⁰⁸

205. BELL ET AL., *supra* note 45, at 4. The *Bell Report*, a National Institutes of Health-commissioned survey of the 1995 practices of 491 IRBs, found that 94% of IRBs were equally or more likely to require changes to a proposal than to approve it as submitted. *Id.* at 11 fig. 4. Thirty-four percent did not approve any proposals without alterations that year. *Id.* at 29 fig. 15. Overall, 73% of IRBs approved 25% or fewer protocols as submitted; 34% approved none as submitted; 10% approved 25%–50% as submitted; and 6% approved more than 50% as submitted. *Id.* at 61. Lack of data about the IRB system is a notorious and persistent problem. See, e.g., PRESIDENTIAL COMM'N FOR THE STUDY OF BIOETHICAL ISSUES, MORAL SCIENCE: PROTECTING PARTICIPANTS IN HUMAN SUBJECTS RESEARCH 33 (Dec. 2011); INST. OF MED., RESPONSIBLE RESEARCH: A SYSTEMS APPROACH TO PROTECTING RESEARCH PARTICIPANTS (Daniel D. Federman et al. eds., 2003); OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF HEALTH & HUMAN SERVS., OEI-01-97-00193 INSTITUTIONAL REVIEW BOARDS: A TIME FOR REFORM (1998) [hereinafter HHS REPORT]; Christine Grady, *Do IRBs Protect Human Research Participants?*, 304 J. AM. MED. ASS'N 1122 (2010); Thomson et al., *supra* note 35, at 96 n.6.

206. Hamburger, *supra* note 14, at 407, 424.

207. The Commission's survey of IRB practices during 1974–1975 found that, overall, IRBs required “modifications” in more than half of the protocols they reviewed. NAT'L COMM'N FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL AND BEHAVIORAL RESEARCH, INSTITUTIONAL REVIEW BOARDS: REPORT AND RECOMMENDATIONS 60 (1978). However, the vast majority of these involved IRB requests for additional information from researchers or required changes to informed consent forms. Substantive changes were required in only 12% to 16% of reviewed proposals—3% to 4%, each, for changes to scientific design, subject selection, risks and discomforts, and confidentiality. *Id.* at 60–61. Like the *Bell Report*, the Commission found marked variability among IRBs, with 14% requiring “modifications” to all proposals and 22% requiring changes to no more than one-third of them. *Id.* at 61. See also Sue Richardson & Miriam McMullan, *Research Ethics in the UK: What Can Society Learn from Health?*, 41 SOCIOLOGY 1115, 1122 (2007) (51% of surveyed social scientists in the U.K. reported having been required by IRBs to alter their research for the worse at least once within the prior five years).

208. See *supra* note 64 and accompanying text.

1. *To Researchers and Society*

Researchers, of course, suffer when research is blocked, altered, delayed or abandoned.²⁰⁹ Their careers can be diminished, stalled, or even ruined. Those who lack power (such as untenured faculty and students) or are on deadline (for graduation, tenure, or a grant) are especially vulnerable. Undergraduates and even master's level graduate students increasingly graduate without any experience in empirical research,²¹⁰ to the detriment of both them and society.

Society, too, clearly suffers from IRB risk aversion. Even acknowledging that much research ultimately fails to yield important knowledge, as Philip Hamburger notes,

[O]ne only has to assume that one in 100,000 projects would otherwise have had profound benefits to understand the loss caused by IRBs. A single educational, epidemiological, or medical study can transform the lives of countless individuals—whether by giving rise to a lifesaving invention or treatment or by prompting a new government policy . . .²¹¹

Nor do these numbers reflect the considerable research that is abandoned or foregone due to the chilling effect of IRB review. Ironically, the most innovative research tends to be the most likely to be blocked or foregone, since it often relies on unorthodox methodologies or involves cutting-edge topics likely to be viewed as controversial or “sensitive” by IRBs.²¹²

2. *To Prospective Participants*

Less obviously—but critically—IRB risk aversion sets back the interests of those who might have chosen to accept an offer to enroll in a study but who, in the wake of an unfavorable risk–benefit decision by an IRB, receive a substantively different (and perhaps less attractive) offer than they otherwise would have had—or no offer at all. It is important that

209. See, e.g., Jack Katz, *Toward a Natural History of Ethical Censorship*, 41 L. & SOC'Y REV. 797, 804 (2007) (researchers abandon plans for field research in favor of studying existing data). There is even some evidence that this chilling effect has spilled over to third parties. Grant reviewers, for instance, have confessed to assigning lower scores than they otherwise would to proposals that they predict may not survive IRB review.

210. See Richardson & McMullan, *supra* note 207 (discussing social science master's students in health in the U.K.).

211. Hamburger, *supra* note 14, at 469.

212. See, e.g., Malcolm M. Feeley, *Legality, Social Research, and the Challenge of Institutional Review Boards*, 41 L. & SOC'Y REV. 757, 769–70 (2007); Annette Hemmings, *Great Ethical Divides: Bridging the Gap Between Institutional Review Boards and Researchers*, 35 EDUC. RESEARCHER 12, 15 (2006).

prospective participants understand that the primary goal of the participant–researcher relationship, unlike the patient–physician or client–practitioner relationship, is not to pursue the individual participant’s best interests. But it does not follow from the fact that research is not *intended by the researcher* to serve individual participant interests that no individual participant can ever (rationally) view participation as *in fact* in her best interests, broadly construed, relative to her other alternatives. The vast majority of agreements between individuals are not intended by both parties to serve the best interests of one of them; rather, both parties typically expect to benefit from the arrangement, often in different ways and to different degrees, commensurate with their individual preferences and alternatives. The conventional wisdom of research regulators and ethicists, which holds that protecting participants primarily means protecting them *from* research, denies this reality.²¹³

Recall the study in which researchers asked female undergraduates about various sensitive topics, and found that those who had experienced child abuse were both more likely to report distress due to remembering the past *and* more likely to report that participation had benefitted them than were other respondents.²¹⁴ Ninety-five percent of participants reported a positive cost/benefit ratio and agreed with the statement, “Had I known in advance what participating would be like for me I still would have agreed.”²¹⁵ Another study found that 92% of participants reported that they would participate in the study again.²¹⁶ Yet, under their broad mandate to consider all conceivable risks, IRBs will almost certainly count the risk that participants will be distressed, and apply it to all prospective participants, while under their unduly narrow sense of what counts as a benefit, they will almost certainly not count these potential psychological benefits for any participants.

Or consider an example from biomedical research. In one study, 65% of terminally ill cancer patients participating in a Phase I drug trial predicted that they would receive psychological benefits²¹⁷ from the reassurance of routine physician contact during a time of uncertainty, the ability to exercise willpower in a situation otherwise marked by factors outside of their control, and the knowledge that they are helping future cancer patients. Yet many argue that Phase I oncology trials have an

213. I develop this argument in *Research Contracts*. See generally Meyer, *supra* note 22, at 4.

214. See text accompanying note 151.

215. Josef I. Ruzek & Douglas F. Zatzick, *Ethical Considerations in Research Participation Among Acutely Injured Trauma Survivors: An Empirical Investigation*, 22 GEN. HOSP. PSYCHIATRY 27, 30 (2000).

216. Hebenstreit & DePrince, *supra* note 149, at 66–67.

217. Agrawal & Emanuel, *supra* note 18, at 1077.

unacceptable risk–benefit ratio, in part because critics undercount expected therapeutic benefits and demand more favorable risk–benefit profiles from oncology research than from virtually identical chemotherapy agents used outside of trials,²¹⁸ but also because they ignore these psychosocial benefits of trial participation. Ironically, although we have bioethics to thank for emphasizing the intensely personal nature of how individuals die, in subjecting one option for dealing with terminal illness to a risk–benefit analysis that refuses to consider any inputs other than those that sound in extended lifespan, we also have bioethics to thank for restricting choice in dying.²¹⁹

Given that IRBs can only make one risk–benefit decision binding on everyone, setting the risk–benefit profile to reflect the interests of the most vulnerable prospective participant might be said to be a prudent strategy. Indeed, it might even be said to be a requirement of justice. But, from the perspective of prospective participants—which is, after all, what the IRB system is designed to protect—this strategy is benign only if participants’ welfare can only be set back, and never advanced, by research participation. The evidence suggests that this is not the case.

IV. PROPOSALS TO REFORM IRBS AND WHY THEY WILL NOT SOLVE (AND MAY EXACERBATE) THE HETEROGENEITY PROBLEM

Rather than responding to participant heterogeneity with risk aversion, can IRBs be reformed to permit them to accommodate prospective participant heterogeneity in their risk–benefit decisionmaking? There is no shortage of proposals to reform the IRB system, including those that would “centralize, regionalize, or consolidate IRBs, strengthen and demystify federal oversight, infuse more support and resources into the system, augment IRB member training, require credentialing of IRB professionals, mandate independent accreditation, educate the public, and continue to investigate ‘alternative’ models of review.”²²⁰ Most of these proposed reforms ultimately seek to redress what their proponents see as IRB risk–benefit “errors” (whether of the Type I or the Type II variety), for which IRB variation in risk–benefit analysis is the most salient symptom. Numerous empirical studies that have consistently found that IRBs—both

218. *See id.*

219. *Accord id.* (“It would be ironic if critics of phase I cancer studies considered only the physical benefits and ignored these quality-of-life and psychological benefits because they want to ensure a quality dying process for terminally ill patients.”).

220. Lura Abbott & Christine Grady, *A Systematic Review of the Empirical Literature Evaluating IRBs: What We Know and What We Still Need to Learn*, J. EMPIRICAL RES. ON HUM. RES. ETHICS, Mar. 2011, at 3.

in the U.S.²²¹ and abroad,²²² and across a range of institutional settings and research methodologies—reach markedly different decisions about the acceptability of similar and even identical studies. Proposals differ chiefly in what they identify as the root cause of IRB risk–benefit error. Those that identify this cause as insufficient lay input into IRB risk–benefit decisionmaking and seek to increase such input in various ways. Other proposals view the ad hoc nature of IRB risk–benefit analysis as the primary problem and so seek redress by formalizing, or adding rigor to, IRB decisionmaking.

This Part considers these two sets of proposals and concludes that, although some reforms might yield independent benefits, few would significantly address the heterogeneity problem, none would solve it, and some might well exacerbate it.

221. See *supra* text accompanying notes 76–78, 115–118, 204; Ceci et al., *supra* note 72, at 1000; Kathleen Dziak et al., *Variations Among Institutional Review Board Reviews in a Multisite Health Services Research Study*, 40 HEALTH SERVS. RES. 279, 280 (2005); Lee A. Green et al., *Impact of Institutional Review Board Practice Variation on Observational Health Services Research*, 41 HEALTH SERVS. RES. 214, 214 (2006); Sarah M. Greene et al., *Impact of IRB Requirements on a Multicenter Survey of Prophylactic Mastectomy Outcomes*, 16 ANNALS EPIDEMIOLOGY 275, 276–78 (2006); Jerry Goldman & Martin D. Katz, *Inconsistency and Institutional Review Boards*, 248 J. AM. MED. ASS'N 197, 202 (1982); Jon Mark Hirshon et al., *Variability in Institutional Review Board Assessment of Minimal-Risk Research*, 9 ACAD. EMERGENCY MED. 1417, 1419 (2002); Jonathan Mansbach et al., *Variation in Institutional Review Board Responses to a Standard, Observational, Pediatric Research Protocol*, 14 ACAD. EMERGENCY MED. 377, 377 (2007); Rita McWilliams et al., *Problematic Variation in Local Institutional Review of a Multicenter Genetic Epidemiology Study*, 290 J. AM. MED. ASS'N 360, 365 (2003); Craig D. Newgard et al., *Institutional Variability in a Minimal Risk, Population-Based Study: Recognizing Policy Barriers to Health Services Research*, 40 HEALTH SERVS. RES. 1247, 1248 (2005); Henry Silverman et al., *Variability Among Institutional Review Boards' Decisions Within the Context of a Multicenter Trial*, 29 CRITICAL CARE MED. 235, 235 (2001); Thomas O. Stair et al., *Variation in Institutional Review Board Responses to a Standard Protocol for a Multicenter Clinical Trial*, 8 ACAD. EMERGENCY MED. 636, 637 (2001); Mary Terrell White & Jennifer Gamm, *Informed Consent for Research on Stored Blood and Tissue Samples: A Survey of Institutional Review Board Practices*, 9 ACCOUNTABILITY RES. 1, 1–2 (2002).

222. See *supra* text accompanying 119–127, 177–80; Hans-Peter Graf & Dennis Cole, *Ethics-Committee Authorization in Germany*, 21 J. INST. MED. ETHICS 229 (1995); Claire Gilbert et al., *Diversity in the Practice of District Ethics Committees*, 299 BMJ 1437, 1438 (1989); Ursula J. Harries et al., *Local Research Ethics Committees: Widely Differing Responses to a National Survey Protocol*, 28 J. ROYAL C. PHYSICIANS LONDON 150, 150 (1994); Matthew Hotopf et al., *Are Ethical Committees Reliable?*, 88 J. ROYAL SOC'Y MED. 31, 32 (1995) (U.K.); Jennifer Marshall & Michael R. Hadskis, *Canadian Research Ethics Boards, MRI Research Risks, and MRI Risk Classification*, IRB: ETHICS & HUM. RES., July–Aug. 2009, at 9, 14; Claire Middle et al., *Ethics Approval for a National Postal Survey: Recent Experience*, 311 BMJ 659, 660 (1995) (U.K.); G. Moutel et al., *Analysis of a Survey of 36 French Research Committees on Intracytoplasmic Sperm Injection*, 351 LANCET 1121, 1123 (1998).

A. *Increased Lay Input into IRB Decisionmaking*

The premise of the first set of reform proposals is that IRB risk–benefit error is primarily caused by insufficient lay input into IRB decisionmaking. Both camps of IRB critics have remarked that IRB decisions often poorly reflect participant interests despite the fact that IRBs’ primary charge is to protect participant welfare. Recall, for instance, the “Type II error camp,” for whom IRBs most often, or most seriously, err in permitting unreasonably risky research to proceed. This camp often attributes such errors to an IRB composed of conflicted or captured members whose incentives lie in protecting the institution or their fellow researchers (in the case of academic IRBs) or in appeasing the entity that pays them (in the case of commercial IRBs), rather than in protecting unidentified participants.

A “Type I error camp” version of this complaint arises cyclically as well, although it is generally reserved for clinical research investigating serious or life-threatening diseases. In the 1980s, for instance, various activists and patient advocates, particularly in the HIV/AIDS and breast cancer “communities,” argued that they were being unreasonably denied opportunities to participate in clinical research by those who were effectively “protecting them to death.” They sought access to research, and sometimes also demanded a role in the development of research agendas, study designs, and drug approval processes.²²³

1. *Lay Membership on IRBs*

One commonly proposed solution to such problems is to amend the regulations that govern IRB membership so that IRBs better reflect participants’ interests. The architects of the current system deliberately chose to make IRBs local, rather than regional or national, so that they would reflect the community’s values and other “local knowledge.”²²⁴ The National Commission, moreover, called for “diverse membership” on IRBs to reflect “awareness and appreciation of the various qualities, values and needs of the diverse elements of the community served by the institution or in which it is located.”²²⁵ The codification of this sentiment in the regulations is the requirement that each IRB “be sufficiently qualified

223. See, e.g., Herbert R. Spiers, *Community Consultation and AIDS Clinical Trials: Part I*, IRB: ETHICS & HUM. RES., May–June 1991, at 7, 8. Today, disease communities are as likely to sponsor or conduct research themselves as they are to take up picket signs.

224. See NAT’L COMM’N, IRBS, *supra* note 24, at 1–2. Thus, although legal scholars often point to inconsistent IRB results, the regulatory framework embraces local variation as a strength of the IRB system rather than a problem to be solved.

225. *Id.* at 14.

through the experience and expertise of its members, and the diversity of the members, including considerations of race, gender, and cultural backgrounds and sensitivity to such issues as community attitudes, to promote respect for its advice and counsel in safeguarding the rights and welfare of human subjects.”²²⁶

A large gap separates this aspiration from reality. First, the decision to establish IRBs at the local level predates globalization and the emergence of widespread, inexpensive telecommunications. Research today is very often conducted at multiple sites that span states and even countries, and much additional research is conducted online without respect to geographic boundaries. Under these circumstances, there is no particular reason to think that institution-based IRBs are especially representative of the population of prospective participants.

But IRBs are unlikely to reflect prospective participant preferences even when research is to be conducted at the same institution whose IRB reviews it. IRBs are by regulation required to have at least five,²²⁷ and in practice have on average about thirteen,²²⁸ members. IRBs are only required to include one member “whose primary concerns are in nonscientific areas” and one “who is not otherwise affiliated with the institution.”²²⁹ Often, the IRB finds one person to fulfill both roles. On average, then, one—or at most two—voting members on a thirteen-member IRB tend to be something other than scientific research faculty affiliated with the institution.

Moreover, neither the nonscience member nor the non-affiliate member need be a research participant, an advocate for participants, or even a random member of the local geographic community. Rather, the nonscience member might be (and often is) a humanities or law faculty member, while the non-affiliate might be a member of the research faculty at the institution across the street or, at best, a professional member of the community, such as a practicing attorney or clinician.

It should therefore not be surprising that, as a whole, IRB members are white, well-educated, institutionally affiliated, medically trained, and male.²³⁰ In most cases, even the “non-scientist” and “non-institutional

226. 45 C.F.R. § 46.107(a) (2012). IRBs must also make “[e]very nondiscriminatory effort” to ensure that members include both men and women. *Id.* § 46.107(b).

227. *Id.* § 46.107(a).

228. Raymond G. De Vries & Carl P. Forsberg, *What Do IRBs Look Like? What Kind of Support Do They Receive?*, 9 ACCOUNTABILITY RES. 199, 203 (2002).

229. 45 C.F.R. § 46.107(c)–(d). The Commission, by contrast, had recommended that “at least one-third but no more than two-thirds of the IRB members should be scientists.” NAT’L COMM’N, IRBS, *supra* note 24, at 14.

230. See BELL ET AL., *supra* note 45, at 23–24 (finding that 95% of surveyed IRB chairs

affiliate” members more closely resemble other IRB members than they do the “lay community” or the population of prospective research participants.²³¹ Nor should it be particularly surprising that token nonscience and non-affiliate members view their contributions to IRB deliberation as modest at best.

In response, many have argued for an increase in lay membership on IRBs,²³² or for a separate process of community consultation in some or all research.²³³ But participant heterogeneity is far too fine-grained for these proposals to provide IRBs with significantly better information about prospective participant preferences than they currently have. Although geographic, special interest, and other communities are often constitutive of individual identity, each individual is simultaneously a member of multiple different communities. Within any of these communities, variation in research risk–benefit preferences will be significant at the unit of the individual, a fact suggested by the oft-noted difficulties in determining who is entitled to speak for a community, and even in identifying the relevant “community” itself. In short, proposals to enhance the local nature of IRB review by adding lay members are not local *enough* to solve the information aspect of the heterogeneity problem. And they would do nothing to address IRBs’ aggregation problem.

2. *Public Transparency and Accountability*

IRB decisionmaking, like that of juries, is essentially conducted in the

were white, 77% were male, and 62% were full-time faculty affiliates of the institution); De Vries & Forsberg, *supra* note 228, at 202, 205–06 (survey of random sample of 10% of IRBs registered with OHRP (n=87) finding that: 85% of IRB members (n=1161) are white, with 28% of IRBs having all white members; in over 85% of IRBs, the majority of members are institutional affiliates).

231. See, e.g., Emily E. Anderson, *A Qualitative Study of Non-Affiliated, Non-Scientist Institutional Review Board Members*, 13 ACCOUNTABILITY RES. 135, 140, 151 (2006) (small study (n=16) of non-affiliated and nonscientist IRB members finding most were white, educated, professional, had no experience as research participants, and were recruited through institutional contacts).

232. See, e.g., NBAC, *supra* note 26, at xvi (recommending that at least 25% of each IRB’s members be nonscientists, non-institutional affiliates, or participant advocates); HHS REPORT, *supra* note 205, at 17–18 (recommending increased nonscientist and noninstitutional membership as a means of mitigating IRB capture by institutional interests); Jesse A. Goldner, *An Overview of Legal Controls on Human Experimentation and the Regulatory Implications of Taking Professor Katz Seriously*, 38 ST. LOUIS U. L.J. 63, 107 (1993) (laypersons constitute at least half of IRB members in Denmark).

233. See, e.g., Neal Dickert & Jeremy Sugarman, *Ethical Goals of Community Consultation in Research*, 95 AM. J. PUB. HEALTH 1123 (2005) (discussing the ethical goals that community consultation achieves).

proverbial black box. It is barely transparent to researchers, much less to the public. IRB meetings are generally closed to researchers. And although agencies have access to the minutes of IRB meetings, which must include “the basis for requiring changes in or disapproving research” and a “written summary of the discussion of controverted issues and their resolution,”²³⁴ these documents generally are not deemed public records under the Freedom of Information Act (FOIA). The regulations require IRBs to provide researchers with a written “statement of the reasons for its decision” whenever it disapproves research, and to allow researchers “an opportunity to respond in person or in writing.”²³⁵ But this statement need not be, and in practice rarely is, detailed, and no explanation at all is required for IRB decisions requiring substantive alterations to research—almost certainly the much larger category.

IRBs could, of course, be made to publicly account for their decisions, as a matter of either law or private policy. IRB minutes could be posted online on institutional or agency websites (with redaction as necessary to protect confidential information); as with FOIA requests, made available to anyone upon request;²³⁶ or included with any published results of the research they have reviewed.²³⁷ But these reforms would only permit comment on IRB decisions after the fact, when any public commentary would come too late, at least for the study at bar. And some of these reforms, such as tying IRB transparency to research publication, fail to address IRB decisions regarding research that is not published or is rejected by IRBs.

To allow for more timely public input, IRBs might be required to hold meetings open to the public (again, with closed door proceedings permitted when necessary to ensure confidentiality). The regulations do not provide researchers, much less potential participants, with a right of appeal, and institutions rarely voluntarily provide such processes. But that, too, could be changed. The real difficulty, instead, is one that is also reflected in the relative failure of public comment periods during administrative rulemaking: even assuming that their voice might have an impact, very few members of the public have sufficient incentive to monitor or comment on IRB decisions. The benefit that an individual can expect from participating in research will usually be modest relative to the effort she would have to

234. 45 C.F.R. § 46.115(a)(2), (b).

235. *Id.* § 46.109(d).

236. *See, e.g.*, MD. CODE ANN., HEALTH-GEN. § 13-2003 (West 2012) (requiring IRBs to make minutes available to any person upon request).

237. *See* Alexander Halavais, *Social Science: Open Up Online Research*, 480 NATURE 174, 175 (2011) (arguing that funders and journals condition their services on IRB agreement to provide their “ethics reflections” for the benefit of researchers and other IRBs).

exert to monitor IRB decisionmaking. Nor, again, would public transparency address the aggregation facet of the heterogeneity problem.

In short, although greater IRB transparency and accountability is independently desirable, it, like increased lay membership on IRBs, cannot solve the heterogeneity problem. Moreover, if taken too far, this line of reform could exacerbate the heterogeneity problem. Many, for instance, advocate a court-like hierarchy of local, regional, and national IRBs in which decisions by “lower” IRBs are subject to appellate review by “higher” IRBs.²³⁸ Like judicial systems, this mechanism would result in not only intra- but also inter-IRB consistency through precedent. But where participant heterogeneity obtains, an increase in top-down, control-and-command risk-benefit analysis might make things worse.

B. *Rigorous, Evidence-Based IRB Decisionmaking*

A second set of proposals is based on the premise that the root cause of IRB risk-benefit error is insufficiently rigorous or evidence-based IRB decisionmaking. In its discussion of IRB risk-benefit analysis, the Commission acknowledged that “[t]he possible harms and benefits from proposed research involving human subjects may not be quantifiable,” but nevertheless insisted that they “should be evaluated systematically to assure a reasonable relation between” them.²³⁹ In practice, however, IRB risk assessment “is highly unstructured; essentially, the members are simply given a set of protocols and asked for their reactions.”²⁴⁰ Indeed, a study of fifty-three IRBs in the Netherlands found that only six used anything like a systematic approach to risk-benefit analysis. The others admitted to relying solely on intuition.²⁴¹

1. *Improved IRB Risk-Benefit Methodology*

Some thus argue that the solution to IRB risk-benefit “error” is a more systematic methodology for assessing research risks (research benefits are essentially ignored). For instance, some advocate for increased staffing,

238. Coleman, *supra* note 12, at 43.

239. NAT'L COMM'N, IRBS, *supra* note 25, at 23. The Commission also noted that risk-benefit “evaluation should include an arrayal of alternatives to the procedures under review and the possible harms and benefits associated with each alternative.” *Id.* IRBs generally do not even pretend to speculate about the risks and expected benefits of alternatives to research participation, nor do proposed methodologies for IRB risk-benefit analysis involve such comparisons.

240. See Coleman, *supra* note 12, at 14; Rid et al., *supra* note 97, at 1472.

241. H.E.M. van Luijn et al., *Assessment of the Risk/Benefit Ratio of Phase II Cancer Clinical Trials by Institutional Review Board (IRB) Members*, 13 ANNALS ONCOLOGY 1307 (2002).

training, or funding of IRBs. But disparities among IRBs in staffing, training, and funding do not seem to correlate with, much less cause, IRB variation.

Others urge IRBs to issue court-like opinions, pointing to the potential debiasing effect of such opinions on otherwise ad hoc risk–benefit reasoning: “Because [IRB] members are not required to state reasons for their decisions, the process encourages reliance on impressionistic judgments, or ‘gut reactions.’”²⁴² Forcing IRBs to specify reasons for their decisions, they say, may curb their tendency to rely on indefensible gut reactions and should help ensure consistency across protocols and time within IRBs. But if participant heterogeneity is real, then formal IRB risk–benefit decisions may be based on post-hoc rationales to justify inescapably subjective decisions. And precedent-based IRB decisionmaking—like other attempts at increasing consistency among IRBs²⁴³—would only magnify the heterogeneity problem.

Still others advocate thinking systematically about research risk in comparison to other risky activities.²⁴⁴ In this vein, research participation has been (or could be) compared to risky employment (e.g., firefighting, law enforcement, emergency rescue work,²⁴⁵ logging, mining, commercial fishing, armed services, professional football, test piloting), risky leisure

242. Coleman, *supra* note 12, at 14.

243. For example, some argue that IRB variation is caused by excessive allowance for IRB discretion, which could be limited through clearer, more specific risk–benefit regulations or agency guidance. See, e.g., de Champlain & Patenaude, *supra* note 177, at 533–34; Lenk et al., *supra* note 18, at 87 (arguing that variation in IRB risk analysis should be addressed through “more detailed, comprehensive, and unambiguous regulation . . . that does not permit such a wide range of interpretation”).

244. Some of the riskiest activities are relatively unregulated, compared to research. These include sports, leisure, and other voluntary activities such as one pack-a-day smoking (annual risk of death: 300 per 100,000 persons at risk), parachuting (200), motorcycling (65), skydiving (58), hang gliding (26) and boating (5), as well as occupations such as lumberjack (118), farmer (28), miner (27), police officer (20) and firefighter (10). Aaron Wildavsky & Adam Wildavsky, *Risk and Safety*, in THE CONCISE ENCYCLOPEDIA OF ECONOMICS tbl.2 (2008), available at <http://www.econlib.org/library/Enc/RiskandSafety.html>. On the other hand, much research more closely resembles risky activities that are totally unregulated, not even by mandatory disclosure rules. This includes, for example, survey research and polling; interview-based research and journalism or ordinary conversing.

245. Alex John London, *Two Dogmas of Research Ethics and the Integrative Approach to Human-Subjects Research*, 32 J. MED. PHIL. 99, 115 (2007); see also Benjamin I. Sachs, *Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing*, 123 HARV. L. REV. 655, 681 (2010) (discussing the potential risks faced by employees who support a unionization effort); Alex John London, *Reasonable Risks in Clinical Research: A Critique and A Proposal for the Integrative Approach*, 25 STAT. MED. 2869, 2881 (2006) (research risks “must not be greater than the risks . . . permitted in . . . other socially sanctioned activities that are similar in structure to the research enterprise”).

activities (e.g., skydiving, mountain climbing, bungee jumping, extreme martial arts), and risky charitable activities (e.g., living organ or tissue donation,²⁴⁶ disaster relief work, volunteer work of various kinds in hostile territories, donating money to charity despite a volatile economy and employment sector). These comparisons might be used either to classify strata of research risks or to define acceptable risk limits.

What such compare-and-contrast exercises mostly suggest, however, is the exceptional way we manage research risks.²⁴⁷ Normatively speaking, little if anything follows from these observations.²⁴⁸ More to the point, preferences regarding these comparator activities are also heterogeneous. When the Environmental Protection Agency surveyed “a range of health risks” along with government and private standards of acceptable risk in order to glean therein some level of “acceptable risk” in those areas which the agency might then use to inform its determination of acceptable levels of a particular pollutant, it found that “[n]o fixed level of risk could be identified as acceptable in all cases and under all regulatory programs.” Rather, “the acceptability of risk is a relative concept and involves consideration of different factors,” including the

certainty and severity of the risk; the reversibility of the health effect; the knowledge or familiarity of the risk; whether the risk is voluntarily accepted or involuntarily imposed; whether individuals are compensated for their exposure to the risk; the advantages of the activity; and the risks and advantages for any alternatives.²⁴⁹

2. *Evidence-Based Risk-Benefit Analysis and Risk-Proportionate Regulation*

Finally, many argue that IRBs should base risk-benefit analysis on

246. See F.G. Miller & S. Joffe, *Limits to Research Risks*, 35 J. INST. MED. ETHICS 445, 447 (2009).

247. We permit competent individuals to assume greater risks in activities that often have far less social value than HSR (and may even involve negative externalities). And we do so on the basis of consent alone, usually accompanied by far weaker (if any) information disclosure, risk minimization, and liability waiver rules; in few, if any, of the above examples do we require anything approaching the kind of case-by-case licensing procedure to which researchers are subjected every time they wish to engage in that activity.

248. The bare fact that we treat research and other risks inconsistently, without (much) more, cannot tell us whether, on one hand, IRBs should be more lenient in vetting research risks or, on the other hand, the Occupational Safety and Health Administration should be less lenient in permitting employment risks, the missions of *Médecins Sans Frontiers* should be subject to independent prospective review of their risks and expected benefits, and third parties should debate the “reasonableness” of tithing or writing checks to particular charities before anyone is permitted to do so. Accord Miller & Joffe, *supra* note 246, at 446–47.

249. See Baruch Fischhoff, *Acceptable Risk: A Conceptual Proposal*, 5 RISK: HEALTH, SAFETY & ENV'T 1, 2–3 (1994).

evidence of research outcomes rather than on their “‘gut’ feeling.”²⁵⁰ Data regarding participant outcomes is not routinely collected, nor does there currently exist any formal mechanism through which IRBs might share such data with one another. Data about participants’ actual experiences, these commentators say, would enable IRBs to manage the “difficult balancing act” of permitting important research to go forward, but “without harm or jeopardy to individual participants.”²⁵¹ Such data might be routinely collected on research outcomes²⁵² and fed into a national database of research risks (and, one hopes, benefits), for incorporation into future IRB risk–benefit analysis.²⁵³

The same data might also inform risk-based stratification of research types at the regulatory or statutory levels. Many have distinguished physical and nonphysical risks,²⁵⁴ with some proposing to make research

250. Fendrich et al., *supra* note 73, at 35.

251. Decker et al., *supra* note 75, at 55.

252. The Commission itself had recommended that IRBs adopt procedures for continuing review of research, such as observing, “on a sample or routine basis,” participant recruitment, the consent process, or the conduct of the research itself, as well as soliciting information from participants through interviews or feedback forms. NAT’L COMM’N, IRBS, *supra* note 25, at 16–17; *see also* CTR. FOR ADVANCED STUDY, IMPROVING THE SYSTEM FOR PROTECTING HUMAN SUBJECTS: COUNTERACTING IRB “MISSION CREEP” 18 (2007) (recommending collection of data regarding, *inter alia*, “what subjects perceive as risk, and what kinds of benefits to subjects and their communities make the relationship fair”); NAT’L RESEARCH COUNCIL, *supra* note 43, at 159–63 (recommending that researchers publish data “about types, incidence, and magnitude of harm encountered in social, behavioral, and economic sciences research” derived through debriefing their participants, and that OHRP “establish an ongoing system for collecting and publishing data that can help assess how effectively IRBs protect human research participants, how efficiently they review research, and how commensurate review is with risk”); David Wendler et al., *Quantifying the Federal Minimal Risk Standard: Implications for Pediatric Research Without the Prospect of Direct Benefit*, 294 J. AM. MED. ASS’N 826 (2005) (discussing the need for empirical data to guide IRB review); Brian Mustanski, *Ethical and Regulatory Issues with Conducting Sexuality Research with LGBT Adolescents: A Call to Action for a Scientifically Informed Approach*, 40 ARCHIVES SEXUAL BEHAV. 673, 674 (2011) (highlighting the need to change the IRB process of risk–benefit analysis from being subjective to being evidence-based).

253. *See, e.g.*, Annette Rid & David Wendler, *A Proposal and Prototype for a Research Risk Repository To Improve the Protection of Research Participants*, 8 CLINICAL TRIALS 705 (2011). Such proposals rarely think to include data about the benefits of research participation, but we can easily imagine including such data as well.

254. *See, e.g.*, Oakes, *supra* note 48, at 449 (“We know a fair amount about . . . physical risks . . . ; the IRB system was set up to address these. We know little about . . . nonphysical risks . . . , and this creates problems. How do we measure and weigh an annoying journalistic inquiry? What about a threat to confidentiality? Deception? Sensitive questions about illegal drug use?”); Mustanski, *supra* note 252, at 680 (“In almost all cases of social/behavioral research, [IRB risk–benefit analysis] involves a subjective determination based on opinions about the probability of a risk outcome occurring and its likely

review less burdensome by limiting IRB review to “high-risk” HSR involving physical interventions while deregulating “low-risk” HSR involving “mere” psychosocial risks.²⁵⁵

In July 2011, HHS and the Office of Science and Technology Policy released *Human Subjects Research Protections: Enhancing Protections for Research Subjects and Reducing Burden, Delay, and Ambiguity for Investigators*, an Advance Notice of Proposed Rulemaking (ANPRM) that contemplates potentially

consequences.”).

255. See, e.g., ZACHARY M. SCHRAG, *ETHICAL IMPERIALISM: INSTITUTIONAL REVIEW BOARDS AND THE SOCIAL SCIENCES 1965–2009* (2010) (suggesting that biomedical and behavioral (i.e., psychology) research be regulated differently than social science, humanities and education research, primarily on the basis of differences in riskiness); Philip Hamburger, *The New Censorship: Institutional Review Boards*, 2004 SUP. CT. REV. 271, 272 (invoking, implicitly, the distinction by lamenting that a researcher must “get . . . prior permission not only if he wants to conduct a dangerous physiological experiment but also if he merely wants to ask individuals about their political opinions”); CTR. FOR ADVANCED STUDY, *supra* note 252, at 5 (“Those cases that pose the greatest chances for risk and harm are, and always have been, in the fields of biomedical research in general and clinical trials in particular.”); E.L. Pattullo, *Commentary: Exemption from Review, Not Informed Consent*, IRB: ETHICS & HUM. RES., Sept.–Oct. 1987, at 6, 6 (proposing that prospective review be limited to research involving deception, intrusion upon the subject’s person, or denial of or reduction in benefits); Oakes, *supra* note 48, at 449 fig. 1 (depicting “Typical Risk Spectrum by Research Discipline,” according to which the low-risk end of the spectrum begins with journalism, whose primary risk is annoyance, proceeds through oral history, anthropological investigations, evaluation research, biomedical epidemiological studies and pharmacological trials, and concludes at the high-risk end with surgical trials, which carry the risk of death).

Often, the proposed regulatory distinction between physical and nonphysical risks is, in turn, mapped onto a second distinction, between biomedical and nonbiomedical (i.e., social science, educational, humanities, and perhaps behavioral) research. The facts that the scandals that led to the current governance regime almost exclusively involved biomedical research and that the National Research Act refers repeatedly to “biomedical and behavioral research,” with no clear mention of social science, and no mention whatever of education or humanities research, do make for odd beginnings in a story that ends with the broadly applicable regulations described in Part I. Typically, the proffered standard relies on a distinction between the psychosocial risks that are typical of nonbiomedical research and the physical risks that are typically limited to biomedical research.

But questions of agencies’ statutory authority to apply the regulations widely aside, risk type does not neatly correspond to research methodology. All methodologies and all disciplines have the potential to set back the interests of research participants. Biomedical studies often involve no serious physical risks, or even any physical risks at all, but sometimes do involve psychosocial, economic, or legal risks. Conversely, behavioral and social science studies can involve physical risks.

We might abandon methodological proxies and base risk-proportionate regulation on the kinds of risks themselves—physical versus nonphysical. But physical harms are not, as a rule, always greater in magnitude, more costly for the victim or society, more irreversible, or otherwise more important to avoid than are psychological, social, economic, and legal harms.

sweeping changes to the regulations under which IRBs operate.²⁵⁶ As its title suggests, the ANPRM attempts to appease both camps of critics by reallocating IRB review and agency oversight resources from “low-risk” studies, where they are inefficient, to studies that “pose risks of serious physical or psychological harm,” which currently suffer from insufficiently rigorous review.

The ANPRM is but one nation’s contribution to a global trend toward “risk-proportionate” regulation of HSR,²⁵⁷ increasingly supported by scholars,²⁵⁸ in which the kind and extent of IRB review and other oversight are proportionate to the riskiness of the research. Risk-proportionate regulation has the potential to appease both camps by IRB reallocating resources that are today spent on review of low-risk research to a more thorough review of high-risk research, thus simultaneously eliminating unnecessary burdens on benign research and freeing up resources to better protect participants from serious harms. It aims for two politically unassailable goals—the safety and welfare of research participants and the efficient use of scarce resources—and wraps these goals in the seemingly unobjectionable language of “proportionality.”

Of course, risk-proportionate regulation of HSR requires a meaningful way for IRBs, regulators or legislators to distinguish “low-” from “high-risk” research. That is, it requires a basis on which some social planner can, in advance and with respect to all prospective participants, deem some research-related harms insufficiently probable or significant to warrant the full panoply of protections afforded participants in other studies. Using research outcomes data as the basis for risk-proportionate regulation (or for “evidence-based” IRB risk–benefit analysis at the protocol

256. ANPRM, *supra* note 34.

257. *See id.*; *see also* Eur. Comm’n on Health and Consumers Directorate-Gen., *Revision of the ‘Clinical Trials Directive’, 2001/20/EC*, SANCO/C/8/PB/SF D(2011) 143488 (Sept. 2, 2011); ACAD. OF MED. SCIS., *A NEW PATHWAY FOR THE REGULATION AND GOVERNANCE OF HEALTH RESEARCH* (2011) (U.K.); PRESIDENTIAL COMM’N FOR THE STUDY OF BIOETHICAL ISSUES, *supra* note 205, at 33 (U.S.); NAT’L RESEARCH COUNCIL, *supra* note 43, at 143 (noting that “IRBs in some instances may overestimate the risks of harm to participants in [social, behavioral, and economic sciences] (and biomedical) research” while “[a]t the other extreme a few IRBs may underestimate risk” and calling for IRB review that is commensurate to study risk); INST. OF MED., *supra* note 205.

258. *See, e.g.*, Dale Carpenter, *Institutional Review Boards, Regulatory Incentives, and Some Modest Proposals for Reform*, 101 NW. U. L. REV. 687, 688–89 (2007) (proposing that IRBs be required to expedite review of low-risk social science research, absent a finding that the study’s risks “substantially outweigh” its anticipated benefits) (emphasis omitted); Scott Kim, Peter Ubel & Raymond De Vries, *Pruning the Regulatory Tree*, 457 NATURE 534 (2009) (suggesting that low-risk research be exempt from IRB review); Adil E. Shamoo, *Deregulating Low-Risk Research*, CHRON. REV., Aug. 3, 2007, at B16 (supporting the exemption of low-risk studies from federal regulation).

level) faces significant problems. In addition to the not inconsiderable expense involved,²⁵⁹ such data would address the information aspect of the heterogeneity problem only crudely. Data about the preferences of particular individuals based on debriefing from particular past studies can only very imperfectly predict the preferences of other, as-yet unidentified individuals regarding other, future studies. And, like other reform proposals, evidence-based risk–benefit analysis would do nothing to address the aggregation problem.²⁶⁰

CONCLUSION

IRBs are quasi-governmental actors charged with protecting research participants, largely by permitting participants to be invited to enroll in a study if and only if the IRB determines that the study’s risks to participants are reasonable in relation to its expected benefits for them, if any, and for society. But as central actors who lack information about the preferences and circumstances of individual prospective participants—and who, in any case, must make a single decision for each study applicable to diverse individuals—IRBs are incapable of determining whether a study’s risk–benefit profile is in fact “reasonable” to any particular prospective participant. Moreover, by employing a broad understanding of research risk and a narrow understanding of research benefit, IRBs tend to assign to proposed studies risk–benefit profiles that are likely to reflect the preferences of the most risk-averse minority of prospective participants. Erring on the side of restricting the kinds of research opportunities to which individuals may be invited is benign only if we assume that individuals can only be harmed, and never benefitted, by participating in research. That claim is refuted by much of the empirical evidence discussed in this Article.

Given its intractability, it should come as little surprise that, on the rare

259. The National Commission itself recognized that this massive data collection and analysis would entail “a substantial strain on the limited resources” of IRBs, which are now under exponentially greater constraints than they were in 1978. NAT’L COMM’N, IRBs, *supra* note 25, at 16–17. And since such data collection would itself constitute human subject research, still further IRB costs would presumably accrue.

260. Moreover, even if past preference data sufficiently reflected all prospective participants’ preferences (in the highly unlikely case that participant preferences turn out to be both homogeneous and stable), there are reasons to doubt that IRBs would base their risk–benefit decisions on at least some of this data. IRBs, like all regulators (indeed, arguably like all human actors), have psychological incentives to resist data when it undermines their *raison d’être*—in this case, data that suggests that research entails very little risk. Similarly, considerable empirical research suggests that decisionmakers are more risk averse when deciding for others than they are when they make the same choice for themselves. The debiasing effect of data on this tendency is unclear. I discuss these and other regulatory and cognitive biases of IRBs in a companion article. See Meyer, *supra* note 22.

occasion when a regulator acknowledges the heterogeneity problem, its counsel to IRBs does not inspire confidence. New York State's HSR guidelines offer a representative example:

[T]olerance for discomfort and inconvenience may vary considerably, causing what may be perceived as ordinary discomfort or inconvenience by some subjects to escalate to significant harm for others. Examples include a bronchoscopy or bone marrow biopsy, which may be experienced as unpleasant by some subjects and as severe discomfort by others, or a sleep study that reverses day and night, which upon completion may require no readjustment by some subjects and a psychologically difficult readjustment by others.²⁶¹

New York IRBs are told to be “cognizant of” participant heterogeneity and to “consider this information in their assessment of the protocol’s risks.”²⁶² As we have seen, however, the idea that IRB risk–benefit analysis meaningfully establishes when research risks are reasonable in relation to their expected benefits is a legal fiction.

We can continue to perpetuate this legal fiction, demanding that quasi-governmental actors perform an essentially impossible task; alienating and disillusioning researchers; and driving researchers and IRBs to strategies of evasion and risk aversion, respectively, that are costly for all stakeholders, reducing the amount, quality, and timeliness of knowledge production, and—less obviously, but just as importantly—denying would-be participants valuable opportunities that would advance their welfare.

Or, we can embrace the implicit utilitarianism of those scholars of regulation who argue that the extent to which IRBs protect participants is not justified by the costs to researchers and society of prospective IRB review. That is, we could reconceive research as “reasonable” whenever its total expected benefits for society and participants (if any) *outweigh* its expected costs—that is, whenever research is expected to maximize social welfare. This, however, would constitute a radical departure from the historical purpose of our system of HSR governance. The Common Rule is singularly devoted to protecting participants from research-related harm. Just as neither Title II of the National Research Act nor its implementing regulations contemplates cost–benefit analysis or any other way in which individual participant welfare might be acceptably sacrificed in service of social welfare,²⁶³ they do not contemplate knowingly sacrificing the welfare of participants with idiosyncratic preferences.

I suggest that there is a third way. We can embrace rather than deny

261. N.Y. IRB GUIDELINES, *supra* note 181, at 9 (footnote omitted).

262. *Id.*

263. *See supra* Part II.C.1.a.

participant heterogeneity, while at the same time increasing the quantity, quality, and speed of research, and remaining faithful to the values that have historically driven HSR governance: participant welfare and respect for participant autonomy. If IRBs cannot meaningfully factor participant heterogeneity into their risk–benefit assessment, rather than futilely tweaking this or other aspects of the IRB system, we should jettison centralized risk–benefit reasonableness inquiries and replace with a system of private ordering that is sensitive to heterogeneous preferences. Individual prospective participants, not IRBs, should decide whether it is reasonable *for them* to accept the risks of participating in a particular research study. I take up this alternative framework in a companion Article.²⁶⁴

264. See Meyer, *supra* note 22.

SOCIAL MEDIA, ADMINISTRATIVE AGENCIES, AND THE FIRST AMENDMENT

ALISSA ARDITO*

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INTRODUCTION

With unprecedented alacrity, federal agencies have heeded the President’s call to open government and embrace social media.¹ Now, the public can communicate with federal agencies in multiple ways. The Pentagon sponsors the Pentagon Channel on YouTube.² Citizens interested in physical activity can “like” the Department of Health and Human Services’s (HHS’s) “Let’s Move” campaign Facebook page.³ Concerned about terrorism? TheBlog@HomelandSecurity.org is only a few clicks away.⁴ A citizen angered because socks are no longer made in

1. Following President Barack Obama’s signal memorandum “Transparency and Open Government,” the Office of Management and Budget (OMB) issued its “Open Government Directive,” which required federal agencies to take specific steps to implement the Administration’s commitments to “transparency, participation, and collaboration.” Memorandum on Transparency and Open Government, 74 Fed. Reg. 4685 (daily ed., Jan. 26, 2009), *available at* http://www.whitehouse.gov/the_press_office/TransparencyandOpenGovernment/; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-16, OPEN GOVERNMENT DIRECTIVE (2009), *available at* http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

2. *The Pentagon Channel*, YOUTUBE, <http://www.youtube.com/user/ThePentagonChannel> (last visited May 14, 2013).

3. *Let’s Move: The Department of Health and Human Services*, FACEBOOK, <http://www.facebook.com/letsmove> (last visited Feb. 2, 2013).

4. *TheBlog@HomelandSecurity*, DEP’T OF HOMELAND SECURITY, <http://blog.dhs.gov/>

the United States can contact Tradeology, the International Trade Administration's Blog.⁵ For citizens concerned about the environment, the Environmental Protection Agency (EPA) maintains "Greenversations"—a collection of nine blogs and seven discussion fora on a variety of environmental topics.⁶ Given the continued housing crisis, someone curious about what the U.S. Department of Housing and Urban Development (HUD) is doing to address it can go to HUDdle, the HUD blog, the HUD Facebook page, HUD on Twitter, and the HUD YouTube channel.⁷ Significantly, if a citizen is dissatisfied or impressed with present attempts to address the housing crisis, he or she can convey as much on the HUD Facebook page or on the agency YouTube channel or on Twitter, all of which are open for comments. The abundant opportunities for public comment that "Agency Web 2.0" provides appear to be an uncomplicated good—a veritable efflorescence of democracy. This commitment to online participation, commendable in principle, is rife with pitfalls in practice. Foremost among them is the First Amendment's freedom of speech guarantee.⁸

Of the twenty-three major federal departments and agencies maintaining social media sites inviting public comment, not one site contains a statement about the First Amendment's free speech clause. Naturally, federal agency attorneys are aware of the First Amendment, but what constitutes compliance when an agency invites public comment on its social media sites is not self-evident. Few agency attorneys have had to brave the contentious realm of First Amendment jurisprudence, and no high court has opined on the application of free speech doctrines to social media sites. Multiple agencies restrict comments on their social media sites in a variety

(last visited May 14, 2013).

5. *Tradeology*, INT'L TRADE ADMIN., <http://blog.trade.gov/> (last visited May 14, 2013).

6. *Greenversations*, ENVTL. PROTECTION AGENCY, www.epa.gov/greenversations (last visited May 14, 2013). For the entire range of Environmental Protection Agency's (EPA's) social media activities, see *Social Media*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epahome/socialmedia.html> (last visited May 14, 2013).

7. *The HUDdle*, DEP'T OF HOUSING AND URBAN DEV. (HUD), <http://blog.hud.gov/> (last visited May 14, 2013); *U.S. Department of Housing and Urban Development*, FACEBOOK, <http://www.facebook.com/HUD> (last visited May 14, 2013); *HUD News*, TWITTER, <http://twitter.com/HUDNews/> (last visited May 14, 2013); *U.S. Department of Housing and Urban Development*, YOUTUBE, <http://www.youtube.com/user/HUDchannel> (last visited May 14, 2013).

8. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of people peaceably to assemble, and to petition the government for a redress of grievances."). Arguably, online public comment also involves the right to petition the Government, but this Article will focus on freedom of speech.

of ways. Are such restrictions permissible? If the agency is seeking to send a message and speak to the public about its activities, may it exert more control?

As state and local governments and their agencies open social media sites inviting public comment, in addition to the twenty-three federal agencies already doing so, questions about whether the government can censor public comments will only grow more clamorous. Interactive technologies offer opportunities for citizen participation at an unprecedented scale, but such opportunities could be stifled if agencies and courts prioritize the government's free speech rights over those of its citizens. A new forum for citizen participation may be subverted into an arena for acclamation. Given the number of agencies engaging in social media, this is a significant area of emerging practice, yet legal scholars have almost entirely ignored not only the phenomenon but also the significant First Amendment challenges it raises.

This Article argues that the public forum doctrine, which limits the government's ability to restrict speech on public property, provides the appropriate framework to address the First Amendment's application to agency social media sites. The alternative, to which some agencies appear to subscribe, is to argue that government speech is the controlling doctrine. The government speech doctrine holds that the free speech clause is irrelevant when the government itself is the speaker. Therefore, an agency has the discretion to censor citizen speech that is inconsistent with its message. Determining when the government is speaking remains opaque, as the doctrine is comparatively new and its lineaments somewhat vague. Because agencies open sites to publicize their mission and policies to the public and to invite public comment, speech on federal agency social media sites is a hybrid of agency speech and private speech on public issues. The question then becomes which type of speech predominates. Given the Administration's statement that the purposes of such sites are to engage the public and to increase participation, and the fact that public comment dominates the sites, private speech prevails. The classic description of a public forum, often used to determine if the doctrine should be applied to particular circumstances, characterizes it as a First Amendment easement.⁹ Permitting the public to comment on agency activities on an agency-sponsored site resembles nothing so much as providing speakers with an easement to use public property for expressive purposes. Although agency social media sites are located on third-party, private platforms, the

9. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 13 (stating that the Free Speech Clause gave citizens "a kind of First-Amendment easement").

state acts affirmatively to open the sites and to maintain them so they are, in effect, public property for purposes of the public forum doctrine, which has been applied to intangible, communicative realms. A federal agency social media site is a limited public forum, which, while not offering the government free reign to restrict or censor public comments, does offer some permissible restrictions while protecting the First Amendment rights of citizen speakers.

Only one other article has addressed a similar issue, arguing, in the context of public comments on government websites, that the appropriate framework is the government speech doctrine.¹⁰ This is not likely to be the way courts approach this issue, however, because recent Federal Circuit and Supreme Court opinions demonstrate that courts use a contextual, pragmatic analysis when forced to choose between the government speech doctrine and the public forum doctrine. A finding of government speech depends upon whether the government can prove it established a message and maintained effective control over the content and communication of the message. A study of federal agency social media sites does not evince a clear message. However, in *Pleasant Grove City v. Summum*, the Supreme Court held that the government can speak through its selection of private speech, a decision that echoed the D.C. Circuit's holding in *People for the Ethical Treatment of Animals, Inc. v. Gittens*.¹¹ A close reading of the opinions cautions against applying the government speech doctrine to private speech on an agency social media site. The selection of private speech is held to be government speech only when the government is acting in an institutionally specific manner, as a government enterprise—be it as a library, art patron, broadcaster, or university—which is not the case on agency social media sites opened to encourage participation and dialogue.

In addition to the doctrinal argument, a theoretical analysis offers a decisive reason to favor the public forum doctrine. An overlooked strand of republican political thought held that negative liberty is more than the absence of interference; it is the absence of dependence on the will of another. Ancient and early modern political thought emphasized the close connection between free speech and non-dependence. Speech can only be free in a self-governing republic where the exercise of the right is not dependent on the arbitrary will of another. This venerable understanding of liberty as non-dependence, also known as neo-Roman liberty, clarifies

10. See generally David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 BYU L. REV. 1981, 1983 (2010).

11. *Pleasant Grove City v. Summum*, 555 U.S. 460, 481 (2009); *People for the Ethical Treatment of Animals, Inc. [PETA] v. Gittens*, 414 F.3d 23, 29–31 (D.C. Cir. 2005).

the much-debated relationship between democratic self-government and individual autonomy in First Amendment theory. Multiple scholars have criticized the democratic view's instrumentalism. They have overlooked the lesson history imparts, that autonomy, or more accurately, negative liberty as non-dependence, entails collective self-government. The republican aversion to arbitrary power clarifies the startling gulf separating the public forum doctrine from the government speech doctrine. Should government speech be the controlling doctrine, a citizen's speech on an agency social media site is subject to the same unaccountable, discretionary power that prevails elsewhere online. There will be no place, no refuge online from the possibility of arbitrary censorship. Because there need to be some realms online where people can speak as citizens, public comments on agency social media sites should be protected by the First Amendment.

Part I of this Article surveys the purpose and use of administrative agency social media, its location on private third-party domains, agency comment policies, and the "privatization" of cyberspace. Part II summarizes the debate between democratic and autonomy-based views of free speech and offers a historical understanding of neo-Roman liberty, which imparts the lesson that autonomy entails collective self-governance. Part II also reviews the public forum doctrine and the government speech doctrine. One doctrine holds governmental restrictions on speech on public property to the highest level of judicial scrutiny; the other frees the government from the First Amendment in specific situations. Part III acknowledges that citizen speech on agency social media sites, which at once encourage public comment and convey messages about agency activities, can be considered a hybrid of government and private speech. Part III then proceeds to examine relevant court opinions, which indicate that a pragmatic analysis of context and purpose is determinative. Finally, Part III deploys the concept of liberty as non-dependence to argue that the public forum doctrine is the correct choice based upon principle as well as precedent. Part IV applies the public forum doctrine to agency social media sites, which are limited public fora, and evaluates subject matter restrictions, civility codes, and various types of protected and unprotected speech, from hate speech to cyberharassment to false statements of fact. Part IV also discusses issues specific to federal agencies, such as liability under state tort law, sovereign immunity, and endorsement.

Though these questions may interest a narrow stratum of federal attorneys and judges, the answers have significant consequences. Because the vast majority of websites and social media sites are in private hands, public space online, the equivalent of sidewalks and parks, which receive

the highest level of First Amendment protection, is next to nonexistent.¹² Opportunities for individuals to express themselves online on civic or political matters without the possibility of restriction by private parties are slim. Hence, the level of First Amendment protection public comments receive on federal social media sites is important as a matter of incremental constitutional law. There are calls to reconceptualize free speech values to remedy the fact that unregulated Internet service providers (ISPs), free to engage in content discrimination or to steer user attention toward consumption, oversee nearly all online expression.¹³ It may well be time for such sweeping changes.

Generally, constitutional law proceeds carefully, with ostensibly narrow holdings, before a doctrine, after a long unobserved germination, emerges to address a new phenomenon. Arguably, the judicial recognition of rights will take a back seat to administrative regulation and legislation of technology in the twenty-first century,¹⁴ but here is an issue which merges the traditional concept of free speech rights as limits on discriminatory state action with the new realm of digital interactive technology, as yet barely touched by First Amendment doctrine. Resolution of this issue will be a significant first step in addressing the theoretical and doctrinal implications of free speech in the era of social media. In this case, a doctrine does not need to be cut out of whole cloth. The public forum doctrine can be renovated slightly to apply to social media sites. Agencies, through self-regulation, and courts, through the traditional recognition of free speech rights on public property, merely need to choose the proper doctrine. This choice of doctrine is one of a series of small decisions of enormous import. Whether there are places online where political speech expressed is free of both government and private censorship or not, whether interactive technology enables wider participation in political discourse or enhances the simulacra of it, hang in the balance.

12. See Dawn C. Nunziato, *The Death of the Public Forum in Cyberspace*, 20 BERKELEY TECH. L.J. 1115, 1116 (2005).

13. *Id.*; see also Jack M. Balkin, Commentary, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 20–21, 49 (2004). Balkin offers a theory of freedom of speech as democratic culture intended to counter a property based theory, which equates the right to free speech with ownership of telecommunications networks. The network owner speaks through editorial judgments about content. *Id.* at 20. Balkin worries less than Nunziato about overt content discrimination by telecommunications companies controlling online access and more about the “diversion and co-optation of audience attention” towards the purchase of goods and services. *Id.* at 22. Notably, the view that a property owner speaks through editorial judgments or content-based discrimination of speech is also found in the government speech doctrine.

14. *Id.* at 50–51.

I. FEDERAL AGENCY SOCIAL MEDIA

Executive departments and agencies should offer Americans increased opportunities to participate in policymaking and to provide their Government with the benefits of their collective expertise and information. Executive departments and agencies should also solicit public input on how we can increase and improve opportunities for public participation in Government.¹⁵

President Obama's Memorandum, "Transparency and Open Government," was intended to herald a new era of openness in government, an openness that would at once nourish democracy and ensure effectiveness and efficiency in government. To that end, the President instructed the Director of the Office of Management and Budget (OMB) to direct agencies on specific steps to effectuate the principles of transparency, participation, and collaboration outlined in the memorandum. OMB specifically directed agencies to develop open government plans and stated that such plans should include "proposals for new feedback mechanisms," including innovative tools and practices creating new methods for public engagement.¹⁶ In practice, "innovative tools for public engagement" has meant social media and web-based interactive technologies, which fall under the aegis of "Web 2.0" technologies.¹⁷ Recognizing this fact, OMB acted swiftly and issued clarifying guidance to executive departments and agencies on social media, in particular on compliance with the Paperwork Reduction Act and Privacy Act.¹⁸ The Government Accountability Office (GAO) has testified before

15. Memorandum on Transparency and Open Government, *supra* note 1.

16. OFFICE OF MGMT. & BUDGET, *supra* note 1, at 9.

17. *Government 2.0, Part I: Federal Agency Use of Web 2.0 Technologies: Hearing Before the Subcomm. on Info. Policy, Census, & Nat'l Archives of the H. Comm. on Oversight & Gov't Reform*, 111th Cong. 42, 48 (2010) [hereinafter Wilshusen Testimony] (statement of Gregory C. Wilshusen, Director, Information Security Issues). Wilshusen explained that the United States Government Accountability Office (GAO) defines Web 2.0 technology as follows:

[Web 2.0] technologies refer to a second generation of the World Wide Web as an enabling platform for Web-based communities of interest, collaboration and interactive services. Internet-based services using these technologies include blogs, social networking sites, video Web sites, and wikis . . . which allow individual users to directly collaborate on the content of Web pages; 'podcasting,' which allows users to download audio content; and 'mashups,' which are Web sites that combine content from multiple sources.

18. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, SOCIAL MEDIA, WEB-BASED INTERACTIVE TECHNOLOGIES, AND THE PAPERWORK REDUCTION ACT (2010) [hereinafter SOCIAL MEDIA], available at http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/SocialMediaGuidance_04072010.pdf; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, M-10-23, GUIDANCE FOR AGENCY USE OF THIRD-PARTY WEBSITES AND APPLICATIONS (2010), available at

Congress on “Challenges in Federal Agencies’ Use of Web 2.0 Technologies” and reported to Congress that federal agencies using social media need procedures for managing and protecting information.¹⁹ Nevertheless, Congress has left federal agencies to their own devices with respect to how to handle this new wave of public interaction in ways that comply with the First Amendment’s freedom of speech guarantee.

The use of Web 2.0 technology may not revolutionize the way in which citizens interact with federal, state, and local governments, but it surely will bring striking changes. Previously, a citizen had to write a letter, make a phone call, or attend a public meeting to make one’s voice or opinion heard by a federal agency. With the advent of federal agency social media, a citizen can post comments, post a video, as well as edit, organize, and share content with federal agencies. Similarly, federal agencies communicated their messages through press releases in the mainstream media. Now, agencies are able to reach citizens directly in an unprecedented way. They have been doing so through websites for years, but with the advent of social media, the communication of the agency message and interaction with the public are blurred in ways that will prove problematic in light of free speech doctrines.

While Web 2.0 encompasses everything from wikis, mashups, blogs on agency websites, video sharing, and podcasts to agency Facebook pages and Twitter accounts, the most popular Web 2.0 technologies are the social networking sites Facebook and Twitter.²⁰ According to GAO, twenty-three of the twenty-four major federal agencies have established pages on Facebook, Twitter, and YouTube.²¹ As previously mentioned, the problem

http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-23.pdf.

19. See Wilshusen Testimony, *supra* note 17, at 42–43; see also U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-11-605, SOCIAL MEDIA: FEDERAL AGENCIES NEED POLICIES AND PROCEDURES FOR MANAGING AND PROTECTING INFORMATION THEY ACCESS AND DISSEMINATE (2011).

20. The Nielsen Company reports that Facebook was the most popular global social networking site. Twitter is the fastest-growing social networking website, increasing over 200 percent in December 2009. *Led by Facebook, Twitter, Global Time Spent on Social Media Sites Up 82% Year Over Year*, NIELSEN, Jan. 22, 2010, <http://www.nielsen.com/us/en/newswire/2010/led-by-facebook-twitter-global-time-spent-on-social-media-sites-up-82-year-over-year.html>.

21. As of June 28, 2011. See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 19, at 2, 4–5. The twenty-four major federal departments and agencies covered by the Chief Financial Officers Act are the Departments of Agriculture (USDA), Commerce, Defense, Education, Energy, Health and Human Services (HHS), Homeland Security, HUD, the Interior, Justice, Labor, State, Transportation, the Treasury, Veterans Affairs, the EPA, General Services Administration (GSA), National Aeronautics and Space Administration (NASA), National Science Foundation, Nuclear Regulatory Commission (NRC), Office of

this Article addresses is not limited to federal administrative agency social media. State and local governments and their agencies have launched social media sites, and citizen speech on those sites implicates the same First Amendment issues. This Article will focus on public comments on federal agency Facebook pages, Twitter accounts, and YouTube sites and blogs, but the analysis and conclusion also apply to state and local government agency social media sites.²²

Facebook is a social networking site that lets its over 950 million members, or “users,” create profiles and connect with other users.²³ Facebook permits each federal agency to establish a “Page,” rather than a “Profile,” which is reserved for individuals, on Facebook to convey information about the agency and to receive public comments posted by users in response.²⁴ In the federal agency context, the other users are invariably members of the public rather than other agencies. Twitter is another social networking site that conveys information through “tweets,” which are messages less than 140 characters in length. Account users post messages to profile pages and reply to the tweets of other users. Moreover, Twitter users can subscribe to the tweets of other users. YouTube permits users to upload videos and share them for other users to watch and respond to via posed comments. While federal agencies have yet to attract the legions of “friends” or “likes” attached to celebrity Facebook and Twitter accounts, the number of citizen “friends” has risen at a respectable pace. As of August 2012, the U.S. Department of State had over 146,680 “likes” on its Facebook page; the National Aeronautics and Space Administration had over 2.5 million Twitter followers, while the White House had 1,409,286 “likes” on its Facebook page.

A. *Third-Party Providers*

For purposes of a First Amendment analysis, two points are relevant.

Personnel Management, Small Business Administration (SBA), Social Security Administration (SSA), and U.S. Agency for International Development (USAID). Only the NRC does not use Facebook, Twitter, or YouTube. Fourteen departments are considered “executive agencies.” Seven agencies are “independent agencies,” while the NRC is classified as one of the “boards, commissions, and committees” that form part of the executive branch.

22. Provided such state and local government and government agency social media sites are opened to encourage citizen participation and engage the public.

23. Brief for Facebook, Inc., as Amicus Curiae Supporting Plaintiff-Appellant, Daniel Ray Carter, Jr. and Vacatur, Bland v. Roberts, 857 F. Supp. 2d 599 (E.D. Va. 2012), *appeal docketed*, No. 12-1671 (4th Cir. Aug. 6, 2012).

24. See *Create a Page*, FACEBOOK, <http://www.facebook.com/pages/create.php> (last visited May 14, 2013).

One is the fact that Facebook, Twitter, and YouTube are third-party commercial service providers. While an agency blog posted on an agency website is on public property because the .gov domain is owned and operated by the government, an agency Facebook page, for example, is on Facebook's platform, not that of the government. A .com domain is a private piece of cyberspace. Recognizing that federal agencies have distinct requirements that render them unable to sign the common terms of service (TOS) agreement, the General Services Administration's (GSA's) Center for Excellence in Digital Government negotiated TOS agreements with third-party service providers on behalf of federal agencies.²⁵ GAO refers to agency social media sites on third-party platforms as "agency sponsored," a description that will prove consequential.²⁶ The second point is the purpose of agency blogs, Facebook pages, and Twitter and YouTube accounts. Based on the President's Memorandum, the purpose of this foray into social media is to engage the public by conveying information about agency activities as well as facilitating public discourse on those activities.²⁷ Former Office of Information and Regulatory Affairs Administrator Cass R. Sunstein captured the duality inherent in public engagement in his memorandum to the heads of federal agencies: "To engage the public, Federal agencies are expanding their use of social media and web-based interactive technologies. For example, agencies are increasingly using web-based technologies, such as blogs, wikis, and social networks, as a means of 'publishing' solicitations for public comment and for conducting virtual public meetings."²⁸ As will be seen, whether social media sites provide an arena for the government to speak or a forum for citizens to make their voices heard determines the level of First Amendment protection public comments receive.

25. *Federal-Compatible Terms of Service Agreements*, GSA'S OFFICE OF CITIZEN SERV. & INNOVATIVE TECH., <http://www.howto.gov/web-content/resources/tools/terms-of-service-agreements> (last visited May 14, 2013).

26. See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 1. HUD's Policies and Procedures for Use of Social Media include sites internal and external to HUD in the departmental definition of social media, thus also eliding the distinction between .com and .gov. DEP'T OF HOUS. AND URBAN DEV., DEPARTMENTAL POLICIES AND PROCEDURES FOR USE OF SOCIAL MEDIA SITES BY HUD OFFICES AND STAFF, *available at* <http://portal.hud.gov/hudportal/documents/huddoc?id=social-media-policy.pdf>.

27. Both purposes are captured in the following: "Executive departments and agencies should harness new technologies to put information about their operations and decisions online and readily available to the public. Executive departments and agencies should also solicit public feedback to identify information of greatest use to the public." Memorandum on Transparency and Open Government, *supra* note 1.

28. SOCIAL MEDIA, *supra* note 18, at 1.

B. *The Purpose and Use of Agency Social Media*

While federal agencies have used social media sites to repost information available on agency websites, post new content, and provide links to non-government websites, soliciting comments from the public and responding to comments comprise a substantial part of federal agencies' activities online. According to a recent GAO survey, twenty-two of the twenty-three agencies with social media sites have used social media to solicit public comment.²⁹ Agencies on Facebook solicit public comment both on the site and sometimes direct the public to comment on the agency website. When inviting public comment on Twitter, agencies commonly direct public comment to blogs on agency websites. Surprisingly, YouTube has been used as often as Facebook to solicit public comment.³⁰ In contrast to Facebook, YouTube, and Twitter, federal agency blogs are located on official agency websites. However, blogs also encourage the public to comment on specific topics relevant to a particular agency's mission. There was a time, not so long ago, when agencies received a majority of public feedback through the mail. Online comments on proposed rules are replacing formal letters.³¹ But public comments on proposed rules are something with which federal agencies have long been familiar and established procedures provide a certain level of bureaucratic reassurance. For better or worse, public comments on social media sites are something altogether different.

C. *The Public Realm Online*

Increasingly ubiquitous, the Internet is celebrated for liberating commerce and communication from the comparatively sedate pace of the recent past. Enchanted by the wealth of information available, few Americans have noticed that the vast majority of websites and social media sites are in private hands. In the 1990s, the U.S. government surrendered control of the Internet backbone network and the domain name system to

29. "Twenty-two of 23 agencies used social media to solicit comments from the public. Of the 22 agencies soliciting feedback, most used Twitter for this purpose." U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19, at 13. Agencies sought feedback through Facebook for both public comment directly on the social media site and for public comment on an agency website. *Id.* Agencies used Twitter to solicit public comment on an agency website. *Id.* YouTube has also been used to solicit public comment. *Id.*

30. *See id.* at 11.

31. *See REGULATIONS.GOV*, <http://www.regulations.gov/> (last visited May 14, 2013); *see also* Bridget C.E. Dooling, *Legal Issues in E-Rulemaking*, 63 ADMIN. L. REV. 893, 898 (2011); Jeffrey S. Lubbers, *A Survey of Federal Agency Rulemakers' Attitudes about E-Rulemaking*, 62 ADMIN. L. REV. 451, 452 (2010).

private companies.³² Attendant upon this transfer, the Federal Communications Commission chose not to regulate ISPs as common carriers, which are restricted from engaging in content discrimination.³³ As a consequence, public space online is next to non-existent. Given that sidewalks and public parks remain, the dearth of public space online may seem unimportant. However, one consequence of private control is that free speech rights are not guaranteed online. Courts have decided that when a private company regulates speech on the Internet, such regulation is not state action and is not protected by the First Amendment's Free Speech Clause.³⁴ Hence, most Internet service companies that provide e-mail, chat rooms, and social media sites are free to discriminate against speech should they choose to do so. One result is the common requirement for users to agree to speech and civility codes through terms of service agreements. This agreement to engage in civilized discourse may seem harmless, even laudable, given the extent to which pornography, vulgar language, and hostile speech flourish online. However, ISPs have proven willing to restrict political speech.³⁵ Examples of ISPs regulating and censoring speech abound.³⁶ While the U.S. Postal Service may not censor

32. See Jay P. Kesan & Rajiv C. Shah, *Fool Us Once Shame on You—Fool Us Twice Shame on Us: What We Can Learn from the Privatizations of the Internet Backbone Network and the Domain Name System*, 79 WASH. U. L.Q. 89, 131–32 (2001); see also Ardia, *supra* note 10, at 1990 (“While the government owns and maintains some websites and computer networks, most public discourse occurs on private websites and is facilitated by private Internet service providers.”).

33. Jack M. Balkin, *The Future of Free Expression in a Digital Age*, 36 PEPP. L. REV. 427, 428 (2009). The telephone service is subject to common carriage requirements that prohibit content discrimination. See, e.g., 47 U.S.C. § 202 (2006); Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005) (stating that the Federal Communications Act “regulates telecommunications carriers, but not information-service providers, as common carriers”).

34. Nunziato, *supra* note 12, at 1135–41; see, e.g., *Cyber Promotions, Inc. v. America Online, Inc.*, 948 F. Supp. 436, 452 (E.D. Pa. 1996); see also *Island Online, Inc. v. Network Solutions, Inc.*, 119 F. Supp. 2d 289, 306 (E.D.N.Y. 2000).

35. Speaking of censorship of sponsored links on Google's search engine, Nunziato observes, “Google has refused to host a range of politically-charged, religious, and critical social commentary in the form of advertisements themselves, as well as the websites to which these advertisements link.” Nunziato, *supra* note 12, at 1123. In 1998, America Online (AOL) shut down an “Irish Heritage” discussion group and removed the earlier postings. *Id.* at 1126. Facebook locked down a political advocacy page in 2010. See Ardia, *supra* note 10, at 1991 n.46.

36. As David Ardia writes: “Because these private intermediaries are not constrained by the First Amendment's free speech protections, it is perilous for society to rely on them to provide forums for public discourse.” Ardia, *supra* note 10, at 1991; see also David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 379 (2010).

the mail, Google has free reign to censor e-mail.³⁷ Although Google appears to be exercising its power over free speech with restraint, it cannot be denied that the deputy general counsel of Google has more power over free speech than any Supreme Court justice or president, Jeffrey Rosen recently observed.³⁸

“Accordingly, for the great majority of Internet speakers, it is not the First Amendment, but AOL’s (or other ISPs’) terms of service, that determine the contours of protection accorded to their Internet expression.”³⁹ And that protection is unreliable. For instance, amateur journalists accused Facebook of censoring reports on the Occupy Wall Street movement, while Google initially declined to run anti-abortion advertisements.⁴⁰ In a recent article, Seth Kreimer argued the government’s decision to privatize speech regulation to “proxy censors” endangers free expression because private intermediaries can and do make

37. Nunziato, *supra* note 12, at 1122–23 (“While the U.S. Postal Service is subject to the dictates of the First Amendment when performing its duties, the private entities that are predominantly responsible for relaying billions of e-mails per day are not, thus these entities are free to monitor and censor the content of the e-mails that they are responsible for delivering.”). Section 230(2) of the Telecommunications Act of 1996, as amended (47 U.S.C. § 230(c)(2) (2000)) permits owners of online conduits to censor online traffic. *See also* Balkin, *supra* note 33, at 437 (stating “censorship is as likely to come from private entities that control telecommunications networks and online services as from the government”).

38. In Rosen’s telling, Google, under political pressure, retreated from guidelines on YouTube which prohibited videos “intended to incite violence,” which tracked the Supreme Court’s First Amendment doctrine. Jeffrey Rosen, *The Deciders: Facebook, Google, and the Future of Privacy and Free Speech*, The Future of the Constitution Series, No. 12, BROOKINGS INSTITUTION (May 2, 2012), <http://www.brookings.edu/research/papers/2011/05/02-free-speech-rosen>. From a different but equally troubling angle, Dawn Nunziato has argued that the authority of the Internet Corporation for Assigned Names and Numbers (ICANN) over the infrastructure of the Internet enables it to “enact regulations affecting speech within the most powerful forum for expression ever developed.” Dawn C. Nunziato, *Freedom of Expression, Democratic Norms, and Internet Governance*, 52 EMORY L.J. 187, 188 (2003).

39. Nunziato, *supra* note 12, at 1127.

40. David Badash, *Has Facebook Censorship Gone Too Far?*, THE NEW CIVIL RIGHTS MOVEMENT (Nov. 7, 2011), <http://thenewcivilrightsmovement.com/has-facebook-censorship-gone-too-far/politics/2011/11/07/29714>. The Christian Institute, which sought to run the anti-abortion ads, was based in the United Kingdom and sued Google for discrimination under the Equality Act of 2006, which forbids religious discrimination. In response to the lawsuit, Google agreed to revise its policy. Ki Mae Heussner, *Google OKs Religious Groups’ Abortion Ads*, ABC NEWS (Sept. 18, 2008), http://abcnews.go.com/Technology/story?id=5827418#.T3sTMvA1_5s. After receiving a takedown notice from the Church of Scientology, Google temporarily removed pages of a website critical of the church. Seth Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 32 n.64 (2006) (citing *Google Restores Church Links*, WIRED NEWS (Mar. 22, 2002), <http://www.wired.com/news/ebiz/0,1272,51257,00.html>).

mistakes. Furthermore, private intermediaries offer no due process guarantees when mistakes, such as confusing a parody with a copyright violation, are made. Incentives, as well as the limitations of current technology, push ISPs to be overbroad in blocking content.⁴¹ “Putting the censorship decision in the hands of the intermediary allows commercially powerful blocs of customers a potential veto on the speech of others.” Equally disturbing, corporations can pressure intermediaries to block speech by sending “cease and desist” notices.⁴² A large amount of speech on the Internet is anonymous speech, and the ability to speak anonymously has expanded free speech opportunities. However, the ability to engage in anonymous speech is dependent on the favor of the service provider and the fact that the provider is insulated from liability, a situation that could change.⁴³ Facebook, for example, does not permit anonymous speech.⁴⁴

A handful of private companies through which an ever-greater amount of speech travels are permitted to engage in content discrimination even if they do not avail themselves of the privilege, being more interested in distracting and entertaining than overtly censoring political speech.⁴⁵ How long this state of affairs remains and whether it is advisable remains to be seen, but the salient point is that for legal purposes the Internet is civil space, not a public one. It is a place for civil society, in between private and public, a place where people mingle in public on private property, much like a shopping center or coffee shop. For this reason, though there is much public discourse online, there is next to no real public space. A series of small decisions on the part of federal agencies and courts, when the issue is

41. Kreimer notes, “It is almost always easier to drop a marginal website than to employ counsel.” Kreimer, *supra* note 40, at 28. Speakers then engage in self-censorship. Moreover, an intermediary is likely to choose the mechanism that is cheaper rather than more precisely tailored thus inflicting what Kreimer terms “collateral damage” on protected expression. *Id.* at 31–32. As Kreimer relates, “Thus, for example, in *Center for Democracy & Technology v. Pappert*, the court found that ISPs blocked access to around 1.2 million ‘innocent’ websites in response to demands by law enforcement to disable four hundred targeted URLs.” *Id.* at 31. As many corporations have demonstrated, it is easier to engage in censorship by pressuring a proxy intermediary than it is to suppress speakers or listeners. *Id.* at 31–33.

42. *Id.* at 32 (“Google is reported to respond to ‘cease and desist’ notices in most cases by simply removing search results, a reaction that can be used to suppress access to websites of critics.”). Kreimer focuses on the state’s use of Internet intermediaries as “proxy censors.”

43. Section 230(c)(1) of the Telecommunications Act of 1996 provides Internet intermediaries with immunity against lawsuits based on the content of the speech that passes through their networks.

44. See *Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/note.php?note_id=183538190300 (last visited May 14, 2013).

45. Balkin *supra* note 13, at 22 (“Once again, the goal is not necessarily censorship of unpopular ideas but rather diversion and co-optation of audience attention.”).

litigated, will play a role in shaping the future of free speech by determining whether there are some places online where speech receives First Amendment protection.⁴⁶

D. Agency Comment Policies

No statement about the First Amendment's Free Speech Clause appears on the twenty-three major federal agency social media sites inviting public comment.⁴⁷ Under the First Amendment, speech is presumptively protected unless it falls into a narrowly carved exception. A citizen about to comment on a government-sponsored Facebook page, for instance, probably assumes his or her comments are protected by the First Amendment, but many agencies offer no such guarantees. The GSA's Center for Excellence in Digital Government negotiated "Federal Compatible Terms of Service Agreements" on behalf of agencies anxious to pursue the call to open government.⁴⁸ As expected, the Negotiated Amendment to the Facebook Terms of Use changes the governing law and liability clause to one that privileges federal law and eliminates the standard indemnity clause.⁴⁹ Facebook acknowledges that the government entity is bound by applicable federal laws and regulations "including those related to ethical standards, limitations on indemnification, fiscal law constraints, advertising and endorsements, freedom of information, governing law, and dispute resolution forum and processes."⁵⁰ Conspicuous in its absence is the First Amendment and whether section 5 of Facebook's "Statement of Rights and Responsibilities," which covers its user comments, applies to a government entity's Facebook page or, in the alternative, if agencies are entitled to take a more or less restrictive approach to public comments.⁵¹ In

46. Net neutrality legislation, provided it becomes law, and Federal Communication Commission (FCC) regulations will likely be challenged on constitutional grounds as well. Should the argument that the government's free speech right to make editorial judgments on its own property prevail in the case of agency social media, a precedent will have been set in favor of the property based vision of free speech supporting the argument that the structural regulation of telecommunications networks interferes with a company's right to speak through its content based choices.

47. This survey is based on the "major federal departments and agencies" covered by the Chief Financial Officer Act, which GAO uses when it surveys agency activities in reports or testimony before Congress. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 19.

48. *Negotiated Terms of Service Agreements*, HOWTO.GOV, <http://www.howto.gov/web-content/resources/tools/terms-of-service-agreements/negotiated-terms-of-service-agreements> (last visited May 14, 2013).

49. *See Amendment to Facebook Terms of Use*, HOWTO.GOV, <http://www.howto.gov/sites/default/files/facebook-tos-amendment.pdf> (last visited May 14, 2013).

50. *Id.*

51. Facebook's Statement of Rights and Responsibilities was initially more restrictive.

fact, it appears many agencies have chosen to restrict public comment on their social media sites in striking ways.

A study of twenty-three agency social media comment policies reveals a vast range of approaches. Focusing on Facebook, at one end are the Departments of Justice (DOJ), HUD, Interior, Treasury, Labor, Transportation, Energy, Education, the National Science Foundation, the Office of Personnel Management, and the U.S. Agency of International Development, which post no comment policy and by default appear to follow the Facebook “Statement of Rights and Responsibilities,” which now tracks First Amendment jurisprudence to some extent in stating that only statements believed to violate the law will be removed.⁵² For example, based on a view of some of the comments that remain posted on the DOJ and the HUD sites, it appears these agencies are not removing comments that are offensive or rude or false and thus recognize commenters’ First Amendment rights. At the other end, one finds the U.S. Department of State Facebook Terms of Service:

The U.S. Department of State on Facebook is moderated. That means all comments will be reviewed before posting. In addition, the U.S. Department of State on Facebook expects that participants will treat each other, as well as U.S. Department of State employees, with respect. The U.S. Department of

After its revision on April 26, 2011, section 5, “Protecting Other People’s Rights,” more closely tracks First Amendment jurisprudence. There is no admonition to avoid vulgar or offensive language or any civility requirement. A user agrees to “not post content or take any action on Facebook that infringes or violates someone else’s rights or otherwise violates the law.” Facebook states that it will remove content that it believes violates the law or other people’s rights. Therefore, if a comment does not violate the law or another person’s rights, it will remain posted. *See Statement of Rights and Responsibilities*, FACEBOOK, https://www.facebook.com/note.php?note_id=183538190300 (last visited May 14, 2013).

52. Section 5. Protecting Other People’s Rights. We respect other people’s rights and expect you to do the same. 5.1. You will not post content or take any action on Facebook that infringes someone else’s rights or otherwise violates the law. 5.2. We can remove any content you post on Facebook if we believe that it violates this Statement. 5.3. We will provide you with tools to help you protect your intellectual property rights. . . . 5.4. If we removed your content for infringing someone else’s copyright, and you believe we removed it by mistake, we will provide you with an opportunity to appeal. 5.5. If you repeatedly infringe other people’s intellectual property rights, we will disable your account when appropriate. 5.6. You will not use our copyrights or trademarks (including Facebook, the Facebook and F logos, FB, Face, Poke, Wall and 32665) without our written permission. 5.7. If you collect information from users, you will: obtain their consent, make it clear you (and not Facebook) are the one collecting their information, and post a privacy policy explaining what information you collect and how you will use it. 5.8. You will not post anyone’s identification documents or sensitive financial information on Facebook.”

See id.

State on Facebook will not post comments that contain vulgar or abusive language; personal attacks of any kind; or offensive terms that target specific ethnic or racial groups. The U.S. Department of State on Facebook will not post comments that are spam, are clearly “off topic” or that promote services or products. Comments that make unsupported accusations will also be subject to review.⁵³

Treating one another with respect seems reasonable, but is it consonant with the First Amendment? When posting a comment on Israel and Palestinian Territories, how does a commenter know what expressions the Department of State considers “offensive terms that target specific racial or ethnic groups?” The line between offensive and controversial is a fine one, and the Department of State may well open itself to charges of unconstitutional viewpoint discrimination if it censors such comments by refusing to post them.⁵⁴

HHS has a comment policy applicable to each social media site or “managed forum” where personal attacks, profanity, and aggressive behavior are also prohibited. HHS also instructs the public to “[t]ell the truth. Spreading misleading or false information is prohibited.”⁵⁵ In conclusion, “We encourage your participation in our discussion and look forward to an active exchange of ideas.”⁵⁶

The U.S. Department of Agriculture’s (USDA’s) comment policy, which applies to users on the USDA blog on the USDA website as well as on Facebook, Twitter, Flickr, and YouTube, is typical of the middle ground of agency comment policies. It reads:

We encourage discussion and comments on posts. Your insights are important to ensure Americans nationwide are informed and can be a part of the USDA’s work, every day.

We will review all comments before posting them. For the benefit of a robust

53. *U.S. Department of State Facebook Terms of Service*, FACEBOOK, http://www.facebook.com/usdos/app_11007063052 (last visited May 14, 2013). In the intervening months the Department of State appears to have changed its comment policy and now directs users to the Facebook Terms of Service (TOS). However, a very similar quoted comment policy still appears on the Department’s Dipnote Blog TOS, <http://blogs.state.gov/state-department-blog-content/about-state-department-blog> (last visited May 14, 2013).

54. *See* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) (“[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”); *see also* *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 395–96 (1992) (invalidating a ban on bias-motivated fighting words as viewpoint discrimination).

55. *Comment Policy*, U.S. DEP’T OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/open/discussion/commentpolicy.html> (last visited May 14, 2013).

56. *Id.*

and constructive conversation, we will post comments only if they relate to the topic discussed within the corresponding blog post. We want to publish your comments, but expect participants to show respect, civility and consideration to the blog authors and other blog visitors who include persons of all ages. Therefore, we will not post comments that: make personal attacks, are far off-topic, promote services or products, contain abusive, profane, or vulgar language, contain sexual content, overly graphic, disturbing, obscene or offensive material, or material that would otherwise violate the law if published here, include offensive language targeting specific ethnic or racial groups.

We will not edit your comments to remove objectionable or inappropriate content, so please ensure that your comment complies with this policy.⁵⁷

There are multiple variations on a similar theme. The modest beginning of the Department of Homeland Security (DHS) comment policy belies the broad sweep with which it ends: “DHS does not moderate comments on the DHS Facebook page prior to posting, but reserves the right to remove materials that pose a security or privacy risk.” DHS will remove any comments that contain:

profanity, personal attacks of any kind, spam, refer to Federal Civil Service employees by name, contain offensive terms that target specific ethnic or racial groups, promote commercial products, are geared towards the success or failure of a partisan political party, group, or candidate, incite hate, or are subject to a claim of infringement or deemed to be an infringement of intellectual property, or that is otherwise objectionable.⁵⁸

DHS does not offer guidance on what it means by inciting hate or what encompasses “otherwise objectionable” comments. The Small Business Administration will delete profanity and “implied profanity,” as well as “defamation to a person or group of people.”⁵⁹ The Department of

57. *USDA Comment Policy*, U.S. DEP’T OF AGRICULTURE, http://www.usda.gov/wps/portal/usda/usdahome?contentid=comment_policy.xml&contentidonly=true (last visited May 14, 2013).

58. It continues, “Any opinions expressed by commentators on the DHS Facebook page, except as specifically noted, are solely those of the individual offering commentary, and does not reflect any DHS component policy, endorsement, or action.” *Department of Homeland Security: Facebook Comment Policy*, FACEBOOK, http://www.facebook.com/homelandsecurity/app_139229522811253 (last visited May 14, 2013). The Federal Emergency Management Agency (FEMA), a division of DHS, explicitly states that its Facebook page is “a moderated channel, meaning all comments will be reviewed for appropriate content.” *FEMA Federal Emergency Management Agency: About*, FACEBOOK, <http://www.facebook.com/FEMA/info> (last visited May 14, 2013).

59. The SBA’s comment policy states that it will remove “other comments that the SBA Social Media Team deems inappropriate.” *SBA Privacy Policy: Facebook*, SBA.GOV, <http://www.sba.gov/content/sba-privacy-policy-facebook> (last visited May 14, 2013).

Defense (DOD) asks participants to agree to stay on topic and to refrain from abusive, defamatory, obscene material, and material that would violate the law. DOD will delete submissions with obscene language, threatening language, hate speech, commercial speech, personal information, or operational security.⁶⁰ GAO (though not a federal agency) reserves the right to remove “name calling” as well as threats or personal attacks. The National Aeronautics and Space Administration (NASA) employs an interesting comment policy, which states, “[t]o encourage free-flowing discussion while maintaining the decorum appropriate to a taxpayer-funded organization, we will moderate comments.” While NASA’s comment policy encourages relevant comments, it moderates profanity, spam, sexually-explicit material, discriminatory material, and personal attacks. The stricture against personal attacks contains some useful guidance, “[n]o personal attacks. Criticism of decision-making and operational management, including the names of individuals involved, is legitimate. Criticism on a purely personal level is not.” In addition, “[C]omments about politics and politicians must, like everything else, be on-topic and free from personal attacks.”⁶¹

Of the eleven agencies and departments that have comment policies, five have a general comment policy which applies to comments posted to blogs on the official agency (.gov) website as well as social media sites including Facebook, Twitter, and YouTube.⁶² Nine agencies state they moderate comments.⁶³ Nine prohibit “offensive” speech, which includes “profanity”

60. *Social Media User Agreement*, U.S. DEPARTMENT OF DEFENSE, <http://www.defense.gov/socialmedia/user-agreement.aspx/> (last visited May 14, 2013).

61. NASA, *Basic Info*, FACEBOOK, <https://www.facebook.com/NASA/info> (last visited May 14, 2013).

62. *Comment Policy*, COMMERCE.GOV, <http://www.commerce.gov/comment-policy> (last visited May 14, 2013); GSA, *General Services Administration: About*, FACEBOOK, <http://www.facebook.com/GSA/info> (last visited May 14, 2013); *Disclaimer: Comment Policy*, DODLIVE, <http://www.dodlive.mil/index.php/disclaimer/> (last visited May 14, 2013); *USDA Comment Policy*, *supra* note 57; *EPA Comment Policy*, U.S. ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epahome/commentpolicy.html> (last visited May 14, 2013).

63. *About the State Department Blog*, DIPNOTE: U.S. DEP’T OF ST. OFFICIAL BLOG, <http://blogs.state.gov/index.php/site/about> (last visited May 13, 2013); *SBA Privacy Policy: Facebook*, *supra* note 59; *EPA Comment Policy*, *supra* note 62; *Disclaimer*, VANTAGEPOINT: DISPATCHES FROM THE U.S. DEP’T OF VETERANS AFF., <http://www.blogs.va.gov/Vantage/disclaimer/> (last visited May 13, 2013); U.S. DEP’T OF VETERANS AFF. [VA], *Disclaimer*, https://www.facebook.com/VeteransAffairs/app_174701229285682 (last visited May 14, 2013); *HHS Comment, Privacy, and Link Policies*, HHS CENTER FOR NEW MEDIA, http://newmedia.hhs.gov/standards/comment_policy.html (last visited May 14, 2013); *United States Social Security Administration*, FACEBOOK, <https://www.facebook.com/notes/social-security-administration/our-comment-policy/369096638815> (last visited May 13, 2013); NASA, *supra* note 61. *Compare USDA Comment Policy*, *supra* note 62, and

or “vulgar and abusive language.”⁶⁴ Nine of the eleven agency comment policies prohibit hate speech variously described as discriminatory language or offensive language targeted at racial or ethnic groups.⁶⁵ The EPA and the DOD prohibit sexist hate speech.⁶⁶ Relevance is another issue, and

COMMERCE.GOV, *supra* note 62 (stating that both the USDA and Department of Commerce review comments before posting but do not use the term “moderate”), and FEMA, *supra* note 58 (stating that its Facebook page is a “moderated channel, meaning all comments will be reviewed for appropriate content”), with DHS, *supra* note 58 (explaining that DHS does not moderate or review comments before they are posted while reserving the right to remove comments after they are posted).

64. The Department of State will “not post comments that contain vulgar or abusive language.” Department of State, *supra* note 63. GSA will remove “vulgar or abusive language.” GSA, *supra* note 62. NASA states “irrelevant, inappropriate, or offensive comments may be edited and/or deleted[,]” and “[n]o profanity.” NASA, *supra* note 61. DHS will remove “profanity,” as well as “offensive terms that target specific ethnic or racial groups.” DHS, *supra* note 58. The USDA will not post “abusive, profane, or vulgar language.” *USDA Comment Policy*, *supra* note 57. HHS prohibits “personal attacks, profanity, and aggressive behavior,” as well as “[i]nstigating arguments in a disrespectful way.” HHS, *supra* note 63. Veterans Affairs will remove “abusive or vulgar language.” VA, *supra* note 63. The SBA will delete “profanity, implied profanity, obscenity or vulgarity.” SBA, *supra* note 59. The Department of Commerce will not post comments that “contain vulgar language.” COMMERCE.GOV, *supra* note 62. The EPA will not post comments that “contain obscene, indecent, or profane language.” EPA, *supra* note 62. DOD bars “vulgar or abusive language.” DOD, *supra* note 60. The SSA does not mention offensive language. SSA, *supra* note 63.

65. The Department of State will not post “offensive terms that target specific ethnic or racial groups.” Department of State, *supra* note 63. DHS will remove comments that “contain offensive terms that target specific ethnic or racial groups.” DHS, *supra* note 58. The USDA will not post comments that “include offensive language targeting specific ethnic or racial groups.” USDA, *supra* note 62. The EPA will delete comments that “contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability.” EPA, *supra* note 62. DOD will delete comments that contain “hate speech or offensive language targeting any specific demographic.” DOD, *supra* note 62. The Department of Commerce will not post comments that contain “offensive terms that target specific ethnic or racial groups.” COMMERCE.GOV, *supra* note 62. The SSA will delete comments that contain “discriminatory language (including hate speech) based on race, national origin, age, gender, sexual orientation, religion or disability.” SSA, *supra* note 63. The SBA will delete “defamation to a person or group of people.” SBA, *supra* note 63. The GSA will delete comments that contain “offensive terms targeting individuals or groups.” GSA, *supra* note 62. Though not an executive branch agency or department, GAO may delete comments that contain “offensive terms or statements targeting individuals or groups.” *Government Accountability Office Facebook Terms of Use*, https://www.facebook.com/usgao/app_250336418365488 (last visited May 13, 2013). FEMA will delete “abusive or vulgar language.” FEMA, *supra* note 58.

66. The EPA will delete comments that “contain hate speech directed at race, color, sex, sexual orientation, national origin, ethnicity, age, religion, or disability.” EPA, *supra* note 62. DOD will delete comments that contain “hate speech or offensive language targeting any specific demographic.” DOD, *supra* note 62.

again approaches vary. Some agencies will delete off-topic comments, while others will delete comments considered “far off-topic.”⁶⁷ Other agency policies simply encourage the public to submit on-topic comments.

The multifarious variations among the eleven agencies with comment policies, not to mention the agencies which have no comment policy, cause one to wonder which agencies are correctly following First Amendment doctrine and which may potentially be violating a citizen’s right to free speech and expression. Do “otherwise objectionable” or “inciting hate” include a comment that mentions or praises the Confederate States of America? In that case, federal agencies would be at odds with the Fourth Circuit.⁶⁸ Agencies that have no comment policy and leave offensive and vulgar comments posted certainly do not want to be seen to be endorsing hateful or offensive speech. Intriguingly, no comment policy mentions religion or religious speech. The government cannot endorse religion or religious beliefs,⁶⁹ and should an agency believe that leaving comments posted amounts to endorsement, as many seem to think based on comment policies enjoining vulgar and offensive speech, avoiding endorsement might lead an agency to delete or refuse to post such a comment. In attempting to follow the Establishment Clause of the First Amendment, the agency may find itself in the unenviable position of violating two other First Amendment Clauses, the citizen commenter’s rights to free speech and free exercise of religion. The answers to such conundrums are not straightforward. First Amendment jurisprudence is not celebrated for its lucidity, but it is the only place to start.

67. The Department of State and VA will not post “off topic” comments. Department of State, *supra* note 63; VA, *supra* note 63. NASA will delete or edit “irrelevant” comments. NASA, *supra* note 61. USDA and Commerce will not post comments that “are far off-topic.” COMMERCE.GOV, *supra* note 62; USDA, *supra* note 57. DOD, HHS, and GSA merely encourage the public to post on-topic or relevant comments. DOD, *supra* note 60; HHS, *supra* note 63; GSA, *supra* note 62. GAO will remove “[m]ultiple successive off-topic posts by a single user.” GAO, *supra* note 65.

68. *Sons of Confederate Veterans, Inc. v. Comm’r of the Va. Dep’t of Motor Vehicles (Sons of Confederate Veterans II)*, 288 F.3d 610, 621–22, 626 (4th Cir. 2002) (holding that the State of Virginia’s refusal to allow a Confederate flag on its “Sons of Confederate Veterans” specialty license plates is unconstitutional viewpoint discrimination because the license plates are private speech).

69. “Congress shall make no law respecting an establishment of religion . . .” U.S. CONST. amend. I.

II. THE DOCTRINAL AND THEORETICAL FRAMEWORK

A. *Theories of Free Speech and Neo-Roman Liberty*

Why the Constitution protects freedom of speech has spurred a long train of theories. Like so much else in modern constitutional thinking, we owe Oliver Wendell Holmes for the most suggestive and enduring theory of the purpose of the Free Speech Clause. In a series of dissents, long celebrated as much for their rhetorical style as for their legal substance, Holmes argued that the central purpose of the Free Speech Clause is to protect the battleground of combative theories from which truth will emerge victorious.⁷⁰ Without the vivifying effects of competition, truth might remain half-grown or hidden in shadows. This provocative fusion of social Darwinism and a major argument of John Stuart Mill's *On Liberty* would later be christened the "marketplace of ideas"—a phrase redolent of a central tenet of laissez-faire capitalism that has exercised a hold over the collective legal imagination.⁷¹ In the 1960s, due to the influence of Alexander Meiklejohn, civic republicanism was the prism through which the Free Speech Clause could be appreciated.⁷² The extent to which the "Madisonian tradition," as identified by Cass Sunstein, can be described as "civic republican" is, of course, open to debate. The emphasis on civic virtue and the quality of public deliberation on political questions bears much in common with the civic republican tradition. However, the Madisonian emphasis on the cultivation of informed deliberation among citizens in order to improve the selection of leaders through election in a representative republic, rather than on the citizenry participating directly in government, is a product of Madison's modernization of republics through the use of representation. Nevertheless, the vision of citizens engaged in self-government, which harkens back to ancient Athenians disputing and deliberating in the agora, can be discerned in the Court's opinion in *New*

70. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

71. JOHN STUART MILL, *On Liberty*, in *ON LIBERTY AND OTHER ESSAYS* 24–26, 40–45, 59 (John Gray ed., Oxford Univ. Press 1998) (1859) (arguing the most credible beliefs are the ones continually open to challenge and that unless truth is debated it will not be comprehended but taken on faith).

72. See CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* xvi–xvii (1993) (tracing a lineage for Meiklejohn's work on the First Amendment in Louis Brandeis and ultimately in James Madison, claiming all as examples of the "Madisonian Tradition" of First Amendment theory in contrast to the Holmesian "marketplace" theory); see also *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) (describing the Founding Fathers' view of freedom of speech as a liberty used as both a means, in discourse, and an end, in spreading truth).

York Times Co. v. Sullivan.⁷³ Of late, the civic republican and liberal theories have merged in the work of Robert Post, who argues that the purpose of the Free Speech Clause is to preserve the structures and processes of communication necessary for democracy.⁷⁴ Other approaches to free speech suggest its animating principle is individual self-realization, or the cultivation of the ability to think for oneself—along the lines of Kantian autonomy, or as a check on government power.⁷⁵ Also worth mentioning is the recurring theme of suspicion of government, which manifests itself in a skepticism toward official discretion, a conviction that vagueness is anathema and that chilling effects are the delicate nerve ends of tyranny, that haunts First Amendment thought. The fear that freedom of speech is perennially vulnerable to subversion translates into a preference for general principles and capacious rules.⁷⁶

The cursory sketch above belies the deep disagreement about the history and purpose of the Free Speech Clause and its relationship to democratic self-government that pervades contemporary scholarship. The

73. 376 U.S. 254, 270 (1964) (“[D]ebate on public issues should be uninhibited, robust, and wide-open.”); see also ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 75 (1960) (“The primary purpose of the [Free Speech Clause] is . . . that all the citizens shall, so far as possible, understand the issues which bear upon our common life. That is why no idea, no opinion, no doubt, no belief, no counterbelief, no relevant information, may be kept from them.”); Balkin, *supra* note 13, at 32 (referring to the civic republican approach as “progressivist/republican”).

74. See generally Robert C. Post, *A Progressive Perspective on Freedom of Speech*, in *THE CONSTITUTION IN 2020* 179 (2009); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2366–69 (2000); Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267, 279–82 (1991).

75. See, e.g., Aditi Bagchi, *Deliberative Autonomy and Legitimate State Purpose Under the First Amendment*, 68 ALB. L. REV. 815, 815–16 (2005) (arguing that the government must not deny individuals the right to engage in independent deliberation about their own opinions); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (describing the “checking argument”); Steven J. Heyman, *Spheres of Autonomy: Reforming the Content Neutrality Doctrine in First Amendment Jurisprudence*, 10 WM. & MARY BILL RTS. J. 647, 653 (2002) (establishing that the doctrine of content neutrality is grounded in the normative principle of autonomy, which means the government may not interfere with individual exercise of autonomy or with the collective autonomy of citizens through restrictions on speech or debate); Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 616–19 (1982) (arguing that the First Amendment’s primary purpose is to protect self-realization).

76. See Frederick Schauer, Comment, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 111 (1998) (writing that the ideas central to First Amendment thinking and the slippery slope rhetoric that characterizes First Amendment culture “all exemplify an attitude that distrusts particularity and insists that rules that are simultaneously broad and concrete are the essential conditions of a strong First Amendment”). Given such an attitude, it is to be expected “that a medium- or institution-specific First Amendment jurisprudence is thought inconsistent with the First Amendment itself.” *Id.*

conventional understanding among most judges and legal scholars is that the Free Speech Clause guards the dialogue, debate, and deliberation necessary for democracy.⁷⁷ An individual's right to free speech is a means to a broader political purpose, be that the pursuit of truth or the discourse required for democracy to function properly. This view, variously called "democratic,"⁷⁸ "collectivist,"⁷⁹ and "progressivist,"⁸⁰ claims a special provenance, finding its origins in John Milton's stirring *Areopagitica*.⁸¹ James Madison figures prominently as the founder of the tradition, which went into abeyance, then reappeared after the First World War in the scholarly writing of Zechariah Chafee and in the dissents, and later the opinions, of Justices Oliver Wendell Holmes and John Louis Brandeis.⁸² The democratic/progressive approach appeared to influence the Supreme Court's jurisprudence in succeeding decades and received renewed scholarly attention in the influential work of philosopher Alexander Meiklejohn.⁸³ According to Meiklejohn, the Free Speech Clause "has no concern about the needs of many men to express their opinions."⁸⁴ Rather, the purpose of the First Amendment is to protect "the thinking process of the community,"⁸⁵ which in turn provides that the government will make "wise decisions" based on the votes of its citizens.⁸⁶ Furthermore, it is possible to assess the deliberative discourse of the community. The traditional town meeting, with its procedural rules and purposeful objective, provides the standard for measuring the quality of discussion, and the regulation of speech in light of that standard.⁸⁷ Meiklejohn sharply distinguishes his town meeting model from the ebullient and chaotic

77. See, e.g., STEPHEN BREYER, *ACTIVE LIBERTY: INTERPRETING A DEMOCRATIC CONSTITUTION* 39 (2008); ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948) [hereinafter MEIKLEJOHN, *FREE SPEECH*]; MEIKLEJOHN, *supra* note 73; SUNSTEIN, *supra* note 72; Alexander Meiklejohn, *Free Speech and its Relation to Self-Government*, in *IDEAS OF THE FIRST AMENDMENT* 752–53 (Vincent Blasi ed., 2d ed. 2006); Cass R. Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 262 (1992).

78. Charles L. Barzun, *Politics or Principle? Zechariah Chafee and the Social Interest in Free Speech*, 2007 BYU L. REV. 259, 262.

79. Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1109 (1993).

80. Balkin, *supra* note 13, at 29.

81. See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

82. *Id.*

83. MEIKLEJOHN, *FREE SPEECH*, *supra* note 77; MEIKLEJOHN, *supra* note 73.

84. MEIKLEJOHN, *supra* note 73, at 55 (internal quotation marks omitted).

85. *Id.* at 27.

86. *Id.* at 26.

87. *Id.* at 24–26.

counter-model of Hyde Park with its tumultuous chatter.⁸⁸ Speech in support of public decisionmaking is essential to the First Amendment, not the street corner agitator or the amateur park orator.

Of late, legal scholars as distinguished as Cass Sunstein and Owen Fiss have promoted theories of the First Amendment that owe a debt to Meiklejohn's version of the democratic free speech tradition. Sunstein has argued that the First Amendment protects democratic self-government for which free speech rights are instrumental and should be regulated in order to enhance the "quality and diversity" of public discourse.⁸⁹ Speaking of his vision of the First Amendment, Sunstein writes, "Instead it emphasizes the need to promote democratic self-government by ensuring that people are presented with a broad diversity of views about public issues."⁹⁰ In a similar vein, Fiss would substitute the "enrichment of public debate" for the "protection of autonomy" so that the Free Speech Clause would permit the state to "restrict political expenditures by the rich or corporations" to let the voices of the less wealthy be heard, or to prioritize the right of citizens to protest at privately owned public shopping centers over the property rights of owners.⁹¹ The work of Sunstein and Fiss exemplify a broader trend in scholarship, which brings attention to the impoverished state of public discourse and seeks remedies ranging from discrete and limited proposals for campaign finance reform to the regulation of hate speech and pornography by importing equal protection principles into free speech theory.⁹²

Lest we too readily accept the narrative, to which proponents and opponents of the democratic/progressive theory ascribe, that the justification for the Free Speech Clause along public interest lines dominates First Amendment jurisprudence and scholarship, Fiss has argued that individual autonomy pervades First Amendment doctrine and theory. "Under the [tradition] extolled by Kalven, the freedom of speech guaranteed by the first amendment amounts to a protection of autonomy—it is the shield around the speaker."⁹³ For Fiss, the unrelenting focus on the

88. *Id.* at 25.

89. Sunstein, *Free Speech Now*, *supra* note 77, at 263, 277.

90. *Id.* at 276 (explaining that the democratic theory would stress the need for people to receive diverse views on public issues rather than the "autonomy of broadcasters with current ownership rights").

91. Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1419–20 (1986).

92. See, e.g., Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Rae Langton, *Speech Acts and Unspeakable Acts*, 22 PHIL. & PUB. AFF. 293, 314 (1993); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 625–26 (1982).

93. Fiss, *supra* note 91, at 1409 (discussing the result of the doctrinal process of affording

individual and the state as censor is the legacy of classical liberalism.⁹⁴ To be clear, Fiss claims that the “tradition” in doctrine and theory protects autonomy for instrumental reasons, in order to guarantee robust debate, and the assumption that protecting autonomy will produce rich public debate has proven false. The point to be taken is the claim that the traditional democratic view does protect autonomy, and the “autonomy” that it protects is more precisely described as negative liberty: the democratic view “assumes that by leaving individuals alone, free from the menacing arm of the policeman, a full and fair consideration of all the issues will emerge.”⁹⁵ The problem for Fiss is that “collective self-determination” and autonomy are not complimentary, but in tension. The protection of autonomy, especially when used to shield powerful private institutions, “might not enrich, but rather impoverish, public debate and thus frustrate the democratic aspirations of the Tradition.”⁹⁶

Objecting to the incursion of equality into First Amendment theory, though sympathetic to the dysfunctions that distress Fiss, Robert Post finds the individual to be the foundation of free speech doctrine. “The ideal of autonomy essentially distinguishes First Amendment jurisprudence from other areas of constitutional law.”⁹⁷ Both Fiss and Post agree that the protection of the street corner speaker is the foundational principle of First Amendment jurisprudence, which remains preoccupied with the space between the speaker and the government to the exclusion of any other considerations. For Fiss, the focus on autonomy is a doctrinal error of profound consequence. Not so for Post, who argues instead that the principle of autonomy cannot be cleaved from collective self-determination as “it is intrinsically connected to democratic self-governance.”⁹⁸ As evidence for the doctrinal focus on autonomy, Post points to multiple First Amendment decisions that cannot be justified solely on a public interest

more and more protection to the street corner speaker as the rule against content discrimination).

94. *Id.* at 1413–14 (analyzing the impoverished free speech doctrine as ill-equipped to face the inequalities in resources and social structures that drown innumerable voices, suffocate meaningful debate, and make free speech a legal fiction for the majority of the population).

95. *Id.* at 1410; *see, e.g.*, ISAIAH BERLIN, *LIBERTY* 177 n.1 (Henry Hardy ed., 2002).

96. Fiss, *supra* note 91, at 1410, 1412 (“[I]n a capitalist society, the protection of autonomy will on the whole produce a public debate that is dominated by those who are economically powerful.”).

97. Post, *supra* note 79, at 1123.

98. Robert Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1524 (1997) (reviewing OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1996)).

rationale. When the Court prohibited restrictions on “offensive,”⁹⁹ “outrageous,”¹⁰⁰ or “insulting”¹⁰¹ speech, speech that cannot be construed as primarily deliberative or contributing to effective debate, it recognized that in the free speech arena the individual has a presumptive right against the government.¹⁰² It is not unworthy of mention that Meiklejohn criticized Chafee and Holmes, often classified as democratic instrumentalists in free speech, for including individual interest in the realm of the First Amendment doctrine and for excessive individualism respectively.¹⁰³

Despite the evidence that free speech doctrine has focused on the individual speaker, arguably to a fault, a flurry of scholarship in recent decades casting itself as revisionist claims that individual autonomy should be the sole justification for free speech protections.¹⁰⁴ Yet, autonomy can be an amorphous concept in legal scholarship.¹⁰⁵ Suffice it to say that autonomy is related to, but is not the equivalent of, freedom—either positive or negative.¹⁰⁶ While the conventional understanding of autonomy as self-government or self-mastery bears something in common with positive freedom as discussed by Isaiah Berlin, and as such embraces both positive and negative liberty, multiple discussions of autonomy in legal scholarship appear to equate autonomy solely with negative liberty understood as the absence of constraint.¹⁰⁷ As such, the “shield around the

99. *Cohen v. California*, 403 U.S. 15, 16 (1971).

100. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 53 (1988).

101. *Boos v. Barry*, 485 U.S. 312, 315–16, 318–22 (1988).

102. “Traditional First Amendment jurisprudence uses the ideal of autonomy to insulate the processes of collective self-determination from such preemption.” Post, *supra* note 79, at 1122.

103. MEIKLEJOHN, *supra* note 73, at 55, 57.

104. See Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 236 (1992); John O. McGinnis, *The Once and Future Property-Based Vision of the First Amendment*, 63 U. CHI. L. REV. 49, 51–52 (1996); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 334–35 (1991).

105. See Richard H. Fallon Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875, 875–76 (1994). Fallon argues that the two leading concepts of autonomy in legal scholarship, positive and negative liberty, are simplistic. *Id.* at 875–77. This is quite true because autonomy is not coterminous with either positive or negative liberty.

106. Provided one believes the distinction Berlin made between positive and negative liberty is one worth making. For the argument that both positive and negative liberty assume the absence of constraint, and that the additional qualities Berlin attributed to his concept of positive freedom have little to do with freedom, see generally Eric Nelson, *Liberty: One Concept Too Many?*, 33 POL. THEORY 58–59 (2005).

107. Autonomy is a concept that underlies theories of freedom. Classical liberals who believe that liberty is only the absence of constraint also believe that the will is autonomous so long as it is free of external coercion or the threat of coercion.

speaker” Fiss described as autonomy is more accurately captured by the term “negative liberty.” “Positive liberty” by contrast is more than the absence of external and internal constraints. It is self-realization, or more accurately, self-perfection.¹⁰⁸ Given that, it may be helpful to characterize this vein of legal scholarship as individualist or by reference to the specific concept of the freedom each espouses. Many proponents of the autonomy/individualist view or varieties thereof take umbrage at the free speech tradition’s emphasis on “self-governance” for treating an individual’s right to speech as instrumental to the furtherance of a public good. Not unsurprisingly, this revisionist view offers its own narrative of decline and fall. Progressive era jurists, long considered heroes of free speech on both individualist and democratic grounds, devised an unprecedented rationale for free speech based on public interest and obscured the original understanding of free speech as a natural property right of the individual.¹⁰⁹ Alarmed that the self-governance theory of free speech offers only a “contingent liberty,” John McGinnis has argued that “the right of free speech could be understood as intimately connected to the [individual’s] natural right of property.”¹¹⁰ Similarly, Mark Graber has argued that a “conservative libertarian” nineteenth century jurisprudence defended free speech on individualist grounds.¹¹¹

In multiple articles, Robert Post has attempted to reconcile the individualist and democratic views suggesting that free speech doctrine is grounded in autonomy, and in that manner, traditional doctrine protects what the Court has termed public discourse, or as Post describes it “the communicative process” constitutive of democratic identity.¹¹² This theory

108. Quentin Skinner, *A Third Concept of Liberty*, 117 PROC. BRIT. ACAD. 237, 239–40 (2002).

109. See, e.g., MARK A. GRABER, *TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM* (1991); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1302 (1998); McGinnis, *supra* note 104, at 50–51. For an argument that Chafee’s free speech theory developed from the private law of defamation and its protections of speech rather than an external ideology, see generally Barzun, *supra* note 78.

110. McGinnis, *supra* note 104, at 64. McGinnis asserts that James Madison’s National Gazette essay, *Property*, published on March 27, 1792, “make[s] it obvious that he adapted Lockean principles to defend freedom of speech on the grounds that it was an aspect of the individual’s property right in his information.” *Id.* at 59–60 & n.45.

111. GRABER, *supra* note 109.

112. Post, *supra* note 79, at 1116. While other scholars focused on deliberation or good decisionmaking, Post looked to doctrine and its use of the more capacious term “public discourse,” and cast a wider net. With its nod to Rawls and Habermas, Post’s notion of communicative processes is more wide-ranging than the deliberation or decisionmaking common in the democratic/public interest theory. Through participation in the formation of public opinion and its unending discussion about national identity, a public opinion that

acknowledges the link between free speech and democratic self-government, but does so in a manner that refuses to treat autonomy instrumentally. Rather, autonomy is “intrinsically connected to democratic self-governance.”¹¹³ However, Post’s conception of the autonomy embodied in First Amendment doctrine is a capacious one. He freights it with active participation, which Fiss, by insisting the autonomy protected was purely negative liberty, sedulously avoided.¹¹⁴ This expansive notion of autonomy, autonomy “properly understood,” makes his fusion vulnerable to those insisting that free speech has roots in property rights having nothing to do with participation in civil society discourse or formalized deliberation.¹¹⁵

Delineating how the history of ideas relates to analytic theory and to legal doctrine is a complex piece of intellectual fretwork beyond the scope of this Article; nevertheless, history may serve to clarify the unresolved relationship between self-government and free speech in particular by offering an alternative account of negative liberty.¹¹⁶

After J.G.A. Pocock’s magisterial *The Machiavellian Moment: Florentine Political Thought and the Atlantic Republican Tradition* transformed the discipline, no student of American political thought doubts that the Atlantic republican tradition, embodied in the English Civil War and American Founding, owes a critical debt to the political thought of the Italian Renaissance.¹¹⁷ The traditional history of free speech in legal scholarship begins with John Milton’s *Aeropagitica*, but that does not go back far enough. The connection between free speech and popular government was a familiar trope in the Renaissance, beginning when Florentine civic humanists of the early fourteenth century theorized and defended the value of their unusual political system, which offered its citizens liberty and the opportunity to participate in rule.¹¹⁸ Florentine liberty had two meanings,

sets the agenda for deliberation, akin to the chatter in coffee shops and salons so critical to the Enlightenment, democratic self-government acquires legitimacy.

113. Post, *supra* note 98, at 1524.

114. *Id.* at 1526. “Participation is at the core of the ‘free-speech tradition’ that *Liberalism Divided* repudiates. The tradition renders the American citizen as active.” *Id.*

115. Post, *supra* note 79, at 1122.

116. I will confine myself to making points that are relevant only because they have not, to my knowledge, appeared before in legal literature.

117. J.G.A. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* (1975).

118. HANS BARON, *THE CRISIS OF THE EARLY ITALIAN RENAISSANCE: CIVIC HUMANISM AND REPUBLICAN LIBERTY IN AN AGE OF CLASSICISM AND TYRANNY* (1966). Quentin Skinner has argued that the republican ideology civic humanists developed in the early *quattrocento* had roots in older traditions of rhetoric and scholastic thought. QUENTIN SKINNER, *THE FOUNDATIONS OF MODERN POLITICAL THOUGHT I: THE RENAISSANCE*

the political independence of the city from an overlord, and a republican constitution that assured freedom of speech and equality under law.¹¹⁹ In 1479, freedom of speech as “the right to say openly what [one] thinks” was essential to the Florentine definition of liberty.¹²⁰ Free speech in Florence accounts for the low reputation of ordinary people according to the Florentine Republic’s most famous, or infamous, son, “everyone speaks ill of people without fear and freely, even while they reign; princes are always spoken of with a thousand fears and a thousand hesitations.”¹²¹ Niccolò Machiavelli warned generations of readers that the ability to speak freely vanishes when “only the powerful propose laws, not for the common freedom, but for their own power; and for fear of them nobody can speak against them.”¹²²

Moreover, Renaissance political theorists believed that liberty was only possible in republics. Subjects of princes, monarchs, or potentates could never be free in any sense of the word. We, today, associate “republican freedom” with active participation—so it seems natural to assert such freedom cannot be enjoyed in a monarchy—but Florentines were making a very different argument. Liberty, meaning the freedom to speak, a classic instance of negative liberty—liberty as freedom from constraint—could only be enjoyed in a self-governing republic. This argument is based on a concept of liberty fundamental to Roman law and its distinction between master and slave.¹²³ Liberty is not only the absence of interference, but the absence of dependence on the will of another. This “alternative vision of negative liberty” familiar to Roman political theory appears in the medieval common law texts of Bracton and Littleton, in addition to Florentine political thought, and was central to the defense of the commonwealth

(1978).

119. Alison Brown, *De-masking Renaissance Republicanism*, in *RENAISSANCE CIVIC HUMANISM: REAPPRAISALS AND REFLECTIONS* 179, 187 (James Hankins ed., 2000).

120. Election by lot, the right to attend public assemblies, and equality that involves preventing “the rich from oppressing the poor or the poor, for their part, from violently robbing the rich,” were also essential to the definition of liberty. Alamanno Rinuccini, *Liberty*, in *HUMANISM AND LIBERTY: WRITINGS ON FREEDOM FROM FIFTEENTH CENTURY FLORENCE* 204 (Renee Neu Watkins ed., trans., Univ. of South Carolina Press 1978).

121. NICCOLÒ MACHIAVELLI, *DISCOURSES ON LIVY* 119 (Harvey C. Mansfield & Nathan Tarcov trans., Univ. of Chicago Press 1996).

122. *Id.* at 50–51.

123. “Certainly the great divide in the law of persons is this: all men are either free men or slaves.” *THE DIGEST OF JUSTINIAN*, I.V.3.35 (Theodor Mommsen & Paul Krueger eds., Alan Watson trans., Univ. of Pennsylvania Press 1985). As Machiavelli writes of the benefits of living in a free republic, “[h]e does not fear that his patrimony will be taken away, and he knows not only that [his children] are born free and not slaves, but that they can, through their virtue, become princes.” MACHIAVELLI, *supra* note 121, at 132.

during the English Civil War.¹²⁴

The eminent historian of political thought, Quentin Skinner, has excavated this concept of liberty, which he terms “neo-Roman,” and charted its course up to the English Civil War. Liberty as non-dependence means that liberty is more than the absence of interference or the threat thereof. It means the absence of dependence on the will of someone else and, in addition, the absence of the awareness of such dependence, because even the awareness of the tentative status of one’s rights restricts one’s actions.¹²⁵ This is an alternative account of the negative liberty native to classical liberalism because its focus is not on being free to be one’s true nature or participate in politics, but on the absence of any constraint on individual action.¹²⁶ This way of thinking about freedom expands the horizon of possible constraints on action. Thus, at the start of hostilities with the Crown in the early seventeenth century, Parliamentarians argued that as long as their rights and liberties were dependent on the prerogative of the king, such rights were just licenses or privileges, and they were merely servants.¹²⁷ “They insisted, in other words, that freedom is restricted not only by actual interference or the threat of it, but also by the mere knowledge that we are living in dependence on the goodwill of others.”¹²⁸

The intimate connection between non-dependence and free speech was made early and often. Sallust, and above all Tacitus, analyzed how being aware of dependence on an arbitrary power constrains speech. First, an individual will refrain from speech or actions that might be misconstrued. John Milton repeatedly quoted and paraphrased Sallust’s warning that the subjects of princes must be cautious and hide their talents.¹²⁹ Second, as Tacitus relates, an individual will be unable to avoid saying things he does not believe.¹³⁰ The only alternative to flattery is suicide or silence.¹³¹

124. Skinner, *supra* note 108, at 247–48. The common law treatises of Henry de Bracton and Sir Thomas Littleton exemplify the analysis of freedom and slavery that commences the *Digest* of Roman law. *Id.* at 248.

125. *Id.* at 247, 254, 256–57.

126. Neo-Roman negative liberty is the absence of interference and the absence of the awareness of dependence on an arbitrary power. One cannot enjoy the freedom to speak, move, or write if at any time that freedom might be withdrawn; even the awareness of such a situation leads to self-censorship. The intuition at the core of this concept of negative freedom is that freedom can be limited by servitude as well as by coercive threat. *Id.* at 257.

127. The objection developed in the Petition of Right of 1628 is that if the Crown possesses a prerogative right in times of necessity, property and personal liberties “are held not ‘of right’ but merely ‘of grace,’ since the crown is claiming that it can take them away without injustice at any time.” *Id.* at 250.

128. *Id.* at 247.

129. John Milton, *The Tenure of Kings and Magistrates*, in POLITICAL WRITINGS 3, 3 (1991).

130. CORNELIUS TACITUS, THE ANNALES OF CORNELIUS TACITUS, THE DESCRIPTION

The point is that even if one is not directly threatened or constrained, the awareness of dependency limits one's actions. This analysis of the stultifying effects of dependency, which appear most clearly in the constraints on freedom of speech, greatly influenced the republican parliamentarians who overthrew the government of Charles I.¹³² The writings of James Harrington, Algernon Sidney, and John Milton, as well as the great Whig and Stuart parliamentary debates of the seventeenth century, were well known to the American founders, many of whom were also directly or indirectly familiar with Roman and Florentine political thought.¹³³ They inherited the claim that only in a self-governing republic will speech be truly free, because only there will the exercise of such a right not be dependent on the arbitrary will of another.¹³⁴

How this historical digression bears on contemporary debates about free speech theory is not immediately apparent. It does tell us something about how one might reconcile individual freedom of speech and democratic self-government in First Amendment theory. To recapitulate, the criticism of the democratic view is that it treats an individual's freedom of speech as instrumental to the broader purpose of democratic self-government. The individualist/autonomy view recognizes an individual's right to speak freely as a core moral imperative, but it discounts the precise way an individual

OF GERMANIE 84 (1591).

131. *Id.* at 125, 139.

132. Skinner, *supra* note 104, at 257. The argument that dependence starves liberty appears in the debates of 1628 over the right to imprison without cause, and in debates from the 1610s to the 1640s over the prerogative right to impose taxes without parliamentary consent. *Id.* at 251. Furthermore, Henry Parker used the neo-Roman argument to great effect in his response to Charles I's claim that the veto, "the Negative Voice," was a prerogative right. *Id.* at 254. Defenses of parliament's decision to take military action in 1642 routinely argued that if the king is allowed the veto, England will consist only of a king, a parliament, and slaves. *Id.*

133. See generally BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1992); PAUL A. RAHE, *REPUBLICS ANCIENT AND MODERN: CLASSICAL REPUBLICANISM AND THE AMERICAN REVOLUTION* (1992); GORDON S. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776–1787* (1969).

134. Speech, as well as property and conscience and so forth. Again, the claim made is not merely that in a republic speech will be free from interference from another because a monarch could provide such a guarantee. The claim is that in a republic no one will be able to suppress or regulate speech on an arbitrary basis. Only in a republic of equal citizens under the rule of law is arbitrary power likely to be minimized. See PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (1997). As far as what is meant by arbitrary power, it can be defined as power unlimited by established procedures, such as the rule of law, or substantively by its lack of consideration of the needs and views of affected individuals. See *id.* at 56. It may be more accurate to state that this is a claim eighteenth-century Americans may have inherited. Hobbes's account of negative liberty as purely freedom from external interference dominated subsequent discourse.

right relates to democratic self-government. Dismissing democratic self-government as instrumental to the pursuit of private rights, however, cannot account for extensive areas of First Amendment doctrine that emphasize protection of speech on public grounds.¹³⁵ Robert Post has gone to great lengths to discipline the democratic view's instrumentalism, "collective self-determination thus entails the value of individual autonomy."¹³⁶ True, but history imparts the lesson that autonomy, or to be more accurate negative liberty as non-dependence, if it is to be real, entails collective self-governance.¹³⁷ Of this, James Madison was well aware when he wrote that, in the new republic, Americans were no longer subjects of the crown but citizens with sovereignty.¹³⁸ And so Justice Brandeis articulated the relationship between individual liberty and democratic self-government in the context of free speech when writing of the Founders of the American Republic, "They valued liberty both as an end and as a means."¹³⁹

Individual liberty and democratic self-government are bound to one another in First Amendment theory and in doctrine.¹⁴⁰ Both are valued as ends, and as means. "Individual human dignity" as Justice Harlan described it, is not instrumental to the purpose of self-government, but the reason for it. Thus, the First Amendment protects more than informed

135. Post argues that these areas of doctrine "express the normative aspirations" of democracy "which seeks to sustain the value of self-government by reconciling individual and collective autonomy through the medium of public discourse." Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995).

136. Post, *supra* note 98, at 1525. Individualists attuned to negative freedom may not ascribe to Post's capacious notion of autonomy, which contains elements of positive and negative liberty. In addition, Post's talkative public sphere "public discourse," which performs the mediating function between individual and collective, assumes an absence of dependence. A republican would argue that civil society may contain arbitrary private power, which forces other people into a state of dependence. No free and equal talkative public sphere can exist prior to the institution of a democratic self-government, and the rule of law prevails. As Locke observed, "Where there is no law, there is no freedom." JOHN LOCKE, TWO TREATISES OF GOVERNMENT 242 (1690).

137. Put another way, the lesson is that an individual can only enjoy full negative liberty if one is free from interference and free from dependence on someone else or even the awareness of it. Liberal freedoms are only protected in a free state where individuals participate in self-government.

138. 4 ELLIOTT'S DEBATES ON THE FEDERAL CONSTITUTION (1876). Individual Americans were no longer dependent on the will of an external sovereign.

139. *Whitney v. California*, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring). Liberty, arguably, as non-interference and non-dependence. Brandeis also states that the Founders knew "the greatest menace to freedom is an inert people," a statement with which Tacitus would surely have agreed.

140. This does not mean there are not portions of First Amendment doctrine outside the sphere of public discourse where other values come into play.

decisionmaking, the pursuit of truth or rational deliberation; it protects the individual: “The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes.”¹⁴¹ The special solicitude the doctrine pays to public discourse, participation, and debate cannot be discounted, however, and this solicitude is justified because it serves self-government. “[T]he First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.”¹⁴² First Amendment doctrine is republican in a profound sense, in its awareness that the enjoyment of individual liberty depends on a republican state, which in turn depends on an engaged and talkative citizenry.

Recognizing that both individual liberty and democratic self-government are intertwined in First Amendment doctrine does not entail that any specific law or regulation is constitutionally valid or invalid. The point I wish to make is that an exclusive focus on one value at the expense of the other impoverishes any analysis. Neither individual liberty nor the interest of collective self-governance can be ruled out in assessing constitutionality.¹⁴³ The historical apprehension that freedom is constrained by dependence on the will of another in addition to interference will appear again to inform the discussion of which doctrine judges and agencies should choose when addressing free speech issues on social media sites—the public forum doctrine or government speech.

B. *The Public Forum Doctrine*

In the early years of the twentieth century the Supreme Court viewed questions of free speech on public property through the *pince nez* of the common law, holding that the government possessed property rights over

141. *Terminiello v. City of Chi.*, 337 U.S. 1, 4 (1949).

142. *Globe Newspaper, Co. v. Superior Court of Norfolk*, 457 U.S. 596, 604 (1982) (citing *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940)); *see, e.g.*, *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled by our decisions.”); *Roth v. United States*, 354 U.S. 476, 484 (1957) (commenting that the First Amendment’s Free Speech Clause “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people”); *Stromberg v. California*, 283 U.S. 359, 369 (1931) (“The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”).

143. At times both values may appear to operate at cross purposes, but neither should be dispensed with lightly.

public places and, like a private owner, could decide when and how its property was used.¹⁴⁴ Needless to say, in practice this approach did not lend itself to a robust recognition of citizens' free speech rights.¹⁴⁵ Then, in 1939, came *Hague v. CIO*, which recognized that citizens' right to exercise freedom of speech in streets and parks overrode the government's common law property rights.¹⁴⁶ "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."¹⁴⁷ In succeeding years, as the Court struck down ordinances banning leafleting on streets and sidewalks, a new doctrine began to take shape, more abstract, rigorous, and friendly to free speech than the old common law view.¹⁴⁸ Explicitly it gave citizens the presumptive right to exercise rights to free speech and expression on streets, sidewalks, and parks, public places dedicated to the exchange of views and discussion by citizens since time immemorial, subject to time, place, and manner restrictions.¹⁴⁹ From 1972, when the Court first used the term "public forum" in *Mosley*, to 1976's *Greer* decision, the doctrine matured. Essentially, the Court held some public properties have special status; this status is created by traditional usage or a decision by the government to make those properties accessible to such activity.¹⁵⁰ Never entirely abandoned, the concept of easement and old

144. Steven G. Gey, *Reopening the Public Forum from Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1539 (1998).

145. In *Davis v. Massachusetts*, the Court upheld a conviction for making a public speech in the Boston Common without obtaining a permit. 167 U.S. 43, 47 (1897). The city argued that it had proprietary rights over the common, therefore, requiring a citizen to obtain a permit was constitutional.

146. *Hague v. CIO*, 307 U.S. 496, 515–16 (1939). The Hague plurality did not explicitly reject the common law governmental property rights approach. Instead, the Court recognized that the free speech clause gave citizens an easement of sorts. *See id.*

147. *Id.* at 515.

148. *See Schneider v. New Jersey*, 308 U.S. 147 (1939). In *Schneider*, the Court held that a local government could not prohibit the distribution of pamphlets on public streets and sidewalks. *Id.* at 162. The Court deciding *Jamison v. Texas*, 318 U.S. 413, 417 (1943), held a similar regulation unconstitutional. Whether the public forum doctrine took shape in the 1940s or later in the 1970s is the subject of some debate. *See Gey, supra* note 144, at 1539–42 for the first view and Robert Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713 (1987), for the latter.

149. *Grayned v. City of Rockford*, 408 U.S. 104, 115–17 (1972).

150. *See Post, supra* note 148, at 1731–32. *Grayned*, as Post sees it, in subjecting all government property to one uniform First Amendment test (the "basic incompatibility test") attempted to dispense with classifications of public space as proprietary or non-proprietary or government as property owner or not in order to focus on the First Amendment principle of free discussion. *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972), which found a Chicago ordinance prohibiting picketing on a public street near a public school

common law proprietary rights lurked in the background of successive public forum cases, and returned in *Greer v. Spock*, which would influence the formulation of the public forum doctrine that continues to hold sway.¹⁵¹

Perry Education Ass'n v. Perry Local Educators Ass'n offered the Court the opportunity to stop adding a room here and there and organize its developing public forum jurisprudence into an immobile tripartite doctrine to be deployed whenever courts were asked to review questions of state regulation of speech on public property.¹⁵² The first level consists of traditional public fora, where the Court guarantees the strongest First Amendment protection to speech and expression.¹⁵³ In parks, streets, and on sidewalks, a content-based restriction of speech is permissible only if it meets a strict scrutiny test, meaning the restriction is “necessary to serve a compelling state interest,” and is “narrowly drawn to achieve that end.”¹⁵⁴ Restrictions on viewpoint are likewise forbidden.¹⁵⁵ Only limited time, place, and manner restrictions may be imposed to prevent incompatible activities, such as two parades marching on a street at the same time.

The next level comprises the designated or limited public forum: “public property which the State has opened for use by the public as a place for expressive activity.”¹⁵⁶ As in a traditional public forum, any content-based restriction must satisfy strict scrutiny. “[A] content-based prohibition must

unconstitutional, replaced proprietary and non-proprietary with a similar distinction between a public forum and other government property (forums that are not public) with different rules applying to each. *See id.* at 94, 96, 99. The purpose may have been to recognize that some public places have a special connection to communication and such a connection warrants a more rigorous First Amendment analysis.

151. *Greer v. Spock*, 424 U.S. 828, 838 (1976), defined a public forum as government property that had “traditionally served” as a place for free speech and expression rather than adopting *Mosley’s* definition of a public forum as one that is “opened up to assembly or speaking.” *See Mosley*, 406 U.S. at 96. In *Grayned*, the Court analyzed whether speech outside a public school was incompatible with the school’s primary use as an educational institution. “The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.” 408 U.S. at 116. *Greer* focused not on whether a free speech activity would interfere with the functioning of a public place, but on various kinds of government property, concluding that the public areas on military bases were government property reserved for functions other than speech, hence they were not public forums. *See Post, supra* note 148, at 1740.

152. 460 U.S. 37 (1983).

153. *Id.* at 45 (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

154. *Id.* (citing *Carey v. Brown*, 447 U.S. 455, 461–62 (1980)). Courts have not recognized any additional traditional public fora and exactly what time constitutes immemorial has not been fully explained.

155. *Carey*, 447 U.S. at 463.

156. *Perry*, 460 U.S. at 45; *see also* *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985).

be narrowly drawn to effectuate a compelling state interest.”¹⁵⁷ Thus, “[g]overnment restrictions on speech in a designated public forum are subject to the same strict scrutiny as restrictions in a traditional public forum.”¹⁵⁸ While “limited forum” and “designated public forum” are often used interchangeably, the Court has on occasion drawn a distinction between the designated public forum, which carries with it all the burdens of tradition, and the limited public forum (or the designated that is then limited), which the state opens up for expressive activity. However, because the state from the start limits the forum to certain speakers or subjects, strict scrutiny no longer applies, and the forum is then closed to outside groups or subjects. In 2009’s *Pleasant Grove City v. Summum*, the Court attempted to clarify the distinction between a designated and limited public forum based on a note in the *Perry* opinion, and to create a provenance to legitimate a forum created by the government “limited to use by certain groups or dedicated solely to the discussion of certain subjects.”¹⁵⁹ In such a forum, reasonable and viewpoint-neutral restrictions on speech may be permissible.¹⁶⁰ While the Court has yet to find a designated public forum, examples of the genus “limited public forum” have been found to exist. A public university’s student activities fund, public school facilities, and a public library are some examples of limited public fora.¹⁶¹

157. *Perry*, 460 U.S. at 46.

158. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009) (citing *Cornelius*, 473 U.S. at 800). The designated public forum is also mentioned in *United States v. Kokinda*, 497 U.S. 720, 726–27 (1990). As Fred Schauer notes, “it is telling that the Court has never found such a designated public forum to exist.” See Schauer, *supra* note 76, at 98 n.74.

159. *Pleasant Grove*, 555 U.S. at 470; see also *Perry*, 460 U.S. at 46 n.7.

160. *Pleasant Grove*, 555 U.S. at 470; see also *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001).

161. In *Perry*, 460 U.S. at 49, the Court held that a school district’s inter-office mail system was a non-public forum. In *Rosenberger*, the Court held that a public university’s refusal to fund a student publication from a religious perspective violated the Free Speech Clause because a student activities fund, a non-spatial or metaphysical arena, was a limited public forum. See *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829–30, 837 (1995). In *Good News Club v. Milford Central School*, 533 U.S. at 106, the Court treated a public school auditorium as a limited public forum. In *Lamb’s Chapel v. Center Moriches Union Free School District.*, 508 U.S. 384 (1993), the Court held that a school district violated the Free Speech Clause when it excluded a private group from screening films at a school because the films discussed family values from a religious perspective. *Id.* at 393. The Court did not actually hold that the school had created a limited public forum, holding only that the school district had engaged in viewpoint discrimination impermissible in even a non-public forum. *Id.* at 394; see also *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, the Court held that the university had created a limited public forum by allowing registered student groups to use school facilities. See *id.* at 272. As a consequence, religious student groups had to be allowed access to the same facilities according to the rules applied to non-religious student groups. See *id.* at 276; see also *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)

Public property, which is neither by tradition nor designation a forum for public discourse, is considered a non-public forum. In a non-public forum the government's old common law property rights come to the fore, and the government as owner can regulate access to and expression on the property, as long as any restrictions are viewpoint neutral and reasonable.¹⁶² A ban on soliciting is considered reasonable and viewpoint neutral. Examples of such non-public fora include, ironically, the sidewalk in front of a post office, and, more sensibly, an airport terminal, charity campaigns in federal government offices, and residential mailboxes.¹⁶³ The difference between a public and non-public forum is critical because when a public forum is found, a citizen is entitled to access as a matter of constitutional law.¹⁶⁴ A public property with the potential to be a new public forum, meaning one not sanctified by time and usage, is evaluated according to the government's intended use.¹⁶⁵ Once the forum has been classified, the court then applies the corresponding level of scrutiny.¹⁶⁶ Tradition and intent are the Court's guiding stars.¹⁶⁷ Disparaging the

(applying the rules established for sidewalks and parks to a public library).

162. *Perry*, 460 U.S. at 46; see also Gey, *supra* note 144, at 1547–48.

163. In *Kokinda*, 497 U.S. at 730, the Court found that the sidewalk outside a post office was not a public forum. In *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 680–81 (1992), the Court found that a publicly owned airport terminal was not a public forum. In *Cornelius v. NAACP Legal Defense & Education Fund, Inc.*, 473 U.S. 788, 806 (1985), the Court held that the Combined Federal Campaign was not a public forum so the government could refuse to allow the NAACP Legal Defense and Education Fund to be one of the charities funded by the campaign. The Court declared federal mailboxes non-public fora in *U.S. Postal Service v. Council of Greenburgh Civic Ass'ns*, 453 U.S. 114, 129–31 (1981).

164. See Kalven, *supra* note 9, at 29–30.

165. Some scholars have argued courts should find more traditional public fora or places that must offer mandatory access as a matter of constitutional law. The Court has repeatedly been offered arguments that places other than sidewalks, streets, and parks (walkways, mailboxes, military bases, shopping centers, city buses) were the “constructive equivalent” of quintessential public fora because people communicate in such places. The Court has consistently rejected such arguments and continues to insist on government intent as a critical factor. See *Perry*, 460 U.S. at 45–46.

166. Justice Kennedy has suggested the Court look to “the actual, physical characteristic and uses of the property” rather than to abstract government intent or historical factors to determine if a property is a public forum. See *Lee*, 505 U.S. at 695 (Kennedy, J., concurring).

167. And at times intent can carry more weight than tradition in finding a public forum. See *Kokinda*, 497 U.S. at 727–30 (reiterating that the purpose of a postal sidewalk is not to be open to expressive activity but to assist the patrons of the post office). Justice Kennedy has been critical of the present public forum doctrine's focus on governmental intent: “It leaves the government with almost unlimited authority to restrict speech on its property by doing nothing more than articulating a non-speech-related purpose for the area, and it leaves almost no scope for the development of new public forums absent the rare approval of the government.” *Lee*, 505 U.S. at 695 (Kennedy, J., concurring).

public forum doctrine for its formalistic inadequacies appears to be a popular judicial and scholarly pastime; however imperfect the doctrine may be, it remains operative.¹⁶⁸ Despite the unfriendly speech potential some scholars have found in the public forum doctrine, should a federal agency social media site be found to be a public forum, it would mean any content-based restriction would face strict scrutiny and much language presently restricted on multiple federal agency sites, such as offensive language or hate speech, would have to be permitted.

C. *The Government Speech Doctrine*

It is generally understood that the Free Speech Clause bars the government from suppressing some speakers while allowing others to speak based on the views expressed.¹⁶⁹ In striking contrast, the government speech doctrine holds that the Free Speech Clause is irrelevant when the government is itself the speaker.¹⁷⁰ Determining when exactly the government is speaking remains opaque as the Court, in part because the doctrine is of recent vintage, has yet to elaborate a clear standard.¹⁷¹ To be new is not necessarily to be novel, however, and the roots of the doctrine lie in the so-called “government enterprise” cases that came before the Court in the decades leading to government speech’s leading role debut in *Johanns v. Livestock Marketing Ass’n*.¹⁷² At issue in the government enterprises cases was the recognition that there were functions of government on public property where the public forum doctrine was unwieldy at best or, at worst,

168. *E.g.*, Post, *supra* note 148, at 1715–16 (explaining the public forum doctrine has received “nearly universal condemnation from commentators”). *See generally* Daniel A. Farber & John E. Nowak, *The Misleading Nature of Public Forum Analysis: Content and Context in First Amendment Adjudication*, 70 VA. L. REV. 1219 (1984) (demonstrating that the public forum doctrine serves to obscure rather than illuminate the interests at stake); Gey, *supra* note 144 (contending that courts have applied the public forum doctrine in a way that discounts the public’s right to free speech and privileges government interests in suppressing speech).

169. The government cannot engage in viewpoint discrimination. “[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.” *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

170. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”).

171. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 574 (2005) (Souter, J., dissenting) (“The government-speech doctrine is relatively new, and correspondingly imprecise.”).

172. *Id.* at 553. The D.C. Circuit identified *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), and *United States v. American Library Ass’n*, 539 U.S. 194 (2003) as progenitors of government speech in *People for the Ethical Treatment of Animals, Inc. v. Gittens*, 414 F.3d 23, 29 (D.C. Cir. 2005).

yielded bizarre results. In such contexts, the government was fulfilling a role as time-honored as the use of streets for political protest—as patron of the arts, as librarian, or as educational institution—a role that by its nature entailed viewpoint discrimination. A sit-in at a public library may demand deployment of the public forum doctrine, but the constitutionality of a public librarian to engage in viewpoint discrimination while selecting books is something else altogether.¹⁷³ The distinctions inherent in various government roles, which take place on government property, would seem to call for institution-specific First Amendment rules, the application of distinct rules for each institution or role, government as broadcaster or government as patron of the arts, where the consequences of government selection, rather than access, are at issue.¹⁷⁴ The obvious ineffectuality of the public forum doctrine in determining whether the denial of a grant by the National Endowment for the Arts constituted unlawful viewpoint discrimination, for instance, inclined the Court to start constructing a new doctrine for such circumstances. Although there were sound reasons to develop multiple institution-specific doctrines, the preference, endemic in First Amendment thought, for a broad, categorical rule prevailed.¹⁷⁵

In 1991's *Rust v. Sullivan*, the Court held that prohibiting doctors receiving government funds from discussing an alternative view was not an exercise in viewpoint discrimination, but a funding decision. At issue was a regulation that forbade subsidized doctors from discussing abortion while counseling patients. Because the government appropriated funds for family planning but not abortion clinics, the Court reasoned that the doctors who worked there were bound by the program's limits when working in their official capacity.¹⁷⁶ The Court plucked *Rust* from comparative obscurity in *Legal Services Corp. v. Velazquez*, which explained that *Rust* should be understood to have relied on government speech even if the Court's

173. *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (applying the rules established for sidewalks and parks to a public library in the context of a sit-in protest). With respect to a public librarian engaging in viewpoint discrimination while selecting books, the current doctrinal framework would classify such an act as the state speaking. Whether this classification precisely captures the activity at issue and the free speech interests at stake remains debatable.

174. The Public Broadcasting System, or its employees, must engage in viewpoint discrimination every day in choosing its program schedule; likewise, the National Gallery, more accurately its curators, when selecting artworks.

175. Schauer, *supra* note 76, at 120. In 1998, Schauer asked if the Court would build on the hints in *Forbes* and *Finley* and develop institutional-specific principles in “content oriented government enterprises cases.” Rather than make institutional-specific decisions, the Court devised another institutionally neutral doctrine—government speech.

176. *Rust v. Sullivan*, 500 U.S. 173, 193–94 (1991).

opinion did not use the precise term.¹⁷⁷ The statute challenged in *Legal Services* violated the First Amendment because the “[Legal Services Corporation] program was designed to facilitate private speech, not to promote a governmental message.”¹⁷⁸

If *Legal Services* baptized the doctrine, *Johanns* was its confirmation.¹⁷⁹ In *Johanns*, the Court held that the Department of Agriculture’s “Beef. It’s What’s for Dinner.” advertising campaign was government speech, thus confirming the doctrine and furthermore holding that citizens have no First Amendment right to opt out of funding government speech.¹⁸⁰ With respect to the all-important question of how government speech is identified, the operative terms are message and control. If the government can prove that it developed a message and exercised control over the communication of that message, it has satisfied the two prongs of government speech.¹⁸¹ Authorship does not mean that government officials must develop the message. A private third party can do so as long as a government official maintains veto power.¹⁸² More controversially, the government is not obligated to reveal itself as the author of the message. The fact that the Court gave the government *carte blanche* to evade accountability by neglecting to require the government to reveal itself as the author unleashed a torrent of criticism, beginning with Justice Souter’s dissent.¹⁸³ The mechanism to distinguish government speech from viewpoint discrimination in favor of private speech, of which the

177. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 541 (2001) (“We have said that viewpoint-based funding decisions can be sustained in instances in which the government is itself the speaker.”). The developing doctrine makes a brief appearance in *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 833 (1995). In *Board of Regents of the University of Wisconsin System v. Southworth*, 529 U.S. 217, 235 (2000), the Court held that students who paid a required activity fee should not be considered private speakers, and that the University had not created a public forum. Rather, the University used the funds to support specific organizations in order to advance a message.

178. *Legal Servs. Corp.*, 531 U.S. at 533–34. The statute in question prohibited the federally funded Legal Services Corporation from accepting clients who sought to contest welfare laws. *Id.* at 536.

179. See generally *Johanns v. Livestock Mktg. Ass’n.*, 544 U.S. 550 (2005).

180. *Id.* at 562–63. A mandatory fee from beef producers paid for the advertisements, and some producers did not wish to participate. *Id.* at 555.

181. *Id.* at 564.

182. In his opinion, Justice Scalia stated that the Secretary of Agriculture oversaw the program, appointed officials, and retained veto power over the content of the advertisement. Congress’s oversight authority and power of the purse gave it the ability to alter the program at any time. *Id.* at 563–64.

183. *Id.* at 570–80 (Souter, J., dissenting); see also Ardia, *supra* note 10, at 2013–14 (discussing the majority opinion in *Johanns* and Justice Souter’s dissent).

government approves, remains opaque.¹⁸⁴ According to the Court, periodic elections enable the government to be held accountable for its speech.¹⁸⁵ This contention of course assumes the electorate can identify the government as the source of speech it approves or rejects, an assumption many observers have found questionable.¹⁸⁶ *Pleasant Grove City v. Summum* made it clear that the public forum doctrine and government speech inhabit different spheres. Although the case involved private expression in a public park, the quintessential traditional public forum, the public forum doctrine was irrelevant. The Court concluded that for purposes of selecting monuments in a public park, government speech is the proper analytic apparatus.¹⁸⁷ Taken out of context, the Court's opinion in *Pleasant Grove*, that the government can speak through its selection of *private* speech, is particularly tempting for federal agencies facing unpleasant comments on social media sites.¹⁸⁸

As applied to federal agency social media sites, both doctrines have problematic consequences. If an agency embraces the public forum doctrine and permits offensive speech, hate speech, or false statements on its social media sites, it may give the appearance of endorsing such speech or face civil liability for contributory negligence. Should an agency choose government speech and refuse to post or remove comments to which it objects, which a court may find to be protected speech, an agency will be

184. See Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply to the Right*, 12 GREEN BAG 2d 413, 426 (2009). According to Chemerinsky, the government could engage in viewpoint discrimination simply by adopting private speech as its own speech. Justice Alito did admit that the possibility of the government speech doctrine being used as a “subterfuge for favoring certain private speakers over others based on viewpoint” was a concern. *Pleasant Grove City v. Summum*, 555 U.S. 460, 473 (2009).

185. The government is “accountable to the electorate and the political process for its advocacy.” *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 235, 235 (2000). “If the citizenry objects, newly elected officials later could espouse some different or contrary position.” *Id.*

186. An assumption Justice Souter examined critically in his dissent in *Johanns*, 544 U.S. at 577–79. See Leslie Gielow Jacobs, *The Public Sensibilities Forum*, 95 NW. U. L. REV. 1357, 1387–88 (2001) (asserting that the government’s right to engage in viewpoint discrimination depends on it being held accountable); see also Gia B. Lee, *Persuasion, Transparency, and Government Speech*, 56 HASTINGS L.J. 983, 1052 (2005) (reiterating the importance of the recipients’ knowledge that the government is responsible for the speech so they know when to hold the government accountable).

187. *Pleasant Grove*, 555 U.S. at 480 (“And where the application of forum analysis would lead almost inexorably to the closing of the forum, it is obvious that forum analysis is out of place.”).

188. *Id.* at 473 (“The City has selected those monuments that it wants to display for the purpose of presenting the image of the City that it wishes to project to all who frequent the Park.”). The importance of context in choice of doctrine will be discussed in Part III *infra*.

guilty of a First Amendment violation. Denial of a constitutional right is a serious matter, and the adverse publicity attendant upon it is well worth considering, in addition to the potential drain on agency resources. Given the gravity of the choice, the following section will examine which doctrine is more appropriate for federal agencies seeking to comply with the Free Speech Clause.

III. CHOICE OF DOCTRINE

A. *Relevant Factors: Mixed Speech on Web 2.0*

There may be situations in which it is difficult to tell whether a government entity is speaking on its own behalf or is providing a forum for private speech.¹⁸⁹ The first step in a First Amendment analysis is to classify speech as either public or private. Under current standards, if the speech is determined to be that of the government, courts apply the government speech doctrine. Speech made to advance a federal agency's viewpoint or in support of an agency's agenda is likely to be treated as government speech. If the speech in question is that of private individuals on government property, courts apply the public forum doctrine. Speech in the context of a government program is the subject of debate and likely to be what has been termed hybrid or "mixed speech," namely "speech that contains both private and governmental components."¹⁹⁰ Some examples of mixed speech, which do not fall neatly into the public forum or government speech categories, include speech by government employees, advertisements on public buses and trains, specialty license plates, and artistic expression when funded by a government grant.¹⁹¹ Although the Supreme Court has not recognized mixed speech, it is helpful to acknowledge that federal agency social media sites, established to promote agency activities and to provide a forum for private speakers to discuss

189. *Id.* at 470 ("[B]ut this case does not present such a situation.").

190. Caroline Mala Corbin, *Mixed Speech: When Speech is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 610 (2008); see, e.g., Jacobs, *supra* note 186, at 1358–59 (providing examples of mixed speech, such as when the government edits compiled private speech into a publication).

191. Corbin, *supra* note 190, at 624–35. For an analysis of public employee speech, see generally Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007 (2005) and *Garcetti v. Ceballos*, 547 U.S. 410 (2006). For political advertising on public transit, see generally *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). For a discussion of specialty license plates, see Corbin, *supra* note 190, at 619–23. For artistic grants and decency regulations as possible viewpoint discrimination, see generally *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998).

public issues, are examples of mixed speech.¹⁹² However, given that free speech jurisprudence continues to view speech in mutually exclusive categories, agencies must make a choice. This decision is difficult because the Supreme Court has yet to devise a theory to distinguish government from private speech. Viewing speech on a spectrum, with private speech on one end and government speech on the other, the choice depends on where federal agency social media lands on the continuum, more specifically, which type of speech predominates.¹⁹³ In a classic free speech case, a state actor prevents a citizen speaker from engaging in a speech activity in a public forum or on private property with the permission of the non-state owner.¹⁹⁴ More commonly, however, free speech cases involve controversies over the government's authority to control speech in its "speech-related enterprises," such as schools, libraries, museums, funding for the arts and humanities, and public television, which now fall under the rubric of government speech.¹⁹⁵

Social media, or Web 2.0, comprises web-based interactive technologies.¹⁹⁶ The Supreme Court has not had occasion to consider applying either doctrine to the Internet or to specific websites on the Internet. Lower courts have applied both doctrines to Internet websites offering approaches of limited guidance.¹⁹⁷ In *Reno v. American Civil Liberties*

192. Corbin claims that the public forum doctrine has always implicitly recognized mixed speech. See Corbin, *supra* note 190, at 624.

193. Put another way, the question is whether the private speech on a federal agency social media site, hosted by a third party, is a public forum situation or a case of government speech.

194. See Schauer, *supra* note 76, at 92–93 (contending that many First Amendment cases concern the state's ability to regulate content in its "intrinsically content-based enterprises"). Although the division between state action and private action is an oft-questioned one, it remains relevant for purposes of a First Amendment analysis. See, e.g., CASS R. SUNSTEIN, *DEMOCRACY AND THE PROBLEM OF FREE SPEECH* 36–38 (1993) (articulating that some regulations that promote freedom of speech intrude on the rights of private actors, which can lead to First Amendment issues).

195. Schauer, *supra* note 76, at 93.

196. See Wilshusen Testimony, *supra* note 17, at 42.

197. In *Putnam Pit, Inc. v. City of Cookeville*, the Sixth Circuit held a local government website was a non-public forum after an independent newspaper alleged the City of Cookeville's refusal to add a link to the paper was viewpoint discrimination impermissible in a designated public forum. 221 F.3d 834, 841–42 (6th Cir. 2000). In *Page v. Lexington County School District One*, the Fourth Circuit determined that the school district's website was government speech even though the site contained links to other websites. 531 F.3d 275, 284–85 (4th Cir. 2008). *Page* was argued after *Johanns*, but some lower courts continue to apply the public forum doctrine to government websites. In both *Hogan v. Township of Haddon*, 278 Fed. Appx. 98 (3d Cir. 2008) and *Vargas v. City of Salinas*, 205 P.3d 207 (Cal. 2009), courts held local government websites were non-public fora. Case law on social media and the Free Speech Clause is negligible.

Union, a case in which the Supreme Court invalidated two provisions of the Communications Decency Act, the Court made some major points. The Internet resembled “vast democratic forums.” In language redolent with public forum imagery, the Court observed that chat rooms enabled any person with a phone line to become a town crier “with a voice that resonates farther than it could from any soapbox.”¹⁹⁸ To be clear, the precise issue under consideration involves not the Internet as a whole but specific interactive social media sites on the Internet, which include Facebook pages, blogs, wikis, mashups, podcasts, and RSS feeds operated, maintained, and sponsored by the federal government. Nonetheless, *Reno* remains fundamental because in it the Court emphasized the growing role the Internet plays in shaping public opinion—once the exclusive preserve of print, radio, and television media—and the unique way the Internet provides citizens with the ability to contribute to public opinion. In addition, the Court stated that “the Internet is not as ‘invasive’ as radio or television” and the Internet user is not a passive recipient of distressing messages, unlike a radio listener or television viewer. For that reason, the Court refused to include the Internet alongside broadcast or cable communications where speech is regulated in the public interest. Significantly, the Court declined to elucidate “the level of First Amendment scrutiny that should be applied to this medium.”¹⁹⁹

B. *The Government Speech Test*

Johanns established that speech by a third party may be attributed to the government and encompassed by government speech, and the case put forth a test to determine the government’s ownership and control of the message.²⁰⁰ For purposes of federal agency social media, the question is

198. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 869, 870 (1997) (“Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.”); see Cass Sunstein, *The First Amendment in Cyberspace*, 104 YALE L.J. 1757, 1763 (1995) (providing an early analysis of the relevance of First Amendment doctrines to the Internet).

199. *Reno*, 521 U.S. at 870. The Court declined to elaborate, in part because doing so would have been outside the ambit of the case, which involved the regulation of indecent speech over the Internet in the interest of protecting minors. The majority opinion held that the central provisions of the Communications Decency Act, 47 U.S.C. § 223, were unconstitutional.

200. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 560–62 (2005) (“When, as here, the government sets the overall message to be communicated and approves every word that is disseminated, it is not precluded from relying on the government-speech doctrine merely because it solicits assistance from nongovernmental sources in developing specific messages.”).

whether government speech applies only when government advances its own message or whether it can also extend to government selection of private messages. Scholarly debate, as one would expect, is not one-sided. A few scholars have concluded that government speech replaces the public forum doctrine in its entirety in the government website context.²⁰¹ Some scholars argue that the government speech doctrine should apply solely when the government is expressing a specific message, while others suggest that the government selection of speech constitutes expression on the government's part and thus the panoply of government speech applies.²⁰² It has also been argued that setting the boundaries of a nonpublic forum can convey a message and that the government has an expressive interest in disassociating from messages with which it does not agree.²⁰³ Given that the focus of this analysis is not what ought to be but what an agency is permitted to do, examining cases may prove a more fruitful line of inquiry.

1. Page, Gittens, and Pleasant Grove: Context, Pragmatism, and Purpose

The test articulated in *Johanns* focuses on the government's establishment of a message and its effective control over the content and dissemination of the message.²⁰⁴ Two recent federal appellate cases offer some assistance.

201. See Ardia, *supra* note 10, at 130; see also Helen Norton, *Not for Attribution: Government's Interest in Protecting the Integrity of Its Own Expression*, 37 U.C. DAVIS L. REV. 1317, 1319–23 (2004) (discussing the difficulties presented by cases involving government and private speech and the government's interest in not appearing to express or endorse certain kinds of speech).

202. See Jacobs, *supra* note 186, at 1360–63; Randall P. Bezanson and William G. Buss argue for limiting government speech to particular situations when it is clear the government is conveying an identifiable message. See Randall P. Bezanson & William G. Buss, *The Many Faces of Government Speech*, 86 IOWA L. REV. 1377, 1431 (2001). In contrast, Helen Norton finds situations in which the selection of messages should be viewed as government speech. Norton, *supra* note 201, at 1338. Jacobs notes that subsidized speech, for instance, is viewed as government speech by the Court if expression is the predominant purpose of the program, and more like private speech if the purpose is to create a forum for private speech. See Jacobs, *supra* note 186, at 1358–59.

203. For the first argument, see Jacobs, *supra* note 186, at 1375. For the second argument, see Norton, *supra* note 201, at 1323–26.

204. *Johanns*, 544 U.S. at 560–62. Before *Johanns*, federal appellate courts developed their own tests, commonly asking: “who is the literal speaker, who exercises editorial control, what is the purpose of the program, and who bears ultimate responsibility[?]” Corbin, *supra* note 190, at 627 n.118; see also *Planned Parenthood of S.C. Inc. v. Rose*, 361 F.3d 786, 792–93 (4th Cir. 2004); *Wells v. City & Cnty. of Denver*, 257 F.3d 1132, 1141 (10th Cir. 2001); *Knights of the KKK v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093–94 (8th Cir. 2000). Despite the Supreme Court's distillation of these tests into the two-pronged test of *Johanns*, the Sixth Circuit continues to emphasize editorial control. See *ACLU of Tenn. v. Bredeesen*, 441 F.3d 370, 375–76 (6th Cir. 2006).

In *Page v. Lexington County School District One*, the Fourth Circuit applied government speech to a website, and in *People for the Ethical Treatment of Animals, Inc. v. Gittens*, the D.C. Circuit applied government speech to the selection of private art for a public sculpture program.²⁰⁵

In *Page*, the Fourth Circuit reviewed whether a school board website with links was government speech or a limited public forum. After passing a resolution opposing a bill before the South Carolina legislature, the school district communicated its opposition through its website, which contained links to other websites, its e-mail system, and school newsletters. The plaintiff alleged that the school district had engaged in impermissible viewpoint discrimination when it denied his request for access to the school district's "informational distribution system."²⁰⁶ The court, in its turn, announced that the matter involved two connected questions: namely, whether the school district's "campaign" against the Put Parents in Charge Act was government speech and whether the school district created a limited public forum by inviting private speech to be conveyed on its website and through its e-mail and newsletters. If the school district had created a limited public forum, denying the plaintiff access constituted viewpoint discrimination. The court applied the *Johanns* test and easily found an identifiable "established" message, in this case opposition to the Put Parents in Charge Act. More relevant was the issue of effective control with respect to links on the district's website. The court held that because the links on the school district's website all led to sites that supported the district's own message, the district had maintained control over its own website and the ability to exclude links at all times. "It thus retained *sole control* over its message."²⁰⁷

With a finding of an established message and effective control, the court concluded that a public forum had not been created, government speech prevailed, and *Page* could not avail himself of the district's website, e-mail system, and newsletters to communicate his support of the bill.²⁰⁸ However, the court did observe that had the website been a chat room or

205. *Page v. Lexington Cnty. Sch. Dist. One*, 531 F.3d 275, 277–78 (4th Cir. 2008); *PETA v. Gittens*, 414 F.3d 23 (D.C. Cir. 2005).

206. *Page*, 531 F.3d at 277–78.

207. *Id.* at 285. The Court based this conclusion on five factors: (1) the school district selected links "that supported its own message"; (2) the school district maintained control over its own website and could exclude a link "at any time"; (3) the district never incorporated any information from a linked website "on its own website"; (4) the district continuously communicated its opposition and, in providing references to other supporters, buttressed its message; and (5) the "disclaimer" stated that only the speech on its website was the school district's. *Id.* at 284.

208. *Id.* at 285.

message board, it likely would have concluded that a limited public forum had been established.²⁰⁹ As additional evidence that the public forum doctrine has not been jettisoned entirely, the court deployed it to analyze individual school newsletters, which it concluded were either limited or non-public fora.²¹⁰ Of more consequence was the court's dictum stating that inviting private speech on a variety of viewpoints perforce creates a public forum. The crucial interactive qualities of a chat room or message board do characterize social media sites.²¹¹

In *People for the Ethical Treatment of Animals v. Gittens*, the D.C. Circuit held that in some contexts the selection of private messages can be government speech. But before federal agencies embrace government speech, the circumstances that give the case its particular atmosphere must be admitted. The case involved the District of Columbia's Commission on the Arts and Planning's selection of private entries for an art exhibit entitled "Party Animals," which would install sculptures of donkeys and elephants at locations around the city. People for the Ethical Treatment of Animals (PETA) submitted multiple designs featuring a shackled or crying elephant, which the Commission rejected as incompatible with the "festive and whimsical" theme of the exhibit.²¹² PETA argued that the Commission had not followed its official whimsical design criteria by accepting serious designs with social or political messages.²¹³ PETA claimed, plausibly, that

209. *Id.* at 284:

Had a linked website somehow transformed the School District's website into a type of 'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different. But nothing on the School District's website as it existed invited or allowed private persons to publish information or their positions there so as to create a limited public forum.

210. *Id.* at 285–86.

211. In *Sutcliffe v. Epping School District*, the First Circuit found the town of Epping's website to be government speech despite the fact that the town had not developed a formal policy for the content of the website or its links. 584 F.3d 314, 331–32 (1st Cir. 2009). Final approval authority sufficed for effective control; however, the issue again was a basic website with no public discourse or comment permitted. *Id.* at 322, 331. The court's finding of government speech despite the absence of a policy articulating the types of private speech permitted has the "potential of permitting a governmental entity to engage in viewpoint discrimination," or at least obscures whether private speech is rejected in order to maintain a consistent message or merely because the views expressed are unpopular. *See id.* at 337 (Torruella, J., concurring in part and dissenting in part). As David Ardia has observed, "As government websites become more interactive, thereby allowing the public to add its own voice to that of the government's, courts will face an increasing challenge in determining when government is itself speaking and when it is simply abusing its power over private speech." Ardia, *supra* note 10, at 2026.

212. *PETA v. Gittens*, 414 F.3d 23, 26 (D.C. Cir. 2005).

213. *Id.* at 27.

the Commission had created a limited public forum, and the rejection of submissions that satisfied the published criteria amounted to impermissible viewpoint or content discrimination.²¹⁴ The court's opinion is ostensibly about the newfangled government speech doctrine, and the court takes pains to try to identify precisely what kind of speech is involved.²¹⁵ By analogy with a public library, the court reasoned that the government speaks through its selection of books and, in this instance, speaks through the selection of art. Tellingly, the court quoted *Arkansas Educational Television Commission v. Forbes*: "In using its 'editorial discretion in the selection and presentation of' the elephants and donkeys, the Commission thus 'engaged in speech activity.'"²¹⁶ The extensive use the court made of *Forbes*, *NEA v. Finley*, and *United States v. American Library Ass'n*—the so-called "government enterprise" cases—rather than the cases that make up the pedigree of government speech—*Rust*, *Southworth*, *Velazquez*, etc.—reveals the real substance of *Gittens*.

Cases such as *Finley*, *Forbes*, and *American Library* involved the selective choices the government must make as a patron of the arts, television broadcaster, and librarian. These cases concerned the government performing institutional roles for which some discrimination on the basis of viewpoint is inherent in their very functioning.²¹⁷ To take the simplest of examples, no sensible person would argue that his speech rights are violated should the National Gallery refuse to hang his painting on its walls. Selectivity is inherent in some types of institutional decisionmaking.²¹⁸ If the National Gallery had to hang every painting offered, the Gallery would cease to function. The bulk of the opinion in *Gittens* discusses the decisions in *Finley*, *Forbes*, and *American Library* that Schauer terms "government enterprise cases" and whether the "Party Animals" program can be considered as such.²¹⁹ The case at hand, the court reasoned, does not

214. PETA cited *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819 (1995), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), in support of its contention that a limited public forum was at issue. *Gittens*, 414 F.3d at 27.

215. *Id.* at 28 ("We think it important to identify precisely what, if anything, constituted speech of the government.").

216. *Id.* (alteration omitted).

217. *Id.*

218. Schauer, *supra* note 76, at 114–15. Some scholars argue that the necessities of institutional decisionmaking and functioning should not grant the government carte blanche to make content-related distinctions. See David Cole, *Beyond Unconstitutional Conditions: Charting Spheres of Neutrality in Government-Funded Speech*, 67 N.Y.U. L. REV. 675 (1992) (making the case for viewing public schools, the arts, and the press as "spheres of neutrality").

219. "Instead, the question we face is whether the 'Party Animals' program, or at least the sponsorship portion of it, was 'one of the government enterprises which may control for content or viewpoint,' and as to this question the public forum doctrine offers no assistance."

resemble providing private speakers with an easement to use government property, and here the venerable expression of Kalven with the lingering scent of common law property rights invites the public forum doctrine to enter by the back door. The easement analogy does not fit, the court reasons, because something else is going on, and this something is the government acting as patron, a role that requires it to engage in otherwise impermissible viewpoint discrimination. In essence, the choice between the government speech or public forum doctrine depends on a contextual analysis, as the opinion quotes from the Supreme Court's opinion in *American Library Ass'n*: "We believe that public forum principles 'are out of place in the context of this case.'"²²⁰ As Schauer has demonstrated, the First Amendment tradition, the Court, and the legal profession remain ill at ease with legal categories based on empirical reality rather than juridical abstraction.²²¹ Hence, after a profoundly contextual analysis of the role the government is playing, the Court cloaks its institutionally specific reasoning under the capacious doctrine of government speech.²²² The Free Speech Clause does not apply to the government as communicator, and it did not restrict the Commission in its decision about PETA's elephants.²²³ Lest this tacked-on conclusion drive federal agencies into an impetuous marriage with government speech, let us remember the case turned on a contextual analysis.²²⁴

In a similar vein, the Supreme Court's opinion in *Pleasant Grove* does not suggest a wholesale adoption of government speech in all cases under the guise that the government is always speaking on its property.²²⁵ The Court's opinion does suggest a contextual and purposive analysis in

Gittens, 414 F.3d at 29 (quoting Schauer, *supra* note 76, at 99).

220. *Id.* at 28 (quoting *United States v. Am. Library Ass'n*, 539 U.S. 194, 205 (2003)).

221. See Schauer, *supra* note 76, at 107–08:

Although the salience of institutionally specific factors is apparent in most such cases, the Court's refusal to make institution-specific decisions is supported not only by most of existing First Amendment doctrine, but also, and more importantly, by a battery of extraordinarily well-entrenched views about the nature and function of law itself, views that are especially concentrated in the First Amendment context.

222. As it had previously cloaked its contextual reasoning in *Forbes* and *Finley* under abstractions, the difference between a factor and a categorical rule in *Finley* and the public forum doctrine in *Forbes*. "The Court peered down the path of institutional specificity in both cases, but when all was said and done it refused to do much more than peer." Schauer, *supra* note 76, at 119.

223. *Id.* at 140.

224. *Id.* at 28–29. Some courts have ignored the analysis in *Gittens*, and taken its conclusion to extremes, and reasoned that selection as a speech act is automatically government speech and thus a school district bulletin board is government speech. See *Ardia*, *supra* note 10, at 146.

225. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

determining which doctrine applies. Public forum analysis applies to the use of a park for the purpose of speeches and “other transitory expressive acts.”²²⁶ The Court acknowledged the difficulties that attend determining when “a government entity is speaking on its own behalf or is providing a forum for private speech.”²²⁷ In the end, the Court narrowly held that even a traditional public forum may be the locus of viewpoint discrimination on the part of the government, but only for the purpose of erecting permanent monuments. Whether it was advisable to proffer a broad categorical rule with respect to monuments in parks, Justice Souter found it premature to do so, and the analysis turned, albeit obliquely, on context and purpose. Time has sanctified the use of parks as arenas of protest and discussion, yet the venerable tradition of monumental civic art reaches back into the distant past. Quoting again from *American Library*’s call to context, the Court stated the public forum doctrine is applied when the government property or program is able to accommodate a large number of speakers. Public parks have limited space for permanent monuments, and furthermore, orators do not monopolize space in the manner of permanent monuments. Because the circuit court had analogized the installation of monuments to speeches, marches, and demonstrations, the Court addressed why that analogy was inapposite, and, based on a pragmatic analysis, the Court concluded that the public forum doctrine was inappropriate for this case because it would lead to the closing of the forum due to monumental clutter.²²⁸ In essence, the Court in *Pleasant Grove* found that for the purpose of selecting permanent monuments, the government resembles a patron of the arts and is therefore able to make decisions that would amount to viewpoint discrimination in other circumstances.²²⁹ However, once again the contextual nature of the analysis was subsumed under “government speech,” and a discussion of the various kinds of meanings monumental art may express.²³⁰

226. *Id.* at 464.

227. *Id.* at 470.

228. “And where the application of forum analysis would lead almost inexorably to closing of the forum, it is obvious that forum analysis is out of place.” *Id.* at 480; *see also id.* at 478–79 (explaining that the erection of monuments in public parks would consume space permanently and crowd out other forms of public expression).

229. For the argument that the *Pleasant Grove* opinion has the potential to subvert the public forum doctrine, see Timothy Zick, Summum, *the Vocality of Public Places, and the Public Forum*, 2010 BYU L. REV. 2203, 2208 (arguing that the permanent–transitory distinction the Court draws is untenable).

230. Essentially attempting to discuss basic principles of art history, in particular that human beings perceive art through empathy and association. See HENRICH WÖFFLIN, *CLASSIC ART: AN INTRODUCTION TO THE ITALIAN RENAISSANCE* (Phaidon Press 1953), for the classic study of empathy. John Ruskin remains the most eloquent exponent of

The opinions in *Page*, *Gittens*, and *Pleasant Grove* caution against assuming that the extension of government speech to the selection of private speech in some contexts means that an agency may freely remove comments on its own social media sites under the cover of government speech. The reasoning in such cases indicates that one cannot lift the framework of government speech and drop it on private speech on a social media site based on a quick association with selection or editorial discretion. Context is all-important. The precise nature of the government's role, be it analogous to running an institution such as a school, library, university, or television station or actually providing a venue for discourse, lurks behind the decision to apply one doctrine over another.

2. *Analysis of Application to Federal Agency Social Media*

If the decision to apply one doctrine or the other is context driven and pragmatic, it is difficult to extract a clear standard. Because both government and private speech may appear on agency social media sites, the question becomes whether government speech or private speech predominates. The first prong in the *Johanns* test is to find that the government has established a message. In *Page*, this was easy because there was a clear message of opposition to a bill before the state legislature. In *Gittens*, the court was willing to dispense with a clear message because editorial discretion or, more truly, connoisseurship, sufficed.²³¹ Some agencies have offered statements for their social media sites. The EPA states that its sites are intended to further its mission.²³² EPA's comment policy states, "We encourage you to share your thoughts as they relate to the topic being discussed."²³³ The U.S. Department of State Facebook Terms of Service state, "The purpose of the U.S. Department of State on Facebook is to engage audiences on issues relevant to U.S. foreign policy."²³⁴ The USDA "is using 'social media' and 'Web 2.0' to interact with people around the globe. USDA is an every day, every way

association. *See generally* JOHN RUSKIN, THE STONES OF VENICE II (1851–1853).

231. *PETA v. Gittens*, 414 F.3d 23, 30 (D.C. Cir. 2005) ("As a speaker, and as a patron of the arts, the government is free to communicate some viewpoints while disfavoring others, even if it is engaging—to use PETA's words—in 'utter arbitrariness' in choosing which side to defend and which side to renounce.").

232. "EPA is using social media technologies and tools in the firm belief that by sharing and experimenting with information we greatly increase the potential for everyone to gain a better understanding of environmental conditions and solutions." *Social Media at EPA*, ENVTL. PROTECTION AGENCY, <http://www.epa.gov/epahome/socialmedia.html> (last visited May 14, 2013).

233. EPA Comment Policy, *supra* note 62.

234. *U.S. Department of State Facebook Terms of Service*, *supra* note 53.

Department and we want to connect with people in ways that are the most convenient and effective for them.”²³⁵ NASA’s Facebook page invites Americans to “[s]hare our passion for space, aeronautics and science!”²³⁶ The SBA’s official social media statement reads, “Social media outlets help the U.S. Small Business Administration share ideas and information with members of the small business community. Your feedback, questions, and comments through social media allow us to better serve the needs of small business owners and entrepreneurs.”²³⁷ A clear message does not evince itself though; as we have seen, the messages conveyed may be obscure, so that is no bar. An agency could argue it wants to convey a message of civilized engagement and respectful discourse, though selecting and rejecting private speech to convey a message about dialogue stretches the limits of government speech alarmingly close to absurdity. However, the use of “engage” and providing a forum for public comment complicates matters. Of course, the real issue is whether a federal agency may, under the cover of government speech, selectively remove comments for any reason. Selection as government speech arises when the government acts in an institutionally specific manner as a government enterprise, library, university, broadcaster, or art patron. By identifying itself as the “U.S. Dept. of State on Facebook” rather than the “U.S. Department of State,” the Department could be attempting to cast itself as a government enterprise in anticipation of a contextually specific analysis.

As for effective control over the content and dissemination of the message, it would appear that the more an agency moderates comments or screens beforehand, thus risking a First Amendment violation should a public forum analysis prevail, the closer the agency’s message gets to meeting the second prong of government speech. Very few agencies—only three—admit to screening before posting, the highest level of speech control. Of the agencies stating that they moderate comments, it appears they may remove comments at some point after the comments are posted.²³⁸ Meeting the bar for control requires an outlay of agency manpower and resources few agencies are willing or able to offer.

235. *Social Media Tools and Resources*, U.S. DEP’T OF AGRICULTURE, http://www.usda.gov/wps/portal/usda/usdahome?navid=USDA_STR (last visited May 14, 2013).

236. NASA, *supra* note 61.

237. *Social Media*, U.S. SMALL BUS. ADMIN., <http://www.sba.gov/social-media> (last visited May 14, 2013).

238. In *Downs v. Los Angeles Unified School District*, the Ninth Circuit leniently determined the school had control over a bulletin board because, even though its control was inconsistent, the school had authority over the bulletin board at all times. 228 F.3d 1003, 1011 (9th Cir. 2000).

Few agencies wish to be associated with offensive, hateful, vulgar, or extremist speech, and naturally would like the dialogue on their social media sites to be substantive as well as decorous. Thus, there are recognizable government speech interests, but such an admission is not conclusive. The primary question is whether such interests should override the free speech interests of private citizens invited to comment on agency sites and blogs.²³⁹ In the absence of a clear message, government speech embraces the selection of private speech only when the government is acting in a specific institutional role that perforce entails selectivity. Admittedly, even private speech in a traditional public forum can be curtailed, but only for a specific purpose—for the purpose of permanent monuments, a curatorial purpose, as it were. In the case of social media, failure to select would not necessitate the closing of the forum, a conclusion based on the distinction between the permanence of monumental art and the evanescence of oratory and protests that proved decisive in *Pleasant Grove*. The term easement, which the Court in *Gittens* used to decide if the circumstances of the case resembled a classic public forum case or the institutional functions consonant with government speech, is a helpful heuristic. Public fora give private speakers an easement to use public property. Permitting the public to comment on agency activities on an agency-sponsored site is akin to providing speakers with an easement.

Given the above, a plausible conclusion to draw is that, although an agency has a recognizable interest in not endorsing certain types of speech, that interest does not mean an agency may freely engage in viewpoint discrimination because its social media site will fall under the aegis of government speech. Because considerations of context, purpose, and pragmatism appear to guide federal appellate courts and the Supreme Court when deciding which doctrine to apply, and a contextually specific analysis in the case of social media does not guarantee a finding of government speech, agencies and judges faced with such a case should look to the public forum doctrine. At this point returning to theory might provide a decisive reason for recommending one doctrine over another.

3. *Argument from Principle: Liberty As Non-Dependence*

Returning to the distinction between master and slave that animated Roman jurisprudence and early-modern political thought in its aversion to arbitrary power, a stronger claim begins to take shape. The neo-Roman

239. See Norton, *supra* note 201, at 1323–26; see also Mary Jean Dolan, *The Special Public Purpose Forum and Endorsement Relationships: New Extensions of Government Speech*, 31 HASTINGS CONST. L.Q. 71, 97–100 (2004) (admitting that the government has expressive goals when it opens various fora, but arguing for a modification of the public forum doctrine).

concept of liberty as non-dependence, that an individual is constrained when vulnerable to the will of another as surely as by external threat, may resolve some tensions in First Amendment theory and, in addition, may present a decisive argument in favor of the public forum doctrine. Recall the central claim that a person is not free when under the authority or control of an arbitrary power—arbitrary in the sense of discretion unbridled by due process of law. Although the arbitrary power republicans militated against in history most often was governmental power, the analysis of freedom and servitude was also applied to situations of private power, as evinced by the republican obsession with corruption, ranging from Tacitus to Jefferson, a situation that prevails when arbitrary private power swallows the fragile concordat among equals ruling together under a constitution. Were it not for this awareness that conditions of servitude are possible in civil as well as in political society, republicanism would have little to offer the modern world. But it does; it can clarify the relevant normative considerations and the startling gulf separating the two doctrines.

Few would deny that negative liberty as the absence of arbitrary power and interference is a human good or a natural right as others might describe it.²⁴⁰ As a good or a natural right, liberty has been interpreted as a moral obligation to limit arbitrary political power and conditions of legal servitude. The neo-Roman concept of liberty heightens awareness of conditions of arbitrary power and dependence that may prevail in civil society.²⁴¹ A prime example of this situation prevails in the context of online speech. An individual's online speech is at the mercy of an ISP with the prerogative power to censor any speech at any time. Free speech on Facebook, for instance, is not a right but a privilege. The only recourse available to contest censorship is a private version of due process, enshrined in terms of service agreements devised by the ISP. An online speaker, even when speaking on a political topic, is a customer, not a citizen. This power dynamic works in some arenas of society, but not in all.

As the Supreme Court recognized in *Reno*, the Internet may perform a significant role in the formation of public opinion. The fact that anyone speaking online on a political topic is subject to censorship by a private actor may impact an individual's ability to participate in public discourse.²⁴²

240. There are exceptions of course. The arbitrary power of parents over children can be considered a positive rather than a negative force, although legal changes in family law have limited this once entirely arbitrary power. The freedom of an addict to indulge an addiction is not necessarily a good state of affairs.

241. Contemporary republican political theorists have analyzed civil society from such a perspective. See PETTIT, *supra* note 134.

242. I follow Post in equating the term "public discourse," which regularly appears in

Whether the government should take steps to remedy this lack of protection for online speech is a broader question.²⁴³ Here, the question is discrete. Given the predominance of arbitrary private power online, does it make a difference if government agencies use, and courts approve, the government speech doctrine to address speech on government-sponsored social media sites? The government speech doctrine gives the government the right to censor speech as it wishes in order to convey its own message. Should government speech be the controlling doctrine, then a citizen's speech on an agency social media site is dependent on the same unaccountable discretionary power that prevails elsewhere online. There will then be no place or refuge online where an individual's speech, on political as well as nonpolitical issues, is not subject to the unbridled discretion of another.

Government is not always the enemy of free speech. In a complex society, threats to free speech appear in a variety of guises.²⁴⁴ Provided that individual liberty as non-dependence and democratic self-government are the twin values at the core of the free speech tradition, nothing in the tradition prevents the government from being a friend of speech in theory.²⁴⁵ When one descends from theory to doctrine, such an assertion becomes more ambiguous.²⁴⁶ Nevertheless, current doctrine has a

First Amendment jurisprudence, with individual participation in the formation of public opinion or "protection of the communicative processes necessary for the maintenance of democracy." See Post, THE CONSTITUTION IN 2020, *supra* note 74, at 179.

243. It may be the case that providing private companies with precisely this sort of discretionary power, essentially having ISPs function as proxy censors, is the most efficient option. For reasons of principle, some people may be more comfortable leaving censorship to the private market rather than to the government.

244. Fiss, *supra* note 91, at 1414 ("The state of affairs protected by the first amendment can just as easily be threatened by a private citizen as by an agency of the state. A corporation operating on private capital can be as much a threat to the richness of public debate as a government agency . . ."). Again, what Fiss means by "richness of public debate," how that can be ascertained, and whether rich debate is the goal of the Free Speech Clause is open to dispute.

245. It is also possible to argue that the application of the public forum doctrine to agency social media sites is consonant with both autonomy-based theories of the First Amendment and democratic theories. Attempting to justify the application of government speech through an appeal to a natural right, Kantian, or property based vision of free speech is difficult. Government speech may be justified as an attempt to enhance discourse and ensure the functioning of the democratic system through wise decisions and deliberation and, in that manner, comports with the democratic view, but the extensive regulation of speech it entails is at cross purposes with much First Amendment doctrine justified on democratic grounds.

246. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367 (1969). Whatever its merits, the fairness doctrine upheld by *Red Lion* remains controversial. The "heckler's veto" permits state intervention in order to protect a citizen's opportunity to speak when threatened by a mob. See *Feiner v. New York*, 340 U.S. 315, 322–29 (1951) (Black, J., dissenting); Fiss, *supra*

resource, however imperfect, to address the situation at hand. The zealous protection the Supreme Court offers to political speech points toward the public forum doctrine.²⁴⁷ To be clear, the argument is not that the government has an interest in enriching or elevating the quality of public discourse through subsidizing speech or some other action; the claim is simply that, if a government agency opens a space for public discourse online, citizen speech should be free of arbitrary censorship.²⁴⁸ If government speech is the controlling doctrine, the government agency has absolute discretionary power to censor citizen speech that does not comport with its message. In such a case, the First Amendment would not afford an individual's speech any protection. Although the space carved out is minimal, there should be some realms online, however small, where people can express themselves on public topics free of fear of censorship, protected by the First Amendment, with due process rights as citizens.²⁴⁹

The objection might be raised that an agency social media site opened to discuss agency issues is a "managerial" function akin to a town meeting.²⁵⁰ A town meeting is a structured institution with a distinct objective: "to act upon matters of public interest."²⁵¹ In light of this goal, speech may be regulated by an agenda, rules of order, and the authority of a moderator. From this perspective, an agency social media site opened to discuss agency topics is an institutional function for which the government speech doctrine is more appropriate. The answer is that the Court's expansive notion of the discourse constitutive of freedom, "robust and uninhibited" should control, and it should do so because comments on social media sites are not a formalized public comment process or opened, like a town meeting, for a

note 91, at 1416–18.

247. See, e.g., *Connick v. Myers*, 461 U.S. 138, 145 (1983) ("The First Amendment 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' 'Speech concerning public affairs is more than self-expression; it is the essence of self-government.' Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of First Amendment values,' and is entitled to special protection.") (citations omitted).

248. Not least because of the possibility that self-censorship might stultify and impoverish discourse over time. To be clear, the government can act positively to subsidize speech to improve public discourse and remain within the bounds of the doctrinal tradition. See, e.g., Robert C. Post, *Subsidized Speech*, 106 YALE L.J. 151, 158–63 (1996).

249. "Public forum doctrine is essential in staking out an important area of mandatory access, especially for those speakers who might otherwise be unable to secure some forum for their speech." Schauer, *supra* note 76, at 106. The public forum doctrine provides a public arena for ordinary people, often lacking influence or resources, not only to speak, but to be heard.

250. See, e.g., Post, *supra* note 79, at 135–37 (discussing managerial functions in a First Amendment context).

251. MEIKLEJOHN, *supra* note 73, at 24.

limited period of time to act on a public matter. Regulations.gov provides a formalized comment process for citizens interested in commenting on proposed rules online. Social media sites opened for purposes of transparency and participation do not present the characteristics of a formalized structure or institutional function.

C. *The Public Forum Test*

The test for a public forum clarified in *Perry* consists of intent and historical use. With respect to intent, the government must take affirmative steps to open a forum for private speech.²⁵² The government's statements regarding its preferences for the forum are relevant as is any evidence that the forum has in practice been used for expression with the government's tacit approval. In *United States v. Kokinda*, the Supreme Court held that a sidewalk outside a post office was not a public forum because the "Postal Service has not expressly dedicated its sidewalks to any expressive activity."²⁵³ Courts often view government intent narrowly, permitting the government to define very specific parameters for acceptable expression.²⁵⁴

252. A non-traditional public forum is one "which the State has opened for use by the public as a place for expressive activity." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

253. 497 U.S. 720, 730 (1990). Justice Kennedy has criticized the *Perry* test's reliance on government intent to identify a designated public forum. See *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 694–95 (1992) (Kennedy, J., concurring) (arguing that the test grants the government too much authority to restrict speech on its property and advocating for an objective inquiry rooted in the actual characteristics and uses of the property). The *Perry* test sometimes encompasses compatibility between speech and the purpose or function of the forum. See *Greer v. Spock*, 424 U.S. 828, 839 (1976) (applying the test to demonstrate that the practice of members of a military establishment being permitted to attend political rallies on their own time off-site did not conflict with the tradition of a politically neutral military); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (arguing that the issue in a public forum case is whether the method of expression is directly at odds with the ordinary activity of a place).

254. If there is evidence the government has opened a forum for expression, despite its protestations to the contrary, the government then argues that it intended the forum to be limited to specific speakers or topics. In *Perry*, the Court permitted the government to deny a union access to an inter-office mail system while allowing another union to have access based on the government's argument that the favored union was the intended speaker. 460 U.S. at 55. As Steven Gey has argued, the flexibility of the *Perry* standard works to the favor of the government. Courts can define the forum narrowly or describe the subject matter permitted so narrowly that the proposed expression falls outside the intended scope of the forum. See Gey, *supra* note 144, at 1551–52. However, Gey also admits that this flexibility permits speech-friendly courts to describe fora in ways conducive to speech. See *id.* at 1552 n.87 (contrasting the Eleventh Circuit's refusal to recognize a highway rest stop as a limited public forum, *Sentinel Communications Co. v. Watts*, 936 F.2d 1189, 1207 (11th Cir. 1991), with a district court's holding that "[t]he State's interests in meeting the safety, rest, and

In the case of federal agency social media, there are express statements of intent. The President's Memorandum on Open Government, which urges agencies to use social media to encourage participation, is a fairly clear statement of intent to open a public forum. However, a public forum is usually found on public property. The public comments (private speech) on blogs on agency websites, classified as social media for their interactive quality, have the strongest argument for applying the public forum doctrine. In this case, many federal agency social media sites are on private sites. Facebook, for instance, is a private site, unlike an agency blog, which is on public property (.gov). The use of private property for a public purpose does not nullify a finding of a public forum, though it adds a complication.²⁵⁵

Because neither doctrine is a perfect fit, the task is to determine whether government or private speech predominates on agency social media sites. One argument in favor is to analogize that a federal agency in effect is leasing or renting space from Facebook or Twitter to invite private speech for a public purpose, as it might lease space for a town meeting, or for government business, as GSA leases space for government offices. The sites are described as "agency sponsored," which indicates the government's primary role in operating and administering the sites. In advocating for heightened First Amendment protections by private ISPs such as Google or AOL, plaintiffs have used the state action principle to argue that ISPs effectively take on the role of the state for purposes of e-mail delivery and Internet communications regulation. These arguments have failed because courts do not consider e-mail delivery or Internet communication a

information needs of its interstate travelers are not jeopardized if newspaper publishers are permitted to engage in their constitutionally protected activities at interstate rest areas." *Jacobsen v. Howard*, 904 F. Supp. 1065, 1070 (D.S.D. 1995)).

255. A person's free speech rights on private property are governed by rules devised in reference to protests and picketing at privately owned shopping centers. The cases turned on an incompatibility analysis with the Court holding that speech at a shopping center is not within the scope of the purposes of the activity. A free speech claim "misapprehends the scope of the invitation extended to the public There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve." *Lloyd Corp. v. Tanner*, 407 U.S. 551, 564-65 (1972); *see also* *Hudgens v. NLRB*, 424 U.S. 507, 520-21 (1976) (holding that picketers were not protected by the First Amendment when advertising their strike at a shopping center). Steven Gey has argued that private companies offering the public access to the internet through the ISP servers, which they own, should not be permitted to censor speech. *See* Gey, *supra* note 144, at 1619-20 n.373. Essentially, because speech is the purpose of the property, the incompatibility assumption that guided the speech-unfriendly rulings in *Lloyd* and *Hudgens*, are inapplicable. *Id.* If the Internet is considered a public forum, speech carried by privately owned servers, essentially through or using private property, should be constitutionally protected. *Id.*

“traditional state function.”²⁵⁶ In this instance, the state action principle need not be invoked because we already have the state acting affirmatively to open a site and possibly acting to regulate, chill, or otherwise prohibit certain types of private speech it has invited onto that site.²⁵⁷ This situation is novel, but its novelty should not obscure the core issue at stake and the resources available within the current doctrinal framework. When private speech predominates on a site or property effectively controlled by the government, the public forum doctrine is likely the most appropriate. Such a provisional conclusion does not mean the public forum doctrine would not need to be renovated or extended to fully address private speech on government sponsored social media sites in the future but, for present purposes, the doctrine is where common sense and informed speculation inexorably lead.

As previously mentioned, despite the fact that the Internet backbone is privatized, *Reno* emphasized the Internet’s public character as an open communicative sphere akin to traditional public fora.²⁵⁸ More concretely, in *Reno*, the Court clarified that speech on the Internet is protected by the First Amendment, though it went no further. As a consequence, the fact that Facebook and Twitter are privately owned sites is not conclusive because the specific question involves federal agencies as operators and regulators of sites on private property. The issue is which free speech protections are incumbent upon the government in operating the site and what rights attach to private speech made at the government’s behest. It bears repeating that Facebook’s comment policy provides more free speech protection than do the comment policies of multiple federal agencies. It is true that First Amendment rights receive the highest level of protection on one’s own private property, but recognizing free speech rights on public property, which the government may restrict under certain carefully prescribed circumstances, has long been viewed as critical to the purposes of the First Amendment, both for the right of access it provides for those lacking the private property or for private resources necessary to express opinions and communicate ideas.²⁵⁹

256. See Nunziato, *supra* note 12.

257. It is conceivable Facebook could argue that, as a private property owner, its comment policy should control. This is an additional reason for terms of service agreements between federal agencies and social media providers such as Facebook to be amended to clarify that these government-operated and maintained sites are public spaces where First Amendment protections apply to the comments made by members of the public.

258. Despite the privatization of Internet services, the communicative medium itself maintains its public character.

259. According to affirmative conceptions of the First Amendment, which include the theory that the free speech clause nurtures the public opinion indispensable for democracy, it

The second factor in the test for a public forum is historical use. This factor comes into play when the Court is asked to consider regulations, laws, or government actions on speech that occurs in streets, sidewalks, parks, or other civic places that might be considered as such. If historical use demonstrates that a physical location has been used for expressive purposes, then the location is classified as a traditional public forum, and the most rigorous free speech protections apply.²⁶⁰ However, intent appears to carry more weight with the Court, as *Kokinda* demonstrated, and intent takes the lead when considering potential candidates for non-traditional public forum status. Because neither the Internet nor social media are sanctified by time and the approbation of generations, they are not likely to be considered traditional public fora, although there are arguments in favor of so doing.²⁶¹

At first glance, public forum jurisprudence appears rooted in place, a logical outgrowth of human activity in the city and town, and an instance of ordinary real world categories imposing themselves on airy and introverted legal thought. However anchored in history and empirical reality the public forum doctrine may appear, it has proven amenable to evolution. In *Cornelius*, the Court applied the public forum doctrine to a “means of communication”—a federal employee charity drive.²⁶² *Rosenberger* likewise extended the public forum framework to another intangible forum, a student activity fund. Using the currency of philosophy, the majority opinion declared that the activity fund “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”²⁶³ Given these precedents applying the public forum doctrine

is vital for the government to provide some spaces, venues, and places where citizens can speak freely, and such rights are guaranteed by the government, rather than by the whim or public spirit of a corporation. This last argument in favor of using public forum analysis to guide questions concerning free speech on government-sponsored social media, of course, is an argument from constitutional principle rather than from settled law.

260. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 55 (1983).

261. Justice Kennedy’s concurrence in *Lee* indicated a willingness to consider opening the category of traditional public forum beyond streets, parks, and sidewalks, provided physical similarities with traditional public fora remained an “important consideration.” See *Int’l Soc’y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 695–99 (1992) (Kennedy, J., concurring).

262. *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800–02 (1984). The Court concluded that the intangible forum was a non-public forum based on an analysis of government intent. *Id.* at 805–06.

263. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 830 (1995). In moving the public forum doctrine beyond its origins in the built environment, Kennedy’s majority opinion evokes Justice’s Brennan’s suggestion that the public forum doctrine apply to any means “specifically used for the communication of information and ideas.” *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 137–38 (1981) (Brennan,

to “metaphysical” or intangible communicative fora, it is reasonable to conclude that the public forum doctrine would be extended to social media sites. Moreover, the interactive character of social media/Web 2.0, within the “vast democratic fora” of the Internet writ large, cuts in favor of a public forum classification.²⁶⁴

In some cases, the public forum test includes an incompatibility analysis. The Court asks whether the expression under consideration is “incompatible with the normal activity of a particular place at a particular time.”²⁶⁵ Expression can be found incompatible with a forum with comparative ease.²⁶⁶ The government’s stated intent is a determining factor in any incompatibility analysis. In this instance, the President’s Memorandum is a clear statement of intent. Facebook, Twitter, YouTube, and blogs are opened by the government for speech activity to be used for communicative purposes. To hold speech incompatible with the government’s intended use, given the express wording of the Open Government Memorandum, would be a tautology.

If the argument that the public forum doctrine is the more appropriate framework in which to consider public comments on agency social media sites is persuasive, given that private speech predominates over any government speech that may be found on such sites, the next step is to identify precisely which kind of public forum such sites would be.²⁶⁷

J., concurring). The Court viewed the facts in *Rosenberger* to be similar to those in *Lamb’s Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Widmar v. Vincent*, 454 U.S. 263 (1981), which both involved access to public school property. *Rosenberger*, 515 U.S. at 842–43. Thus, the extension of the public forum doctrine from physical to metaphysical was remarkably nonchalant. *Id.* at 830.

264. Broadcast media is a channel of communication that the Court has recognized as subject to increased regulation and less First Amendment protection. See *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 400–01 (1969). Subsequent Court decisions, especially *Reno*, declined to extend to the Internet the doctrine that scarcity permits heightened regulation of speech.

265. *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972).

266. In the shopping center cases of the 1970s, the Court deployed a version of the incompatibility analysis to limit free speech rights on private property in the public realm.

267. The Supreme Court tends to use either the public forum doctrine or government speech to address questions about mixed or hybrid speech (“speech that is both private and governmental” as defined by Corbin). In *Garcetti v. Ceballos*, 547 U.S. 410, 421–22 (2006), the Court treated mixed speech or, more precisely, private speech by public employees while working, as government speech. In other cases, the Court found the public forum doctrine more suitable for balancing the competing speech interests at stake. See, e.g., *Ark. Educ. Television Comm’n v. Forbes*, 523 U.S. 666, 678–80 (1998) (noting previous Court precedent had designated the Arkansas state agency operating a network of noncommercial television stations as a public forum). Although this Article follows Fred Schauer in viewing *Forbes* as a “government enterprise” case, the Court ostensibly used the public forum doctrine to determine the debate was a non-public forum. See *supra* note 76. *Rosenberger*

Clearly, an agency Facebook page or blog is not a traditional public forum. A non-public forum is easy enough to find, but a forum open to all citizens with an Internet connection could hardly be considered a non-public forum. An agency social media site could be described as a forum open to all viewpoints on topics related to that agency's mission. As previously stated under *Perry*, midway between the venerable free-for-all of the traditional forum and the odd but plentiful closed forum lies the limited or designated public forum.²⁶⁸ While the two are classified together and to some extent originated together, they have since parted ways. A designated public forum is one created for expression by the express designation of the government.²⁶⁹ While lower courts have found designated fora, the Supreme Court has yet to acknowledge one. More common is the limited public forum, which received its most comprehensive discussion by the Court in the *Rosenberger* opinion. A limited public forum is created by the government, so like a designated forum and unlike a traditional forum, intent, rather than history, carries the day, but it was constrained at the moment of creation "to use by certain groups or dedicated solely to the discussion of certain subjects."²⁷⁰ It is reasonable to conclude that a federal agency social media site is likely a limited public forum, a conclusion which, while not offering the government carte blanche to restrict, remove, or limit public comments, does offer some permissible restrictions while providing

could also be classified as a case that involved governmental and private speech that was viewed through the public forum prism. See 515 U.S. at 845–46 (analyzing the University of Virginia student activities fund as a limited public forum). Lower courts illustrate a similar inconsistency, treating private advertisements on public transportation, participation in government civic programs, and Adopt-A-Highway signs as public forum cases. See *Hopper v. City of Pasco*, 241 F.3d 1067, 1081 (9th Cir. 2001) (holding that an art exhibit in the city hall was a designated public forum); *Children of the Rosary v. City of Phoenix*, 154 F.3d 972, 978, 980–81 (9th Cir. 1998) (holding that bus advertising panels were nonpublic fora); *Christ's Bride Ministries, Inc. v. Se. Pa. Transp. Auth.*, 148 F.3d 242, 252 (3d Cir. 1998) (holding private advertisements as non-public or designated public fora respectively); *Texas v. Knights of the KKK*, 58 F.3d 1075, 1080 (5th Cir. 1995) (holding the Adopt-A-Highway program a non-public forum).

268. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

269. Expression in such a venue receives the same protections it would in a traditional public forum, which means that any restrictions are subject to strict scrutiny. *Pleasant Grove City v. Summum*, 555 U.S. 460, 469–70 (2009) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1984)).

270. *Id.* at 470 (citing *Perry*, 460 U.S. at 46 n.7). In a limited public forum, the government may impose reasonable and viewpoint-neutral restrictions. See *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106–07 (2001) (holding that the government could not discriminate against the Good News Club's evangelical Christian club since the club's free speech was being held in the limited public forum of a public school).

heightened protection of citizens' First Amendment rights.²⁷¹

IV. APPLICATION TO FEDERAL AGENCY SOCIAL MEDIA

The Supreme Court has interpreted the First Amendment's sweeping stricture against the regulation of speech to mean "that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²⁷² Essentially, restricting the manner of expression, its timeliness, or its sound level, for example, is permissible, but the substance of what a person says or does—the "content" of that expression—has a significant degree of immunity or, put in terms more congenial to legal analysis, is presumptively protected. Courts treat laws attempting to restrict speech or expression based on its content, otherwise known as content-discriminatory laws, with a high degree of skepticism manifested in the strict scrutiny test, which requires the government to show the regulation at issue is necessary to achieve a compelling government interest. The parameters of content discrimination and its obverse, the principle of content neutrality, remain imprecise.²⁷³ Nonetheless, a recent analysis persuasively demonstrated that the Court's concept of content discrimination embraces both viewpoint and subject matter discrimination, while generally excluding discrimination related to message or forms of communication.²⁷⁴ Likewise, in various opinions the Court has explained that the accompanying principle of content neutrality means that the government must be viewpoint neutral and subject matter neutral when regulating speech.²⁷⁵ To flesh out legal abstractions, "subject

271. While some scholars have argued that a limited public forum permits so much expression the government speech doctrine is a better fit, it has also been argued that the public forum doctrine has not only become an obstacle to a coherent analysis but is hostile to speech.

272. *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

273. For an illuminating discussion of how the Supreme Court's jurisprudence on content discrimination is less haphazard than it appears, see Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 260–62 (2012) (claiming that the Court has evinced a consistent definition of content discrimination that covers both subject matter and viewpoint discrimination).

274. *Id.* at 254–56.

275. See *Perry*, 460 U.S. at 45 (asserting that a state must demonstrate that its regulation is necessary to serve a compelling state interest and that its regulation is narrowly drawn in order to implement a content-based exclusion); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 640–41 (1994) (emphasizing that laws that furnish special treatment upon the media are subject to more intense scrutiny); see also Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices*, 42 CLEV. ST. L. REV. 199, 201–03 (1994) (emphasizing content neutrality partakes of the view that equality is fundamental to the First Amendment).

matter” generally means the topic of the speech, while “viewpoint” generally means the perspective, opinion, or ideology of the message.²⁷⁶

A. Subject-Matter Restrictions

Content neutrality and the impermissibility of content discrimination acquire a distinct color in public space. When a court finds a public forum, certain rules apply. A law or regulation restricting the content of speech, meaning on the basis of its subject or viewpoint, in a public park or on a sidewalk must pass strict scrutiny.²⁷⁷ Restrictions in a designated public fora shoulder the same burden.²⁷⁸ In a limited public forum, by contrast, the court cuts an aperture. When the state establishes a limited public forum, “[i]t may be justified in reserving its forum for certain groups or the discussion of certain topics.”²⁷⁹ Laws that restrict speech based on the views or opinion expressed remain subject to strict scrutiny. Subject-matter limitations, however, are viewed under the less stringent intermediate scrutiny standard. The restrictions must be viewpoint neutral and reasonable in light of the purpose served by the forum.²⁸⁰ *Good News Club v. Milford Central School District* provides a helpful example of a subject-matter

276. Chemerinsky, *supra* note 275, at 203; *see also* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000) (stating that a viewpoint neutral requirement indicates that the government cannot regulate speech on the basis of the ideas behind the message, while a subject matter-neutral requirement necessitates that the government cannot regulate speech based on the topic of the speech). For a discussion of the differences between subject matter- and viewpoint-based restrictions, see Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 239–42 (1983) (arguing that the Supreme Court has been inconsistent in its analysis of subject-matter restrictions by treating it as viewpoint-based in certain cases while regarding it as content-neutral in other cases).

277. In a traditional or designated public forum, a content restriction must pass strict scrutiny. *See Perry*, 460 U.S. at 45–46 (declaring that a state must show that its narrowly tailored restriction is required to serve a compelling state interest).

278. In theory, such restrictions are permissible, but demonstrating a compelling government interest sets a high bar.

279. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 99 (2001); *see also* *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

280. *Good News Club*, 533 U.S. at 99 (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)). Viewpoint-based restrictions have to meet strict scrutiny and must be narrowly tailored to serve a compelling state interest. *See* *Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (maintaining that the government cannot ban expressions of free speech merely because society believes those expressions are offensive).

restriction in a limited public forum that did not meet intermediate scrutiny. In *Good News*, the Court determined that a school engaged in viewpoint discrimination by excluding a religious club from an after-school forum. Although the club otherwise engaged in a permissible purpose, namely the teaching of morals and character development allowable under Milford's policy, the club was excluded for its religious approach or viewpoint, essentially for being non-secular.²⁸¹ The Court's analysis gives a fair indication of how hard it is to refrain from viewpoint discrimination and how carefully decisions must be made in order to be considered viewpoint neutral even under the apparently more lenient standard of intermediate scrutiny.

If the Department of State explicitly establishes a limited public forum for the discussion of foreign policy topics, it may be able to remove comments that fall outside the stated scope of the forum in theory, although several caveats must be kept in mind in practice. The Department of State may exclude or restrict or refuse to post comments that are obviously off-topic.²⁸² But drawing the line in grey areas is always more a matter of careful judgment. The employee time required to maintain subject-matter restrictions may absorb agency resources. Agencies have to be consistent, because failing to moderate the forum to practice such limitations opens later restrictions to strict scrutiny. Arguing such a restriction is reasonable in light of the purposes of the forum may prove problematic.²⁸³ It may be

281. The Court based its analysis on two prior opinions, *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger*, 515 U.S. 819. In *Lamb's Chapel*, the Court determined that a school district violated the Free Speech Clause when it excluded a private group from presenting films at a school based solely on the films' discussion of family values from a religious perspective. 508 U.S. at 393–94. In *Rosenberger*, the University of Virginia's denial to fund a student publication focused on religion violated the Free Speech Clause. 508 U.S. at 842, 845–46.

282. At present, the Department of State will not post comments that "are clearly 'off topic.'" However, the Department does not provide a definition or examples of permissible topics.

283. Put another way, given the fact that social media sites are neither scarce nor limited by time, is it reasonable to argue that an irrelevant or off-topic statement must be removed? The standard is not simply reasonable, but reasonable in view of the purpose of the forum. The government does have a significant degree of discretion under public forum doctrine depending on how it defines the purpose of the forum. In *Cornelius*, a public forum case in which the forum at issue was found to be non-public, the Court stated: "The federal workplace . . . exists to accomplish the business of the employer." 473 U.S. at 805. The salient point is that the primary purpose of the forum at issue was something other than discussion. In *Perry*, access to an inter-office mail system was denied based on speaker identity, rather than subject matter, even though the purpose was communication, because the government's contention that one union had a different relationship to the public school teachers appeared reasonable to the Court. 460 U.S. at 39–41. In the case of agency

more reasonable for agencies to move irrelevant comments into an off-topic category rather than remove them from the site entirely. A key point is that subject-matter restrictions must be applied consistently and neutrally, and viewpoint neutrality can be deceptive. For example, excluding religious speech runs afoul of the intermediate scrutiny standard because it is not viewpoint neutral based on *Good News*.²⁸⁴ It should be stressed that the ability to remove comments that are off-topic, provided an agency has explicitly stated what is topical for purposes of the forum, does not provide cover to remove controversial or inflammatory statements. Attempts to cast exclusions on degrading or offensive or rude speech as subject-matter limitations rather than viewpoint restrictions have occasionally been successful in lower courts.²⁸⁵ However, courts are alert to covert viewpoint discrimination under the guise of subject-matter limitations.²⁸⁶ Take a facile example: if an agency removed “to hell with the Secretary’s policy” as off-topic, the agency will likely have engaged in unconstitutional viewpoint discrimination under the aegis of a subject-matter restriction, because the comment was not off topic. Agencies must remove off-topic comments, no matter how eloquent or erudite, and should retain topical comments, be they crude or ill-conceived. The issue of profane, rude, or uncivil speech invites discussion of civility codes, which multiple agencies have adopted on their social media sites.

1. *Civility Codes and Viewpoint Neutrality*

Ten federal agencies post civility codes or comment policies on their social media sites. “We want to publish your comments, but expect

sponsored social media, the primary purpose of the forum is to encourage discussion on topics relevant to the agency’s mission, based on a general survey of agency statements and the President’s Open Government Memorandum. Given the lack of time or space limitations on agency social media sites, removing off-topic comments may be unnecessary; however, even if removing comments absorbs the time of agency staff, doing so may not be unreasonable should an agency want the discussion to remain focused and relevant.

284. *Good News*, 533 U.S. at 112 (“[S]peech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint.”).

285. In *Perry v. McDonald*, 280 F.3d 159, 170–71 (2d Cir. 2001), the Second Circuit held that refusing to license vanity plates with scatological topics was a viewpoint-neutral regulation. In *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65, 90 (1st Cir. 2004), the First Circuit held that the Massachusetts Bay Transportation Authority’s policy of rejecting derogatory advertisements was viewpoint neutral.

286. The fact that courts are aware of the possibility a subject-matter restriction may be a cover for impermissible viewpoint discrimination does not discount the difficulties involved in identifying viewpoint discrimination. See Abner S. Greene, *Government of the Good*, 53 VAND. L. REV. 1, 33 (2000).

participants to show respect, civility and consideration to the blog authors and other blog visitors who include persons of all ages,” is a typical example.²⁸⁷ More than a few of these civility codes are problematic both on their face and potentially as applied. A vague standard, such as “otherwise objectionable” or “vulgar” certainly chills speech and has the effect of a prior restraint on speech.²⁸⁸ Restricting speech that is “offensive” or that “incites hate” leaves extensive discretion to the government to determine what is acceptable—a grant of authority antithetical to the First Amendment tradition.²⁸⁹ As the Supreme Court recently held, speech in a public place on matters of public concern is protected, even if crude, rude, or insensitive.²⁹⁰ “Narrow, objective, and definite standards” are the imperative of the Court, which leaves little to agencies’ discretion. Banning profanity appears to be objective, narrow, and definite and thus a policy that may be implemented in a viewpoint-neutral manner.²⁹¹ Of course, the Supreme Court has cautioned that forbidding particular words may cause collateral damage, namely the suppression of ideas.²⁹² It is not unreasonable to contend that some views can only be conveyed by the use of strong, even profane language. When applying civility policies, agency attorneys must use extraordinary care. Even the most narrowly tailored and objective policy will fail if applied improperly.²⁹³ For example, a policy forbidding profanity would not include offensive speech, although such speech may appear equally distasteful.

A civility policy has to satisfy intermediate scrutiny, meaning it should be reasonable in light of the purpose of the forum as well as viewpoint neutral.

287. *USDA Comment Policy*, *supra* note 57.

288. The First and Fifth Amendments shield citizens from the arbitrary enforcement of vague standards. *See Reno v. ACLU*, 521 U.S. 844, 875 (1997); *see also Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 131 (1992) (holding that a county ordinance requiring public speakers, parades, or assemblies to apply for a permit was a prior restraint on speech). A law subjecting speech to a prior restraint must include “narrow, objective, and definite standards to guide the licensing authority.” *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969).

289. *See Elena Kagan, Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 512 (1996) (claiming the government is unable to distinguish true ideas from false).

290. *Snyder v. Phelps*, 131 S. Ct. 1207, 1217 (2011). Precisely how protected personally offensive and hurtful speech on a matter of public concern remains unclear.

291. Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 140 (1981).

292. *Cohen v. California*, 403 U.S. 15, 26 (1971) (“[W]e cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process.”).

293. In *Cohen*, the Court invalidated the application of a breach of the peace law, which was neutral on its face.

Civility requirements in the context of advertisements in public fora have been found constitutional, but such holdings rest on the captive audience doctrine, which does not appear applicable to the social media context.²⁹⁴ A “captive audience” is one that cannot escape the speech at issue and is confronted with the potentially offensive messages in a place with a strong expectation of privacy. Online speech can be considered the functional equivalent of written speech, and the Court is more likely to find an audience confronted with offensive sound to be captive. Readers “may escape exposure to objectionable material” by looking away.²⁹⁵ Members of the public who visit agency social media sites may do so from the privacy of home, where one has the right to be spared from offensive speech, or from public places with Internet connections.²⁹⁶ Notwithstanding the fact that the majority of public commenters do so from the privacy of their own homes, the fact that people may avoid or escape unwanted or offensive comments with comparative ease by averting their eyes is likely to be dispositive.²⁹⁷

2. *Time, Place, and Manner Restrictions*

If broad civility policies may be suspect, what about incivility that actually disrupts the forum? Time, place, and manner restrictions comprise another realm of permissible regulation of speech. Such restrictions must

294. See *Lehman v. City of Shaker Heights*, 418 U.S. 298, 304 (1974) (Douglas, J., concurring); *AIDS Action Comm. of Mass., Inc. v. Mass. Bay Transp. Auth.*, 42 F.3d. 1, 13 (1st Cir. 1994). A municipal ban on political advertising on commuter buses is permissible because riders can be considered a captive audience.

295. See *Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n*, 447 U.S. 530, 542, 544 (1980) (arguing that customers who are offended by material in a billing insert can “escape exposure” by throwing the insert in the trash).

296. See *Carey v. Brown*, 447 U.S. 455, 471 (1980) (regarding the government’s interest in protecting the privacy of the home); see also *Frisby v. Schultz*, 487 U.S. 474, 487–88 (1988) (addressing the same issue); *FCC v. Pacifica Found.*, 438 U.S. 726 (1978) (holding that the FCC could prohibit some kinds of offensive speech because people receiving the broadcasts were in the privacy of their own homes and thus a captive audience).

297. See *Consol. Edison Co. of N.Y.*, 477 U.S. at 530. Even at home a person is not a captive audience if one can avoid or get rid of the offensive message easily. It is not clear when an audience is considered “captive” or receiving messages under coercion or duress. “The ability of government . . . to shut off discourse solely to protect others from hearing it is . . . dependent upon a showing that substantial privacy interests are being invaded in an essentially intolerable manner.” *Cohen*, 403 U.S. at 21. In *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–12 (1975), the Court held that the limited privacy interests of individuals on the streets means it is incumbent upon them to avoid offensive expression. Communicating via blogs and Facebook walls is akin to walking down a street in that one opens oneself to a variety of comments and experiences. However, one enters the public sphere while remaining at home where privacy interests are strong.

be narrowly tailored to serve the government's legitimate, content neutral interest, but the regulation need not be the least intrusive or the least restrictive means of doing so.²⁹⁸ Moreover, it must leave open ample alternative channels of communication. Context is determinative in applying time, place, and manner restrictions to a public forum. The Court focuses on whether the expression is incompatible with the "normal activity of a particular place at a particular time." If the government can point to an activity or a purpose for a place that involves something other than the expression at issue, the time, place, and manner restriction will usually be held constitutional.²⁹⁹ Scholars have claimed that the Court has watered the time, place, and manner test down to a pro forma exercise.³⁰⁰ In the case of federal agency social media, expression actually is the normal activity of the place at a particular time, so the focus would be on types of expression that would interfere with the normal activity of the site. Of course the preeminent example of a public forum involving speech as its primary activity is a public meeting.³⁰¹ What counts as disruptive in the context of a city, town, or public meeting is unclear as a matter of law.³⁰² Profane speech alone is not enough.³⁰³ However, restrictions on speech are permissible if used specifically and neutrally as to preserve the functioning of the meeting. If booing, jeering, and interruptions interfere so much that the meeting cannot continue, a time, place, and manner restriction could pass constitutional muster. Hostile questions are permitted, even in a public meeting, as is the expression of opposition and making obnoxious

298. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

299. *See Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time."). In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640, 651 (1981), the Court drew a distinction between people assembled on public streets and those assembled at a fair to uphold time, place, and manner regulations of speech at a public fair.

300. *See Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (establishing that the modern standard requires time, place, and manner regulations to be "narrowly tailored to serve a significant governmental interest"). *See generally Gey, supra* note 144.

301. A public meeting is a limited public forum opened for the discussion of a specific topic or specific topics.

302. Paul D. Wilson & Jennifer K. Alcaez, *But It's My Turn to Speak! When Can Unruly Speakers at Public Hearings Be Forced to Leave or Be Quiet?*, 41 URB. LAW. 579, 594-95 (2009).

303. *Leonard v. Robinson*, 477 F.3d 347, 352, 359-60 (6th Cir. 2007); *see also Norse v. City of Santa Cruz*, 586 F.3d 697, 701 (9th Cir. 2009) (Tashima, J., concurring in part and dissenting in part). On appeal for the second time before the Ninth Circuit, a three-judge panel justified the City of Santa Cruz's expulsion of a citizen from a city council meeting for parading around the council chambers. Whether a Nazi-style salute alone constituted disruption divided the panel.

statements in a rude manner. The First Amendment protects protests and symbolic speech, but it does not protect interference that prevents all public discourse and, in effect, silences it.

Working with a rough analogy to a public meeting, if an agency Facebook wall or blog is similar to a public meeting, spamming is the equivalent of mobbing a meeting or continued jeers that make discussion impossible. Given that a twenty-four-hour interactive virtual site is not subject to space or time limitations, it is more difficult to interfere with a social media site than it is to render a meeting nonfunctional, and for that reason any time, place, or manner restriction based on such an analogy should be undertaken with care. In all probability, a federal agency can regulate spam or similar interruptions or repeated statements that render blogs or sites unusable. A content-neutral time, place, or manner restriction, narrowly tailored to ensure that an agency can maintain discussions, will likely pass muster.³⁰⁴

B. *Unprotected Speech*

1. *Obscenity*

Two types of speech, obscenity and fighting words, fall outside the protective purview of the First Amendment. Agencies can remove both types of speech from postings, boards, or walls or refuse to post them altogether. In order to be properly characterized as obscene, rather than merely indecent or vulgar, speech must pass the three-part *Miller* test, which asks:

- (a) whether the average person applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as whole, lacks seriously artistic, political, or scientific value.³⁰⁵

Naturally, the use of “contemporary community standards” has come into question in the Internet age; but for the time being, it remains

304. See *United States v. Grace*, 461 U.S. 171 (1983) (holding a complete restriction on flags or banner displays on the public sidewalks outside the Supreme Court was unconstitutional because it was not narrowly tailored); *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding an ordinance that prohibited the residential display of signs was unconstitutional because it failed to leave open alternative channels of communication).

305. *Miller v. California*, 413 U.S. 15, 24 (1973) (internal citations and quotations omitted); see *Pope v. Illinois*, 481 U.S. 497, 500–01 (1987) (emphasizing that the first and second parts of the *Miller* test are issues of fact for a jury to determine when applying contemporary community standards).

constitutionally valid. In addition, child pornography receives no protection from the First Amendment and need not meet the *Miller* test to be banned.

As previously mentioned, multiple agency comment policies forbid vulgarity and indecency. Indecent speech, if made in a public forum on an issue of public concern, is protected by the First Amendment and should remain posted.³⁰⁶ Indecent speech that does not reference an issue of public concern or speak to the stated subject matter or topic of a social media site, board, or wall may be moved or removed in the process of maintaining the site for the use of established topics in a limited public forum. In this case, the speech is moved because it is off-topic—not because it is indecent. The Department of Agriculture mentions that people of all ages use the site. The agency could argue that there is a government interest in protecting minors and that removing an indecent YouTube video post is consonant with that interest.³⁰⁷

2. *Fighting Words: The Brandenburg Test*

Chaplinsky v. New Hampshire is the classic statement of what is commonly known at the “fighting words” doctrine—words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”³⁰⁸ Such speech, which includes “epithets or personal abuse” that “are no essential part of any exposition of ideas,” may be removed from an agency social media site. Hence, comment policies prohibiting “personal attacks” are constitutionally sound with the caveat that such a personal attack must have no ideological component. If an attack speaks to a public issue or has a public component, the speech may be protected. The fighting words doctrine received its present formulation in the 1969 case of *Brandenburg v. Ohio*, where the Court held that the government may “forbid or proscribe advocacy of the use of force or of law violation . . . where such advocacy is directed to incit[e] or produc[e] imminent lawless action and is likely to incite or produce such action.”³⁰⁹ The test focuses on preventing unlawful conduct rather than policing provocative speech and distinguishes between vociferous advocacy and advocacy likely to produce harmful

306. The Court has repeatedly struck down laws targeting indecent or sexual speech. *Ashcroft v. ACLU*, 542 U.S. 656, 670 (2004); *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 811 (2000); *Reno v. ACLU*, 521 U.S. 844, 868 (1997); *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 131 (1989).

307. *See Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2771 (2011) (Breyer, J., dissenting).

308. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

309. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

action.³¹⁰ Advocacy is perforce protected unless it is “intended to produce, and likely to produce, *imminent* disorder.”³¹¹

At the risk of clumsy simplification, the more speech advocates an imminent crime, the less likely it is to be protected, but the more ideological or abstract the advocacy, the more likely the speech, even if extreme, offensive, or provocative, is protected. One way to distinguish between the two is to consider the audience. Speech, however offensive or provocative, when directed at a mass or general audience, especially if it is grounded in what Kent Greenawalt describes as an “ideological motive” is probably not a solicitation to commit a crime. Speech encouraging lawless action aimed at a particular person or group without any panoply of principle is likely to meet the *Brandenburg* test and be unprotected.³¹² In *NAACP v. Claiborne Hardware*, the Court held highly charged statements with threatening connotations were protected as “emotionally charged rhetoric” that did not meet the *Brandenburg* test.³¹³ However, the Court has held that “true threats” do exist and are not protected.³¹⁴ Most noteworthy is the fact that the test applies to Internet speech, and lower courts have used it to distinguish between direct threats online and websites that may imply the encouragement of harm.³¹⁵

C. Protected Speech

1. Offensive, Extremist, and Profane Speech

Nine agencies proscribe “offensive” speech, which is variously described

310. Daniel T. Kobil, *Advocacy On Line: Brandenburg v. Ohio and Speech in the Internet Era*, 31 U. TOL. L. REV., 227, 235 (2000). In *Hess v. Indiana*, 414 U.S. 105, 108–09 (1973), the Court stressed the imminence element of the test and concluded that when a speaker advocates an illegal action that may take place several hours in the future, the imminence requirement of the *Brandenburg* test is not satisfied.

311. *Hess*, 414 U.S. at 109.

312. KENT GREENAWALT, *SPEECH, CRIME, AND THE USES OF LANGUAGE* 260, 266 (1989).

313. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 928 (1982) (concerning statements by the leader of a boycott of white-owned businesses).

314. See *Virginia v. Black*, 538 U.S. 343, 359–60 (2003) (defining a “true threat” as one that conveys the danger of physical harm).

315. See *United States v. Carmichael*, 326 F. Supp. 2d 1267, 1288 (M.D. Ala. 2004) (holding that a website with the names and photos of government agents with “wanted” underneath the photos did not satisfy the imminence requirement and the case was similar to *Claiborne Hardware*); *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1149–50 (W.D. Wash. 2003) (holding that release of the personal information of individuals online even to encourage intimidation by third parties was not unlawful advocacy).

as including “profanity” or “vulgar and abusive language.”³¹⁶ For example, the HHS prohibits “[p]ersonal attacks, profanity, and aggressive behavior,” as well as “[i]nstigating arguments in a disrespectful way.”³¹⁷ The Department of Commerce will not post comments that contain “offensive terms that target specific ethnic or racial groups.” Nor will the Department of Homeland Security.³¹⁸ It bears repeating that there is no category for offensive or controversial speech, whether on the Internet or elsewhere, within First Amendment jurisprudence.³¹⁹ As a result, a comment cannot be regulated or removed from an agency-sponsored social media site “simply because it is upsetting or arouses contempt.”³²⁰ It is not unworthy of mention that speech on public issues rests on an empyrean height in the First Amendment firmament.³²¹ At best, agency prohibitions presume the messages and words encompassed by “offensive,” “disrespectful,” and “vulgar and abusive” are self-evident. At worst, they appear to countenance, even sanction, disregard of the First Amendment by agency employees administering social media sites. The Court consistently holds restrictions on controversial speech discriminatory on the basis of viewpoint or subject matter either on its face or as applied, so such speech is protected.³²² It bears repeating that the law distinguishes extreme and offensive speech from speech intended to produce imminent harm.³²³ Because such restrictions on offensive or controversial speech likely

316. See *supra* note 64 and accompanying text.

317. *Comment Policy*, DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 55.

318. COMMERCE.GOV, *supra* note 62; *Department of Homeland Security*, *supra* note 58.

319. It should be noted that some scholars believe offensive messages, especially ones motivated by bias or likely to produce intolerance, should be illegal. See Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5, 5 (2002). Even violent speech (without incitement) has been held to be protected. See generally *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2732 (2011).

320. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011). The Court has repeatedly disavowed the regulation of offensive speech as impermissible content discrimination. See, e.g., *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 135 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988) (plurality opinion). Whether the Court does so because regulation of offensive speech is intrinsically wrong, or wrong because it conceals viewpoint discrimination is not obvious. For a discussion, see Kendrick, *supra* note 273, at 250–51.

321. *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.” (internal quotation marks omitted)).

322. Put another way, restrictions on controversial speech have been found to be biased on the basis of subject matter or viewpoint, and as such, are prime examples of content discrimination. See *supra* note 273.

323. See *Boos v. Barry*, 485 U.S. 312, 322 (1988) (“[I]n public debate [we] must tolerate insulting, and even outrageous, speech in order to provide adequate ‘breathing space’ to the freedoms protected by the First Amendment.” (internal quotation marks omitted)).

constitute impermissible content discrimination, they are inherently suspect and subject to strict scrutiny. An agency would need to persuade a court that a restriction on “vulgar,” “disrespectful,” or “offensive” comments is narrowly drawn to serve a compelling state interest, a singular feat given the slippery and subjective meanings of such terms.

Six agencies explicitly enjoin profanity.³²⁴ Restrictions against particular words appear content-neutral because they can be applied uniformly to speech on any subject or speech evincing any conceivable viewpoint.³²⁵ Nevertheless, profanity is presumptively protected. In *Cohen v. California*, the Court applied a neutral disorderly conduct statute to a profane expression on Cohen’s jacket.³²⁶ Harlan’s opinion gives every indication of abjuring the right of the government to decide that specific words are vulgar or offensive either in facially discriminatory laws or in the application of a facially neutral law.³²⁷ Following *Cohen*, it appears that agency restrictions on profanity may violate the First Amendment on its face or as applied through removal of a particular comment from the site. The type of scrutiny such a restriction on profanity would receive is not abundantly clear. While a neutral classification would seem to call for intermediate scrutiny, it is possible to draw a tentative conclusion from *Cohen* that a restriction against profanity, both on its face and as applied, is subject to strict scrutiny.³²⁸

2. *Hate Speech*

Nine agencies with comment policies forbid hate speech, variously described as discriminatory or offensive language targeted at racial or

324. NASA states “No profanity.” The DHS asserts it will remove “profanity.” The USDA will not post “abusive, profane, or vulgar language.” HHS prohibits “personal attacks, profanity, and aggressive behavior.” The SBA will delete “profanity, implied profanity, obscenity or vulgarity.” The EPA will not post comments that “contain obscene, indecent, or profane language.” See *supra* notes 55, 57–59, 61–62.

325. “To hell with [federal agency’s] policy” and “[t]o hell with opponents of [federal agency’s] policy” are examples of a restriction on a particular word that can be applied neutrally.

326. The Court held that Cohen’s jacket could be worn inside a federal courthouse, a public forum, although the opinion did not engage the public forum doctrine extensively. The Court concluded that although the law was neutral, it applied to Cohen because of the offensiveness of the words on his jacket, and because the application was content-based, it was subject to strict scrutiny. 403 U.S. 15, 18 (1971) (“The conviction quite clearly rests upon the asserted offensiveness of the *words* Cohen used to convey his message to the public.”).

327. *Id.* at 25.

328. See Kendrick, *supra* note 273, at 271.

ethnic groups.³²⁹ While no agency wishes to harbor or appear to condone hate speech, the difference between hate speech and hate crime is relevant for First Amendment purposes. Hate speech without an incitement to violence is protected speech, however intolerant or antithetical to the principles of an open and democratic society, and cannot be removed or censored on an agency social media site.³³⁰ *R.A.V. v. City of St. Paul*, which combined hate speech and fighting words, is instructive in this regard.³³¹ The Supreme Court ruled on a St. Paul ordinance that outlawed fighting words on the basis of race, color, creed, religion, or gender. Four teenagers were convicted under the ordinance for burning a cross in an African-American family's yard. The Court held the law was unconstitutional because it purported to regulate only specific fighting words based on prejudice.³³² Although hate speech is constitutionally protected, hate crimes are not.

Hate crimes are criminal acts such as assault, battery, and harassment motivated by the victim's racial group, gender, ethnicity, or orientation.³³³ Verbal or online threats of violence, coercion, or intimidation that meet the *Brandenburg* test are criminal acts and can be prosecuted. There is a critical point at which hate speech can elide into a hate crime; the advocacy of a hate crime, provided it is imminent and likely to produce action, can be prosecuted. For instance, comments that threaten an imminent and likely hate crime or comments that amount to online harassment on the basis of a racial group or gender may be considered a hate crime, and an agency has a duty to remove such comments or to refrain from posting them.

The posting of hate speech on government-sponsored social media sites is a sensitive matter because it may give the impression of endorsement and because agency employees monitoring sites may feel personally offended and justified in removing such comments.³³⁴ The claim that reprehensible

329. For each agency's precise phrasing, see *supra* note 324 and accompanying text.

330. The First Amendment's protection of controversial, minority, or intolerant speech helps society as a whole to appreciate tolerance and become more tolerant. LEE BOLLINGER, *THE TOLERANT SOCIETY*, 237–48 (1986).

331. See generally 505 U.S. 377 (1992) (finding that the hate speech must be on-topic or address some matter relevant to the agency or its mission to remain posted).

332. *Id.* at 386. The city could outlaw all fighting words or none, but could not prohibit only those fighting words offensive to certain groups. Essentially, the law was under-inclusive and concealed viewpoint discrimination.

333. Hate crimes are illegal in forty-five states and in the District of Columbia. Hate crimes can be federal crimes if they occur on federal property or meet other requirements.

334. Multiple legal scholars believe hate speech should comprise an actionable offense. See Richard Delgado, *Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133, 143–47 (1982); see also Mari J. Matusda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2378–79 (1989)

views outside the mainstream do not belong in legitimate public debate has a moral appeal, but moral appeal is not legally enforceable. However, by taking a strong First Amendment stance and leaving hate speech posted, agencies may be under-inclusive. An offended reader could file a civil suit against another commenter for the tort of intentional infliction of emotional distress.³³⁵ The First Amendment can be deployed as a defense to tort claims as it was recently in *Snyder v. Phelps*, exemplifying the tension between the First Amendment and egalitarian values legal scholars began to explore in the wake of *Hustler Magazine, Inc. v. Falwell*.³³⁶

D. Unlawful Speech

1. Cyberstalking and Cyberharassment

Several comment policies target “abusive speech,” but fail to distinguish between speech that may be protected even if obnoxious or hateful, and speech that may be criminal. Cyberstalking is the use of online communication, including the Internet and e-mail, to stalk an individual, and usually evinces a pattern of threatening behavior.³³⁷ Thirty-five states have cyberstalking laws, meaning the laws either explicitly include references to electronic communication or contain language broad enough to encompass it.³³⁸ Cyberharassment involves harassing messages or entries

(claiming that the toleration of hate speech amounts to state action).

335. For a discussion of whether a federal agency could be potentially liable under contributory negligence and the likelihood of immunity under Section 230 of the Telecommunications Act of 1997, see *infra* Part IV.F.

336. *Snyder v. Phelps*, 131 S. Ct. 1207, 1215–16 (2011). The speech must touch upon a matter of public concern and not be purely private. The First Amendment does not shield purely private speech from tort liability because such speech does not contribute to the discourse on public issues essential to democracy, and the chilling effects of regulation are less insidious in consequence. See *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.* 472 U.S. 749, 758 (1985)). The Court applies a public concern test to determine whether the speech in question is directed to a matter of public or private concern. The test’s parameters appear loosely defined. Speech that relates to a political, social, or community concern, or addresses topics of general interest to the public meet the public concern standard. See *San Diego v. Roe*, 543 U.S. 77, 83–84 (2004) (per curiam); *Connick v. Myers*, 461 U.S. 138, 146 (1983); see also *Bartnicki v. Vopper*, 532 U.S. 514, 528–29 (2001) (noting a federal wiretapping statute, as applied, regulated disclosure of a matter of public concern).

337. See *State Cyberstalking and Cyberharassment Laws*, NAT’L CONF. OF ST. LEGISLATURES (NCSL), <http://www.ncsl.org/issues-research/telecom/cyberstalking-and-cyberharassment-laws.aspx#Laws> (last visited May 14, 2013).

338. Generally through language that refers to stalking by any device or means. The behaviors encompassed by cyberstalking may be prosecuted under stalking laws in the states without cyberstalking laws.

or other forms of electronic communications used to torment an individual.³³⁹ Unlike cyberstalking, cyberharassment does not require a credible threat. Thirty-eight states have cyberharassment protections, either in specific statutes or by including electronic harassment under preexisting statutes.³⁴⁰ Cyberstalking or harassment on an agency social media site may be easier to spot than other types of non-protected speech because such comments appear repeatedly and are directed to a specific individual. Comments that approach a crime, even a non-federal crime, should be removed, especially if a victim requests it.

2. *Defamation, Libel, and Slander*

The Department of State asserts, “Comments that make unsupported accusations will also be subject to review.” The USDA, HHS, and DHS follow suit, while NASA contains a nuanced gloss on the prohibition.³⁴¹ These strictures against personal attack obfuscate protected speech from forms of libel, defamation, and slander. Plaintiffs can file tort actions for defamation, libel, or slander in state court. The basic elements of defamation require a false and defamatory statement, communicated or “published” to a third party, a publisher acting negligently, and damages.³⁴² Libel is permanent defamation, and slander is the cause of action for oral “published” statements.³⁴³ From appearances, some agencies enjoin speech that falls outside the narrow boundaries of defamation. The factual requirement of a falsity is not only hard to prove but hard to identify because it excludes opinions, ideas, ruminations, even accusations related to a person. Furthermore, defamation for public figures requires an additional element of malice.³⁴⁴ Accusations or potentially libelous statements on agency social media sites are especially problematic. An agency may fear potential liability for not removing a potentially libelous comment, although the Telecommunications Act may insulate a federal

339. NCSL, *supra* note 337.

340. *Id.*

341. *See* NASA, *supra* note 61 (“No personal attacks. Criticism of decision-making and operational management, including the names of individuals involved, is legitimate. Criticism on a purely personal level is not.” Moreover, “[c]omments about politics and politicians must, like everything else, be on topic and free from personal attacks.”).

342. RESTATEMENT (SECOND) OF TORTS: DEFAMATION § 577 (1977). The plaintiff must prove falsity as part of a prima facie case in defamation cases involving public figures or private individuals and public concerns.

343. “Published” is a euphemism for communication to an audience in this context.

344. The fault standard of malice requires knowing falsity or a reckless disregard for truth.

agency from liability.³⁴⁵ On the other hand, removing a comment preemptively may violate the free speech rights of a commenter. Decisions must be made, case-by-case, based on an analysis of the context of the comment. Given the vague and overbroad statements on some agency social media comment policies, it is advisable to remember that statements concerning public figures, such as agency heads or officials, are likely to be protected speech given the especially stringent standards the Supreme Court set out for public figures attempting to prove defamation.³⁴⁶ Statements, including offensive, hyperbolic, or ludicrous claims about private individuals on matters of public concern, comprise yet another category that is often protected.³⁴⁷

E. Problematic Speech

1. False Statements of Fact

As discussed, libel is a false statement that is not only unprotected by the First Amendment but also punishable by law. However, false ideas or false facts by themselves are not illegal, and the dominant theme of the First Amendment is one of benign neglect with respect to falsehoods.³⁴⁸ For the most part the First Amendment shields people who make false statements, even intentionally, in the public sphere from punishment.³⁴⁹ Holocaust denial is one instance of a falsehood that exists undisturbed. However, does the First Amendment protect false statements in a public forum such as an

345. 47 U.S.C. § 230(c)(1) (2006).

346. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964) (establishing constitutional restrictions on tort actions involving defamation and public figures).

347. For the public concern test the Court applies to determine whether the First Amendment is a proper defense to tort liability, see *id.* In tort actions involving private individuals and public concerns, states can permit private plaintiffs to sue for damages for “actual injury,” which includes humiliation and mental anguish. The fault standard of malice is suitable for cases in which the plaintiff sues for presumed or punitive damages. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

348. With the exception of commercial fraud. For more on the First Amendment and falsehood, see Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

349. Defamation and fraud are examples of false factual statements that are unprotected or for which the First Amendment does not offer a defense. *United States v. Stevens*, 559 U.S. 460 (2010) did not explicitly name false statements of fact as unprotected speech. The Court’s precedent varies as to whether factual falsity is protected speech. *N.Y. Times Co.*, 376 U.S. at 254, implied that false speech was protected under the First Amendment. In *Gertz*, 418 U.S. 323, the Court stated false statements of fact fall outside the ambit of the First Amendment. Given the Court’s most recent opinion in *Stevens* and the general tenor of First Amendment doctrine, it would appear false statements of fact are protected speech, with a possible caveat for intentional or knowingly false statements of fact based on *Garrison v. Louisiana*, 379 U.S. 64 (1964).

agency social media site? Uniquely among agencies, HHS enjoins falsehood on its social media sites.³⁵⁰ The precise wording of the warning implies that making a false comment may be a punishable offense, which is problematic in itself, in addition to the probable chilling of speech likely to result. Furthermore, relying on the government to distinguish truth from falsehood is at odds with the principles of popular government and robust deliberation at the heart of the First Amendment tradition, in both doctrine and popular perception, which leave it to the people or the marketplace of ideas to judge the veracity of claims.³⁵¹ For those reasons, other agencies are ill-advised to follow HHS's example. False statements or claims should remain posted on sites, and the agency may respond. However, because HHS's agency mission involves public health, which critically depends on accurate information on health issues, and it maintains its site to encourage dialogue about health-related issues, HHS could argue that it has a substantial interest in preventing harm and false statements of fact, about the efficacy of medicines or the spread of disease or the effects of vaccines, that have a credible potential to cause harm through misinformation. Thus, the agency's interest in conveying accurate information about public health hypothetically could justify refusing to post false statements that have the potential to cause harm, given the Court's apparent ambivalence about the status of false statements in First Amendment doctrine.³⁵²

2. *Commercial Speech and Discrimination*

While commercial speech is likely to be considered off-topic on agency social media sites, it should be added that restrictions on commercial speech are governed by a more lenient standard than are other forms of speech.³⁵³ The Fair Housing Act and comments that purport to advertise dwellings or rooms provide an occasion to consider commercial speech, discriminatory

350. See *supra* note 55 and accompanying text (“Tell the Truth. Spreading misleading or false information is prohibited.”).

351. See Stone, *supra* note 276, at 228 (asserting that the people are the proper judges of the value of speech in a democracy); see also Kagan, *supra* note 289, at 512 (contending that the government is prone to “err, as a result of self-interest or bias, in separating the true and noble ideas from the false, abhorrent ones”).

352. This justification would be more persuasive in the absence of a strong disclaimer clearly separating the HHS official website as a source of information from the interactive social media sites open to public comment.

353. *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557 (1980); *Edenfield v. Fane*, 507 U.S. 761, 777 (1993) (“Even under the First Amendment’s somewhat more forgiving standards for restrictions on commercial speech, a State may not curb protected expression without advancing a substantial governmental interest.”).

statements, and illegal statements in light of the First Amendment. Section 804 of the Act forbids, among other things, advertisements for sale or rental that indicate preference or discrimination with respect to race, color, religion, sex, handicap, familial status, or national origin.³⁵⁴ Discriminatory statements on a HUD social media site that violate the Fair Housing Act can be removed and prosecuted. Such statements would be de facto advertisements or comments functioning as classified ads that offer, for instance, “apartment available willing to rent whites only, no children.” An illegal statement can be removed and HUD’s Office of General Counsel, along with the DOJ’s Civil Rights Division, can consider prosecution. However, statements that advocate repeal of the Fair Housing Act, voice objections to it, or counsel disobedience on an ideological level, even if offering discriminatory prejudice as a justification for disobedience, should remain posted because such statements do not violate Section 804.³⁵⁵ Advocacy of the violation of the law is protected unless it passes the *Brandenburg* test of intent, incitement, lawless action, and likely effect.³⁵⁶ Thus, if a non-commercial comment so advocates a violation of the Fair Housing Act it amounts to “fighting words,” to use the old-fashioned expression, it may be removed. Distressing as it may be, and contrary to the purposes of the Act, discriminatory comments made in a fair housing context such as “single whites without kids make the best tenants,” should remain posted.

F. *Liability, Immunity, and Endorsement*

1. *Agency Liability*

Federal agencies want their social media sites to comply with the First Amendment, but liability under state tort law looms in the background. Should a member of the public take offense at a comment the agency did not remove because it appeared to be protected speech, the offended citizen could sue the source of the comment under various torts and the agency’s failure to remove the comment could open it to a claim of contributory negligence. The most likely scenario involves hate speech or vituperative,

354. 42 U.S.C. § 3604(c) (2006).

355. Section 804(c) states that it shall be unlawful “[t]o make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.”

356. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (stating that “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

prejudicial statements that do not rise to the *Brandenburg* test and are protected, so an agency leaves them posted because they are, however offensive, on-topic. A member of the public, if so outraged, could sue in state court for intentional infliction of emotional distress. Fear of liability could induce an agency to be overbroad in the speech it removes or refuses to post. Such a fear is more phantasm than reality. Agency liability may be precluded by § 230(c)(1) of the Telecommunications Act of 1996, which states that “[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”³⁵⁷ Section 230(c)(1) exempts Internet service providers, search engines, social-networking sites, and individual bloggers from liability for the speech of other users.³⁵⁸ As a user of an interactive computer service, a federal agency, in all likelihood, cannot be held liable under state tort law for public comments.³⁵⁹

Should § 230 not apply to the federal government, it should be noted that the United States waives sovereign immunity for torts. However, the intentional infliction of emotional distress is not listed among the qualifying tort actions. There are statutory exemptions to this waiver, which include libel and slander.³⁶⁰ Furthermore, any claim based on an employee acting in a discretionary function, which can encompass reviewing public comments in a limited public forum, is another exception to the waiver of sovereign immunity for torts.³⁶¹ The First Amendment, of course, can be used as a defense to claims of tortuous speech. Agency liability then should not be cause for excessively zealous patrolling and overly broad removal of speech, nor should immunity be cause to condone criminal or tortuous speech on agency social media sites. There is no shortcut for reasoned and informed judgment on a case-by-case basis. An agency may choose to wait and remove comments based on a received complaint for tortuous speech and opt to use more alacrity in patrolling its sites for actual crimes by preemptively removing speech that appears to be cyberstalking or cyberharassment.

357. 47 U.S.C. § 230(c)(1) (2006).

358. The immunization from liability applies to injunctive relief as well as damages. 47 U.S.C. § 230(e)(3); *see, e.g.*, *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997) (finding AOL not liable for defamatory statements published by one of its users and upholding the dismissal of state law claims for injunctive relief in addition to damages).

359. At least one state court has held that § 230(c)(1) confers immunity on governmental entities. *See Kathleen R. v. City of Livermore*, 104 Cal. Rptr. 2d 772 (Cal. App. 4th 2001).

360. 28 U.S.C. §§ 2674, 2680(h) (2006).

361. *Id.* § 2680(a).

2. *Sovereign Immunity for Constitutional Claims*

An additional concern is delineating the precise First Amendment claim a citizen could bring should an agency remove or refuse to post comments the citizen believes are protected First Amendment speech. A citizen could argue that by refusing to post or repeatedly taking down comments the agency has denied him access to a public forum to which he is entitled as a matter of law.³⁶² Moreover, a citizen could claim that the repeated denial of access and any accompanying coercion or persuasion by government officials chilled or silenced the exercise of First Amendment rights. Agencies that moderate comments and refuse to post comments open themselves to an additional claim of censorship.³⁶³ A citizen's constitutional claim against a government agency would proceed through a lawsuit seeking limited, non-monetary relief, for example, an injunction compelling the federal agency to post the comment or comments.³⁶⁴ In response to such a claim, a federal agency would argue, as it has in the past, that sovereign immunity for constitutional claims precludes the claim.³⁶⁵ Section 702 of the Administrative Procedure Act (APA) waives sovereign immunity for any person suffering legal wrong or adversely affected by agency action seeking non-monetary relief.³⁶⁶ Whether agency action in removing a public comment from its social media site can be considered an "agency action" under the APA for purposes of waiving immunity is not

362. A claim of denial of access is common in public forum cases. *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 40–41 (1983), is a classic example.

363. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). When reviewing questions involving the First Amendment, courts must "look through forms to the substance" of government action. Casual statements including "the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation" can contravene the First Amendment. *Id.* at 67. The Ninth Circuit interpreted this opinion to mean that the First Amendment is violated when the acts of government officials "would chill or silence a person of ordinary firmness from future First Amendment activities." *Mendocino Envtl. Ctr. v. Mendocino Cnty.*, 192 F.3d 1283, 1300 (9th Cir. 1999).

364. Most commonly, injunctive and declaratory relief.

365. The federal government has argued that the Constitution does not waive sovereign immunity and that a plaintiff bringing a constitutional claim involving an administrative agency must rely on the Administrative Procedure Act's (APA's) waiver provision.

366. 5 U.S.C. § 702 (2006):

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party.

obvious.³⁶⁷ Agencies have argued that the waiver under § 702 applies only to agency actions as defined by the APA and are limited by § 704, but federal circuit courts have held that the requirement that the agency action be final or “reviewable by statute” applies only to claims arising under the APA, not the Constitution itself.³⁶⁸ Hence, suits for injunctive relief against the federal government for which the First Amendment, not the APA, is the cause of action may proceed. An agency employee’s removal of a comment or refusal to post a comment on a federal agency social media site, sponsored and maintained by the agency, satisfies the requirement “that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority.”³⁶⁹

3. *Endorsement*

If an agency social media site is a limited public forum where public

367. Debate turns on the role of and legislative history behind the first and second sentence of 5 U.S.C. § 702. The second sentence, which contains the waiver of sovereign immunity, was added to the statute in 1976. If a court interprets the second sentence as limiting the waiver to instances of “judicial review of agency action” in the first sentence and “agency action” as defined by the APA, a claim such as the one considered here would not proceed because taking down a comment is not an agency action under the APA. Thus, a waiver of sovereign immunity would be subject to § 704, which would limit claims to agency action made reviewable by statute and final agency action such as a final rule. The Ninth Circuit and the D.C. Circuit have rejected such arguments and held that a constitutional challenge does not depend on the cause of action found in the first sentence of § 702. Thus, any action in court seeking non-monetary relief for federal agency action (not necessarily defined by the APA) that arises under the Constitution itself may proceed via a waiver of sovereign immunity. *Veterans for Common Sense v. Shinseki*, 644 F.3d 845 (9th Cir. 2011); *Trudeau v. FTC*, 456 F.3d 178, 186 (D.C. Cir. 2006). Basically, the first sentence offers constitutionally aggrieved citizens a cause of action. The second sentence waives immunity for all causes of action involving agencies seeking non-monetary relief, which includes judicial review for federal agency action. The waiver is more expansive and embraces a variety of causes of action.

368. See *Veterans for Common Sense*, 644 F.3d at 865 (“But § 704 in no way limits § 702’s broad waiver of sovereign immunity with respect to suits for injunctive relief against the federal government—suits for which the APA itself is not the cause of action.”).

369. 5 U.S.C. § 702 (2006). Based on a generous reading of § 702’s waiver of sovereign immunity, the Ninth Circuit permitted a First and Fourth Amendment challenge to INS surveillance even though the agency actions did not fall within the APA’s definition of “agency action.” See *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 525 (9th Cir. 1989). In *Trudeau*, 456 F.3d 178, the FTC argued that § 702’s waiver applies only to actions arising under the APA and since the APA limits judicial review to final agency action in § 704, sovereign immunity was not waived because the agency’s conduct was not a final agency action. The court held that the plaintiff’s First Amendment claim could proceed regardless of whether the conduct was final agency action because § 702 was not restricted to suits brought under the APA.

comment is shielded by the Free Speech Clause, a variety of inane, insipid, offensive, even hateful comments must remain posted.³⁷⁰ Concerns about agency endorsement are not unwarranted, but such concerns do not justify a turn to government speech. The government speech doctrine offers agencies the option of editing public comment to suit an agency's articulated message; however, as previously discussed, suffocating the First Amendment on agency social media sites explicitly opened to encourage participation is unwise for a variety of principled, legal, and prudential reasons. Avoiding the appearance of governmental endorsement of hate speech and discriminatory speech is a valid interest, but as of yet, unrecognized by the courts. Under the public forum doctrine, private speech on public property is not attributed to the government, which is consonant with conventional understandings and traditional uses of parks, sidewalks, and streets. In cases implicating the Establishment Clause and the public forum doctrine, disclaimers have featured significantly to clarify that the government is neither a speaker nor endorsing the private speech at issue.³⁷¹ Even in a public forum, the government's failure to act can give the impression of endorsement.³⁷² Given that social media sites are a new free speech arena for which traditional understandings cannot be assumed, posting a disclaimer which clearly states that the agency does not endorse the private speech found on its site and that the site is a limited public forum where citizens' comments are protected by the First Amendment should allay concerns about the appearance of endorsement.

CONCLUSION

New technologies and new government endeavors often give rise to calls for changes to legal doctrine, but, more often than not, legal doctrine does not need to change drastically to accommodate novel enterprises. Agency-sponsored social media sites appear to be terra incognita for application of the First Amendment, but a closer look demonstrates that the

370. As long as such comments are topical. A purely private insult or slur would be of doubtful relevance to any subject-matter category on an agency social media site.

371. See *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 783–84 (1995) (Souter, J., concurring) (“I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it.”). The plurality in *Pinette* advocated for the adoption of a per se rule that private speech in a public forum could never be attributed to the government and implicate the Establishment Clause. *Id.* at 767–70 (plurality opinion). For a discussion of the role of endorsement in *Pinette*, see Corbin, *supra* note 190, at 636–39, 660. Printed disclaimers also figured prominently in the Court's discussion of the student publication in *Rosenberger v. Rector & Visitors of University of Virginia*, 515 U.S. 819, 823–24 (1995).

372. *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring).

public forum doctrine provides the most suitable and useful compass. Viewing such sites as limited public fora enables the sites to function as intended—as arenas for public discourse, not governmental pontification, where free speech rights are not dependent on the discretion of a private corporation or administrative agency, but are instead guaranteed by the Constitution.

COMMENTS

OFAC, THE DEPARTMENT OF STATE, AND THE TERRORIST DESIGNATION PROCESS: A COMPARATIVE ANALYSIS OF AGENCY DISCRETION

LOUISA C. SLOCUM*

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INTRODUCTION

In October 2012, the *Washington Post* published a series of articles entitled “The Permanent War,” outlining the Obama Administration’s approach to fighting terrorism.¹ The articles discussed the most well-known aspects of the War on Terror, including targeted killings and the Obama Administration’s covert operations in Africa. What the articles did not discuss, however, were the equally important, but somewhat less visible, efforts to impose financial sanctions on terrorist entities. The list of Foreign Terrorist Organizations (FTOs), maintained by the Department of State,² and the list of Specially Designated Global Terrorists (SDGTs), maintained jointly by the Departments of State and Treasury,³ govern these sanctions. The lists allow the government to designate certain individuals and groups as terrorists and ultimately prevent those entities from accessing their financial assets within the United States. As a result of these sanction programs, the government has prevented terrorist groups from accessing over \$21,000,000.⁴ This Comment will compare the different abilities of the Departments of State and Treasury to designate entities under relevant financial sanctions programs. It will also discuss the wide discretion exercised by the Department of the Treasury when implementing financial sanctions, outline the potential harmful consequences of that discretion,

1. See, e.g., Greg Miller, *Plan for Hunting Terrorists Signals U.S. Intends to Keep Adding Names to Kill Lists*, WASH. POST, Oct. 23, 2012, http://www.washingtonpost.com/world/national-security/plan-for-hunting-terrorists-signals-us-intends-to-keep-adding-names-to-kill-lists/2012/10/23/4789b2ae-18b3-11e2-a55c-39408f6e6a4b_story.html.

2. See BUREAU OF COUNTERTERRORISM, U.S. DEP’T OF STATE, *Foreign Terrorist Organizations* (Sept. 28, 2012), <http://www.state.gov/j/ct/rls/other/des/123085.htm>.

3. See U.S. DEP’T OF STATE, *Terrorism Designation FAQs*: Question 1, 2 (July 10, 2012), <http://www.state.gov/r/pa/prs/ps/2012/07/194808.htm>.

4. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP’T OF THE TREASURY, *Terrorist Assets Report* (2011), available at <http://www.treasury.gov/resource-center/sanctions/Programs/Documents/tar2011.pdf> (presenting the amount of blocked funds held by Foreign Terrorist Organizations (FTOs), Specially Designated Global Terrorists (SDGTs), and Specially Designated Nationals, another type of entity designated by the Department of the Treasury).

and suggest ways to limit this discretionary power.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA)⁵ governs FTO designations, while Executive Order 13,224,⁶ issued pursuant to the International Emergency Economic Powers Act (IEEPA),⁷ governs SDGT designations. Under § 302 of AEDPA,⁸ the Secretary of State can designate an organization as an FTO if the organization is foreign; engages in “terrorism” or “terrorist activity,”⁹ or has the intent to engage in such activity; and threatens the security of the United States or its citizens.¹⁰ The Secretary of State also has the power to designate certain foreign groups or individuals as SDGTs under Executive Order 13,224 if the groups or individuals threaten the national security of the United States.¹¹ Under the same executive order, the Secretary of the Treasury has the authority to designate any group or individual as an SDGT if he finds that the entity is “owned or controlled by” a designated terrorist group; assists in, sponsors, or provides material or financial support to a terrorist group; or is “otherwise associated with” a terrorist group.¹² Once an entity has been designated as either an FTO or an SDGT, the Office of Foreign Assets Control (OFAC) at the Department of the Treasury can freeze the entity’s assets.¹³ OFAC also has the power to block an entity’s assets during the pendency of an investigation into an entity’s status.¹⁴ The Secretary of

5. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8 U.S.C.)

6. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

7. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified at 50 U.S.C. §§ 1701–1706 (2006 & Supp. IV 2010)).

8. See 110 Stat. at 1248 (codified at 8 U.S.C. § 1189 (2006)) (amending § 219 of the Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.)). On its website, the Department of State maintains that it acts pursuant to the Immigration and Nationality Act. See U.S. DEP’T OF STATE, *supra* note 2. Because the Antiterrorism and Effective Death Penalty Act (AEDPA) amended the provision of the Immigration and Nationality Act that permits the Secretary of State to designate FTOs, this Comment uses “AEDPA” to describe that provision, 8 U.S.C. § 1189.

9. See *infra* notes 41–42 for the definition of these terms.

10. 8 U.S.C. § 1189(a)(1)(A)–(C) (2006).

11. Exec. Order No. 13,224, 3 C.F.R. 786 (2002). President Bush designated twenty-seven individuals and groups as SDGTs in the executive order, *id.* at 790, leaving future designations to the Secretaries, *id.* at 788–89.

12. *Id.* at 787. “Otherwise associated with” is defined in 31 C.F.R. § 594.316 (2012).

13. See 8 U.S.C. § 1189(a)(2)(C) (2006); 31 C.F.R. § 594.201(a) (2012). This Comment will use the words “freeze” and “block” interchangeably when discussing the assets of designated entities, and will also use “blocking orders” to describe the process by which the Office of Foreign Assets Control (OFAC) executes a freeze of an entity’s assets.

14. See Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (authorizing the Secretary of the Treasury to take all actions the President is authorized to take under the International

the Treasury delegated his ability to designate SDGTs and block assets to OFAC.¹⁵

While both Departments have legal authority to designate terrorist entities, the Department of the Treasury, acting through OFAC, plays a broader and more discretionary role in the process of imposing financial sanctions on these entities. The Secretary of State's ability to designate an FTO is limited by certain procedural requirements,¹⁶ and her¹⁷ authority to designate an SDGT depends solely on an entity's ability to attack the United States—a factor that is virtually identical to her authority under AEDPA.¹⁸ Under these provisions, the Department of State's authority to designate SDGTs is limited to individuals such as the leaders of terrorist groups.¹⁹ In contrast, OFAC has the authority to designate an entity as an SDGT based on whether the entity provides support to or is associated with terrorist groups²⁰ and thus can designate entities that do not directly threaten the country's security. In addition, OFAC controls the assets of SDGTs after designation and exercises discretion about whether to freeze the assets of FTOs in the first instance.²¹ Thus, OFAC exercises a more discretionary power over both types of designated entities than the Department of State. Because the primary effect of an entity's designation as an SDGT is the blocking of its assets,²² OFAC's discretionary powers are

Emergency Economic Powers Act (IEEPA); 50 U.S.C. § 1702(a)(1)(B) (2006) (allowing the President to block assets “during the pendency of an investigation”); *see also* 31 C.F.R. § 594.201 n.1 (describing how OFAC publishes the names of entities with assets blocked pending investigation).

15. *See* 31 C.F.R. § 594.802.

16. *See infra* Part I.A for a discussion of these requirements.

17. This Comment will use feminine pronouns to refer to the Secretary of State because all the actions taken by the Secretary of State that are relevant to this Comment were taken by former Secretary of State Hillary Rodham Clinton.

18. *Compare* 8 U.S.C. § 1189(a)(1)(A)–(C) (allowing the Secretary of State to designate a foreign group as an FTO if the group engages in terrorist activity that threatens national security), *with* Exec. Order No. 13,244, 3 C.F.R. 786 (2002) (allowing the Secretary of State to designate foreign persons that have committed, or pose a threat of committing, a terrorist act that threatens U.S. citizens or the national and economic security of the country as SDGTs).

19. Interview with Jason Blazakis, Dir., Office of Terrorist Designations & Sanctions, U.S. Dep't of State, in Wash., D.C. (Nov. 13, 2012).

20. *See* Exec. Order No. 13,244, 3 C.F.R. 786 (2002).

21. *See* 31 C.F.R. §§ 594.101–901 (detailing OFAC's procedures for regulating the financial transactions of SDGTs); *id.* §§ 597.101–801 (describing OFAC's procedures for regulating the financial transactions of FTOs); *see also* 8 U.S.C. § 1189(a)(2)(C) (“Upon [designation], the Secretary of the Treasury *may* require United States financial institutions possessing or controlling any assets of any foreign organization included in the notification to block all financial transactions involving those assets” (emphasis added)).

22. *See* U.S. DEP'T OF STATE, *Terrorism Designation FAQs*, Question 6 (July 10, 2012),

heightened in the SDGT process. In addition, entities affected by this discretionary power frequently cannot challenge OFAC's actions because OFAC's procedures for appealing its designations are less comprehensive than AEDPA's.²³

OFAC's complete control of the financial sanction process, combined with its ability to both designate entities with only indirect links to terrorism as SDGTs and block their assets pending investigation, has caused some scholars to assert that OFAC violates the constitutional rights of affected entities.²⁴ Affected entities often make a similar argument based on the sanctions' harsh effects. For example, Mr. Muhammad Salah is the only U.S. citizen designated as a Specially Designated Terrorist,²⁵ a characterization identical in every way to an SDGT except for the executive order governing his status.²⁶ As a Specially Designated Terrorist, Mr. Salah cannot access any of his money unless he first obtains a license from OFAC.²⁷ As the licenses only allow enough money to cover "basic maintenance," he cannot use his money to purchase luxuries such as birthday presents for his children or a newspaper.²⁸ In addition, he cannot travel outside the country to visit family and friends, and cannot maintain a bank account.²⁹ He has lived under these conditions since 1995, without being given a statement of reasons for his designation.³⁰ He argues that

<http://www.state.gov/r/pa/prs/ps/2012/07/194808.htm>.

23. Compare 31 C.F.R. § 501.807 (allowing an entity to submit "arguments" or "evidence" to OFAC as to why its designation is inappropriate), with 8 U.S.C. § 1189(a)(4)(B)–(C) (permitting a group to petition for delisting from the FTO list by showing that circumstances have changed enough so that designation is no longer warranted, and mandating that the Secretary of State decide such a petition within 180 days).

24. See, e.g., David Cole, Essay, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 3, 26–28 (2003) (arguing that administrative actions such as blocking orders constitute a way for the government to avoid the constitutional rights provided by the criminal process); Vanessa Ortblad, Comment, *Criminal Prosecution in Sheep's Clothing: The Punitive Effects of OFAC Freezing Sanctions*, 98 J. CRIM. L. & CRIMINOLOGY 1439, 1448–49 (2008) (explaining how OFAC's lack of an evidentiary standard has resulted in many Muslim charities being designated as terrorist entities).

25. See Complaint at 1, 6–7, *Salah v. U.S. Dep't of the Treasury*, No. 1:12-cv-07067 (N.D. Ill. filed Sept. 5, 2012).

26. See *id.* at 3; Exec. Order No. 12,947, 3 C.F.R. 319 (1998). OFAC's powers under this Executive Order are virtually identical to its powers under Executive Order 13,224. Compare Exec. Order No. 12,947, 3 C.F.R. 319, 319 (1998) (allowing the Secretary of the Treasury to block "all property and interests in property" of designated persons), with Exec. Order No. 13,224, 3 C.F.R. 786, 787 (2002) (allowing the Secretary of the Treasury to block "all property and interests in property" of designated persons).

27. See Complaint *supra* note 25, at 2.

28. See *id.*

29. See *id.* at 8–9.

30. See *id.* at 6.

OFAC's actions violate his First and Fifth Amendment rights.³¹

Some courts have held that OFAC's power to impose such dire consequences on U.S. citizens and legal aliens violates their constitutional rights,³² while others have upheld OFAC's actions.³³ These differing judicial opinions on the legality of OFAC's powers, combined with the significant impact that OFAC's actions can have on U.S. citizens and legal aliens, imply that the SDGT-designation procedure is ripe for change. This Comment suggests amending the existing process to provide necessary procedural safeguards for entities affected by OFAC's designation decisions and blocking orders, while still allowing OFAC to protect the nation from terrorism.

Part I provides a summary of the relevant laws governing the terrorist designation process, specifically AEDPA, IEEPA, and Executive Order 13,224. Part I also briefly summarizes the powers of both the Department of State and OFAC under the current legal regime. Part II discusses the discretionary nature of OFAC's SDGT designation process in more detail, specifically examining OFAC's own regulations and analyzing how courts review FTO and SDGT designations. Part III examines the impact of OFAC's discretionary powers on affected entities. Finally, Part IV provides possible ways to limit OFAC's discretionary power, concluding that an amendment to IEEPA is the best way to effectively balance the procedural rights of affected entities with OFAC's important sanctioning powers.

I. THE LEGAL AUTHORITY TO DESIGNATE TERRORISTS

The power to designate and impose sanctions on terrorist entities is part of a larger effort to protect the country from terrorism, which is governed by a myriad of different laws.³⁴ When designating and sanctioning terrorist

31. *See id.* at 12–14.

32. *See, e.g.,* Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury, 686 F.3d 965, 995 (9th Cir. 2012) (concluding that OFAC's warrantless seizure of an SDGT's assets violated its Fourth Amendment rights); KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (*KindHearts I*), 647 F. Supp. 2d 857, 872 (N.D. Ohio 2009) (finding that OFAC's asset blocking constituted a Fourth Amendment seizure).

33. *See, e.g.,* Islamic Am. Relief Agency v. Gonzales, 477 F.3d 728, 734 (D.C. Cir. 2007) (determining that OFAC's administrative record was sufficient to justify its designation of an American charity as an SDGT); Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156, 163 (D.C. Cir. 2003) (finding that OFAC provided a designated terrorist group sufficient due process by offering it an opportunity to present evidence to rebut its redesignation).

34. *See generally* Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, 118 Stat. 3638 (2004) (codified as amended in scattered provisions of 50 U.S.C.) (amended fourteen times since its enactment); Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered

entities, the government primarily relies on AEDPA,³⁵ IEEPA,³⁶ and Executive Order 13,224.³⁷

A. *Antiterrorism and Effective Death Penalty Act of 1996*

In 1996, Congress responded to an increasing number of terrorist attacks against U.S. citizens by passing the Antiterrorism and Effective Death Penalty Act of 1996.³⁸ The law primarily amended federal habeas corpus law,³⁹ but also amended existing provisions of the Immigration and Nationality Act⁴⁰ to allow the Secretary of State to designate certain groups as FTOs.

In its current version, AEDPA allows the Secretary of State to designate a group as an FTO if the group meets three criteria: (1) it is foreign; (2) it engages in “terrorism”⁴¹ or “terrorist activity,”⁴² or has the intent to engage in terrorist activity;⁴³ and (3) it threatens the security of the United States or

provisions of 8 U.S.C.) (amended six times since its 1996 enactment); Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered provisions of 8 U.S.C.) (amended 168 times since its enactment). Most of these laws were further amended or expanded by the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001. Pub. L. No. 107-56, 115 Stat. 272 (2001) (codified in scattered sections of 18 U.S.C.) (amended in 2005 and 2006). The USA PATRIOT Act is itself controversial and has been the subject of numerous academic debates. *See generally* Rebecca A. Copeland, *War on Terrorism or War on Constitutional Rights? Blurring the Lines of Intelligence Gathering in Post-September 11 America*, 35 TEX. TECH L. REV. 1, 2–3 (2004) (concluding that the USA PATRIOT Act’s extension of the powers of the Foreign Intelligence Surveillance Act adversely affects constitutional rights). The constitutional validity of the USA PATRIOT Act is beyond the scope of this Comment.

35. 110 Stat. at 1247–48.

36. 50 U.S.C. §§ 1701–1705 (2006 & Supp. IV 2010).

37. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

38. *See, e.g.*, H.R. REP. NO. 104-383, at 37 (1995) (“The origin of this legislation . . . is tied to a series of tragic events that have shocked the civilized world,” including the Pan Am bombings, the 1993 World Trade Center bombings, and the Oklahoma City attacks).

39. *See generally* H.R. REP. NO. 104-23, at 9 (1995) (advocating passage of a bill to reduce the abuse of habeas petitions and limit the arbitrary imposition of the death penalty).

40. Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

41. 8 U.S.C. § 1189(a)(1)(B) (2006) (defining “terrorism” in accordance with 22 U.S.C. § 2656f(d)(2) (2006) as “premeditated, politically motivated violence perpetrated against noncombatant targets by subnational groups or clandestine agents”).

42. “[T]errorist activity” is defined in 8 U.S.C. § 1182(a)(3)(B)(iii) (2006), and includes, *inter alia*, hijacking, threatening an individual in order to compel action by another individual, and the use of a biological or chemical weapon. *See id.* § 1182(a)(3)(B)(iii)(I)–(II), (V)(a).

43. *Id.* § 1189(a)(1)(B).

its citizens.⁴⁴ If the Secretary of State decides to designate a group under AEDPA, she must report her intention to the Speaker and Minority Leader of the House of Representatives, the Senate President pro tempore, the Majority and Minority Leaders of the Senate, and members of certain congressional committees⁴⁵—each via a classified statement.⁴⁶ This statement can include hearsay and uncorroborated statements⁴⁷ as long as it explains how the group fits within the requirements of the statute.⁴⁸ Within seven days of notifying Congress, the Secretary of State must publish the designation in the Federal Register.⁴⁹ She must also create an administrative record of the reasons supporting the designation, which can include both classified and unclassified information.⁵⁰ The government need not disclose the classified information to the FTO but must disclose the information to a court on judicial review.⁵¹ Once the Secretary of State notifies Congress of her intent to designate a group, OFAC can freeze all of that group's assets held or controlled by a U.S. financial institution⁵² but may choose not to.⁵³ Once designated as an FTO, alien members of the group⁵⁴ face possible deportation, third parties who provide material support to the group face possible criminal sanctions, and financial organizations in possession of the group's funds may face penalties for

44. *Id.* § 1189(a)(1)(C). The D.C. Circuit held that determining whether a group threatens the security of the nation is a nonjusticiable political question and lies solely within the Executive Branch's discretion. *See* *People's Mojahedin Org. of Iran v. U.S. Dep't of State (PMOI I)*, 182 F.3d 17, 23 (D.C. Cir. 1999) (citing *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103 (1948)). Therefore, judicial review of FTO designations is limited to the first two elements of the statute.

45. 8 U.S.C. § 1189(d)(3) (defining the relevant committees as the Senate Committees on the Judiciary, Intelligence, and Foreign Relations and the House Committees on the Judiciary, Intelligence, and International Relations).

46. *Id.* § 1189(a)(2)(A)(i).

47. *See PMOI I*, 182 F.3d at 19 (explaining that the Secretary of State can rely on "third hand accounts, press stories, material on the Internet or other hearsay").

48. The D.C. Circuit distinguished the statutory "findings" in AEDPA from findings made during an ordinary administrative proceeding because the Secretary of State was not required to provide a group with an adversarial hearing or an opportunity to rebut her evidence before making such findings. *See id.*

49. 8 U.S.C. § 1189(a)(2)(A)(ii). As of 2001, the Secretary of State must also notify the FTO of her intention to designate the group *before* she publishes the designation in the Federal Register. *See infra* notes 141–142 and accompanying text.

50. 8 U.S.C. § 1189(a)(3)(A)–(B).

51. *Id.* § 1189(a)(3)(B).

52. *Id.* § 1189(a)(2)(C).

53. *See supra* note 21 and accompanying text.

54. An "alien" is any member of the group who is not a U.S. citizen or national. 8 U.S.C. § 1101(a)(3).

failing to report that possession to OFAC.⁵⁵

Designation as an FTO lasts indefinitely.⁵⁶ It can only be revoked by an Act of Congress⁵⁷ or by the Secretary of State.⁵⁸ To challenge a designation, an FTO must submit a petition for revocation outlining why relevant circumstances have changed so much so that its status as an FTO is no longer appropriate.⁵⁹ The FTO can file a revocation petition every two years,⁶⁰ and the Secretary of State must decide whether to revoke the designation within 180 days of receipt.⁶¹ If an FTO does not file a revocation petition within five years, the Secretary of State herself must review the designation.⁶² She must revoke a designation if the circumstances leading to the designation have sufficiently changed or if “the national security of the United States warrants a revocation.”⁶³ Revocation decisions are subject to the same procedural requirements as designations, including publication in the Federal Register.⁶⁴

A designated FTO may seek judicial review of the Secretary of State’s action in the D.C. Circuit no later than thirty days after publication of its designation or the response to its revocation petition.⁶⁵ On judicial review, the D.C. Circuit examines only the administrative record created during the designation process, in addition to any classified information submitted by the government.⁶⁶ The court can invalidate any designation or denial of a revocation petition if the Secretary of State’s decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to [a] constitutional right,” “in excess of statutory jurisdiction, authority, or limitation,” or “lacking substantial support in the

55. See U.S. DEP’T OF STATE, *supra* note 22 (stating that U.S. financial institutions may be required to block a designated FTO’s transactions); see also 31 C.F.R. § 597.701(b) (2012) (allowing OFAC to impose civil penalties on financial institutions that fail to comply with reporting requirements).

56. See 8 U.S.C. § 1189(a)(4)(A) (“A designation under this subsection shall be effective for all purposes until revoked by [an Act of Congress or the Secretary of State].”). Prior to 2004, a designation under this section lasted for only two years. 8 U.S.C. § 1189(a)(4)(A) (2000), amended by Intelligence Reform and Terrorism Prevention Act of 2004 § 7119, Pub. L. No. 108-458, 118 Stat. 3638, 3801–03 (2004).

57. 8 U.S.C. § 1189(a)(5).

58. *Id.* § 1189(a)(6)(A)–(B).

59. *Id.* § 1189(a)(4)(B)(iii).

60. *Id.* § 1189(a)(4)(B)(ii).

61. *Id.* § 1189(a)(4)(B)(iv)(I).

62. *Id.* § 1189(a)(4)(C)(i).

63. *Id.* § 1189(a)(6)(A)(i)–(ii).

64. *Id.* § 1189(a)(6)(B).

65. *Id.* § 1189(c)(1).

66. *Id.* § 1189(c)(2).

administrative record.”⁶⁷ Because courts generally defer to an agency head’s decision as long as the decisionmaking process complies with statutory requirements,⁶⁸ the court gives substantial deference to the Secretary of State’s decision if it complies with procedural requirements.⁶⁹

B. *International Emergency Economic Powers Act (IEEPA)*

In 1977, Congress passed IEEPA—“an Act with respect to the powers of the President in time of war or national emergency.”⁷⁰ This law modified two older statutes, the National Emergencies Act⁷¹ and the Trading with the Enemy Act,⁷² and gave the President the power to declare a national emergency in response to “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States.”⁷³ In such a national emergency, the President can issue regulations that “investigate, regulate, or prohibit” certain monetary, credit, or securities transactions involving foreign entities.⁷⁴ The President can also nullify or void a transaction involving “any property in which any [designated] foreign country or a national thereof has any interest.”⁷⁵ Such regulations apply to all property within the jurisdiction of the United States or its financial institutions.⁷⁶ In 2001, Congress amended IEEPA to allow the President to block an entity’s assets “during the pendency of an investigation.”⁷⁷ IEEPA does not provide an explicit standard for judicial review.⁷⁸

67. *Id.* § 1189(c)(3)(A)–(D).

68. *See* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971) (finding that the Secretary of Transportation’s actions were “entitled to a presumption of regularity” but that the Court could determine whether his actions exceeded his statutory authority), *abrogated in part by* *Califano v. Sanders*, 430 U.S. 99, 105 (1977).

69. *See, e.g., In Re People’s Mojahedin Org. of Iran*, 680 F.3d 832, 838 (D.C. Cir. 2012) (*per curiam*) (compelling the Secretary of State to make a final decision on an FTO’s petition but reinforcing that her eventual decision would be “entitled to great deference”).

70. Pub. L. No. 95-223, 91 Stat. 1625 (1977) (codified as amended at 50 U.S.C. §§ 1701–1706) (2006 & Supp. IV 2010).

71. Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified as amended at 50 U.S.C. §§ 1601–1751 (2006 & Supp. IV 2010)).

72. Pub. L. No. 65-91, 40 Stat. 411 (1917) (codified as amended at 50 U.S.C. App. §§ 1–44 (2006)).

73. 50 U.S.C. § 1701(a).

74. *Id.* § 1702(a)(1)(A)(i)–(iii).

75. *Id.* § 1702(a)(1)(B) (emphases added).

76. *Id.* § 1702(a)(1).

77. Sec. 106, Pub. L. No. 107-56, 115 Stat. 272, 277–78 (2001) (amending 50 U.S.C. § 1702(a)(1)(B) (2000)).

78. *See* 50 U.S.C. §§ 1701–1706 (2006 & Supp. IV 2010). The law does, however,

Whenever the President invokes IEEPA, he must report certain statutory findings to Congress, including the circumstances that necessitated the declaration of an emergency,⁷⁹ why the circumstances constitute an “unusual and extraordinary threat,”⁸⁰ what specific actions he intends to take, why those actions are necessary to deal with the threat, and which foreign nations or entities will be affected by his actions.⁸¹ After declaring a national emergency, the President must report any changes in the situation giving rise to the emergency to Congress at least once every six months.⁸² Presidents frequently exercise their IEEPA authorities through executive orders.⁸³ These orders declare a national emergency, describe the facts giving rise to the emergency,⁸⁴ and outline regulations for mitigating the danger caused by the emergency.⁸⁵ Under the National Emergencies Act and IEEPA, national emergencies expire on the anniversary of their issuance unless renewed annually by the President,⁸⁶ and thus the President

allow the government to provide the court with classified information on judicial review, see *id.* § 1702(c), but does not provide a clear standard by which courts should review Executive Branch regulations, other than under the general standards of the Administrative Procedure Act (APA). Because the APA itself does not provide a cause of action, agencies challenging agency action must invoke another statute to challenge that action in court. *See* *Califano v. Sanders*, 430 U.S. 99, 104 (1977). IEEPA does not provide such a cause of action.

79. 50 U.S.C. § 1703(b)(1).

80. *Id.* § 1703(b)(2). This provision is extremely important because the powers exercised under the law can *only* be executed pursuant to an “unusual and extraordinary threat” to the nation. *See id.* § 1701(b) (“The authorities granted to the President . . . may only be exercised to deal with an unusual and extraordinary threat with respect to which a national emergency has been declared for purposes of this chapter and may not be declared for any other purpose.”).

81. *Id.* § 1703(b)(2)–(5).

82. *Id.* § 1703(c). The President delegated these reporting requirements to the Secretary of the Treasury for the national emergency created by Executive Order 13,224. *See* Exec. Order No. 13,313, 3 C.F.R. 248 (2004).

83. *See, e.g.*, Exec. Order No. 12,730, 3 C.F.R. 305 (1991), *revoked by* Exec. Order No. 12,867, 3 C.F.R. 649 (1994); Exec. Order No. 12,170, 3 C.F.R. 457 (1980).

84. *See, e.g.*, Exec. Order No. 12,730, 3 C.F.R. 305 (1991) (finding that the “unrestricted access of foreign parties to U.S. goods” constituted an unusual and extraordinary threat to the nation, especially due to the expiration of the Export Administration Act of 1979). *But see* Exec. Order No. 12,170, 3 C.F.R. 305 (1991) (finding an “unusual and extraordinary threat,” but not describing why).

85. *See, e.g.*, Exec. Order No. 12,730, 3 C.F.R. 305 (1991) (allowing for the continuations of regulations created by the Secretary of State under the Export Administration Act to “protect the domestic economy from the excessive drain of scarce materials”).

86. *See* 50 U.S.C. § 1622(d) (2006) (stating, “Any national emergency declared by the President . . . shall terminate on the anniversary of the declaration of that emergency” unless the President notifies Congress of his intent to continue it within ninety days of its expiration); *id.* § 1706(a)(1)–(2) (maintaining the termination provisions in the National

must specifically authorize the continuance of an emergency. Both President Bush and President Obama have extended the national emergency declared in Executive Order 13,224 every year since its issuance.⁸⁷

C. Executive Order 13,224

On September 23, 2001, President Bush invoked IEEPA and issued regulations to freeze the assets of certain individuals and groups that he believed were responsible for the attacks of September 11, 2001.⁸⁸ Bush issued Executive Order 13,224 after finding that “the pervasiveness and expansiveness of the financial foundation of foreign terrorists” necessitated economic sanctions against terrorist entities⁸⁹ and showed an increased need for cooperation between domestic and foreign financial institutions.⁹⁰ He also found, as required by IEEPA, that the threat of terrorism was ongoing and posed “an unusual and extraordinary threat” to the nation’s safety.⁹¹ Bush designated twenty-seven foreign individuals and organizations as terrorist entities in the Annex to the Executive Order⁹² and ordered the Secretary of the Treasury to immediately block the assets of those entities.⁹³

Executive Order 13,224 also authorized the Secretary of State, after consultation with the Secretary of the Treasury and the Attorney General, to designate foreign persons who had committed or posed “a significant risk

Emergencies Act).

87. See, e.g., Notice of Sept. 19, 2002, 67 Fed. Reg. 59,447 (Sept. 20, 2002); Notice of Sept. 11, 2012, 77 Fed. Reg. 56,519 (Sept. 12, 2012).

88. See Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (blocking “all property and interests in property” belonging to individuals and groups named in the Executive Order or designated under the Executive Order’s regulations).

89. *Id.* President Bush may have been responding to the perception that Osama bin Laden was a billionaire who financed the September 11, 2001, attacks largely out of pocket. See JOHN ROTH ET AL., NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, MONOGRAPH ON TERRORIST FINANCING 20 (2004), available at http://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf (finding that the U.S. government had long thought that bin Laden financed al-Qaeda through a large inheritance and his successful Saudi business). The *Monograph on Terrorist Financing Report* dispelled this myth. See *id.* at 23 (describing discoveries made by the National Security Council in 1999 and 2000 that the Saudi government divested bin Laden of most of his assets); *id.* at 4 (finding that al-Qaeda received money from “a variety of sources,” including fundraising and Islamic charities).

90. See Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

91. *Id.*

92. *Id.* at 790.

93. *Id.* at 787.

of committing” terrorist acts against the United States as SDGTs.⁹⁴ In addition, the Executive Order authorized the Secretary of the Treasury,⁹⁵ after consultation with the Secretary of State and the Attorney General, to block the property of all persons “owned or controlled by, or [who] act for or on behalf of those persons listed in the Annex to this order or [designated by the Department of State].”⁹⁶ Once designated as an SDGT, an entity cannot access any of its property or money located within the United States or its financial institutions.⁹⁷ These two provisions clearly provide a large amount of power to both the Secretary of State and the Secretary of the Treasury and allow each Secretary to make important national security decisions without significant oversight. As a result, both Departments generally work together to make designation decisions.⁹⁸ The Executive Order also vests an additional amount of discretion in the Secretary of the Treasury by allowing him to block an entity’s assets during the pendency of an investigation into an entity’s final status as an SDGT.⁹⁹ The Secretary of the Treasury also has the power to grant licenses to entities for certain specified transactions, such as the payment of lawyers’ fees.¹⁰⁰

As authorized by Executive Order 13,224, OFAC created its own internal regulations to determine what happens to the assets of a designated SDGT or an entity with assets blocked pending investigation.¹⁰¹ OFAC’s regulations, however, do not provide much guidance for entities seeking to challenge OFAC’s actions. Only two provisions at the end of the regulations describe how an entity may attempt to change its status as an SDGT,¹⁰² and those options are limited. While an SDGT may request a meeting with OFAC’s director, the director has complete discretion

94. *Id.*

95. OFAC makes these designation decisions today on behalf of the Secretary of the Treasury. *See supra* note 15 and accompanying text.

96. Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

97. *See* U.S. DEP’T OF STATE, *supra* note 22.

98. According to the Director of the Office of Terrorist Designations at the Department of State, OFAC, the Department of State, the Department of Justice, and the Department of Homeland Security jointly designate an entity under Executive Order 13,224. Interview with Jason Blazakis, *supra* note 19.

99. *See supra* note 14 and accompanying text.

100. *See* 31 C.F.R. § 501.801 (2012) (authorizing OFAC to issue both general licenses pursuant to the Department of the Treasury’s policies, and specific licenses when requested by an affected entity); *id.* § 594.506 (detailing the procedures by which OFAC will approve of accessing blocked accounts for legal fees).

101. *See* 31 C.F.R. §§ 594.101–.901; *see also id.* §§ 501.101–.901 (defining OFAC’s general rulemaking procedures and reporting requirements).

102. *Id.* §§ 501.806–.807.

whether to grant or deny the meeting.¹⁰³ In addition, the director may hear evidence about why the group should not be designated as an SDGT, but he does not have to.¹⁰⁴ Moreover, the regulations do not provide a way for entities with assets blocked pending investigation to challenge the blocking order.¹⁰⁵ In short, OFAC has virtually complete control over the fate of an SDGT once it has been designated.

D. A Summary of the Designation Abilities of the Department of State and OFAC

Because the roles of the Department of State and OFAC in designating terrorists overlap, it is important to examine each agency's respective role in the process. Under AEDPA, the Department of State has the power to designate a foreign group as an FTO if the group meets certain statutory requirements—most importantly, the fact that it threatens the security of the United States.¹⁰⁶ It has essentially the same power under Executive Order 13,224.¹⁰⁷ Under the same executive order, OFAC has the power to designate any person or group, including a domestic entity, as an SDGT if the entity is either controlled by or provides support to terrorist groups.¹⁰⁸ The difference in what each agency can do is dramatic: OFAC's authority under Executive Order 13,224 only allows it to designate entities that indirectly threaten the country through providing financial support to designated terrorist groups. It is possible that some of these entities could also fall within the State Department's designation powers—if, for example, an entity both threatened terrorist attacks and donated money to other terrorist groups—but OFAC's powers also allow the agency to designate entities such as non-profit groups that do not intend to harm the country.¹⁰⁹

In addition, OFAC possesses the unique ability to impose financial sanctions on both FTOs and SDGTs, although it does not have to exercise blocking orders against FTOs.¹¹⁰ The primary consequences of designation as an FTO are criminal sanctions, the possible deportation of alien

103. *Id.* § 501.807(c).

104. *Id.* § 501.807(b); *see also infra* Part II.B (detailing OFAC's regulations).

105. *See* 31 C.F.R. §§ 594.101–.901 (declining to provide guidance for groups with assets blocked pending investigation).

106. *See supra* Part I.A.

107. *See supra* note 18 and accompanying text.

108. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

109. The Director of the Office of Terrorist Designation and Sanctions at the Department of State explained that OFAC's ability to designate terrorists under Executive Order 13,224 is more flexible than the ability of the Department of State under the same executive order. Interview with Jason Blazakis, *supra* note 19.

110. *See supra* note 21 and accompanying text.

members, and a reporting requirement for financial institutions.¹¹¹ Although OFAC may also freeze the assets of the group, designation as an FTO itself does not automatically lead to such an outcome.¹¹² In contrast, the primary effects of designation as an SDGT are a complete inability to use any assets located within the United States¹¹³ and the imposition of penalties on third parties who violate relevant blocking orders,¹¹⁴ both of which are imposed by OFAC. The Department of State does not play any role in imposing financial sanctions on SDGTs, and thus OFAC controls the entire process once an entity is designated or its assets are blocked pending investigation.¹¹⁵ In addition, OFAC's ability to block an entity's assets pending investigation¹¹⁶ gives the agency a far more flexible power than that exercised by the Department of State when investigating an FTO.

II. A COMPARATIVE ANALYSIS OF FTOS AND SDGTs

OFAC's more flexible and discretionary role in the terrorist designation process becomes even clearer by examining how courts have interpreted OFAC's actions and by examining OFAC's own regulations. While the decisions of both the Department of State and OFAC receive judicial deference, the judiciary has imposed more procedural requirements on the Department of State's FTO designation decisions than it has on OFAC's blocking orders and SDGT designation decisions.¹¹⁷ In addition, the lack of a concrete procedure governing OFAC's actions makes it more difficult for a court to impose a check on OFAC's powers than to impose a check on the statutorily defined procedures governing the Department of State's FTO decisions.¹¹⁸

111. See *supra* notes 54–55 and accompanying text.

112. See *supra* note 21 and accompanying text.

113. See U.S. DEP'T OF STATE, *supra* note 22.

114. See 31 C.F.R. § 594.701(a)(1) (2012) (imposing civil penalties on any person who violates a blocking order or license).

115. According to the Director of the Office of Terrorist Designations and Sanctions at the Department of State, OFAC is primarily responsible for the enforcement of financial sanctions. Interview with Jason Blazakis, *supra* note 19.

116. See *supra* note 14 and accompanying text.

117. The Department of State has been sued only three times by a terrorist group and never by an individual. Interview with Jason Blazakis, *supra* note 19. This dearth of litigation most likely arises because the Department of State can only designate *foreign persons* who threaten the national security of the United States. See *supra* Part I.A. Entities designated by the Department of State likely lack sufficient connections with the United States to sue the government, and many may not want to challenge their status as terrorists. Interview with Jason Blazakis, *supra* note 19.

118. See 8 U.S.C. § 1189(a)(2)(A)(i)–(ii) (2006).

A. *Judicial Review of Agency Action*

1. *State Department FTO Decisions*

The D.C. Circuit, when reviewing an FTO designation or revocation petition, reviews the Secretary of State's action to ensure that it is based on "substantial support in the administrative record."¹¹⁹ Because courts generally defer to the Executive Branch's reasoning on national security and foreign policy issues,¹²⁰ the court has generally upheld the Secretary of State's decision if it was based on a sufficient administrative record.¹²¹ Such judicial deference is not unlimited, however. For example, the D.C. Circuit recently held that the Department of State violated the People's Mojahedin Organization of Iran's (PMOI's) procedural due process rights when it did not provide the group with sufficient notice of the reasons behind its designation as an FTO.¹²²

In 1997, the Secretary of State designated the PMOI as an FTO.¹²³ The PMOI was founded in 1963 by a group of Marxist Iranians opposed to the Shah.¹²⁴ The group participated in the Iranian revolution and conducted a series of attacks against the Iranian government during the 1970s.¹²⁵ In 1986, the group relocated to Iraq but continued to launch attacks both in Iran and around the world throughout the 1990s, including an attack against the Iranian mission in New York City in 1992.¹²⁶ In 1999, the PMOI petitioned the D.C. Circuit for review of its designation, as

119. *Id.* § 1189(c)(3).

120. *See* *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 734 (D.C. Cir. 2007) ("[W]e reiterate that our review—in an area at the intersection of national security, foreign policy, and administrative law—is extremely deferential."); *Oetjen v. Cent. Leather Co.*, 246 U.S. 297, 302 (1918) ("The conduct of the foreign relations of our government is committed by the Constitution to the executive and legislative—the political—departments of the government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision.").

121. *See, e.g., PMOI I*, 182 F.3d 17, 24 (D.C. Cir. 1999) (finding that the Secretary of State's decision to designate a group as an FTO was substantially supported by the administrative record).

122. *See infra* notes 146–153 and accompanying text.

123. *See PMOI I*, 182 F.3d at 18. The official name of the group is the Mujahedin-e Khalq Organization, or simply MEK. *See id.* at 20 n.3. Because the People's Mojahedin Organization (PMOI) is the named plaintiff in all cases at issue, this Comment will refer to the group as the PMOI.

124. Joint Appendix, Volume 1, at 5, *People's Mojahedin Org. of Iran v. U.S. Dep't of State (PMOI III)*, 613 F.3d 220 (D.C. Cir. 2010) (No. 1205130).

125. *Id.* at 5–6 (listing the terrorist activities as killing several U.S. military and civilian personnel in Tehran, bombing a U.S. diplomatic facility, assassinating the deputy chief of the U.S. Military Mission, and murdering an American executive of Texaco).

126. *Id.* at 6.

authorized by AEDPA.¹²⁷

The D.C. Circuit found that the Secretary of State's decision complied with AEDPA's requirements.¹²⁸ Because the PMOI had no presence in the United States, it had no constitutional rights and had only the protections of the statute.¹²⁹ Thus, the court's review was limited to determining whether the Secretary of State's decision that the group was a foreign entity engaged in terrorist activity¹³⁰ had adequate support in the administrative record.¹³¹ After examining the record, including classified portions, the court concluded that the record supported the determination that the group met the necessary statutory requirements, and thus upheld the designation decision.¹³² In the opinion, the court noted that AEDPA was "unique" because it did not require any kind of adversarial process, presentation of evidence, or advance notice to the affected group.¹³³ The court also emphasized that its role was limited to simply determining whether the Secretary of State complied with the statutory requirements, not to determining the ultimate fairness of her decision.¹³⁴

Two years later, the Secretary of State redesignated the PMOI as an FTO and added its "political front,"¹³⁵ the National Council of Resistance of Iran (NCRI), to the designation after concluding that the NCRI was an alias of the PMOI.¹³⁶ Both groups again challenged their designation in the D.C. Circuit, arguing that the Department of State violated their Fifth Amendment Due Process rights.¹³⁷ Because the court agreed that the NCRI was an alias of the PMOI and found that the NCRI's U.S. bank account constituted presence in the country, it held that the Due Process Clause applied to the group's claims and that the Secretary of State violated the due process rights of both groups.¹³⁸ The court disposed of the

127. *PMOI I*, 182 F.3d at 17.

128. *Id.* at 24–25.

129. *Id.* at 22 ("A foreign entity without property or presence in this country has no constitutional rights, under the due process clause or otherwise.")

130. *See supra* note 44 and accompanying text for a discussion of the nonjusticiability of the third prong of the Secretary of State's decision.

131. *See PMOI I*, 182 F.3d at 22 (citing AEDPA's statutory provision mandating the court to set aside a designation lacking "substantial support in the administrative record").

132. *Id.* at 25.

133. *Id.* at 19.

134. *Id.* at 25.

135. *See Nat'l Council of Resistance of Iran v. U.S. Dep't of State (NCRI I)*, 251 F.3d 192, 197 (D.C. Cir. 2001) (noting that, in 1999, the Secretary designated the National Council of Resistance of Iran (NCRI) for the first time); *see also* Joint Appendix, *supra* note 124, at 5 (defining the NCRI as the "political front" of the PMOI).

136. *NCRI I*, 251 F.3d at 197.

137. *Id.* at 200.

138. *Id.* at 200–01.

Government's argument that the NCRI's bank account was too small to trigger constitutional protections¹³⁹ and found that the designation amounted to an interference with the group's liberty without due process of law.¹⁴⁰ The court found that, to constitutionally designate the PMOI as an FTO,¹⁴¹ the Department of State had to notify the group of its upcoming designation *before* the designation's publication in the Federal Register and provide the group with an opportunity to challenge the decision.¹⁴²

The court also rejected the Department of State's argument that providing such pre-designation notice would interfere with its ability to protect national security.¹⁴³ Indeed, the court held that informing the group of its impending designation, informing the group of the unclassified information used to make that designation decision, and permitting the group to provide its own information to rebut the designation would not adversely affect the national security of the nation.¹⁴⁴ The court held that the Secretary of State could designate a group without predesignation notice if she could "demonstrat[e] the necessity of withholding all notice and all opportunity to present evidence until the designation is already made" but found that she had not presented such a necessity in this case.¹⁴⁵

In 2010, the D.C. Circuit, relying on its past decisions, again held that the Department of State violated the due process rights of the PMOI by failing to provide the group with adequate notice of the impending denial of its revocation petition.¹⁴⁶ In 2008, the PMOI had petitioned the Department of State for delisting from the FTO list,¹⁴⁷ citing many different changes in its activities since its initial designation and subsequent redesignation.¹⁴⁸ The Secretary of State denied the group's petition and

139. *Id.* at 202 (refusing to determine how "substantial" an alien's presence in the United States needed to be in order to claim constitutional protections and finding that the NCRI had sufficient connections to raise a constitutional claim).

140. *Id.* at 204.

141. Because the D.C. Circuit refers to the PMOI and the NCRI as the same entity, this Comment uses "PMOI" to refer to both groups.

142. *See NCRI I*, 251 F.3d at 206–07 (rejecting the Government's contention that notifying Congress of the Secretary of State's intention protected against an erroneous designation and finding that post-deprivation remedies did not provide adequate due process for the PMOI).

143. *Id.* at 207–08.

144. *Id.*

145. *Id.* at 208.

146. *PMOI III*, 613 F.3d 220, 227 (D.C. Cir. 2010) (per curiam).

147. *Id.* at 222.

148. *See* Joint Appendix, *supra* note 124, at 58 (explaining that the former and current Secretaries General of the PMOI officially renounced violence and terrorism in 2003 and 2006); *id.* at 59 (describing how the PMOI forces in Iraq entered into a ceasefire with NATO troops); *id.* at 62 (stating how the Department of State's 2007 Country Reports on

informed the group of such denial one day before publishing the final decision in the Federal Register.¹⁴⁹ She did not, however, give the group any notice of the unclassified information on which she relied until *after* her denial of its petition.¹⁵⁰ The court held that, without knowing the relevant information in advance of the Secretary of State's final decision, the PMOI had no way to challenge that decision, and thus had no way to assert its due process rights.¹⁵¹ The judges were particularly bothered by the Secretary of State's action because they could not determine, by looking at the record, which information formed the primary basis for her decision to deny the petition.¹⁵² Therefore, the court remanded the case back to the Department of State to provide the PMOI with sufficient reasons and an opportunity to respond to those reasons.¹⁵³

Many possible reasons exist for the D.C. Circuit's evolution from finding that the PMOI had no due process rights to finding that those rights were violated. The fact that the PMOI developed a presence within the United States—entitling it to constitutional protections¹⁵⁴—and the Department of

Terrorism found that PMOI did not have the intent or capacity to commit terrorist attacks); *id.* at 67–76 (reporting that a tribunal in the United Kingdom removed the PMOI from the list of terrorist organizations in 2008); *id.* at 131–38 (providing testimony from members of the U.S. Congress in support of the PMOI's delisting from the FTO list).

149. *PMOI III*, 613 F.3d at 225–26.

150. *Id.* at 226.

151. *Id.* at 227. The Government tried to argue that the changes in the law since the previous case involving the PMOI justified its lack of predesignation notice. *See supra* note 56 and accompanying text. The court rejected this argument, finding that the amendments to the law did not justify providing a lower standard of due process to the PMOI. *PMOI III*, 613 F.3d at 228.

152. *Id.* at 229.

153. *Id.* at 231. The story did not end on remand, however. Under AEDPA, the Secretary of State has 180 days from the time she receives a petition to make a final decision. *See* 8 U.S.C. § 1189(a)(4)(B)(iv)(I) (2006). In 2012, nearly two years after the remand, Secretary Clinton had yet to make a final decision on the PMOI's petition. The group filed a writ of mandamus in the D.C. Circuit to compel Clinton to delist the group. *See In re People's Mojahedin Org. of Iran*, 680 F.3d 832, 833 (D.C. Cir. 2012) (*per curiam*). On June 1, 2012, the court ordered the Secretary of State to make a final decision on the PMOI's status within four months; if she failed to do so, the court would order her to remove the group from the FTO list. *Id.* at 838. On September 21, 2012, apparently in response to lobbying efforts ahead of the court-imposed October 1 deadline, Secretary Clinton announced that she would remove the PMOI from the FTO list. *See* Scott Shane, *Iranian Dissidents Convince U.S. to Drop Terror Label*, N.Y. TIMES, Sept. 21, 2012, <http://www.nytimes.com/2012/09/22/world/middleeast/iranian-opposition-group-mek-wins-removal-from-us-terrorist-list.html>; *see also* U.S. DEP'T OF STATE, OFFICE OF THE SPOKESPERSON, *Delisting of the Mujahedin-e Khalq* (Sept. 28, 2012), <http://www.state.gov/r/pa/prs/ps/2012/09/198443.htm>.

154. *See supra* notes 138–140 and accompanying text (holding that the NCRI had sufficient connections in the U.S. to trigger constitutional protections).

State's inability to follow the court's instructions on remand likely contributed to the changing opinions. Thus, the ultimate outcome of the PMOI litigation should not necessarily be used to predict any future action by the D.C. Circuit when reviewing FTO designations, especially regarding groups without any presence in the United States.¹⁵⁵ However, the outcome does show that the court is willing to look beyond the procedural requirements of AEDPA and compel the Department of State to provide adequate due process to FTOs.

2. OFAC SDGT Decisions

In contrast to the explicit provision in AEDPA providing for review of an FTO designation in the D.C. Circuit,¹⁵⁶ IEEPA does not provide any standards for judicial review of SDGT designations.¹⁵⁷ However, because OFAC, as an agency, makes the designations, courts review these decisions as they would the decisions of any other agency: under the standards of the Administrative Procedure Act.¹⁵⁸ Thus, courts review an SDGT designation by examining whether the decision was arbitrary and capricious, an abuse of discretion, or in violation of statutory authority.¹⁵⁹ Some courts are reluctant to reverse OFAC's designation decisions on the merits and defer to OFAC's own decisionmaking process.¹⁶⁰ However,

155. According to the Director of the Office of Terrorist Designations and Sanctions, most FTOs are entirely foreign entities. Interview with Jason Blazakis, *supra* note 19.

156. 8 U.S.C. § 1189(c)(1) (2006).

157. See *supra* note 78 and accompanying text.

158. See *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 976 (9th Cir. 2011) (citing *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 496–97, n.18 (2004)) (finding that the judicial review provisions of the APA govern review of OFAC's SDGT designations).

159. 5 U.S.C. § 706(2)(A)–(C) (2006). While these standards are deferential to all agencies, agencies engaged in decisions about foreign affairs receive an even higher degree of deference. See *Humanitarian Law Project v. Reno*, 205 F.3d 1130, 1137 (9th Cir. 2000) (“[When a] regulation involves the conduct of foreign affairs, we owe the executive branch even more latitude than in the domestic context.”); *KindHearts I*, 647 F. Supp. 2d 857, 917 (N.D. Ohio 2009) (citing *Regan v. Wald*, 468 U.S. 222, 242 (1984)) (“Although arbitrary and capricious review is highly deferential to agencies, the government asserts an even higher degree of deference in the realm of foreign affairs.”).

160. See, e.g., *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 730 (D.C. Cir. 2007) (finding that OFAC's designation was “supported by the record and not contrary to law”); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) (“Treasury's decision to designate [a group] as an SDGT was based on ample evidence in a massive administrative record.”); *Kadi v. Geithner*, 2012 WL 898778, at *13 (D.D.C. Mar. 19, 2012) (finding that the record “as a whole” supported OFAC's conclusion that Kadi was involved with another terrorist group), *appeal dismissed by* No. 12-5076, 2012 WL 3243996 at *1 (D.C. Cir. July 31, 2012).

some courts have held that OFAC's actions violated an affected entity's due process rights.¹⁶¹ Because of the reluctance of many courts to reverse OFAC's decisions, an entity challenging OFAC's actions is unlikely to win its case on the merits.

In *Islamic American Relief Agency v. Gonzales*, the D.C. Circuit upheld OFAC's designation of an American branch of an international Islamic charity as an SDGT.¹⁶² The group's parent organization had already been designated as an SDGT based on evidence that it financially supported terrorist groups.¹⁶³ In upholding the American branch's designation, the court held that OFAC relied on "substantial evidence" in the record to support its decision,¹⁶⁴ and dismissed the group's claims that it was not affiliated with the parent group and not associated with terrorism.¹⁶⁵ In addition, the court did not mention why the parent organization was designated in the first place but relied instead on OFAC's own discretion to make that decision.¹⁶⁶

In *Holy Land Foundation for Relief & Development v. Ashcroft*, the D.C. Circuit upheld OFAC's redesignation of an American charity as an SDGT based on OFAC's reasonable belief that the charity had ties to Hamas.¹⁶⁷ The court held that OFAC could permissibly redesignate the group based on its "genesis and history," even without any recent evidence of a link between the group and Hamas.¹⁶⁸ The court also found that the evidence in the record was sufficient to support such a redesignation, even though much of it was hearsay and classified information.¹⁶⁹ OFAC's ability to present

161. See *Al Haramain*, 686 F.3d at 985 (concluding that OFAC violated an SDGT's due process rights by failing to provide sufficient notice of reasons behind designation); *KindHearts I*, 647 F. Supp. 2d at 897 (finding that OFAC's asset blocking denied an SDGT its due process rights to notice and an opportunity to be heard).

162. 477 F.3d at 730.

163. *Id.* at 731.

164. See *id.* at 732 (reaching this conclusion without explaining the content of either the classified or unclassified record).

165. See *id.* at 734 (dismissing the Islamic American Relief Agency's argument that the similarity between its name and the Islamic African Relief Agency was "purely coincidental").

166. See *id.* at 733–34 (detailing all the reasons that the Islamic American Relief Agency office was, in fact, the same entity as its parent entity, but declining to explain why the African branch was designated in the first place).

167. *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 159, 162 (D.C. Cir. 2003).

168. See *id.* at 162 (finding that no evidence existed to support the conclusion that the Holy Land Foundation had severed ties with Hamas).

169. *Id.*; accord *Islamic Am. Relief Agency*, 477 F.3d at 734 (upholding OFAC's decision based on the strength of the record as a whole, even though the evidence in the unclassified record by itself was "not overwhelming").

classified information to the court did not violate the group's due process right to receive notice of its redesignation or exceed OFAC's authority because the government had the right, under IEEPA, to rely on classified information in making its designation.¹⁷⁰ Lastly, the court held that OFAC provided the group with sufficient time to rebut its redesignation after informing the group of its intent to redesignate thirty-one days prior to actually taking action.¹⁷¹

Even though several other decisions have upheld OFAC's actions,¹⁷² decisions on the constitutionality of OFAC's actions are not consistent among circuits. Although several courts have found that OFAC violated an entity's Fourth Amendment rights, they have disagreed about which actions actually constituted the violation.¹⁷³ And while other courts have found that OFAC provided constitutionally inadequate notice of a pending designation,¹⁷⁴ the opinions disagree about the degree of harm suffered by the group as a result of the due process violation.¹⁷⁵ These differences in judicial opinions and outcomes make it difficult for an entity challenging

170. *Holy Land Found.*, 333 F.3d at 164 (citing 50 U.S.C. § 1702(c) (2006)).

171. *Id.* (citing *NCRI I*, 251 F.3d 192, 209 (D.C. Cir. 2001)) (finding that such a notification procedure, even without an actual summary of the relevant *facts* used in the decision, protected the Holy Land Foundation's due process rights). In relying on *NCRI I*, the D.C. Circuit held that even if OFAC violated the notice requirement before the group's initial designation, OFAC did not violate the group's rights during the *redesignation* process. *See id.* at 163 ("Even if Treasury's initial designation arguably violated [the group's] due process rights, [its] funds are blocked currently by a redesignation which Treasury applied in accordance with the requirements we outlined in [*NCRI I*].").

172. *See, e.g.*, *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 979 (9th Cir. 2011); *cf. KindHearts I*, 647 F. Supp. 2d 857, 893–97 (N.D. Ohio 2009) (finding that OFAC's ability to block a group's assets pending a final decision on its status as an SDGT was not unconstitutionally vague).

173. *See Al Haramain*, 686 F.3d at 995 (holding that OFAC's warrantless seizure of a group's assets violated the group's Fourth Amendment right to be free from unreasonable seizures); *KindHearts for Charitable Humanitarian Dev., Inc. v. Geithner (KindHearts III)*, 710 F. Supp. 2d 637, 647 (N.D. Ohio 2010) (reiterating that the role of the judiciary is to protect private parties from unreasonable exercises of Executive Branch discretion). *But see Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 78 (D.D.C. 2002) (finding that OFAC violated the Holy Land Foundation's Fourth Amendment rights by entering its corporate offices and searching the premises without a warrant, but not by blocking the group's assets).

174. *See, e.g., KindHearts I*, 647 F. Supp. 2d at 904–08 (finding that OFAC violated the group's due process rights by failing to provide it with adequate notice of the reasons for its designation).

175. *See Al Haramain*, 686 F.3d at 990 (finding that OFAC's due process violations were harmless, based on an examination of the entire record). *But see KindHearts III*, 710 F. Supp. 2d at 657 (finding that OFAC could not meet its burden of proving the harmlessness of its due process violations beyond a reasonable doubt).

OFAC's actions to predict whether a court will invalidate a particular action, as well as what factors the court will rely on to make its decision.

For example, in *Al Haramain Islamic Foundation, Inc. v. U.S. Department of the Treasury*, the Ninth Circuit held that OFAC violated a group's due process rights by failing to provide the group with an adequate summary of the unclassified evidence on which it relied to redesignate the group as an SDGT.¹⁷⁶ The court held that it might be impracticable for OFAC to provide a group with a statement of the reasons for its designation in certain situations, such as if the group presented an imminent national security threat.¹⁷⁷ Because OFAC waited four years before redesignating the group as an SDGT, however, the court found that those national security concerns were clearly not present to justify the lack of notice.¹⁷⁸ The court went on, however, to find that OFAC's due process violations were harmless because the group could not have provided any additional information by which OFAC would have come to a different conclusion, even if it had been provided with the requisite due process.¹⁷⁹ Therefore, the court upheld the SDGT designation based on the administrative record.¹⁸⁰

In contrast, in *KindHearts for Charitable Humanitarian Development, Inc. v. Geithner*, the Northern District of Ohio held that OFAC's failure to provide an SDGT with an adequate statement of reasons for its designation constituted a harmful due process violation.¹⁸¹ However, the court held that OFAC had the burden of proving the harmlessness of its due process violations beyond a reasonable doubt.¹⁸² The Ninth Circuit expressly refused to apply this burden to OFAC in *Al Haramain*, finding that the

176. See *Al Haramain*, 686 F.3d at 988 (finding that OFAC had to provide the group with a statement of the actual reasons behind the designation decision, not just a copy of the administrative record).

177. *Id.* at 986.

178. *Id.*

179. *Id.* at 989–90. The D.C. Circuit rejected this same logic in the case of the PMOI. See *PMOI III*, 613 F.3d 220, 220–29 (D.C. Cir. 2010); *NCRI I*, 251 F.3d 192, 209 (D.C. Cir. 2001) (“Hence, State asks us to assume that nothing the PMOI would have offered—not even evidence refuting whatever *unclassified* material the Secretary may have relied on—could have changed her mind.”).

180. *Al Haramain*, 686 F.3d at 990.

181. See *KindHearts III*, 710 F. Supp. 2d 637, 657 (N.D. Ohio 2010). In this particular case, OFAC blocked the assets of the group for three years without making any final decision as to the group's status, and the founder of KindHearts actually relied on OFAC's own published guidelines for charitable groups when he founded the charity. See *KindHearts I*, 647 F. Supp. 2d 857, 864–65 (N.D. Ohio 2009).

182. See *KindHearts III*, 710 F. Supp. 2d at 654–56 (citing *Tenn. Secondary Sch. Athletic Ass'n v. Brentwood Acad.*, 551 U.S. 291, 303 (2007)).

beyond a reasonable doubt standard did not apply to civil litigation.¹⁸³ Therefore, even though the district court in *KindHearts* held that OFAC violated an SDGT's due process rights, the fact that other courts have not found a similar due process violation¹⁸⁴ makes it unlikely that an entity challenging OFAC's actions will win a due process challenge.

Although several courts have found that OFAC violated an SDGT's Fourth Amendment rights, the courts disagree about which of OFAC's actions actually constituted the violation.¹⁸⁵ In addition, the district court in *KindHearts* struggled to find an adequate remedy for the Fourth Amendment violation, finally settling on a post hoc probable cause hearing to determine the validity of OFAC's search of a group's offices.¹⁸⁶ Such a remedy is unlikely to satisfy the needs of an entity that cannot access any of its money. Thus, an entity challenging OFAC's actions in court is unlikely to benefit in any meaningful way from its lawsuit, even if a court finds in its favor. The inconsistent outcomes and inadequate remedies for affected entities illustrates OFAC's broad ability to both designate groups as SDGTs and freeze assets with only a limited judicial check. If OFAC's constitutional violations ultimately do not affect the outcome of its designation decisions or blocking orders, and if courts are unable to adequately fix any possible Fourth Amendment or Due Process violations, OFAC likely has little incentive to change its own decisionmaking process. As a result, OFAC's discretion to designate groups through its existing process seems likely to continue.

B. The Lack of Comprehensive Procedural Requirements in OFAC's Regulations

OFAC has promulgated its own regulations detailing how it manages the

183. See *Al Haramain*, 686 F.3d at 989 (citing *Brentwood Acad.*, 551 U.S. at 303) (finding that the Supreme Court's use of the "reasonable doubt" standard in *Brentwood Academy* was merely a rhetorical tool to explain the true harmlessness of the constitutional error, and finding that the standard was inapposite to a civil case).

184. See *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 739 (D.C. Cir. 2007) (finding that OFAC's designation was lawful under all relevant laws and the Constitution); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) ("Therefore, Treasury provided [the Holy Land Foundation] with the requisite notice and opportunity for response necessary to satisfy due process requirements."); *Kadi v. Geithner*, 2012 WL 898778, at *24 (D.D.C. Mar. 19, 2012) (finding that Kadi's opportunity to submit evidence to OFAC constituted sufficient due process), *appeal dismissed by* No. 12-5076, 2012 WL 3243996, at *1 (D.C. Cir. July 31, 2012).

185. See *supra* note 173 and accompanying text.

186. See *KindHearts III*, 710 F. Supp. 2d at 646-53 (balancing the government's interest in protecting national security with the violations to *KindHearts*' constitutional rights, and concluding that a post hoc probable cause hearing was the best possible solution).

blocked assets of both SDGTs and FTOs.¹⁸⁷ These regulations contain information ranging from OFAC's general reporting requirements,¹⁸⁸ to its licensing procedures,¹⁸⁹ to the definition of "otherwise associated with."¹⁹⁰ Notably, the regulations do not provide any guidance on how OFAC actually makes its designation or asset-freezing decisions. Therefore, most entities affected by OFAC's actions can only guess at the reasons behind them. Because OFAC can designate or freeze the assets of any entity that it concludes is controlled by, acting on behalf of, providing material or financial support to, or is "otherwise associated" with a designated terrorist entity,¹⁹¹ it is likely that many entities with only indirect links to terrorism will not know why OFAC blocked their assets. Entities designated as SDGTs by the Department of State, as well as those designated as FTOs, do not face the same problem, because the Department of State can only designate entities that directly threaten terrorism.¹⁹² Therefore, these entities have knowledge of a clearer link between their actions and their designation.

Once OFAC has designated an entity as an SDGT or blocked its assets, the agency adds the entity to the Specially Designated Nationals List, which includes entities designated under all of OFAC's sanctions programs, including FTOs, SDGTs, Specially Designated Terrorists, and other groups and individuals who support terrorism.¹⁹³ An entity has only a limited ability to remove itself from that list. To facilitate removal, an entity "may submit arguments or evidence that [it] believes establishes that

187. See 31 C.F.R. §§ 594.101–.901 (2012) (outlining procedures for SDGTs); *id.* §§ 597.101–.901 (outlining procedures for FTOs); see also *id.* §§ 501.101–.901 (outlining OFAC's general rulemaking and other procedures).

188. *Id.* §§ 501.601–.606.

189. *Id.* § 501.801.

190. *Id.* § 594.316 (defining "otherwise associated with" as "to own or control" or "to attempt, or to conspire with one or more persons, to act for or on behalf of or to provide financial, material, or technological support, or financial or other services, to"). This definition was added to OFAC's regulations in 2007, see 72 Fed. Reg. 4206, 4207 (Jan. 30, 2007), and the D.C. District Court found that such an addition prevented an entity from claiming that the term, as used in Executive Order 13,224, was unconstitutionally vague. See *Kadi v. Geithner*, 2012 WL 898778, at *34 (D.D.C. Mar. 19, 2012), *appeal dismissed by No.* 12-5076, 2012 WL 3243996, at *1 (D.C. Cir. July 31, 2012).

191. See Exec. Order 13,224, 3 C.F.R. 786, 787 (2002).

192. See *supra* notes 18–19 and accompanying text.

193. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, *Resource Center: Frequently Asked Questions*, Question 18 (Mar. 18, 2013, 1:53 PM), <http://www.treasury.gov/resource-center/faqs/Sanctions/Pages/answer.aspx#17>. The Specially Designated Nationals List currently stands at 556 pages. See OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEP'T OF THE TREASURY, *Resource Center: Specially Designated Nationals List* (Mar. 14, 2013), <http://www.treasury.gov/ofac/downloads/t11sdn.pdf>.

insufficient basis exists for the designation.”¹⁹⁴ The entity may also “propose remedial steps” that would help negate the basis for inclusion on the list.¹⁹⁵ After submitting this evidence in writing, the entity can request a meeting with OFAC’s director to discuss the evidence and reasons for the initial listing.¹⁹⁶ The director has complete discretion over whether to grant the request for a meeting and can choose to review the submitted evidence without such a meeting.¹⁹⁷ This discretionary power gives OFAC’s director the ability to make a final decision about the status of an affected entity without allowing the entity to participate meaningfully in the process. Such an outcome seems to contradict the ultimate conclusion of the D.C. Circuit in its PMOI litigation: a group cannot adequately respond to a designation if it does not know why it was designated in the first place.¹⁹⁸ Applying the same logic as the D.C. Circuit, entities designated by OFAC lack an adequate way to rebut the evidence behind their status as SDGTs.

Thus, even compared with the deferential judicial review of FTO designations,¹⁹⁹ the procedures governing OFAC’s designation and blocking order decisions leave OFAC with a large amount of flexibility and discretion. Although OFAC consults with other Executive Branch officials when making initial designation decisions,²⁰⁰ its complete control of an entity’s assets after designation, as well as its ability to block assets pending investigation,²⁰¹ allows it to exercise a large amount of discretion with few procedural or judicial checks.

III. THE REAL IMPACTS OF OFAC’S ACTIONS

The fact that an agency has discretion, of course, does not necessarily mean that an agency violates constitutional rights. Courts allow agencies the flexibility to create and interpret their own rules, and usually uphold an agency’s procedures if they comply with the agency’s statutory authority.²⁰² Courts usually review the decisions of agencies engaged in foreign affairs,

194. 31 C.F.R. § 501.807(a).

195. *Id.* (recommending steps such as reorganizing a corporation or other entity or allowing certain blocked persons to resign from a corporation).

196. *Id.* § 501.807(b)–(c).

197. *Id.* The provision does not say whether OFAC must give reasons for its denial of a meeting.

198. *See supra* notes 135–153 and accompanying text.

199. *See supra* Part II.A.1.

200. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (requiring the Secretary of the Treasury to consult with the Secretary of State and the Attorney General before designating SDGTs).

201. *See supra* note 14 and accompanying text.

202. *See supra* note 68 and accompanying text.

such as OFAC and the Department of State, under an even more deferential standard than agencies engaged in purely domestic decisionmaking.²⁰³ However, OFAC's ability to freeze the assets of entities with only indirect links to terrorism has led it to block the assets of certain groups, such as Muslim charities, that deny their ties to terrorist groups.²⁰⁴ Entities whose assets are blocked, either after designation or during the pendency of an investigation, suffer harm to both their monetary and non-monetary interests. If such entities actually support terrorism, such harm is likely justifiable to protect the United States. For groups that do not use their resources to support terrorism, however, the lack of adequate procedures behind designations and the blocking of assets increases the possibility that they will suffer long-term deprivations of their property without due process of law.

A. Monetary Impacts of Blocking Orders

Because OFAC can block the assets of a group pending investigation into its status as an SDGT,²⁰⁵ an entity may lose access to its money before OFAC ever takes any final action on its SDGT designation. In addition, any individual, company, or organization that transfers assets to or from the blocked entity,²⁰⁶ contributes goods or services to the entity,²⁰⁷ maintains property owned by the entity,²⁰⁸ or conducts any kind of secure transaction with the entity²⁰⁹ can face criminal and civil penalties.²¹⁰ Penalties are governed by IEEPA and thus can increase with inflation.²¹¹ As of 2010, IEEPA mandated that the maximum civil penalty for violating an OFAC blocking order or license was \$250,000 or twice the amount of

203. See *supra* note 159 and accompanying text.

204. Because the Department of State designates entities as SDGTs based on whether an entity threatens the security of the United States or threatens to commit a terrorist attack, see Exec. Order No. 13,224, 3 C.F.R. 786 (2002), it would not be able to designate a domestic charity as an SDGT, even if the charity financially supported extremist causes. Interview with Jason Blazakis, *supra* note 19.

205. See *supra* note 14 and accompanying text.

206. See 31 C.F.R. § 594.202 (2012) (nullifying and voiding any asset transfers after the issuance of a blocking order, subject to certain exceptions).

207. *Id.* § 594.204.

208. *Id.* § 594.206.

209. *Id.* § 594.201(b).

210. See 50 U.S.C. § 1705 (Supp. IV 2010) (describing possible penalties for violating any regulations issued pursuant to IEEPA); 31 C.F.R. § 594.701(a).

211. See 31 C.F.R. § 594.701(a)–(b)(2) (stating that penalties are governed by IEEPA and are subject to adjustment pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990 and 18 U.S.C. § 3571 (2006)).

the prohibited transaction.²¹² In addition, IEEPA imposes a criminal fine of not more than \$1,000,000 for willful violations of a license or blocking order, in addition to a possible prison sentence of up to twenty years.²¹³ Thus, even a suspicion of participating in terrorist activity can have severe financial and punitive consequences for an entity and those it does business with.²¹⁴

The effects of OFAC's blocking orders are not limited to monetary penalties for third parties, however. An entity whose assets are blocked can also suffer severe financial hardship, including the inability to use any of its money to further its organizational goals. For example, the Holy Land Foundation, once the largest Muslim charity in the United States,²¹⁵ with an annual budget of \$14 million,²¹⁶ argued that OFAC "put it out of business" by designating it an SDGT in December 2001²¹⁷ and depriving it of any ability to use its U.S. funds. The group's designation and OFAC's subsequent blocking order prevented the group from executing millions of dollars in charitable donations to refugees, orphans, and other groups abroad.²¹⁸ Donating to charity, or *zakat*, is one of the five fundamental tenets of the Muslim religion, as well as an important form of political participation and foreign aid.²¹⁹ Before designation, the Holy Land Foundation provided relief to victims of the Oklahoma City bombings, victims of earthquakes in Turkey and India, refugees in the Gaza Strip, and victims of the September 11, 2001 attacks.²²⁰ OFAC's blocking order rendered the group incapable of providing its charitable services to those specific clients.²²¹ Although OFAC alleged that the Holy Land Foundation was controlled by Hamas, the group repeatedly denied that allegation.²²²

In December 2001, OFAC also froze the assets of the Global Relief

212. 50 U.S.C. § 1705(b)(1)–(2) (Supp. IV 2010); *see also* 31 C.F.R. § 594.701(a)(1).

213. 50 U.S.C. § 1705(c); *see also* 31 C.F.R. § 594.701(a)(2).

214. Indeed, Vanessa Ortblad argues that financial sanctions, while not intended to be punitive, have a significant punitive effect on groups subject to them. *See* Ortblad, *supra* note 24, at 1439 ("The sanctions indefinitely deprive an individual or an entity of property without meaningful due process and indefinitely label OFAC's target as a supporter of terrorism.").

215. Brief of Appellant, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) (No. 02–5307), 2003 WL 25586053, at *7.

216. *The Holy Land Foundation*, FREEDOMTOGIVE, <http://freedomtogive.com/holy-land-foundation-the-hlf/> (last visited May 11, 2013).

217. Brief of Appellant, *supra* note 215, at *7.

218. *Id.* at *7–9.

219. *Id.* at *8–9; *see also* ROTH ET AL., *supra* note 89, at 21 (explaining the importance of *zakat* to the Muslim faith).

220. Brief of Appellant, *supra* note 215, at *8–9.

221. *Id.*

222. *Id.* at *9.

Foundation, an Illinois nonprofit charity.²²³ At the time that its assets were blocked, the Global Relief Foundation provided humanitarian aid to needy Muslim individuals in twenty nations and had received over \$5 million in donations from its members, many of whom were American.²²⁴ Without access to its American funds, the group could not function as a nonprofit agency.²²⁵ Similarly, Mr. Yassin Abdullah Kadi, a Saudi architect and businessman,²²⁶ lost his ability to execute business transactions when the United States and the United Kingdom simultaneously designated him as a terrorist and froze his assets in October 2001.²²⁷ After the issuance of this joint blocking order, Mr. Kadi, whose net worth is approximately \$65 million,²²⁸ could not withdraw any money from his bank accounts to conduct business in either the United States or the United Kingdom.²²⁹ Mr. Kadi's situation, as well as the experiences of the Holy Land Foundation and the Global Relief Foundation, illustrate the severe financial impact of OFAC's blocking orders, whether or not those orders are accompanied by a final SDGT designation. Many of the groups subjected to OFAC's blocking orders may actually be supporting terrorism, and so such harsh financial sanctions are likely necessary to protect national security. However, the very harshness of the sanctions underscores the need for proper procedures before implementing them to ensure that entities that do not deserve such severe monetary deprivations are not mistakenly subjected to such actions.

B. *Non-Monetary Impacts of Blocking Orders*

Although the financial impact of a blocking order can be devastating to both designated SDGTs and entities with assets blocked pending investigation, the non-monetary impact of blocking orders and SDGT designations can be just as devastating, according to the individuals and groups subjected to those orders. When OFAC designated Mr. Kadi as an SDGT in 2001, for example, the United Nations and the European Union

223. Petition for Writ of Certiorari, at 2–3, *Global Relief Found., Inc. v. Snow*, 540 U.S. 1003 (2003) (No. 03–46), 2003 WL 23717146.

224. *Id.* at 2.

225. *Id.* at 5.

226. See Landon Thomas Jr., *A Wealthy Saudi, Mired in Limbo Over An Accusation of Terrorism*, N.Y. TIMES (Dec. 12, 2008), http://www.nytimes.com/2008/12/13/world/middleeast/13kadi.html?pagewanted=1&_r=2&sq=Yassin%20Kadi&st=cse&scp=1.

227. See Complaint at 7, *Kadi v. Paulson*, No. 1:09–cv–00108 (D.D.C. filed Jan. 16, 2009), *argued sub nom.* *Kadi v. Geithner*, 2012 WL 898778, at *1 (D.D.C. Mar. 19, 2012).

228. See Thomas, *supra* note 226.

229. See Complaint, *supra* note 227, at 7.

also added his name to their terrorist designation lists.²³⁰ As a result, Mr. Kadi's international reputation and business interests suffered.²³¹ He also experienced depression and "the humiliation of having to ask family members for financial help."²³² Although he successfully petitioned the European Court of Justice for removal from its terrorist list in 2008,²³³ his inability to successfully access the evidence relied on for his designation by the United States,²³⁴ as well as the lack of criminal charges against him, has left him "caught in a legal limbo."²³⁵

Like Mr. Kadi, the Holy Land Foundation argued that OFAC refused to consider evidence it presented in an attempt to rebut its SDGT designation.²³⁶ The group also argued that OFAC relied on outdated, uncorroborated, and unreliable evidence, such as statements allegedly elicited from Palestinians after being tortured by the Israeli government.²³⁷ Similarly, the Global Relief Foundation asserted that OFAC relied on "mostly unsworn statements, newspapers articles and innuendo comprised entirely of hearsay presented in a rambling format insulated from cross-examination" when justifying its blocking order.²³⁸ In addition, the Global Relief Foundation claimed that it was incapable of mounting a proper defense to OFAC's designation because OFAC maintained custody of approximately 500,000 of the group's business records.²³⁹

Government agents also searched the offices of both the Holy Land Foundation and the Global Relief Foundation in an effort to help further OFAC's investigation.²⁴⁰ During the search of the Global Relief Foundation's offices, the agents seized everything from books to religious texts to computers.²⁴¹ The group argued that the search violated its Fourth Amendment rights because the agents did not obtain a warrant.²⁴² The

230. *See id.* at 13 (noting that the United Nations and the European Union took this action at the request of the United States).

231. *Id.* at 3.

232. Thomas, *supra* note 226.

233. Complaint, *supra* note 227, at 14–16.

234. *See id.* at 17–18 (asserting that Mr. Kadi filed several Freedom of Information Act requests since his initial asset blocking and received no response from OFAC).

235. Thomas, *supra* note 226.

236. Brief of Appellant, Holy Land Found. for Relief & Dev. v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003) (No. 02–5307), 2003 WL 25586053, at *9 (arguing that OFAC denied repeated requests to meet with the group).

237. *Id.* at *9–10.

238. Petition for Writ of Certiorari, Global Relief Found., Inc. v. Snow, 540 U.S. 1003 (2003) (No. 03–46), 2003 WL 23717146, at *5.

239. *Id.* at *3–4.

240. *Id.* at *3; Brief of Appellant, *supra* note 236, at *7.

241. Petition for Writ of Certiorari, *supra* note 238, at *3.

242. *Id.*

Islamic American Relief Agency, a Missouri-based charity,²⁴³ claimed that the government's search of its offices actually violated not just its Fourth Amendment rights, but its First Amendment rights as well.²⁴⁴ Government agents searched its offices and seized property on the night before Ramadan, interfering with the group members' ability to make a charitable donation specifically timed to occur during the holiday.²⁴⁵ Moreover, the group contended that FBI agents conducting the search engaged in "unlawful methods of interrogation, threats and intimidation, on [the Agency's] officers, donors, and employees, and their families despite repeated requests for an attorney to be present."²⁴⁶ Regardless of the truth of those allegations, the respective experiences of the Islamic American Relief Agency, the Holy Land Foundation, the Global Relief Foundation, and Mr. Yassin Kadi illustrate the very real consequences of OFAC's broad power to freeze assets and designate entities as SDGTs. To ensure that OFAC does not subject undeserving entities to these consequences, proper procedures are needed before OFAC implements such sanctions.

IV. A PLAN FOR THE FUTURE: BALANCING NATIONAL SECURITY AND DUE PROCESS

The power to block the assets of suspected terrorists is an important and powerful weapon in the government's fight against terrorism, but the power is also flawed in its implementation against certain affected entities. Because OFAC's discretionary authority leads to many of the most significant negative impacts,²⁴⁷ any changes to the process should focus primarily on OFAC, rather than the Department of State. SDGTs and entities with blocked assets currently have no way to meaningfully challenge OFAC's conclusions and actions, and as a result have little chance of changing their status as SDGTs or unfreezing their assets. In order to satisfy due process, entities affected by OFAC's actions must be provided with an opportunity to challenge OFAC's SDGT designation decision, OFAC's blocking order, or both. To meet this due process requirement, OFAC must provide an entity with a statement of the reasons behind the

243. See Appellant's Final Brief on Appeal, at 4, *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728 (D.C. Cir. 2007) (No. 05-5447).

244. *Id.* at 2, 36-38; see also *Islamic Am. Relief Agency v. Gonzales*, 477 F.3d 728, 735-37 (D.C. Cir. 2007) (rejecting the Islamic American Relief Agency's argument that OFAC violated its First Amendment rights).

245. Appellant's Final Brief on Appeal at 9, *Islamic Am. Relief Agency*, 477 F.3d 728 (No. 05-5447).

246. *Id.* at 9.

247. See *supra* Part I.D for a discussion of OFAC's discretionary ability to designate SDGTs.

designation or blocking order, a chance to challenge the action before a neutral decisionmaker, and a limited opportunity for judicial review.²⁴⁸ Providing designated SDGTs and other affected entities with these due process guarantees would put them in the same position as designated FTOs.²⁴⁹ Although there are several possible ways to provide SDGTs with these requirements—including amending Executive Order 13,224 and amending OFAC’s own regulations—amending IEEPA is the best way to balance the government’s interest in protecting the country with the due process rights of entities possessing blocked assets.

A. Amending Executive Order 13,224

As Executive Order 13,224 grants OFAC a wide range of powers to designate SDGTs and block their assets, amending the Executive Order seems, at first blush, to be a good way of limiting some of that discretion and creating procedural rights for affected entities. Executive orders, however, are utilized for the express purpose of allowing the President to control the actions of the Executive Branch²⁵⁰ and so are inherently discretionary. They allow the President to deal with specific problems affecting the country in any way that he desires, without interference from the other branches of government. Therefore, the President is unlikely to amend Executive Order 13,224 to provide more due process rights for designated entities unless he decides that such action is necessary to deal with ongoing national security threats.

Because the prevention of terrorism and the protection of national security is primarily the domain of the Executive Branch, courts will likely continue to defer to the judgments of the President and the Executive Branch on national security-related issues and are unlikely to nullify an executive order pertaining to national security unless it clearly violates

248. Because OFAC can only block the assets of SDGTs located in the United States, see Exec. Order No. 13,244, 3 C.F.R. 786 (2002) (blocking all the property interests of designated groups “that are in the United States”), designated SDGTs have a right to certain procedural requirements before being deprived of their property. The nature of those procedures will vary depending on the surrounding circumstances. See *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 570 n.7 (1972) (“Before a person is deprived of a protected interest [such as liberty or property], he must be afforded opportunity for some kind of hearing, ‘except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event.’” (quoting *Boddie v. Conn.*, 401 U.S. 371, 379 (1971))).

249. See *supra* notes 138–153 and accompanying text for a discussion of the due process that the Department of State must provide to FTOs.

250. See KENNETH R. MAYER, WITH THE STROKE OF A PEN: EXECUTIVE ORDERS AND PRESIDENTIAL POWER 34 (2001).

constitutional rights²⁵¹ or the separation of powers.²⁵² Although the Supreme Court has nullified the use of executive orders in some situations,²⁵³ it has routinely upheld the President's power to make national security decisions through executive orders.²⁵⁴ As a result, the President has little incentive to amend Executive Order 13,224, even to provide additional procedural protections for affected parties. In addition, even if a future President did amend Executive Order 13,224, such an amendment would not necessarily lessen OFAC's discretion in the SDGT process. Because OFAC has congressional authorization to create and maintain its own regulations,²⁵⁵ OFAC could continue to maintain its own discretionary procedures for designating SDGTs and blocking assets even if the President amended Executive Order 13,224 to limit its discretion.

B. Amending OFAC's Regulations

Due to the impracticalities inherent in amending Executive Order 13,224, amending OFAC's own regulations seems to provide a simpler way to protect the procedural due process rights of entities affected by OFAC's actions. OFAC has amended its regulations before, and publishes such amendments in the Federal Register.²⁵⁶ In theory, OFAC could amend its SDGT regulations by creating an evidentiary standard to follow when making designation decisions or issuing blocking orders, publishing its decisionmaking process, or giving affected entities an automatic right to meet with OFAC's director to challenge OFAC's actions. Such changes would make OFAC's decisionmaking process more transparent, and would also provide affected entities with their required due process rights.

However, OFAC currently has little incentive to make significant

251. *Cf. Ex parte Endo*, 323 U.S. 283, 298–99 (1944) (assuming that laws and executive orders were passed in accordance with constitutional principles).

252. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587–88 (1952) (holding that an executive order authorizing the President to seize all of the steel mills in the country amounted to the President making laws, in violation of Article I of the Constitution).

253. *See, e.g., Youngstown*, 343 U.S. at 659–60 (Burton, J., concurring) (refusing to authorize the use of an executive order to take action that Congress specifically prohibited).

254. *See generally Korematsu v. United States*, 323 U.S. 214 (1944) (upholding an executive order imposing a curfew on Japanese-American citizens based on the President's determination that such an order was necessary to protect the country).

255. *Cf.* 31 U.S.C. § 321(b)(1) (2006) (giving the Secretary of the Treasury the power to promulgate regulations to carry out the functions of his office); *id.* § 321(b)(2) (authorizing the Secretary of the Treasury to delegate duties to another officer within the Department of the Treasury).

256. *See, e.g., International Emergency Economic Powers Act Civil and Criminal Penalties*, 73 Fed. Reg. 32,650 (June 10, 2008) (codified at 31 C.F.R. pts. 535–42, 545, 560, 585–88, 593–95).

changes to its regulations, because courts generally uphold its decisionmaking process on judicial review.²⁵⁷ If more courts find that OFAC's actions violate the constitutional rights of SDGTs and entities possessing assets blocked pending investigation, it is possible that OFAC would respond to the resulting pressure by amending its regulations. Until a court reaches such a conclusion, however, OFAC has little incentive to change its regulations and will likely maintain its existing discretionary role in the SDGT designation process.

C. Amending the IEEPA

Because executive orders are discretionary and OFAC has little incentive to change its own regulations, the best option for improving the SDGT-designation process is to impose some kind of statutory check on OFAC, similar to the statutory check on the Secretary of State's power provided by AEDPA.²⁵⁸ To properly balance the interests of the government in preventing terrorism with the due process rights of SDGTs and other affected entities, the SDGT designation process should be amended to provide more due process protections, and should be codified in IEEPA. Because IEEPA expressly allows the Executive Branch to exercise its discretion to make national security decisions through presidential regulations,²⁵⁹ codifying the process in a statute would allow the Executive Branch to continue to exercise its discretion, but in a manner limited by certain procedural requirements.²⁶⁰

Section 203 of IEEPA²⁶¹ describes the regulations the President may create when declaring a national emergency, as well as the limitations on his authority to enact these regulations.²⁶² Congress should amend IEEPA and add a new provision to this section mandating certain procedural requirements that the President's regulations must meet when they affect

257. See *supra* Part II.A.2 (discussing the amount of deference that courts typically give to OFAC's decisionmaking process).

258. See *supra* Part I.A for a discussion of these requirements.

259. 50 U.S.C. § 1702(a) (2006).

260. Codifying the necessary procedural requirements in a statute such as AEDPA would give Congress complete control over the process, and thus limit the Executive Branch's flexibility to issue regulations governing the designation of terrorists and terrorist entities. According to the Director of the Office of Terrorist Designation and Sanctions at the Department of State, flexibility is important to the success of OFAC's economic sanctions as a national security tool. Interview with Jason Blazakis, *supra* note 19.

261. Pub. L. No. 95-233, 91 Stat. 1625, 1626 (1977) (codified at 50 U.S.C. § 1702).

262. See *id.* § 1702(a) (allowing the President to create regulations to exercise his IEEPA powers); *id.* § 1702(b)(1), (3) (forbidding the President from regulating postal or telephonic communications between individuals or limiting the importation of "informational materials" such as books, films, and artwork).

persons or groups who are present in the United States.²⁶³ This provision should mandate that agencies implementing these regulations, including OFAC and the Department of State,²⁶⁴ provide affected entities with a post-deprivation statement of reasons for a designation decision or blocking order, a post-deprivation hearing²⁶⁵ before a neutral decisionmaker, and an option for judicial review in the D.C. Circuit.²⁶⁶

Under the amended section of IEEPA, agencies could continue to exercise their powers under Executive Order 13,224, and so OFAC would retain its ability to designate an entity as an SDGT or block its assets based on the amount of financial or other support the entity provides to other terrorists.²⁶⁷ However, the regulations issued pursuant to the new IEEPA section should require OFAC to provide an affected entity with an unclassified summary of the reasons behind its designation or blocking order and provide the entity with a realistic way to respond to the information.²⁶⁸ Such a notification requirement would help limit OFAC's

263. Such a provision would be codified at 50 U.S.C. § 1702(d). Limiting such an amendment to entities with a U.S. presence would be simpler than trying to apply a new law to entities that have no connection to the United States, which have limited due process rights. *See supra* note 129 and accompanying text.

264. Although the Department of State's ability to designate SDGTs does not implicate the same discretionary issues as OFAC's abilities, *see supra* Part I.D, the Department of State's SDGT designations should be governed by the same standards as OFAC's designations because OFAC ultimately controls the financial assets of *all* designated SDGTs. *See supra* note 115 and accompanying text.

265. The importance of protecting the country from terrorist attacks, combined with the possibility that a group given notice of an upcoming blocking order would transfer its assets out of the country, create an "extraordinary situation" in which a predeprivation hearing would not be required. *See supra* note 248 and accompanying text; *see also* *Al Haramain Islamic Found., Inc. v. U.S. Dep't of the Treasury*, 686 F.3d 965, 985 (9th Cir. 2011) (noting that the possibility of "asset flight" justifies denying a group pre-deprivation notice); *Holy Land Found. for Relief & Dev. v. Ashcroft*, 219 F. Supp. 2d 57, 76 (D.D.C. 2002) (citing *Calero Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 679–80 (1974)) (finding that the government met all of the requirements of an extraordinary situation, specifically the necessity of the deprivation to serve a compelling interest, the necessity of speed in agency action, and the necessity of acting pursuant to a "narrowly drawn statute"), *aff'd*, 333 F.3d 156 (D.C. Cir. 2003).

266. Allowing the D.C. Circuit to review the outcome of this hearing would impose a similar standard to that provided in AEDPA, *see* 8 U.S.C. § 1189(c) (2006), and would also comport with an accepted practice of allowing the courts of appeals to directly review agency action, *see* *The Choice of Forum for Judicial Review of Administrative Action* (Recommendation 75–3), 40 Fed. Reg. 27,926, 27,927 (July 2, 1975) (arguing that, in the interests of judicial economy, judicial review in the courts of appeals is generally preferable to review in the district courts).

267. *See* Exec. Order No. 13,224, 3 C.F.R. 786 (2002).

268. Such a requirement would be similar to the protections afforded to FTOs. *See generally supra* Part II.A.1.

ability to impose harsh sanctions on entities linked only indirectly to terrorist activity, especially if such entities do not actually support terrorism. OFAC should provide its statement of reasons concurrently with notification of its intent to designate an entity or block the entity's assets. Concurrent notification of OFAC's action and the reasons behind that action would help prevent OFAC from blocking an entity's assets for several years without making a final decision on an entity's status.²⁶⁹ In addition, receiving notice of the reasons early in the designation process would provide entities with a more meaningful opportunity to challenge OFAC's actions.

Second, the regulations under the new IEEPA section should require the director of OFAC to meet with an entity challenging either the blocking of its assets or its final designation as an SDGT, and require the Director to respond to the entity's challenge to OFAC's actions.²⁷⁰ Even though due process requires that entities adversely affected by an agency's action have the ability to challenge that action,²⁷¹ OFAC's current regulations allow the director to meet with an entity at his discretion.²⁷² Such a discretionary provision allows the director to deny some entities the right to challenge his actions without fully listening to their arguments. While such action violates an entity's due process right to be heard, SDGTs and other entities with blocked assets are not entitled to a full evidentiary hearing. Because the primary consequence of designation as an SDGT is a blocking of assets, entities designated as SDGTs—unlike those designated as FTOs²⁷³—may attempt to transfer their assets overseas.²⁷⁴ To prevent such a possibility, while still providing an affected entity the right to challenge its actions, OFAC should only have to provide a post-deprivation hearing.²⁷⁵ Such a

269. See, e.g., *KindHearts III*, 710 F. Supp. 2d 637, 643, 645 (N.D. Ohio 2010) (explaining that the group's assets were first frozen in early 2006, the assets were still frozen in 2010, and the group had not been finally designated as an SDGT).

270. By challenging a blocking order pending final investigation, an entity could conceivably avoid a final SDGT designation and significant deprivation of its property. Thus, allowing an entity to challenge this initial agency action is important to protect the entity's due process rights.

271. See, e.g., *Londoner v. City & Cnty. of Denver*, 210 U.S. 373, 385 (1908) (holding that when a state legislature delegated its authority to raise taxes to an agency, individuals affected by those taxes were entitled to an opportunity for the agency to hear their objections to the tax).

272. See 31 C.F.R. § 501.807(c) (2012).

273. See *supra* notes 54–55 and accompanying text for a discussion of the primary consequences of an FTO designation.

274. See *supra* note 265 and accompanying text.

275. See *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976) (finding that because the nature of due process is “flexible” and depends in part on a balance between the interests of government and the affected party, post-deprivation hearings often meet the requirements of

hearing could take the form of a mandatory meeting with OFAC's director or someone he delegates to hear an entity's evidence. Even though the director of OFAC plays a crucial role in the designation process itself, he could still hear evidence and be a neutral decisionmaker,²⁷⁶ subject to judicial review.

Lastly, the regulations governed by the new IEEPA provision should include a provision for limited judicial review of the outcome of an entity's informal hearing with OFAC in the D.C. Circuit. Under the current legal system, SDGTs and other affected entities have no inherent right to challenge their designation in court,²⁷⁷ except to argue that the subsequent agency action²⁷⁸ is arbitrary, capricious, in violation of constitutional rights, or in excess of statutory jurisdiction.²⁷⁹ Unless provided by statute, individuals challenging an agency's actions can only challenge final agency action.²⁸⁰ Thus, without an express statutory grant to review the blocking of assets pending investigation, a court cannot review that action. As a result of OFAC's express ability to block an entity's assets pending investigation, however, affected entities may have to wait several years²⁸¹ before OFAC issues a final action subject to judicial review. Thus, permitting an entity to seek judicial review of an adverse outcome from the meeting with OFAC's director will allow an affected entity to receive prompt review of the agency action that most affects it—the freezing of its assets, whether or not accompanied by a final designation as an SDGT. The scope of the judicial review should be limited to an analysis of whether OFAC's actions were arbitrary and capricious, an abuse of discretion, in violation of statutory authority, or incompatible with statutory procedure.²⁸² Allowing an affected entity to challenge OFAC's actions in

due process).

276. *See, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 47–53 (1975) (rejecting the argument that an agency head could not also be an impartial decisionmaker).

277. *See* Exec. Order No. 13,224, 3 C.F.R. 786, 789 (2002) (“Nothing contained in this order is intended to create . . . any right, benefit, or privilege, substantive or procedural, enforceable at law . . .”); *see also supra* note 78 and accompanying text.

278. *See* 5 U.S.C. § 702 (2006) (providing that an individual who suffers harm as a result of agency action is entitled to judicial review of that action).

279. *See id.* § 706(2)(A)–(C).

280. *See id.* § 704 (providing that courts can only review final agency actions and actions explicitly made reviewable by statute).

281. For example, OFAC blocked the assets of KindHearts for Charitable Humanitarian Development, Inc., for three years without making a final decision as to their status as an SDGT. *See supra* note 269 and accompanying text.

282. 5 U.S.C. § 706(2)(A), (C)–(D). By mandating that all regulations issued pursuant to IEEPA provide the procedures described in this section, entities challenging OFAC's actions will have no reason to argue that the agency's actions are “contrary to constitutional right, power, privilege, or immunity,” *id.* § 706(2)(B), since the procedures will protect the

court after an unsatisfactory hearing would provide the best way for an entity to assert its due process rights.

Therefore, to properly balance OFAC's important interest in imposing financial sanctions on terrorists with the interests of entities adversely affected by OFAC's actions, Congress should amend IEEPA to ensure that Executive Branch regulations issued pursuant to the law meet certain procedural requirements. Specifically, the law should mandate that all agencies implementing those regulations, including OFAC, provide affected groups with a statement of reasons for their actions, an opportunity to present evidence to a neutral decisionmaker, and an opportunity to challenge the outcome of that presentation in the D.C. Circuit.

CONCLUSION

Although financial sanctions are not as visible an aspect of the War on Terror as targeted killings, the power to impose these sanctions on individuals and groups suspected of terrorist activity has helped keep the country safe in the years since the September 11, 2001 attacks.²⁸³ The imposition of those sanctions, however, also allows OFAC to exercise an extremely flexible and discretionary power that often reaches entities linked only indirectly—if at all—to the individuals and terrorist groups responsible for those attacks. Unlike designation as an FTO, which is based on a concrete link to such dangerous terrorist groups, designation as an SDGT depends on which agency makes the designation decision. If designated by the Department of State, an individual or group must, like an FTO, actually threaten the security of the country. If designated by OFAC, however, an SDGT must only be associated with such a dangerous group in some way. OFAC's ability to characterize an entity as an SDGT is broad, flexible, and discretionary.

Entities designated as SDGTs, as well as entities whose assets are frozen pending investigation into their final status, face severe monetary and non-monetary consequences. At the same time, OFAC's own regulations and the deferential nature of judicial review limit an affected entity's ability to mitigate those consequences. As a result, affected entities lack a meaningful way to challenge OFAC's actions, a right provided to virtually all other entities, including FTOs, challenging adverse agency action. To provide entities affected by OFAC's actions with their required constitutional rights, to ensure that OFAC maintains its ability to block the assets of terrorist

constitutional rights of affected entities.

283. See ROTH, *supra* note 89, at 2 (“[Preventing terrorists from accessing money] has been presented as one of the keys to success in the fight against terrorism: if we choke off the terrorists’ money, we limit their ability to conduct mass casualty attacks.”).

entities, and to protect the safety of the country, Congress should amend IEEPA to require that its regulations provide certain procedural requirements. Any new regulations issued pursuant to the law should provide entities with notice of the reasons behind OFAC's actions, a chance to challenge this action before a neutral decisionmaker, and an opportunity for judicial review. Such an amendment would ensure that OFAC can continue to exercise its flexible powers to implement important financial sanctions, while also protecting the constitutional rights of all entities within the United States.

SEX AND SEXUAL ORIENTATION: TITLE VII AFTER *MACY V. HOLDER*

CODY PERKINS*

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INTRODUCTION

Discrimination based on minority traits is not a new concept in our society. Whether based on skin color, religion, sexual orientation, gender, or any other characteristic, the biases that pervade our culture can have an incredible impact on individuals. When these biases affect the aspects of our lives that allow us to shelter ourselves, feed our families, and act as functioning members of society, they become an issue of national significance. In 1963, President Kennedy began to recognize the problems of prejudice in the field of employment, where some individuals were fired or simply not hired at all on the basis of some of these characteristics.¹

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1. See Special Message to the Congress on Civil Rights and Job Opportunities, 248 PUB. PAPERS 483, 488–91 (June 19, 1963) (stating that African Americans were more than twice as likely to be unemployed as the general populace, and suggesting federal responses to correct the problem).

Accordingly, Congress passed Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits discrimination in employment “because of . . . race, color, religion, sex, or national origin.”² The policy rationale behind the Act was fairly simple: employers should focus only on characteristics relevant to employment when making employment decisions, and the enumerated traits listed in Title VII will almost never have any bearing on whether someone can perform a certain job.³

Particularly at issue after the passage of Title VII was its “because of sex” provision. Added on at the last minute and therefore with very little legislative history to shed light on Congress’s intent, the meaning of “because of sex” became a matter of judicial interpretation.⁴ Early on, the courts defined “sex” as merely biological sex, and interpreted the provision to only prohibit discrimination against biological men and women (mostly women) for being a man or being a woman.⁵ As time went on and courts evolved, however, interpretations of Title VII’s “because of sex” provision were expanded to include discrimination based on not just biological sex, but also sex stereotyping—discriminating against someone for violating gender norms.⁶ In the landmark case of *Price Waterhouse v. Hopkins*,⁷ the Supreme Court ruled definitively that discriminating against a woman, not for being a woman per se but for failing to act sufficiently feminine, was discriminating on the basis of sex under Title VII because it was “sex

2. 42 U.S.C. § 2000e-2 (2006).

3. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 243 (1989) (“When an employer ignored the attributes enumerated in the statute, Congress hoped, it naturally would focus on the qualifications of the applicant or employee. The intent to drive employers to focus on qualifications rather than on race, religion, sex, or national origin is the theme of a good deal of the statute’s legislative history.”). But see 42 U.S.C. § 2000e-2(e) (stating that there are some instances where “religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise”).

4. See Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880–84 (1967) (stating that the “because of sex” provision was added as a last-minute amendment by conservatives in an attempt to defeat the entire bill, and thus very little guidance was given to the Equal Employment Opportunity Commission (EEOC) as to the meaning of “sex”).

5. See *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984), cert. denied, 471 U.S. 1017 (1985) (finding that Title VII, under its plain meaning, only prohibited discrimination against women for being women and men for being men, and did not prohibit discrimination based on gender identity); *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662–63 (9th Cir. 1977) (stating that “Congress has not shown any intent other than to restrict the term ‘sex’ to its traditional meaning” and, therefore, holding that the sole purpose of Title VII is to ensure the equal treatment of men and women).

6. *Hopkins*, 490 U.S. at 250 (“[A]n employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”).

7. 490 U.S. 228 (1989).

stereotyping.”⁸ In doing so, the Court stated that Title VII’s prohibition on discrimination in employment “because of sex” reflected Congress’s intent that employers not take gender into account at all in making employment decisions.⁹

Following *Hopkins*, other cases have clarified the meaning of “sex stereotyping,” finding sex stereotyping impermissible in such disparate situations as a man harassed at work for “walking and carrying his serving tray ‘like a woman,’”¹⁰ a man harassed for taking his spouse’s last name (a traditionally feminine practice),¹¹ a woman asked questions about her spouse and children in an interview when male applicants were not,¹² and a woman terminated because she became engaged to the son of a competitor and her employer believed women were more likely than men to engage in “pillow talk.”¹³ As recognized in these cases, under *Hopkins*, impermissible sex discrimination occurs whenever a person is treated differently in an employment context because they are not acting in accordance with stereotypes and gender norms about how people of their biological sex should act.

After *Hopkins*, many thought that gays, lesbians, and transgender people should have the right to bring cases under Title VII, arguing that discrimination against lesbian, gay, bisexual, and transgender (LGBT) people is based either on the stereotype that men should only be attracted to women and women should only be attracted to men, or that people born biologically male or female should identify as that biological gender and express themselves as such.¹⁴ The courts originally dismissed these kinds of cases out of hand, finding that the discrimination was not because of sex but rather because of sexual orientation or gender identity.¹⁵ Recently they have become more receptive to the idea, particularly in the case of

8. *Id.* at 250.

9. *Id.* at 239.

10. See *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 870 (9th Cir. 2001).

11. See *Koren v. Ohio Bell Tel. Co.*, No. 1:11-CV-2674, 2012 WL 3484825, *4–5 (N.D. Ohio Aug. 14, 2012).

12. See *Bruno v. City of Crown Point*, 950 F.2d 355, 362 (7th Cir. 1991), *reh’g denied* (Jan. 31, 1992), *cert. denied*, 112 S. Ct. 2998 (1992).

13. See *Vincenti v. Hilliard-Lyons, Inc.*, No. 91-5374, *1 (6th Cir. Dec. 5, 1991).

14. See Anthony E. Varona & Jeffrey M. Monks, *En/Gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 83–84, 89–90, 102–03 (2000).

15. See, e.g., *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 703–07 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *Sarff v. Cont’l Express*, 894 F. Supp. 1076, 1084 (S.D. Tex. 1995).

transgender individuals.¹⁶ The Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing Title VII, has made great strides as well, recognizing in recent nonbinding decisions¹⁷ that discrimination based on sexual orientation falls under sex stereotyping and is therefore covered under Title VII.¹⁸ Most recently, the EEOC issued a decision in *Macy v. Holder*¹⁹ stating that transgender individuals can bring claims based on both a “sex stereotyping” theory and a new theory based on *Hopkins* that any employment action that takes gender into account at all is per se sex discrimination under Title VII.²⁰

However, the EEOC has not issued any comparable guidance or binding adjudicatory decisions stating that claims of discrimination based on sexual orientation are cognizable under Title VII. This Comment argues that the EEOC should issue written guidance making it clear that Title VII’s prohibition on discrimination in employment “because of sex” includes discrimination on the basis of sexual orientation, both under a “sex stereotyping” theory and a per se “taking gender into account” theory as presented in *Macy*. Part I provides an overview of Title VII, its history (including its treatment in *Hopkins*), and the courts’ application of Title VII to sexual orientation. Part II provides an overview of the role and impact of the EEOC with regard to the federal agencies and the courts, and presents the EEOC’s treatment of sexual orientation for Title VII purposes. Part III presents the decision in *Macy* and shows how and why its interpretation of “because of sex” is unique and different from previous interpretations of Title VII. Part IV shows how the *Macy* decision supports guidance by the EEOC that discrimination based on sexual orientation will always be both sex stereotyping and “per se because of sex” because it “takes gender into account.” Part V shows that clear and official guidance is necessary to ensure that Title VII continues to be read and implemented in a manner consistent with *Macy*.

16. See, e.g., *Glenn v. Brumby*, 663 F.3d 1312, 1316 (11th Cir. 2011) (holding that discrimination against transgender people is inherently based on sex stereotyping and therefore protected under Title VII of the Civil Rights Act of 1964 (Title VII)).

17. See *infra* Part II (clarifying that not all appeals go up to the full Commission for a vote, and that those which are instead decided by attorneys in the Office of Federal Operations are not binding on anyone except the parties involved).

18. See *Castello v. Donahoe*, Appeal No. 0120111795, 2011 WL 6960810, at *3 (EEOC Dec. 20, 2011); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011).

19. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (EEOC Apr. 20, 2012), <http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt>.

20. *Id.*

I. THE HISTORY OF TITLE VII

The idea that Title VII's "because of sex" provision could be interpreted to prohibit one man's harassment of another,²¹ refusing promotion to a woman who acted aggressively,²² denying a job to a person identifying as transgender,²³ or harassing someone for being gay²⁴ was almost certainly not in the minds of Congress when Title VII was first passed in 1964. To be sure, determining what *was* in the minds of Congress has been a difficult task from the start—the House debate on the addition of "sex" to Title VII encompasses no more than nine pages,²⁵ and the word "sex" was added to the statute only two days before its passage in the House.²⁶ Representative Howard Smith, a Virginia Democrat who had a history of railing *against* civil rights,²⁷ introduced the amendment to have "sex" included in the statute and is often credited with having introduced the provision in an attempt to derail the entire bill.²⁸

Given this sparse and confusing background, the first courts to deal with the "because of sex" provision tended toward the conservative, often attempting to use the "plain language" of the statute and subsequent legislation to determine the scope and meaning of "sex."²⁹ What little legislative history there was clearly indicated that Congress considered the protection of women as the purpose of including the provision,³⁰ and thus,

21. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79–80 (1998).

22. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 234–35 (1989).

23. *Macy*, 2012 WL 1435995 at *9.

24. *Castello*, 2011 WL 6960810, at *2–3.

25. *See* 110 CONG. REC. 2,577–84 (1964).

26. *See id.* at 2,804–05.

27. *See* Robert C. Bird, *More Than A Congressional Joke: A Fresh Look at the Legislative History of Sex Discrimination of the 1964 Civil Rights Act*, 3 WM. & MARY J. WOMEN & L. 137, 151–52 (1997) (relating that Representative Smith fought against the Civil Rights Bill, the Fair Employment Practices Commission, and other pieces of legislation offering protection to minorities prior to 1964).

28. *See, e.g.*, Deborah Epstein, *Can a "Dumb Ass Woman" Achieve Equality in the Workplace? Running the Gauntlet of Hostile Environment Harassing Speech*, 84 GEO. L.J. 399, 409 n.62 (1996) (asserting that the amendment adding the "sex" provision to Title VII was proposed by anti-civil rights, conservative legislators in an attempt to defeat the bill entirely). *But see, e.g.*, Bird, *supra* note 27, at 157–58 (stating that, while Representative Smith was against the Civil Rights Act in general and his actions did indicate that he was not serious about his proposed amendment, he actually believed that, if the Act was to pass, that the "sex" provision should be included to protect white women competing against black women in employment).

29. *See, e.g.*, *Holloway v. Arthur Andersen & Co.*, 566 F.2d 659, 662 (9th Cir. 1977) (using both the plain meaning of the statute and legislative activity subsequent to Title VII's passage to determine that Congress meant the word "sex" to be understood traditionally).

30. *See* 110 CONG. REC. 2,577–84 (1964) (showing that every statement made on the House floor regarding the "sex" provision referenced its significance for women).

courts found no difficulty in construing the statute to protect biological women from discrimination in employment on the basis of being women.³¹ More expansive interpretations were originally struck down, as courts strove to remain true to congressional intent.³²

However, this strict, conservative reading of Title VII did not last long. Over time, courts interpreted the statute to protect many more people in many more and diverse situations. The protections of Title VII were applied to men as well as women,³³ and the Court found discrimination in such varied situations as a company's refusal to allow fertile women to perform certain jobs³⁴ and an employer's refusal to accept applications from women with preschool aged children while accepting applications from men with preschool aged children.³⁵ Courts determined that sexual harassment was always "because of sex,"³⁶ and plaintiffs began to bring more and more theories before the courts as to why their specific instances of being discriminated against were "because of sex" under Title VII.

Arguably one of the most important interpretations of "because of sex" came from the 1989 Supreme Court case *Price Waterhouse v. Hopkins*.³⁷ Hopkins was a senior manager in an accounting firm who had been denied

31. See, e.g., *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711, 718 (7th Cir. 1969) (holding that a seniority system allowing men to bid for all plant jobs but prohibiting women from bidding for jobs that require lifting over thirty-five pounds was impermissible employment discrimination on the basis of sex under Title VII because being a man was not a bona fide occupational qualification for lifting over thirty-five pounds).

32. See, e.g., *Gen. Electric Co. v. Gilbert*, 429 U.S. 125, 128 (1976) (holding that an employer's disability benefits plan does not violate Title VII just because it fails to cover pregnancy-related disabilities).

33. See *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 685 (1983) (holding that a health benefits plan covering employees and their spouses that provided greater pregnancy-related coverage to female employees than to the spouses of male employees constituted discrimination against male employees on the basis of sex under Title VII); *Diaz v. Pan Am. World Airways*, 442 F.2d 385, 388 (5th Cir. 1971) (holding that refusal to hire men to be flight attendants was impermissible sex discrimination under Title VII).

34. See *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 197, 222 (1991) (holding that a company policy excluding fertile women from lead-exposed jobs was discrimination because of sex under Title VII).

35. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 547 (1971) (Marshall, J., concurring) (per curiam) ("When performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant.").

36. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 65 (1986) (holding that sexual harassment, even that which does not lead to economic injury, is impermissible sex discrimination under Title VII when it creates a hostile work environment).

37. See 490 U.S. 228 (1989) (holding that gender role stereotypes also fall under Title VII protection).

partnership because she exhibited traits considered to be traditionally masculine, such as acting aggressively, refusing to wear makeup, and generally walking, talking, and dressing in an unfeminine manner.³⁸ The Court held that Hopkins had been discriminated against “because of sex” under Title VII because she had been denied partnership on the basis of “sex stereotyping.”³⁹

Under this reasoning, courts would no longer just look at whether discrimination was based on a person’s gender, but would also look at whether discrimination was based on a person’s transgression of “gender norms” or for acting in a manner traditionally associated with the opposite sex.⁴⁰ As the Court in *Hopkins* stated, discriminating against an employee for transgressing gender norms violated Title VII because, under Title VII, “an employer may not take gender into account.”⁴¹

The fact that extensions of Title VII went far beyond Congress’s originally anticipated protection of women was addressed explicitly in 1998, in *Oncale v. Sundowner Offshore Services, Inc.*⁴² In *Oncale*, the Court extended Title VII’s protections to prohibiting same-sex harassment between heterosexual males.⁴³ In doing so, the Court recognized that Congress had not passed Title VII to prohibit this kind of harassment but reconciled its decision by stating clearly that, while discrimination such as this,

was assuredly not the principal evil Congress was concerned with when it enacted Title VII . . . statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.⁴⁴

This statement made clear that the judiciary could apply Title VII to any employment discrimination that it deemed to be “because of sex,” regardless of Congress’s original intent.

The *Oncale* Court’s decision to focus less on congressional intent in interpreting Title VII was not without foundation. After the statute’s original passage in 1964, Congress’s subsequent amendments to Title VII did little to lessen the confusion around the sex provision. The Equal Employment Opportunity Act of 1972 amended Title VII to add state and local governments, educational institutions, and the federal government to those entities subject to Title VII’s admonitions but was conspicuously silent

38. *Id.* at 233, 235.

39. *Id.* at 257–58.

40. *Id.*

41. *Id.* at 244–45.

42. 523 U.S. 75 (1998).

43. *Id.* at 82.

44. *Id.* at 79.

as to the meaning of “because of sex,” even though many cases had arisen around the country making it clear that courts were struggling to interpret the provision.⁴⁵ Although the EEOC had issued a new rule providing some guidelines as to how “because of sex” should be interpreted in 1972,⁴⁶ Congress remained silent until 1978, for the first time adding some clarification to “because of sex” by stating that the provision included discrimination on the basis of pregnancy via the Pregnancy Discrimination Act of 1978.⁴⁷ This was the only amendment to Title VII to address the meaning of “sex:” when Congress again amended Title VII in the Civil Rights Act of 1991, there was no mention of how courts should interpret “because of sex.”⁴⁸

Although this lack of meaningful guidance from Congress allowed courts to extend Title VII far beyond its original interpretation,⁴⁹ this trend did not reach discrimination involving sexual orientation or gender identity. In fact, plaintiffs identifying as LGBT attempting to bring cases not related to their sexual orientation or gender identity often had their cases dismissed where heterosexual plaintiffs would most likely have prevailed.⁵⁰ Those who brought claims alleging that discrimination based on sexual orientation or gender identity was “because of sex” fared much worse. In *DeSantis v.*

45. Pub. L. No. 92-261, § 701, 86 Stat. 103, 103 (codified as amended at 42 U.S.C. § 2000e (1972)). Compare *Doe v. Osteopathic Hosp. of Wichita, Inc.*, 333 F. Supp. 1357, 1362 (D. Kan. 1971) (holding that a woman could not be fired because she was pregnant under Title VII), with *Cheatwood v. S. Cent. Bell Tel. & Tel. Co.*, 303 F. Supp. 754, 759 (M.D. Ala. 1969) (stating that an employer could have a rule against pregnant women being hired for certain positions without violating Title VII).

46. See Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.2 (2012) (addressing confusion surrounding the meaning of “bona fide occupational qualification,” sex-oriented state employment legislation, separate lines of progression and seniority systems for men and women, distinctions based on marital status, job advertisements, employment agencies, pre-employment inquiries as to sex, the Equal Pay Act, and “fringe benefits”).

47. See Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e (2006)).

48. See Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. § 1981 (2006)).

49. See, e.g., *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 870, 875 (9th Cir. 2001) (holding that harassment against a man for “walking and carrying his serving tray ‘like a woman’” was impermissible sex stereotyping under Title VII).

50. See, e.g., *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1086–87 (7th Cir. 2000) (finding that coworkers calling the male plaintiff a “bitch” and drawing graffiti associating the plaintiff with a drag queen was not discrimination based on sex under *Hopkins* because this was not discrimination based on the sex stereotype that the plaintiff was too feminine, but rather discrimination based on sexual orientation, despite the fact that the plaintiff had not put his orientation at issue). But see *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002) (en banc) (“[S]exual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment.” (emphasis added)).

Pacific Telephone & Telegraph Co.,⁵¹ the court rejected an argument that discrimination against a man for being attracted to other men was sex discrimination under Title VII.⁵² Although the plaintiff argued that he would have been treated differently if he were a woman and therefore the discrimination was “because of sex,” the court responded that this argument was merely an attempt to “bootstrap Title VII protection for homosexuals,” and that discrimination on the basis of sexual orientation was not impermissible under Title VII because it affected biological males and females equally.⁵³ Even those who attempted to bring cases under a *Hopkins* sex stereotyping claim,⁵⁴ arguing that they were being discriminated against for violating the gender norm of being attracted to the opposite sex,⁵⁵ were turned away. In *Vickers v. Fairfield Medical Center*,⁵⁶ the court found that discrimination based on perceived homosexuality and therefore a failure to “conform to the traditionally masculine role” in sexual relationships was not impermissible sex discrimination under a *Hopkins* sex stereotyping theory because the harassment was not based on the plaintiff’s gender nonconformity, but rather his perceived homosexuality.⁵⁷

Recently, courts have become much more receptive to finding that discrimination against transgender people is impermissible sex stereotyping under Title VII.⁵⁸ In *Glenn v. Brumby*,⁵⁹ Glenn informed her employer that

51. 608 F.2d 327 (9th Cir. 1979) (partially abrogated by *Nichols*, although not referring to the court’s treatment of sexual orientation).

52. *Id.* at 334.

53. *Id.* at 331.

54. *See supra* notes 37–41 and accompanying text (explaining that, under the *Hopkins* sex stereotyping theory, discriminating against someone for failing to conform to certain norms associated with their gender, such as refusing to promote a woman who acts “too manly” in dress, appearance, or demeanor, is discrimination “because of sex” under Title VII).

55. *See infra* Part IV (discussing the “sex stereotyping” theory of discrimination).

56. 453 F.3d 757 (6th Cir. 2006).

57. *Id.* at 763; *see also* *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005) (distinguishing between sex stereotypes and stereotypes based on sexual orientation to find no Title VII discrimination).

58. *See* *Glenn v. Brumby*, 663 F.3d 1312, 1320–21 (11th Cir. 2011) (finding that firing a transgender person in the process of transitioning from male to female on “the sheer fact of the transition” is inherently based on sex stereotyping and therefore protected under Title VII) (citing *Lewis v. Smith*, 731 F.2d 1535, 1537–38 (11th Cir. 1984)); *Schwenk v. Hartford*, 204 F.3d 1187, 1202–03 (9th Cir. 2000) (holding that a prison guard’s sexual assault of a preoperative male-to-female transgender prisoner was “because of gender” under Title VII because the guard’s actions were motivated by the fact that she failed to “conform to socially-constructed gender expectations”); *Schroer v. Billington*, 577 F. Supp. 2d 293, 305–06 (D.D.C. 2008) (holding that rescinding a job offer after learning that the applicant intended to transition from male to female was impermissible sex stereotyping under Title VII regardless of whether the rescinding of the offer was based on whether the employer “perceived Schroer to be an insufficiently masculine man, an insufficiently feminine woman,

she was preparing to transition from male to female and was immediately fired as a result. The court found that firing Glenn because of “the sheer fact of the transition”⁶⁰ was inherently sex stereotyping because discrimination against transgender people constitutes discrimination on the basis of gender nonconformity.⁶¹ Although many believe that the kinds of arguments made in *Glenn* directly extend to sexual orientation, only a minority of courts have indicated that lesbian, gay, and bisexual (LGB) people may someday be able to succeed on a sex stereotyping theory,⁶² and none have yet made that leap. No courts have accepted the argument that discrimination based on sexual orientation is per se “because of sex.”

II. THE ROLE AND IMPACT OF THE EEOC

Although the courts have made few steps in extending Title VII to LGB people, the EEOC has made much greater strides. This is no surprise: in much of the history of Title VII’s evolution, the first steps in adopting new interpretations have been taken by the EEOC in issuing guidelines and making adjudicatory decisions.⁶³ The scope of the EEOC’s power to substantively interpret Title VII has been the subject of much dispute,⁶⁴ and many believe that the agency has no such statutory authority.⁶⁵ However,

or an inherently gender-nonconforming transsexual”).

59. 663 F.3d 1312 (11th Cir. 2011).

60. *Id.* at 1320–21.

61. *Id.* at 1320.

62. *See, e.g.*, *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) (“Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what ‘real’ men do or don’t do.”).

63. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986) (citing EEOC Guidelines defining sexual harassment and relying on them to support a finding that “hostile environment” sexual harassment is sex discrimination under Title VII).

64. *See* Rebecca Hanner White, *The EEOC, the Courts, and Employment Discrimination Policy: Recognizing the Agency’s Leading Role in Statutory Interpretation*, 1995 UTAH L. REV. 51 (1995) (analyzing whether the EEOC has been delegated interpretation and rulemaking authority by Congress to interpret Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act).

65. *See, e.g.*, *Transcript of April 25, 2012 Meeting*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (2012), <http://www1.eeoc.gov/eeoc/meetings/4-25-12/transcript.cfm?renderforprint=1> (last visited May 14, 2013) (“We are an enforcement agency. We have the authority to issue, amend, or rescind federal procedural regulations. We have no authority to make substantive changes in the law by issuing guidance that goes beyond what is contained in the statutes as interpreted by the courts. Our job is to follow Congressional intent and court interpretations; not make new law.”).

the agency has issued numerous “guidelines,”⁶⁶ which, though unofficial regulations and lacking the force of law granted by statutory mandate,⁶⁷ are still afforded some deference by courts.⁶⁸ Similarly, EEOC adjudicatory decisions are granted some judicial deference, and although they are not binding on anyone outside the federal sector, they are often treated as indications of what will constitute “good practice” in the future.⁶⁹ It is no wonder that the EEOC has had such influence on and foresight into how the courts will interpret Title VII—the Commission was established in 1964 by Title VII itself, and its sole duty is to enforce most federal laws regarding employment discrimination, including Title VII.⁷⁰ In addition to promulgating guidance as to how these laws should be interpreted, the Commission investigates complaints and conducts mediation between employers and employees in the private sector and can bring lawsuits in federal court against private employers accused of discrimination.⁷¹ In the federal sector, the EEOC accepts appeals in individual cases and is charged with determining whether the agencies are interpreting and applying the law correctly.⁷²

Not all appeals of federal sector employment discrimination, however, go before the full Commission and so not all decisions have the same

66. See *EEOC Regulations*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/regulations/> (last visited May 14, 2013).

67. See 42 U.S.C. § 2000e-12(a) (2006) (expressly delegating to the EEOC only the power to issue procedural rules).

68. See, e.g., *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) (holding that agency action must be given deference by the courts as long as Congress has not spoken directly on the issue and the agency’s construction of the statute is reasonable); *Griggs v. Duke Power Co.*, 401 U.S. 424, 433–34 (1971) (“The administrative interpretation of the Act by the [EEOC] is entitled to great deference [and since] the Act and its legislative history support the Commission’s construction, this affords good reason to treat the guidelines as expressing the will of Congress.”) (citations omitted); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that informal agency processes, while not deserving of *Chevron* deference, “do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance”).

69. EEOC’s Federal Training & Outreach Division, *What Does the Macy Decision Mean for Title VII?*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (June 15, 2012), http://www.eeoc.gov/federal/training/brown_bag_macy.cfm (stating that agencies should begin to treat the *Macy* decision as prohibiting discrimination on the basis of sexual orientation under Title VII as well).

70. See 42 U.S.C. § 2000e-4 (2006). But see *Workplace Laws Not Enforced by the EEOC*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/laws/other.cfm> (last visited Jan. 24, 2013) (providing a list of federal employment laws not enforced by the EEOC).

71. See *About the EEOC: Overview*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/> (last visited May 14, 2013).

72. *Id.*

precedential and binding effect on the agencies.⁷³ The Commission is a bipartisan body made up of five members and a General Counsel, which are appointed by the President, all subject to confirmation by the Senate.⁷⁴ Given the limited number of commissioners and the thousands of claims that are submitted per year, the Commission delegates much of its adjudicatory power to the Office of Federal Operations, where writing attorneys issue most of the opinions that come out of the EEOC.⁷⁵ These opinions, while binding on the parties involved, do not have the precedential weight of actual Commission decisions and agencies are not required to adopt their interpretations of federal law.⁷⁶ As a result, the only truly binding authority on the federal agencies issuing from the EEOC comes from the thirty to fifty cases that actually make their way up to the full Commission for a vote every year.⁷⁷

Given this system, the EEOC's treatment of sexual orientation is somewhat convoluted. There is binding precedent from the Commission that "Title VII's prohibition of discrimination based on sex does not include sexual preference or sexual orientation."⁷⁸ However, two decisions have recently been issued through the Office of Federal Operations indicating that discrimination based on sexual orientation *is* discrimination based on sex for Title VII purposes under a *Hopkins* sex stereotyping theory.⁷⁹ In *Veretto v. Donahoe*, the Office of Federal Operations found that discrimination against a man for marrying another man was a valid sex stereotyping claim, because it was discrimination based on the stereotype that "marrying a woman is an essential part of being a man," as well as

73. See EEOC's Federal Training & Outreach Division, *supra* note 69 (stating that only thirty to fifty cases actually go before the full Commission per year, and only these cases have precedential effect on future federal sector cases).

74. See *The Commission*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, <http://www.eeoc.gov/eeoc/commission.cfm> (last visited May 14, 2013).

75. See EEOC Federal Training & Outreach Division, *supra* note 69.

76. *Id.*

77. *Id.*

78. *Johnson v. Frank*, Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991); see also *Morrison v. Dalton*, Appeal No. 01930778, 1994 WL 746296, at *1 (EEOC June 16, 1994) (holding that harassment in the form of one coworker informing other coworkers that complainant was gay and had been observed kissing another man was not based on his sex, but rather his sexual orientation, and was therefore not impermissible discrimination "due to sex" under Title VII); see also *Yost v. Runyon*, Appeal Nos. 01965505 & 01965383, 1997 WL 655997, at *2 (EEOC Oct. 2, 1997) (holding that discrimination based on sexual orientation was not prohibited by Title VII).

79. See *Castello v. Donahoe*, Appeal No. 0120111795, 2011 WL 6960810, at *2-3 (EEOC Dec. 20, 2011); *Veretto v. Donahoe*, Appeal No. 0120110873, 2011 WL 2663401, at *3 (EEOC July 1, 2011).

stereotypes about gender roles in marriage.⁸⁰ Similarly, in *Castello v. Donahoe*, the Office of Federal Operations found that discrimination against a woman for being attracted to other women was a valid sex stereotyping claim under Title VII, because it was discrimination based on the stereotype that women should only be attracted to and have relationships with men.⁸¹

These decisions, while not binding on federal agencies, indicate that the EEOC intends to allow claims based on sexual orientation under a sex stereotyping theory under Title VII.⁸² This inference is supported by recent informal statements by the elements within the EEOC indicating that agencies should begin to treat discrimination based on sexual orientation as cognizable under Title VII.⁸³ However, there is still no official guidance or binding precedent from the EEOC to clarify this point.

III. THE DECISION: *MACY V. HOLDER*

While there may be no binding precedent from the EEOC stating that sexual orientation is covered under Title VII, there *is* binding precedent regarding transgender people. In *Macy v. Holder*, Ms. Macy—a police detective from Phoenix who was still presenting as a man at the time—had applied for and been given assurances that she would be hired for a position with the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).⁸⁴ After going through a significant number of steps in the hiring process and being told repeatedly that she would be hired, Ms. Macy disclosed to ATF that she was in the process of transitioning from male to female and days later was informed that the position she had applied for was no longer available due to budget constraints.⁸⁵ Upon further investigation, Ms. Macy learned that the position had in fact been offered to someone else and filed a formal Equal Employment Opportunity complaint with ATF, alleging discrimination in hiring based on sex.⁸⁶ When the agency failed to

80. *Veretto*, 2011 WL 2663401, at *3.

81. *Castello*, 2011 WL 6960810, at *2–3.

82. See EEOC’s Federal Training & Outreach Division, *supra* note 69 (stating that *Castello* and *Veretto*, while not binding, reflect the EEOC’s intention to find that discrimination on the basis of sexual orientation is impermissible discrimination “based on sex” under Title VII).

83. See *id.* (showing EEOC Commissioner Chai Feldblum advising an agency EEO employee that, although there is no binding precedent on the subject, she expects to see cases applying *Macy* to sexual orientation in the future, and so it would be smart for agencies to treat discrimination based on sexual orientation as “because of sex” under Title VII).

84. EEOC Appeal No. 0120120821, 2012 WL 1435995, at *1 (EEOC Apr. 20, 2012).

85. *Id.*

86. *Id.* at *2.

identify her claim as sex discrimination, instead creating a separate claim of “discrimination based on gender identity,” Ms. Macy appealed her case to the EEOC.⁸⁷

In a reversal of its previous position,⁸⁸ the full Commission held that “discrimination based on gender identity, change of sex, and/or transgender status” is discrimination “because of sex” under Title VII.⁸⁹ In making this determination, the EEOC utilized two important theories: a traditional “sex stereotyping” theory⁹⁰ and a new “per se because of sex” theory, both based on the Supreme Court’s decision in *Hopkins*.

Under the “sex stereotyping” theory, the Commission stated that, as in *Hopkins*, “gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms.”⁹¹ Following this theory, the Commission recognized that discrimination against someone for being transgender is always based on a person transgressing the gender-based expectation and norm that people born biologically male should identify as men and people born biologically female should identify as women. As a result, the Commission stated that discrimination against transgender people is always “because of sex” under Title VII.⁹² In coming to this conclusion, the Commission cited *Brumby* and other cases finding sex stereotyping in discrimination against transgender people,⁹³ and reiterated *Hopkins*’s admonition that discriminating against someone for failing to act sufficiently masculine (for men) or feminine (for women) is discrimination on the basis of sex under Title VII.⁹⁴ This argument was a direct extension of the sex stereotyping theory as it had been used in the past.⁹⁵

However, the Commission did not confine its decision to this sex stereotyping theory. In addition to that argument, the Commission introduced a new theory in Title VII jurisprudence: that transgender

87. *Id.*

88. *See* Kowalczyk v. Brown, Appeal No. 01942053, 1996 WL 124832, at *1 n.1 (EEOC Dec. 27, 1994) (holding that withdrawing an offer of employment on the basis of “transsexualism” is not discrimination “because of sex” for Title VII purposes); Campbell v. Espy, Appeal No. 01931703, 1994 WL 652840, at *3 (EEOC July 21, 1994); Casoni v. U.S. Postal Serv., Appeal No. 01840104, 1984 WL 485399, at *3 (EEOC Sept. 28, 1984).

89. *Macy*, 2012 WL 1435995 at *1.

90. *See supra* notes 39–41 and accompanying text (outlining the *Hopkins* sex stereotyping theory).

91. *Macy*, 2012 WL 1435995 at *6.

92. *Id.*

93. *See supra* note 58.

94. *Macy*, 2012 WL 1435995, at *7–9.

95. *See supra* notes 39–41 and accompanying text (outlining the *Hopkins* sex stereotyping theory).

individuals could bring a cognizable claim under Title VII on the basis of transgender status alone, *without* arguing sex stereotyping.⁹⁶ The Commission relied on a new *per se* theory of sex discrimination that any employment decision that *takes sex into account* is *per se* sex discrimination under Title VII.⁹⁷ In adopting this interpretation, the Commission cited *Hopkins*'s language that "an employer may not take gender into account in making an employment decision"⁹⁸ and that employers could not allow "sex-linked evaluations to play a part in the decisionmaking process."⁹⁹ In short, the Commission determined that any employment decision that takes gender into account in any way is impermissible discrimination under Title VII on the basis of sex.¹⁰⁰ As the Commission stated,

[An] employer has engaged in disparate treatment 'related to the sex of the victim' . . . regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.¹⁰¹

As a result of *Macy*, not only was previous Title VII "sex stereotyping" jurisprudence extended to transgender individuals, but a new "per se because of sex" theory was introduced. Under this new theory, the Commission followed *Hopkins*'s lead by focusing less on whether an employment decision treated men and women differently and more on Congress's intent that certain characteristics should never be taken into account at all in employment decisions, and that employers should instead be focusing on the job-related merits of each applicant.¹⁰² This theory made it clear that any discrimination based on the fact that a person is transgender is "per se because of sex" for Title VII purposes.

IV. HOW THE *MACY* RATIONALE DIRECTLY EXTENDS TO THE COVERAGE OF SEXUAL ORIENTATION UNDER TITLE VII

The sex stereotyping and "per se because of sex" theories on which the

96. *Macy*, 2012 WL 1435995, at *10.

97. *Id.* at *9.

98. *Id.* at *7 (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989)).

99. *Id.* at *6 (citing 490 U.S. at 255) (internal alterations omitted).

100. *See id.* at *8; EEOC's Federal Training & Outreach Division, *supra* note 69 (explaining the *Macy* decision to agency employees and stating that "if gender's on the brain, if gender is clearly being taken into account, that's a violation of Title VII").

101. *Macy*, 2012 WL 1435995, at *7 (emphasis added) (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000)).

102. *See Hopkins*, 490 U.S. at 228, 239, 243.

Commission based its decision in *Macy* can be applied directly to LGB people, and therefore the EEOC should issue official guidance to the agencies that discrimination based on sexual orientation is impermissible sex discrimination under Title VII. Under a sex stereotyping theory, discrimination on the basis of sexual orientation is always going to be the result of the LGB person violating the gender norm of being attracted to the opposite sex. It is incontrovertible that, in our society, there is a distinct gender norm that men should be attracted to only women, and women should be attracted to only men. When an employer discriminates on the basis of sexual orientation, they are acting because the person in question is violating the gender norm that he or she should be attracted to the opposite sex.¹⁰³ Just as the impermissible discrimination in *Hopkins* was directed at the plaintiff for being a woman who transgressed gender norms by acting masculinely,¹⁰⁴ a gay woman who is discriminated against for being a woman who acts masculinely by having the traditionally male trait of being attracted to women is being discriminated against on the basis of a sex stereotype. As a result, discrimination on the basis of sexual orientation should always be impermissible under a Title VII sex stereotyping theory.

Just as in *Macy*, however, sex stereotyping is not the only theory by which discrimination on the basis of sexual orientation is impermissible under Title VII. Under *Macy*'s "per se because of sex theory," discrimination on the basis of sexual orientation will also always be "because of sex." This is not because LGB people inherently present themselves more masculinely (for women) or femininely (for men) than heterosexual people,¹⁰⁵ although that is certainly a stereotype on its own.¹⁰⁶ The reason that those who

103. See Varona & Monks, *supra* note 14, at 84 ("[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction. Since there is a 'presumption and prescription that erotic interests are exclusively directed to the opposite sex,' those who are attracted to members of the same sex contradict traditional notions about appropriate behavior for men and women.") (citing Sylvia Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. 187, 196 (1988)).

104. 490 U.S. 228 (1989).

105. See EEOC's Federal Training & Outreach Division, *supra* note 69 (quoting Dan Vail, Acting Assistant General Counsel in the Office of General Counsel for the EEOC) ("Stereotyping is not just about how you look or how you present yourself or your mannerisms . . . discrimination on the basis of sexual orientation inherently, inevitably is grounded in the notion that the person you're harassing or discriminating against because they're gay or lesbian or bisexual, that that victim, that person, doesn't adhere to the norm that you want them to adhere to, which is if you're born a man, then you should be attracted only to women.").

106. See John Stossel & Gena Binkley, *Gay Stereotypes: Are They True?*, ABC NEWS (Sept. 15, 2006), <http://www.abcnews.go.com/2020/story?id=2449185&page=1#UXL887WG1I4> (addressing and dispelling the stereotype that gay men are super stylish, obsessed with fashion, and tend to prefer more feminine professions, while lesbians like

discriminate on the basis of sexual orientation will always have “gender on the brain” is because one’s sexual orientation is always about the gender of the person one is attracted to. People identifying as LGB are attracted to people of the same sex: women are attracted to women and men are attracted to men (at least some of the time, in the case of bisexuals).¹⁰⁷ Consider the following example:

Situation A: Pat (male) is attracted to Beth (female). Employer is okay with this, and allows Pat to remain employed.

Situation B: Pat (female) is attracted to Beth (female). Employer is not okay with this, and fires Pat.

In Situation A, where Pat is heterosexual, there is no discrimination; in Situation B, where Pat is homosexual, there is. The difference between the two situations will always be not just Pat’s sexual orientation but also Pat’s gender. Pat’s attraction to women is only okay with the employer if Pat is a man. Because Pat’s gender matters to the employer and is taken into account, discrimination against Pat for her sexual orientation will always be based on the fact that Pat is a woman attracted to women and not a man attracted to women. Although most situations of discrimination are likely to be more nuanced than in this example, as long as the employer is discriminating on the basis of sexual orientation they will necessarily be treating a woman who is attracted to women differently than a man who is attracted to women, and vice versa. This means that employers who discriminate on the basis of sexual orientation always act differently on the basis of the employee’s gender and have “gender on the brain,” and thus the discrimination is “per se because of sex” under the *Macy* reasoning.

Although the above hypothetical clearly demonstrates that the *Macy* sex stereotyping and “per se because of sex” theories directly apply to LGB people when discrimination is based on sexual orientation,¹⁰⁸ courts and agencies have failed to acknowledge these kinds of arguments in the past.¹⁰⁹ In the next section, this Comment outlines how courts have justified this failure and why it is thus crucial that the EEOC issue clear guidance that discrimination based on sexual orientation always provides a basis for a cognizable claim under Title VII.

sports and the military).

107. See MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 126 (11th ed. 2007) (defining “bisexual” as “of, relating to, or characterized by a tendency to direct sexual desire toward both sexes”); *Id.* at 596 (defining “homosexual” as “of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex”).

108. *But see infra* Part V.

109. *See infra* Part V.

V. WHY THE EEOC MUST ISSUE GUIDANCE

Given the previous discussion, one might wonder why anything further is required from the EEOC beyond the *Macy* decision. After all, if discrimination against gay and lesbian people is so clearly sex stereotyping and so clearly does take gender into account,¹¹⁰ why is that reasoning not enough? Because the EEOC has both acknowledged the sex stereotyping argument in nonbinding decisions¹¹¹ and suggested that agencies start to treat claims of discrimination based on sexual orientation as “because of sex,”¹¹² it might seem that the public should be content to wait until a claim based on sexual orientation eventually reaches the full Commission. The Commission could then apply *Macy* using the aforementioned reasoning, thereby effecting a binding decision on the agencies.

There are two reasons why prompt guidance¹¹³ is necessary to ensure that LGB people are protected from discrimination under Title VII. First, precedent shows that the *Macy* decision could be interpreted in a manner that does not include discrimination based on sexual orientation as “because of sex.” Second, the practice and makeup of the EEOC could allow a new Administration and new Commission members to apply those alternate interpretations sooner rather than later.

As to the first issue, much of the confusion in Title VII jurisprudence has centered on how exactly to characterize certain kinds of discrimination, because characterization has a lot to do with whether the discrimination is covered under Title VII. With sexual orientation, one could characterize the situation as shown in Part IV,¹¹⁴ where men are discriminated against for transgressing the gender norm that they should be attracted to women, and vice versa.¹¹⁵ This characterization, if employed, makes it obvious that the discrimination is based on sex stereotyping and takes gender into

110. See *supra* Part IV.

111. See *Castello v. U.S. Postal Serv.*, EEOC Appeal No. 0120111795 2 (Dec. 12, 2011), available at <http://www.eeoc.gov/decisions/0520110649.txt>; *Veretto v. U.S. Postal Serv.*, EEOC Appeal No. 0120110873, 2011 WL 2663401, at *3 (2011) (finding that discrimination on the basis of sexual orientation can be considered impermissible sex stereotyping under Title VII).

112. See EEOC’s Federal Training & Outreach Division, *supra* note 69 (advising an agency employee that, although there is no binding precedent on the subject, the Commission expects to see cases applying *Macy* to sexual orientation in the future and suggesting that agencies address sexual orientation discrimination under Title VII based on *Castello* and *Veretto*).

113. See *supra* notes 65–68 and accompanying text (showing that the EEOC does not have the power to promulgate substantive regulations and, thus, can only substantively interpret Title VII through guidelines).

114. See *supra* Part IV.

115. *Id.*

account. However, one could also characterize the situation as men and women being discriminated against equally for being attracted to the same sex.¹¹⁶ In this characterization of the issue, one could argue—and many courts have—that the discrimination is not based on sex, since men and women are being treated equally in that context.¹¹⁷

One could also argue—and again, courts have—that the discrimination is not taking gender into account because the characteristic being acted upon negatively is not the fact that a person is a man who is attracted to other men, but rather the fact that a person is attracted to someone of the same sex, regardless of whether that person is a man or a woman.¹¹⁸ These possible characterizations, though inconsistent with *Hopkins*,¹¹⁹ make it much less clear that *Macy* will automatically extend to protecting LGB people, and given the history of courts and other adjudicators refusing to extend reasoning based on one set of facts to its logical conclusion on a different set of facts,¹²⁰ clear guidance from the EEOC is necessary to ensure that LGB people truly will be covered under Title VII's "because of sex" provision.

One might respond that while these kinds of restrictive characterizations *could* be used, the EEOC has made it very clear that it does not intend to use these kinds of characterizations in its treatment of LGB people.¹²¹ In fact, at least one Commissioner has gone so far as to informally instruct agencies to start treating LGB people as covered under Title VII.¹²² Since these actions indicate that the Commission is likely to issue a binding decision in some future case stating explicitly that, under the *Macy* reasoning, LGB people are covered by Title VII's "because of sex" provision, it might seem unnecessary to issue guidance beforehand on the issue. However, the Commission is made up of five members appointed by

116. See, e.g., *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979).

117. *Id.*

118. See *Dillon v. Frank*, 58 FAIR. EMPL. PRAC. CAS. (BNA) 144 (6th Cir. Jan. 15, 1992) (holding that an employer does not violate Title VII in discriminating on the basis of sexual orientation as long as gay men are treated the same way as lesbian women).

119. See *Varona & Monks*, *supra* note 14, at 114 (noting that the Supreme Court did not require *Hopkins* to demonstrate that a man who failed to conform to gender norms would have been granted partnership while a woman did not).

120. See *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (finding that *Hopkins* did not cover one man calling the male plaintiff a "bitch" or graffiti associating the plaintiff with a drag queen, because this was not discrimination based on the sex stereotype that the plaintiff was too feminine, but rather discrimination based on sexual orientation).

121. See EEOC's Federal Training & Outreach Division, *supra* note 69 (showing that EEOC Commissioner Feldblum expects the *Macy* decision to be extended to prohibiting discrimination based on sexual orientation under Title VII in the future).

122. *Id.*

the President, and each has a five-year term.¹²³ A new Administration could appoint new commissioners with very different political allegiances, and although the Commission is bipartisan by statutory mandate,¹²⁴ members of both political parties have exhibited reticence about supporting gay rights in the past.¹²⁵ As the full Commission only votes on a limited number of cases per year,¹²⁶ and the EEOC often takes an incredibly long time to process appeals,¹²⁷ the Commission could be very different in makeup and agenda by the time it comes to issuing a binding decision. Given the existence of federal precedent refusing to extend Title VII to discrimination based on sexual orientation,¹²⁸ it would not be inconceivable for the Commission to adopt those courts' characterizations and refuse to extend *Macy* to sexual orientation. Although EEOC Commissioner Chai Feldblum and other elements within the agency have been vocal about their intent to extend *Macy*,¹²⁹ very little deference need be paid to these vocalizations.¹³⁰

123. See 42 U.S.C. § 2000e-4(a) (2006) (noting the composition and term of the Commission).

124. *Id.* (requiring that, of the five members of the Commission, no more than three be affiliated with the same political party).

125. See, e.g., Alexander Bolton, *Vulnerable Democratic Senators Balk at Obama's Gay Marriage Endorsement*, HILL, May 12, 2012, <http://thehill.com/homenews/senate/227007-vulnerable-democratic-senators-balk-at-obamas-endorsement-of-gay-marriage> (stating that some Democrats are not prepared to support gay marriage); Michael Guest, *The Republican Party's Anti-Gay Bias*, WASH. POST, May 4, 2012, http://www.washingtonpost.com/opinions/richard-grenell-and-the-republican-partys-anti-gay-bias/2012/05/04/gIQApXgL2T_story.html (condemning the "Republican Party's obsession with demonizing gay and lesbian citizens").

126. See EEOC's Federal Training & Outreach Division, *supra* note 69 (showing Commissioner Feldblum stating that the full Commission votes on and makes precedential only between thirty and fifty cases a year).

127. See Stephen Losey, *EEOC Taking Longer to Complete Appeals, Hearings, Investigations*, FEDERAL TIMES, Aug. 20, 2012, <http://www.federaltimes.com/article/20120820/AGENCY02/308200002/EEOC-taking-longer-complete-appeals-hearings-investigations> (stating that appeals often take more than a year to resolve, with the average processing time for a hearing measuring 345 days in 2011).

128. See, e.g., *Vickers v. Fairfield Med. Ctr.*, 435 F.3d 757, 764–65 (6th Cir. 2006) (holding that discrimination on the basis of sexual orientation cannot be found to be because of sex under a sex stereotyping theory); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–18 (2d Cir. 2005) (distinguishing between sex stereotypes and stereotypes based on sexual orientation to find no Title VII discrimination); *DeSantis v. Pac. Tel. & Tel. Co.*, 608 F.2d 327, 331 (9th Cir. 1979) (holding that discrimination against a man for being attracted to another man is not impermissible under Title VII because it treats men and women equally).

129. See EEOC's Federal Training & Outreach Division, *supra* note 69 (showing Commissioner Feldblum stating that she expects the *Macy* decision to be extended to prohibiting discrimination based on sexual orientation under Title VII in the future).

130. See Elise Foley, *Deportation Guidelines to Officially Define Same-Sex Couples as Families*,

Because all these different characterizations are theoretically possible and have been used in courts across the country, clear guidance is needed from the EEOC. This guidance will help ensure that the interpretation of *Hopkins* used in *Macy*—showing that discrimination against transgender people is both “sex stereotyping” and “per se because of sex”—will be extended to sexual orientation, because discrimination against LGB people will always be the result of sex stereotyping and always takes gender into account.

CONCLUSION

Prohibitions on discrimination in employment are not merely a matter of legal fairness. For those who cannot find a job for reasons wholly unrelated to their qualifications (such as sexual orientation), unemployment can mean hunger, homelessness, bankruptcy, and much more.¹³¹ When studies show that between fifteen and forty-three percent of LGB people have experienced some form of discrimination at work,¹³² the importance of institutionalized protection from the EEOC and from the courts becomes all the more apparent.

Without further action from the judiciary or Congress,¹³³ guidance from the EEOC is obviously just the first step in a long road toward true equality in employment. However, this step is a crucial starting point, as EEOC decisions and guidance are often persuasive in court decisions¹³⁴ and are afforded some deference.¹³⁵ With such high stakes and with countless

HUFFINGTON POST, Sept. 28, 2012, http://www.huffingtonpost.com/2012/09/28/deportation-same-sex-couples_n_1923094.html (emphasizing the difference between an oral promise from an agency and real guidance, and outlining the significance of putting these promises into writing for field officers).

131. See THE UNITED STATES CONFERENCE OF MAYORS, HUNGER AND HOMELESSNESS SURVEY: A STATUS REPORT ON HUNGER AND HOMELESSNESS IN AMERICA'S CITIES, 1–2 (2012) (finding that unemployment is the number one cause of hunger and the number two cause of homelessness in the United States).

132. See Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CTR. FOR AM. PROGRESS (June 2, 2011), <http://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

133. See Chris Geidner, *Workplace Protections for LGBT Workers Remain Stalled*, BUZZFEED.COM (Dec. 18, 2012, 4:18 PM), <http://www.buzzfeed.com/chrisgeidner/workplace-protections-for-lgbt-workers-remain-stal> (stating that the Employment Non-Discrimination Act has not passed in the sixteen years since it was first introduced, despite being put up for a vote numerous times in Congress, and showing that legislators do not expect the Act to pass the House of Representatives in the 113th Congress).

134. See *supra* Part II.

135. See *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (holding that informal agency processes, while not deserving of *Chevron* deference, “do constitute a body of

individuals living under the daily threat of being fired, refused employment, or harassed at work because of their sexual orientation, the EEOC must commit to taking this step and issuing guidance to ensure Title VII protections for LGB Americans.

experience and informed judgment to which courts and litigants may properly resort for guidance”).

RECENT DEVELOPMENTS

PICTURING A REMEDY FOR SMALL CLAIMS OF COPYRIGHT INFRINGEMENT

VIRGINIA KNAPP DORELL*

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* J.D., 2013, American University Washington College of Law; B.A., University of North Carolina at Chapel Hill. First, thank you to the *Administrative Law Review* Board and staff members for their friendship and support. Endless amounts of gratitude are also due my faculty advisor, Professor Ripple Weistling, and my mentor, Professor Elizabeth Earle Beske, for their guidance and invaluable advice. Most importantly, thank you to my family for their love and generosity, particularly Oren Dorell and our sons, Malcolm and Leo, who inspire me daily. Last, but not least, this is dedicated to Megan Ramsey, without whose help I would not have made it through law school. The dedicated, reliable, trustworthy childcare Megan provided should be a right—not a privilege—for all working moms.

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INTRODUCTION

A photographer snaps a picture. The simplicity of those words fails to capture the work that goes into the act. For a professional photographer, it encompasses years of school, apprenticeship with another photographer or on a newspaper,¹ and the challenges of building a small business, all to reach a point where “snapping” pictures for a living pays an annual median wage of only \$29,130.² When a photographer takes a picture, years of study and practice coalesce into a reflexive action that is maximally efficient at composing a piece of art. It is also at that moment when a person who copies the photo³ takes not just the original expression of the image, but also full advantage of its author’s training.⁴ Sadly, the photographer is unlikely to find any remedy for infringement under our current copyright regime.⁵

Remedies for copyright infringement are found exclusively in federal court, but the high costs and delays of litigation effectively block creators without deep pockets from being able to protect their works from infringers. A growing criticism of the copyright system is that many small players who lack financial resources—and who most depend on the royalties their works provide—have no cost-effective, practical way to stop infringement.⁶

1. BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, OCCUPATIONAL OUTLOOK HANDBOOK, PHOTOGRAPHERS (2012), available at <http://www.bls.gov/oco/pdf/ocos264.pdf> (describing average education and training required for professional photographers).

2. *Id.* (specifying the 2010 annual median wage for professional photographers).

3. 17 U.S.C. § 106 (2006) (granting authors exclusive rights to reproduce, distribute, adapt, perform, and display their works).

4. *Id.* § 102(a) (defining subject matter protected by copyright as “original works of authorship fixed in any tangible medium of expression”).

5. *Id.* §§ 501–505 (creating a cause of action for copyright infringement and specifying remedies under the law).

6. Mickey H. Osterreicher & Alicia Wagner Calzada, *Comments of the National Press Photographers Association*, NAT’L PRESS PHOTOGRAPHERS ASS’N, at 7 (Oct. 27, 2011), http://blogs.nppa.org/advocacy/files/2012/01/final_Copyright-Small-Claims-Comments-

Individual photographers are just one category of authors who create copyrighted works that are easily infringed and who find remedies hard to come by.⁷

Yet the costs of intellectual property infringement—while hard to quantify—continue to rise.⁸ Business groups estimate that pirated and counterfeit intellectual property traded on international markets had a value of \$250 billion in 2007,⁹ and could be worth up to \$960 billion in 2015.¹⁰ In the field of photography, industry leaders suggest that photographers have suffered estimated losses as high as \$10 billion from online photo infringement.¹¹ The two largest stock photo companies report at least 112,000 incidents of online copyright infringement annually.¹² These incidents of pirating and infringement have a huge impact on the copyright industry, which represents eleven percent of the gross domestic product.¹³ The Copyright Alliance estimates that the United States loses

01-17-12-1.pdf (describing digital photo infringements as “right-click gone wild” and noting that, even if infringements are uncovered, “most will never be prosecuted because it is economically unfeasible for the creators to commence an action in federal court”).

7. *Legislation/Copyrights: Content Providers Not Keen About Small Claims Infringement Remedies*, 71 PAT. TRADEMARK & COPYRIGHT J. (BNA) 584 (Mar. 31, 2006) (quoting Authors Guild Executive Director Paul Aiken as saying his members would welcome a “small claims” process for infringement claims, but quoting Brad Holland of the Illustrators’ Partnership of America as strongly opposed to litigation reforms that could undermine authors’ rights under federal copyright law).

8. ORG. FOR ECON. CO-OPERATION & DEV., *THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY* 9 (2007), available at <http://www.oecd.org/industry/industryandglobalisation/38707619.pdf> (noting the difficulty in assessing the impact of intellectual property counterfeiting and piracy because of the fragmented information available).

9. ORG. FOR ECON. CO-OPERATION & DEV., *MAGNITUDE OF COUNTERFEITING AND PIRACY OF TANGIBLE PRODUCTS: AN UPDATE 1* (2009), available at <http://www.oecd.org/sti/industryandglobalisation/44088872.pdf> (providing trade figures for all intellectual property, including patents, trademarks, and copyrighted works).

10. *See* BUS. ACTION TO STOP COUNTERFEITING AND PIRACY (BASCAP), *ESTIMATING THE GLOBAL ECONOMIC AND SOCIAL IMPACTS OF COUNTERFEITING AND PIRACY* 8 (2011) (calculating projected values for 2015 based on an estimated increase of twenty-two percent each year). *But see* IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 74 (2011) (calling into question the methodology of the BASCAP report and suggesting that it overestimates the impact of intellectual property piracy).

11. Mikal E. Belicove, *Why Buy the Cow When You Can Get the Download for Free?*, *ENTREPRENEUR* (Sept. 17, 2009) <http://www.entrepreneur.com/blog/218532> (quoting Lawrence Gould, CEO of microstock photo service Vivotzoom, on the impact of online theft of stock and microstock photos). Gould based his projection on an estimate by image-tracking service PicScout that found 85% of rights-managed images on commercial websites were misused.

12. *Id.* (reporting numbers from Getty Images and Corbis, which closely track online use of their stock photos).

13. STEPHEN E. SIWEK, INT’L INTELLECTUAL PROP. ALLIANCE, *COPYRIGHT INDUSTRY*

\$58 billion in revenues annually from copyright piracy, including taxes and lost business profits.¹⁴

A right guaranteed in the U.S. Constitution,¹⁵ copyrights can only be enforced by federal district courts, which have exclusive jurisdiction over infringement complaints alleged by copyright owners.¹⁶ Yet if a copyright owner suffers only a small amount of economic damage from the infringement or lacks resources to pursue a claim, the time and cost of litigating in federal court can often outweigh the benefits.¹⁷ The most recent economic survey estimates that, in an intellectual property lawsuit with less than \$1 million at stake, the median cost was \$350,000 to litigate a case.¹⁸ In addition to high costs, a federal district court case takes an average of twenty-three months to conclude.¹⁹ A prominent copyright litigation guide recommends that attorneys first analyze a client's financial position before even considering potential jurisdiction or venue for a case.²⁰ There is currently no alternative to federal district court for addressing small infringements like that suffered by an individual photographer trying

IN THE U.S. ECONOMY: THE 2003–2007 REPORT 3 (June 2009), *available at* <http://www.iipa.com/pdf/IIPASiwekReport2003-07.pdf> (reporting the 2007 estimate of \$1.52 trillion of value added to the gross domestic product by the U.S. copyright industry).

14. STEPHEN E. SIWEK, INST. FOR POLICY INNOVATION, *THE TRUE COST OF COPYRIGHT INDUSTRY PIRACY TO THE U.S. ECONOMY* 11 (2007) *available at* http://www.copyrightalliance.org/files/siwekcopyrightpiracy_studypdf.pdf. Siwek also finds that copyright piracy domestically and abroad cost 373,375 jobs in the United States.

15. U.S. CONST. art. I, § 8.

16. 28 U.S.C. § 1338 (2006).

17. *See* LISA SHAFTEL, NAT'L ADVOCACY COMM. CHAIR, GRAPHIC ARTISTS GUILD, *Remedies for Small Copyright Claims Comments Submitted by the Graphic Artists Guild*, at 3 (Jan. 16, 2012),

http://www.copyright.gov/docs/smallclaims/comments/23_graphic_artists_guild.pdf (arguing that litigation in federal courts is “completely financially impractical” when an infringement causes damages less than \$30,000 and further noting that their members say that most infringing uses of their graphic images result in actual damages less than \$15,000).

18. STEVEN M. AUVIL, CHAIR, LAW PRACTICE MGMT. COMM., AM. INTELLECTUAL PROP. LAW ASS'N, *REPORT OF THE ECONOMIC SURVEY 2011*, 35 *available at* <http://www.aipla.org/members/Documents/AIPLA%202011%20Report-%20Summary%20102411.pdf>. The American Intellectual Property Law Association's (AIPLA's) report is drawn from the ranks of practitioners and is aimed at the intellectual property bar, so it is the best guide for assessing actual costs of intellectual property litigation.

19. OFFICE OF JUDGES PROGRAMS, STATISTICS DIVISION, ADMIN. OFFICE OF THE STATES COURTS, U.S. CTS., *FED. JUDICIAL CASELOAD STATISTICS*, tbl. C-5 (2010), *available at* <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2010/tables/C05Mar10.pdf>.

20. *See* JOHN W. HAZARD, JR., *COPYRIGHT LAW IN BUSINESS AND PRACTICE* § 9:1 (revised ed. 2011) (advising caution before bringing any suit “if counsel knows his claims for copyright infringement will not involve large demands for statutory damages or healthy (and provable) amounts of regular damages”).

to protect a single image.²¹

The Copyright Office has noted the high hurdles that small claimants face in halting copyright infringement.²² In October 2011, the Copyright Office issued an initial Notice of Inquiry into potential remedies for “small copyright claims.”²³ The Copyright Office conducted multiple public meetings in November 2012 and expects to submit recommendations for improving the remedy process to Congress in the fall of 2013.²⁴ Small copyright claims would include those suffered by copyright owners like individual authors and photographers who may not have significant resources to pursue a federal copyright infringement action.²⁵

This Article recommends the creation of an alternative administrative process to remedy small claims of copyright infringement. Part I discusses the challenges copyright owners face to halt infringements. This Part also analyzes prior proposals for remedying copyright infringement²⁶ with other administrative proceedings domestically²⁷ and abroad²⁸ to gather ideas for a new administrative copyright remedy process.

Part II advocates for the creation of an administrative panel in the Copyright Office to hear small claims of copyright infringement and applies the proposal to a hypothetical infringement of stock photographs to analyze

21. See *Frequently Asked Questions About Copyright*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/help/faq/faq-infringement.html> (last visited May 7, 2012) (noting that the Copyright Office does not enforce the laws it administers, and that copyright owners must enforce their rights by filing suit in federal district court).

22. See *Remedies for Small Copyright Claims: Hearing Before the Subcomm. on Courts, the Internet, and Intellectual Prop., H. Comm. on the Judiciary*, 109th Cong. 92 (2006) (statement of the U.S. Copyright Office) (pointing out “that there are serious questions about the effectiveness of the current system that merit further study”).

23. Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,758 (Oct. 27, 2011). The Copyright Office issued a third request for comments in February 2013. 78 Fed. Reg. 13,094 (Feb. 26, 2013).

24. MARIA A. PALLANTE, U.S. COPYRIGHT OFFICE, PRIORITIES AND SPECIAL PROJECTS OF THE UNITED STATES COPYRIGHT OFFICE: OCTOBER 2011–OCTOBER 2013, 5 (Oct. 25, 2011).

25. Remedies for Small Copyright Claims, 76 Fed. Reg. at 66,759.

26. See, e.g., Mark A. Lemley & R. Anthony Reese, *Reducing Digital Copyright Infringement Without Restricting Innovation*, 56 STAN. L. REV. 1345, 1410–25 (2003) (proposing a streamlined dispute resolution system).

27. See TRADEMARK TRIAL AND APPEAL BOARD (TTAB), TTAB ACCELERATED CASE RESOLUTION (ACR) FAQ (2011), <http://www.uspto.gov/trademarks/process/appeal/> (describing the accelerated administrative process for trademark *inter partes* proceedings).

28. See, e.g., INNOVATE LEGAL, GUIDE TO INTELLECTUAL PROPERTY DISPUTES IN THE PATENTS COUNTY COURT: A STEP BY STEP GUIDE TO THE PROCESS OF LITIGATION, http://www.innovatelegal.co.uk/Guide_to_the_Patents_County_Court.pdf (summarizing the process of the small claims court for hearing patent, copyright, and trademark infringement claims in England and Wales).

whether a new process would improve the chances of a copyright owner in finding a remedy for an infringement. This Article suggests that small copyright infringement claims could be brought before administrative law judges (ALJs) in the Copyright Office through an online submission process that would require a prima facie showing of infringement. This would be a simpler and more efficient process than filing a complaint for copyright infringement in federal district court. Remedies available would include monetary damages that are currently available under the copyright statute, but could include introduction of new remedies, such as enforcing licenses, requiring attribution, and designating frequent, willful copyright infringers as “repeat offenders” to warn Internet Service Providers (ISPs) of increased liability in providing copyright infringers with digital access. Part III examines the benefits of a streamlined administrative process, including better access to remedies for more copyright owners as well as more respect for the copyright laws. However, this Part also points out that potential problems still exist, including the inability to seek injunctive relief through an administrative proceeding and the challenges with hearing affirmative defenses such as fair use. Finally, the Article concludes by urging the Copyright Office to press for adoption of a new administrative proceeding to address more small copyright infringement claims.

I. BACKGROUND AND ANALYSIS

A. *Current Framework Creates Copyrights Without Remedies*

The federal courts enjoy exclusive jurisdiction over copyright cases to ensure uniformity of national copyright law.²⁹ But the benefits of national uniformity also come with high costs and lengthy delays in pursuing infringement complaints. When Congress completely overhauled the Copyright Act in 1976,³⁰ it explicitly preempted state law protection for original works of authorship.³¹ Even prior to the 1976 revisions, though,

29. 28 U.S.C. § 1338 (2006).

30. Copyright Act, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended at 17 U.S.C. §§ 101–810 (2006)).

31. 17 U.S.C. § 301 (2006); H.R. REP. NO. 94-1476, at 129–30, (1976). Drafters of the 1976 Act wanted it known in “the clearest and most unequivocal language possible” that § 301 was “one of the bedrock provisions of the bill” Common law copyright predated the first U.S. copyright statute in 1790 and protected unpublished works. It coexisted alongside the statutory copyright system for published works and created a complicated body of case law to determine when a work was “published.” Section 301 abolishes rights available under common law and state statutes that are equivalent to the federal copyright provisions and declares that federal rights attach at the moment of fixation in a tangible medium, instead of at publication.

supremacy of federal copyright law was embedded in case law.³² This consolidation of copyright law in federal court came from a desire for uniform interpretation of copyright laws³³ and a perception of more sophisticated decisionmaking abilities at the federal level.³⁴

To make a federal claim for copyright infringement, the owner of a copyrighted work first must prove that she is the registered owner of the material.³⁵ The work must be original, exhibit a modicum of creativity, and be within the subject matter of copyright. The plaintiff also must show that the defendant has wrongfully exercised one or more of the six exclusive rights granted to the copyright holder under the Copyright Act.³⁶ Upon filing a complaint in federal district court, the plaintiff bears the burden of proving a prima facie case of infringement, but the defendant can then present affirmative defenses, including statutory defenses such as fair use and judicially-created defenses such as copyright misuse.³⁷

While consolidating jurisdiction in the federal courts has helped clarify and unify copyright law when compared to the earlier state and federal system, it has also led to a complicated body of *federal* case law interpreting what is a copyrighted work, when infringement occurs, and what are valid affirmative defenses. As copyright grew from its original function—

32. See *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225, 231–32 (1964) (affirming that states may neither directly nor indirectly interfere with the objectives of federal patent law); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234, 237–38 (1964) (declining to enforce states’ unfair competition laws when the states’ actions would interfere with federal patent and copyright laws).

33. See MARY LAFRANCE, *COPYRIGHT LAW IN A NUTSHELL* 393 (2008) (“The purpose of conflict preemption in the fields of copyright and patent law is to promote national uniformity in the regulation of these forms of intellectual property.”).

34. See *Grable & Sons Metal Prods., Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 312 (2005) (noting the “experience, solicitude, and hope of uniformity” offered by the federal forum). Justice Souter’s opinion in *Grable* relied on an often-cited American Law Institute (ALI) study that highlights federal courts’ “adeptness” at patent cases. AM. L. INST., *STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS* 164–65 (1968). The ALI study found that federal question jurisdiction is necessary not only to preserve uniformity, but also “to protect litigants relying on federal law from the danger that state courts will not properly apply that law, either through misunderstanding or lack of sympathy.” *Id.* at 4.

35. 17 U.S.C. § 411 (2006). However, to comply with the U.S. adoption of the Berne Convention, foreign authors are exempted from the requirement to register their works before bringing a U.S. federal claim for infringement. See *id.*; Berne Convention for the Protection of Literary and Artistic Works, art. 18, Sept. 9, 1886, S. Treaty Doc. No. 99-27 (forbidding signatory countries from requiring formalities like registration as a condition of copyright protection).

36. 9 M. ELAINE BUCCIARI, *Cause of Action for Copyright Infringement Under the Federal Copyright Act of 1976, as amended*, in 9 CAUSES OF ACTION 2D 81, at § 4 (1997).

37. LAFRANCE, *supra* note 33, at 293.

preventing the literal copying of books—the challenge of balancing owners’ property interests in their works with reasonable public access also became more difficult. The digital revolution of the last fifteen years has made copying even easier, only intensifying the demand for better balancing between the property interests of copyright owners and the public’s access to information.³⁸

The number of intellectual property (IP) cases filed in federal court continues to rise, even as the cost and time required to litigate each case has risen in kind.³⁹ In direct correlation, the relevance of copyright also has increased for average Americans.⁴⁰ However, the unceasing demands on the federal courts for all types of cases mean that the copyright suits face a long wait and potentially high costs to be heard.⁴¹ Copyright practice guides point to avoiding court unless the value of the intellectual property at stake outweighs the attorneys’ fees and delays that inevitably attend an infringement action.⁴² High costs and delays may prevent some potential plaintiffs from even going to court, stymieing the development of copyright law as a whole.⁴³ Some scholars believe that when the general public lacks

38. See MICHAEL WEINBERG ET AL., *A COPYRIGHT OFFICE FOR THE 21ST CENTURY: RECOMMENDATIONS TO THE NEW REGISTER OF COPYRIGHTS, PUBLIC KNOWLEDGE* 11 (2011), <http://www.publicknowledge.org/files/docs/ACopyrightOfficeforthe21stCentury.pdf> (encouraging the Register of Copyrights to increase public participation in the Office decisionmaking process).

39. For the twelve-month period ending in March 2011, the Administrative Office of the U.S. Courts recorded a twelve-percent increase in the number of copyright cases commenced in the U.S. District Courts. See ADMIN. OFFICE OF THE U.S. COURTS, *FEDERAL JUDICIAL CASELOAD STATISTICS: MARCH 31, 2011*, at 48 tbl. C-2 (2011), available at <http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/Statistics/FederalJudicialCaseloadStatistics/2011/tables/C02Mar11.pdf>. High litigation costs are driven in part by the costs of discovery. Sharon Cullars, *Trends in IP Litigation Costs*, LEGAL FIN. J. (Nov. 24, 2011), <http://legalfinancejournal.com/trends-in-ip-litigation-costs/>.

40. See John Tehranian, *Infringement Nation: Copyright Reform and the Law/Norm Gap*, 2007 UTAH L. REV. 537, 539 (arguing that increased public consciousness of copyright issues highlights the differences between copyright law and copyright norms).

41. See AM. LAW INST., *supra* note 34, at 1 (decrying—even in the 1960s—the “continually expanding workload of the federal courts and the delay of justice resulting therefrom”).

42. See Jeremy Phillips, *Keep It Cheap—Ten Tips for Minimizing IP Dispute Settlement Costs*, WORLD INTELL. PROP. ORG. MAG., Feb. 2010, at 23 (advising clients to “[t]hink carefully before entering an IP dispute”); Alan Bamberger, *Art Copyright Infringement and Your Creative Health*, ARTBUSINESS.COM, <http://www.artbusiness.com/copfringe.html> (last visited May 7, 2013) (noting that the “overwhelming majority of infringement cases involve far less money than is cost effective to fight legal battles over”).

43. See Anthony Ciolli, *Lowering the Stakes: Toward a Model of Effective Copyright Dispute Resolution*, 110 W. VA. L. REV. 999, 1009 (2008) (highlighting that “[c]ourts have been unable to rule on many important copyright law questions” because plaintiffs and

investment in how the Copyright Act functions—both to protect owners’ rights and to protect users’ enjoyment of copyrighted materials—the public will reject the system by both ignoring the rules and advocating for changes in the law.⁴⁴

Photographers were one of the first groups to decry the barriers to copyright enforcement.⁴⁵ During a 2006 discussion of legislation to address the “orphan works” problem,⁴⁶ the Copyright Office noted that individual authors had little recourse for recovering for infringement of singular works. An affordable and timely process to obtain a remedy was not available.⁴⁷ A congressional hearing on the topic produced few recommendations, but writers echoed the photographers’ sentiment.⁴⁸ The Copyright Office offered to study the issue further, which led to the current

defendants who cannot afford federal litigation either do not bring a complaint or accept quick but inequitable settlements to end disputes).

44. See Jessica Litman, *Billowing White Goo*, 31 COLUM. J.L. & ARTS, 587, 598 (2008) (advocating for a recognition of users’ rights in the face of growing public disillusionment with the fairness of a copyright regime that appears to overly benefit rights holders). The public uproar over the Stop Online Piracy Act (SOPA), H.R. 3261, 112th Cong. (2011), and PROTECT IP Act of 2011 (PIPA), S. 968, 112th Cong. (2011), could be seen as a sign of growing disenchantment with entrenched copyright interests overreaching to protect their markets. See Eric Engleman, *Google Says 7 Million Signed Petition Against Anti-Piracy Bills*, BLOOMBERG BUSINESSWEEK, Jan. 20, 2012, <http://www.businessweek.com/news/2012-01-20/google-says-7-million-signed-petition-against-anti-piracy-bills.html>; Stephanie Condon, *PIPA, SOPA Put on Hold in Wake of Protests*, CBS NEWS (Jan. 20, 2012, 3:17 PM), http://www.cbsnews.com/8301-503544_162-57362675-503544/pipa-sopa-put-on-hold-in-wake-of-protests/.

45. Letter from Stephen P. Morris, Operations Manager, Prof1 Photographers of Am. to Jule L. Sigall, General Counsel, Copyright Office 11–13 (Mar. 25, 2005), <http://www.copyright.gov/orphan/comments/OW0642-PPA.pdf>. Within the photographers’ comments comes a call for an “alternative forum” to federal district court for orphan works and other types of infringement claims. *Id.* at 2.

46. The “orphan works” problem occurs when someone wants to use a copyrighted work but cannot find the owner to get permission. U.S. COPYRIGHT OFFICE, REPORT ON ORPHAN WORKS I (2006). Opposition from the content community killed prior attempts to legislate use of orphan works. See also Dugie Standeford, *Support Mixed for U.S. Orphan Works Bill As Issue Catches Global Attention*, INTELL. PROP. WATCH (May 7, 2008, 2:53 PM), <http://www.ip-watch.org/2008/05/07/us-orphan-works-bills-support-mixed-as-issue-catches-global-attention> (describing opposition from visual artists who feel that the legislation has been written too broadly). While outside the scope of this Article, orphan works are still a bone of contention between copyright owners and users.

47. U.S. COPYRIGHT OFFICE, *supra* note 46, at 114.

48. See *Legislation/Copyrights: Content Providers Not Keen About Small Claims Infringement Remedies*, 71 PAT. TRADEMARK & COPYRIGHT J. (BNA) 584 (Mar. 31, 2006) (presenting a survey by Authors Guild Executive Director Paul Aiken of the organization’s members that found 55% of the 2,100 respondents favored a type of small claims process for infringement claims, 28% were neutral, and 17% were opposed).

notice-and-comment rulemaking process.⁴⁹ That may, in turn, lay bare the intricacies of copyright for the public to weigh in on, and may help build momentum for a shift in the law.⁵⁰

B. *Academic Proposals to Change Copyright Infringement Remedy Procedures*

Many scholars have called for reforms to the copyright system to provide better access to remedies for copyright infringement. A comparative analysis of these suggestions illustrates the advantages of an administrative proceeding that would be an efficient, low-cost alternative to filing a copyright infringement claim in federal district court.

1. *Lemley–Reese Proposal*

The abrupt rise of file sharing on peer-to-peer (p2p) networks like Napster⁵¹ and Grokster⁵² sparked a discussion of how to improve copyright enforcement in the digital age.⁵³ Looking at copyright infringement through the lens of deterrence,⁵⁴ Professors Mark A. Lemley and R. Anthony Reese suggested a streamlined copyright dispute resolution process as an alternative to federal district court for some instances of copyright infringement over p2p networks.⁵⁵ Their proposal was an opening salvo in the debate on updating copyright enforcement to keep up with digital infringement and provides a number of process suggestions that could be adopted.

49. Remedies for Small Copyright Claims, 76 Fed. Reg. 66,758, 66,759 (Oct. 27, 2011).

50. See Pamela Samuelson et al., *The Copyright Principles Project: Directions for Reform*, 25 BERKELEY TECH. L.J. 1175, 1177 (2010) (noting the “considerable stress” on copyright law from digital technologies as well as user-generated content, which raises awareness of copyright for “ordinary people”).

51. See *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004, 1011–12 (9th Cir. 2001) (detailing the programming that permits Napster users to store, copy, and transfer MP3 music files from one user to another via the Internet).

52. See *MGM Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 919–20 (2005) (providing free software that allows peer-to-peer (p2p) sharing of electronic files).

53. See Lemley & Reese, *supra* note 26, at 1410–25 (proposing “[a] streamlined dispute resolution system” to lower the cost of enforcement for copyright owners).

54. See *id.* at 1391 (discussing criminal law research by Gary Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 176–79 (1968), that found that a rational actor will change her behavior based on a calculus of “the penalty that she will pay if caught multiplied by the probability that she will be caught”); see also Glynn S. Lunney, Jr., *The Death of Copyright: Digital Technology, Private Copying, and the Digital Millennium Copyright Act*, 87 VA. L. REV. 813, 852 (2001) (noting that “an increase in the number of enforcement actions would increase the risk of a lawsuit for each private copier”).

55. Lemley & Reese, *supra* note 26, at 1413.

Lemley and Reese adapted their proposal for an online dispute resolution system from the Uniform Dispute Resolution Policy⁵⁶ for trademark domain names that is run by the Internet Corporation for Assigned Names and Numbers.⁵⁷ Lemley and Reese suggested that a single ALJ in the Copyright Office could hear prima facie cases of infringement over p2p networks through an online proceeding with no in-person hearings and limited discovery.⁵⁸ The proposal anticipated that certain affirmative defenses could be heard and resolved by the ALJ, but that some factual disputes should be dismissed without prejudice and handled through a regular court proceeding.⁵⁹ A panel of ALJs would hear appeals of initial decisions, Lemley and Reese suggested, and unsuccessful appellants would have the further option to take the dispute to district court.⁶⁰ The professors concluded by recommending remedies that would include monetary damages and assessment of costs to unsuccessful defendants, as well as informing ISPs of “repeat infringers,” thereby ostracizing infringers and increasing the disincentives to infringe.⁶¹

The Lemley–Reese administrative model contains obvious advantages over a federal district court case for copyright infringement. Providing an online forum reduces the need for copyright owners to travel to the nearest federal district court to file a complaint and also reduces the likelihood that an attorney would be needed to navigate the procedural waters. Requiring the copyright owner to present a prima facie case of infringement encourages more straightforward, easy cases to self-select the administrative track. That provides benefits to the parties, who would achieve case

56. See Elizabeth C. Woodard, Note, *The UDRP, ADR, and Arbitration: Using Proven Solutions to Address Perceived Problems with the UDRP*, 19 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1169, 1180–83 (2009) (describing the process in the Uniform Dispute Resolution Policy).

57. See Lemley & Reese, *supra* note 26, at 1411; see also Rebecca Haas, Comment, *Twitter: New Challenges to Copyright Law in the Internet Age*, 10 J. MARSHALL REV. INTELL. PROP. L. 231, 251–52 (2010) (proposing that a streamlined administrative process would save time and money as compared to a civil suit in federal district court for Twitter users).

58. See Lemley & Reese, *supra* note 26, at 1413–15 (suggesting also that bringing a p2p infringement case before an Administrative Law Judge (ALJ) should also require a minimum number of infringements, e.g., fifty uploads during any thirty-day period).

59. See *id.* at 1415–17 (discussing how an ALJ could resolve or pass on claims of fair use, copyright misuse, and other defenses).

60. See *id.* at 1417 (further noting that courts could discourage fruitless appeals by forcing parties who lose frivolous appeals to pay the costs).

61. See *id.* at 1418–22. Informing an Internet service provider (ISP) that one of its customers was a “repeat infringer” could impact the ability of the ISP to claim the “safe harbor” provisions of the Digital Millennium Copyright Act, which requires ISPs to conform to a policy of terminating accounts of “repeat infringers” in some circumstances. 17 U.S.C. § 512 (2006).

resolution faster in an administrative proceeding, as well as benefits to the federal courts, which would see fewer copyright cases on the federal docket. The proposal to potentially “exile” repeat offenders from ISPs is a practical addition to the arsenal for copyright owners and a significant deterrent in an ever more digitally dependent world.⁶²

2. *Alternative Dispute Resolution Proposal*

Alternative dispute resolution (ADR) proceedings also provide a model for resolving small copyright infringement disputes.⁶³ After considering the fundamental and adversarial interests of both intellectual property owners and infringers,⁶⁴ IP attorney Kevin Lemley found that eight out of nine types of intellectual property disputes could best be handled by mediation or a mixed arbitration–mediation program, rather than litigation.⁶⁵ The mediation model would encourage parties to resolve their disputes by using a limited discovery process and holding the hearing before an experienced, neutral third-party who acts as a “settlement facilitator.”⁶⁶ In contrast, the arbitration–mediation model would put the dispute first before a neutral arbitrator who acts as a decisionmaker.⁶⁷ That decision would then be sealed while the parties undergo a mediation process that may be more quickly resolved, given the threat of the arbitrator’s decision hanging over them.⁶⁸ The process for both would be housed within the federal courts

62. The Center for Copyright Information recently created a Copyright Alert System that encourages content creators to contact ISPs to notify them of alleged infringements. The ISP will then warn its customer to halt the alleged infringement or else face further repercussions, such as slowing connection speeds. *See What Is a Copyright Alert?*, CENTER FOR COPYRIGHT INFO., <http://www.copyrightinformation.org/the-copyright-alert-system/what-is-a-copyright-alert/> (last visited May 7, 2013).

63. Kevin. M. Lemley, *I’ll Make Him an Offer He Can’t Refuse: A Proposed Model for Alternative Dispute Resolution in Intellectual Property Disputes*, 37 AKRON L. REV. 287, 325 (2004).

64. *See id.* at 293–94 (defining the fundamental interest of an owner as seeking to get value from his intellectual property asset and the adversarial interest of an owner as seeking to exclude others from using his intellectual property); *id.* at 296 (defining the fundamental interest of an infringer as desiring to freely use a piece of others’ intellectual property and the adversarial interest as expecting to freely use the intellectual property). These fundamental and adversarial motivations, Kevin Lemley argues, set up the range of disputes that copyright owners and infringers will engage in and may predetermine how best those disputes can be resolved. *Id.* at 297–98.

65. *See id.* at 319–20 (estimating a likelihood of agreement in cases based on whether the owner or infringer weighs his fundamental or adversarial interest more heavily).

66. *Id.* at 305.

67. *Id.* at 307.

68. *See id.* at 307–08 (describing the benefits of arbitration–mediation as opposed to mediation–arbitration).

and would be initiated upon the filing of an infringement complaint.⁶⁹ Along with the complaint, the plaintiff would submit an “ADR Brief” to the court’s board of mediators and arbitrators, who could then determine from the parties’ stated interests what forum best suited the dispute.⁷⁰

An ADR process shares some of the benefits of an administrative proceeding, including lower costs, faster resolution of cases, and an easing of the federal courts’ workload.⁷¹ Additionally, mediators with extensive copyright experience would be better able to resolve complex issues such as fair use.⁷² Foregoing protracted discovery would save time, money, and the intangible stress of the process, and the final settlement could remain confidential, unlike federal court cases.⁷³

There are, however, obstacles that likely would prevent the wide-scale adoption of mediation or arbitration—mediation in small copyright infringement cases. Since the process is voluntary, it is more likely to be chosen by parties who already have a relationship or see the value in creating a mutually beneficial agreement.⁷⁴ It is not likely to be as appealing for a copyright owner who wants to gamble on receiving statutory damages⁷⁵ or an alleged infringer who is only interested in free use and not paying a licensing fee.⁷⁶ Finally, since the process would only begin upon the filing of an infringement complaint, it still places a burden on small players with few resources to initiate a complaint.⁷⁷

69. *See id.* at 321 (noting that parties must voluntarily agree to mediation for it to work). Kevin Lemley points to the success rate of the Lanham Act Mediation Program in the U.S. District Court for the Northern District of Illinois as a model for how mediation can work in intellectual property disputes. The trademark mediation program reported successful resolution of two-thirds of the cases submitted to it. *Id.* at 309.

70. *Id.* at 323. The defendant would file its ADR Brief with its answer.

71. *See id.* at 312–13 (noting that mediation puts parties with fewer resources on more even ground with parties who have more financial resources).

72. *Id.* at 314; *see also* Elizabeth Champnoi, *Alternative Dispute Resolution for Copyright and Trademark Matters*, IP L. 360 (last visited May 7, 2013), <http://www.foreclosuremediationfl.adr.org/si.asp?id=4328> (touting the fifty trained “neutrals” who serve on the Copyright Panel of the American Arbitration Association and the expertise they provide).

73. *See* Lemley, *supra* note 63, at 313–14 (discussing the mental anguish caused by an “arduous litigation process” and the privacy and confidentiality mediation encourages).

74. *See* Ciolli, *supra* note 43, at 1017 (pointing out that parties will still need attorneys in a court-sponsored mediation and that some will not find it “socially optimal” to settle their disputes outside of court).

75. Lemley, *supra* note 63, at 316–17.

76. *Id.* at 318.

77. Ciolli, *supra* note 43, at 1017.

3. *Federal Small Claims Court Proposal*

Creation of a specialized federal small claims court for intellectual property cases could also create a forum that would encourage copyright protection. Two proposals suggest a model that could be used for copyright cases.

The benefits of an “expedited and simplistic” process under a small claims model are extolled by Anthony Ciolli.⁷⁸ Ciolli suggested using ALJs to hear disputes under a relaxed set of rules of evidence and procedure and housing the small claims proceeding in the federal courts where it would be a mandatory first step before a district court hearing.⁷⁹ Although Ciolli analogized the proposed IP small claims court to state small claims courts, he did not support the idea of a blanket jurisdictional limit on “small” copyright claims because of the potential for statutory damages that could range from \$750 to \$30,000 for each infringement.⁸⁰ Ciolli contrasted his proposal with the Lemley–Reese proposal by noting that a federal small claims court could hear all the affirmative defenses as well as consider injunctive relief—a remedy not available in an administrative setting.⁸¹ Ciolli also argued for allowing parties who participate in a federal small claims proceeding to agree to make it nonbinding.⁸²

Proposals for a patent small claims court also have been advanced, building off proposals from the American Bar Association and American Intellectual Property Law Association in the 1990s and a small claims intellectual property court in Great Britain.⁸³ Patent Attorney Robert P. Greenspoon proposed a trial experiment at one federal district court for patent claims, but the idea also could be used with other forms of intellectual property. The court would have a \$1 million ceiling for damages and the potential for a streamlined discovery process and jury trial before a federal judge.⁸⁴ Greenspoon also suggested making the court mandatory upon the request of either party.⁸⁵

Greenspoon drew ideas from the Patents County Court (PCC) of England and Wales, which hears claims not just of patent infringement but

78. *Id.* at 1023.

79. *Id.* at 1024.

80. *Id.* at 1025–26.

81. *Id.* at 1024–25.

82. *See id.* at 1026 (suggesting that to do so would make the proceeding more attractive for wealthy litigants).

83. Robert P. Greenspoon, *Is the United States Finally Ready for a Patent Small Claims Court?*, 10 MINN. J.L. SCI. & TECH. 549, 549–50 (2009).

84. *See id.* at 563–66 (describing a framework for a federal patent small claims court).

85. *Id.* at 563.

also of trademark and copyright infringement.⁸⁶ Trials last for no more than two days, and the PCC carefully controls the cross-examination of witnesses.⁸⁷ There is no formal cap on damages, but the court recommends that cases valued at more than £500,000 be heard in the High Court.⁸⁸ Copyright scholars in the United Kingdom also have suggested creating a small claims process within the PCC for even lower value claims of copyright infringement than are already heard within the PCC.⁸⁹ Time limits are set on the written presentation of evidence in the case, and non-attorneys can represent individuals before the PCC.⁹⁰ Even at the PCC, however, ADR is encouraged as another way to reduce costs of pursuing intellectual property infringers.⁹¹

Keeping the small claims court within the federal court system could be a small step closer to providing a more efficient forum for small copyright owners. The process would preserve the option to seek injunctive relief and could act as a “mini-trial” that would entice even wealthy plaintiffs to use the proceeding as a tryout for large cases.⁹² Providing a bench of dedicated judges would ensure the cases were handled by a court competent and familiar with the nuances of copyright law.⁹³ If non-attorneys could successfully handle cases, as at the PCC, then some cost-savings would be realized.⁹⁴ The downside would be that even minimally restricted discovery rules still place a hefty financial burden on small plaintiffs and defendants.⁹⁵ Housing a small claims proceeding in the federal courts also does nothing to decrease the burden on the federal judiciary or the delays litigants face in resolving disputes. An additional logistical problem would be choosing

86. CHANCELLOR OF THE HIGH COURT, THE PATENTS COUNTY COURT GUIDE 5 (May 2011) (parsing the allocation of responsibilities between the High Court for Patents and the Patent County Court, which was created to hear “smaller, shorter, less complex, less important, lower value actions”).

87. *See id.* at 5–6 (explicitly referencing the court’s purpose of providing “access to justice” for small- and medium-sized businesses).

88. *Id.*

89. HARGREAVES, *supra* note 10, at 13. The independent report, commissioned by U.K. Prime Minister David Cameron, endorses streamlined procedures, a fixed scale of recoverable costs, and a cap on damages.

90. CHANCELLOR OF THE HIGH COURT, *supra* note 86, at 10.

91. *Id.* at 15–16.

92. Ciolli, *supra* note 43, at 1026.

93. *Cf.* Greenspoon, *supra* note 83, at 565–66 (describing the costs and benefits of drawing from the ranks of senior judges for a specialized patent court and the level of expertise that they could bring to bear in making rulings).

94. CHANCELLOR OF THE HIGH COURT, *supra* note 86, at 15.

95. *See* Ciolli, *supra* note 43, at 1029 (anticipating that poorer litigants will be forced into inequitable settlements by wealthier parties who can drive up the costs of discovery and pre-litigation motions).

whether to locate a federal small claims court in each federal district or just in a few districts close to major intellectual property centers (e.g., New York, Nashville, Los Angeles, and Washington, D.C.).

C. *Other Administrative Proceedings Provide Useful Analogies*

Federal administrative agencies provide some ideas that could be employed in a copyright infringement administrative proceeding. An examination of procedures in fields as diverse as veterans' benefits and trademarks highlights potential benefits and drawbacks for an administrative proceeding in the Copyright Office.

1. *Trademark Trial and Appeal Board*

Within the intellectual property arena, the Trademark Trial and Appeal Board (TTAB) provides a ready model for the Copyright Office to consider. The TTAB is a panel of ALJs in the U.S. Patent and Trademark Office that hears challenges to the registration of trademarks as well as petitions to cancel trademark registrations on the basis that a mark has become generic or infringes on a prior mark.⁹⁶ The TTAB's remedy is limited to determining whether a mark can be registered or canceled, but if a trademark owner seeks damages or injunctions, he must go to federal court.⁹⁷ Nevertheless, the cancellation of a registered mark or blocking of a proposed mark is a protective wall for a trademark owner who wants to stop goods entering the market with a confusingly similar mark that infringes his own.

The cost of a TTAB proceeding is generally less than that of a federal court dispute over a trademark, but TTAB proceedings take more time.⁹⁸ To help remedy this delay, the TTAB recently instituted an Accelerated Case Resolution (ACR) process to handle smaller, less complicated cases with fewer disputed facts.⁹⁹ The parties must stipulate that the TTAB can resolve any disputed facts and must rely on a written record to settle their claims. In exchange, the ALJs are to make a decision on the merits within

96. Lanham Act § 17, 15 U.S.C. § 1067 (2006).

97. 3 MCCARTHY ON TRADEMARKS & UNFAIR COMPETITION § 20:99 (4th ed. 2013).

98. David J. Kera, *Inter Partes Matters: General Background and Prefiling Considerations*, in A LEGAL STRATEGIST'S GUIDE TO TRADEMARK TRIAL AND APPEAL BOARD PRACTICE 2 (Jonathan Hudis, ed. 2010).

99. TRADEMARK TRIAL & APPEAL BOARD MANUAL OF PROCEDURE §§ 528.05(a)(2), 702.04 (3d ed. 2011); TTAB, U.S. PATENT & TRADEMARK OFFICE, ACCELERATED CASE RESOLUTION (2011) available at http://www.uspto.gov/trademarks/process/appeal/Accelerated_Case_Resolution__ACR__notice_from_TTAB_webpage_12_22_11.pdf.

fifty days of considering the written record.¹⁰⁰ The ACR provides a simplified process for trademark owners who wish to settle their business disputes and move on with their trade.

The written record that is at the heart of each case is a central benefit of the TTAB procedure. The process does not require parties to go through an oral hearing, which saves time and money. There is typically the same amount of discovery in a TTAB case as there is in federal district court, though; parties must invest the same—or more—time and money as in litigation. With their specialized knowledge of trademark law and expertise in interpreting complicated case law surrounding “likelihood of confusion” between similar marks, the TTAB judges can be a resource for the parties.¹⁰¹ On the other hand, the TTAB is hamstrung by its inability to grant injunctive relief, which for trademark owners can make a significant difference in the market.

2. *Department of Veterans Affairs*

Another model for the Copyright Office is the U.S. Department of Veterans Affairs (VA), which has—at least on paper—a “nonadversarial, informal system” for the determination of benefits for veterans and their dependents.¹⁰² Critics, however, insist that even a pro-claimant system such as the one at the VA requires strong advocates.¹⁰³ Initial hearings are held at regional offices closer to claimants, and in some facilities, videoconferencing is available.¹⁰⁴ The style of the hearing highlights the Department’s intention to make it open and approachable for non-attorneys. Hearings are typically conducted in “unimposing” rooms in standard government buildings, and the decisionmaker sits on the same level as the claimant. Formal rules of evidence do not apply, so the claimant and representative gain a significant amount of control over the organization, scope, and duration of the hearing.¹⁰⁵ The Board of Veterans Appeals reviews agency decisions *de novo* before appeal to federal district

100. *Id.*

101. *See* Lanham Act § 17, 15 U.S.C. § 1067 (2006). “Likelihood of confusion” is the test that determines whether one trademark infringes on another by causing consumer confusion in the marketplace.

102. VETERANS BENEFITS MANUAL 7 (Barton F. Stichman et al., eds., 2012). The manual points out that the biggest obstacle in winning a Veterans Affairs benefits claim is determining which evidence is needed and tracking the evidence down.

103. *Id.*

104. *Id.* at 959–61. Despite the availability of videoconferencing, the manual recommends that claimants try to make an in-person hearing because “it is more difficult to deny a claim after meeting face-to-face with the claimant.” *Id.*

105. *Id.* at 962.

court.¹⁰⁶

The Copyright Office could adopt a similar style in creating administrative procedures that are easy to use for creators and authors less adept at handling legal issues. The VA hearings encourage pro se applicants to take initiative in their own cases and encourage cooperation between administrators and claimants. If the Copyright Office were to use similar strategies for its hearings, it could foster more equitable outcomes regardless of the depths of the parties' pockets.

3. *Social Security Administration*

The Copyright Office could also look to the example set by the Social Security Administration (SSA) with claims for disability benefits. Appeals take place in a nonadversarial hearing before an ALJ. Like the VA hearings, federal rules of evidence are not applied.¹⁰⁷ As a matter of policy, the Agency will hold hearings within seventy-five miles of a claimant's home, and if the claimant cannot travel, the ALJ can meet at the claimant's home, hospital, or a nearby institution.¹⁰⁸ If the claimant does not have an attorney, the ALJ has a positive duty to the parties in front of him to develop the record.¹⁰⁹ The ALJ can compel production of documents and appearances of witnesses, who must testify under oath.¹¹⁰

The SSA hearings demonstrate another example of creating a procedure intended to assist the parties involved. Were the Copyright Office to follow a similar path, it could schedule voluntary hearings for copyright infringement actions at the request of both parties. It could also consider permitting videoconferencing or allowing "circuit rider" ALJs from the Copyright Office to hold regional hearings of cases, if the parties agree to coordinate schedules so as to maximize the ALJs' time in the region. For instance, if there were a number of cases that were filed from New York, an ALJ based in the Copyright Office could hold a week of hearings there to make them more convenient to both parties and to resolve a number of cases in the same trip. Unfortunately, holding regional hearings or setting up videoconferencing would require either that the Copyright Office invest more in hardware and facilities, or that the Copyright Office partner with other agencies or courts around the country with the necessary resources

106. *Id.* at 879.

107. 20 C.F.R. § 404.950(c) (2012).

108. See CHARLES E. SAMUELS, VIRGINIA LAW FOUNDATION, ESTABLISHING AND MAINTAINING A SUCCESSFUL SOCIAL SECURITY DISABILITY BENEFITS PRACTICE I-15 (2011) (offering continuing legal education on the Social Security Administration's hearing process).

109. *Fessler v. Matthews*, 417 F. Supp. 570, 574 (S.D.N.Y. 1976).

110. 20 C.F.R. § 404.950(d)–(e) (2012).

and facilities to conduct these hearings.

II. RECOMMENDATIONS

A. Creation of a Copyright Infringement Remedy Panel (CIRP)

This Article proposes the creation of a new Copyright Infringement Remedy Panel (CIRP) at the Copyright Office. The CIRP would provide an administrative remedy for the smallest claims of copyright infringement, giving more value to copyright creators and inspiring more respect from users of copyrighted material by creating an additional deterrent to infringement.¹¹¹

The CIRP would be composed of a panel of three ALJs based in the Copyright Office.¹¹² The CIRP judges would be similarly qualified and recruited to the office in the same manner as the three Copyright Royalty Judges (CRJs) who currently hear statutory licensing cases under Title 17.¹¹³ Because an administrative staff already exists to support the CRJs, a support structure would be in place to provide assistance to CIRP judges. These CIRP judges would initially assess an infringement claim online but, like SSA or VA judges, could travel to hold voluntary hearings in regional federal facilities, which would improve access to the hearings for copyright

111. The role of administrative agencies in copyright law has been limited, but there are good arguments for increasing the use of agencies for copyright adjudication. See Sapna Kumar et. al., Panel Discussion, *An Uncomfortable Fit?: Intellectual Property Policy and the Administrative State*, 14 MARQ. INTELL. PROP. L. REV. 441, 448, 458–59 (2010) (recording comments by Professor Jason Mazzone encouraging Congress to delegate more power to an administrative agency to oversee copyright law).

112. Constitutional separation of powers questions about housing a tribunal of administrative law judges in the Copyright Office are beyond the scope of this Article, but are a large concern for the Office. See *Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 684 F.3d 1332, 1340–41 (D.C. Cir. 2012) (holding that the position of the Copyright Royalty Judges (CRJs) violates the Appointments Clause and granting the Librarian of Congress the power to remove the CRJs from their offices in order to alleviate the constitutional question); *SoundExchange, Inc. v. Librarian of Cong.*, 571 F.3d 1220, 1226 (D.C. Cir. 2009) (Kavanaugh, J., concurring) (raising a separation of powers question about the appointment of CRJs by the Librarian of Congress instead of by the President under the Appointments Clause); Michael W. Carroll, *Fixing Fair Use*, 85 N.C. L. REV. 1087, 1131–32 (2007) (suggesting that a separation of powers argument against ALJs in the Copyright Office should be considered through a functional, rather than formalist, analysis); Greg Louer, Comment, *Copyright at a Crossroad: Why Improper Appointment of Copyright Royalty Judges Could Undermine American Copyright Law, and How Congress Can Solve the Problem*, 60 CATH. U. L. REV. 183, 205 (2010) (advocating that Congress amend Title 17 to give the President authority to appoint Copyright Royalty Judges in order to avoid the separation of powers problem).

113. 17 U.S.C. §§ 801–802 (2006).

owners around the country.¹¹⁴

Infringement claims brought before the CIRP could remain “small claims” by capping damage awards at some number that incentivizes participation in the CIRP process.¹¹⁵ That amount could be set at a hard-and-fast number, perhaps fewer than \$30,000,¹¹⁶ or it could be indexed to inflation or some other annually escalating number. Calculations of damages could be determined based on the proven value of the work,¹¹⁷ though some groups representing artists emphasize the need for any administrative procedure to continue to award statutory damages, costs of the action, and attorney’s fees.¹¹⁸ If the CIRP process remains simple, there may be little need to hire an attorney to pursue a claim. Costs of pursuing an infringement claim through the CIRP also should be minimal if discovery is limited and the proceeding takes place primarily online or in regional hearings.

A key feature of the CIRP would be the ability of copyright owners to bring an initial infringement claim online. A centralized website linked to the Copyright Office site would allow copyright owners to provide proof of registration for their work and to present a prima facie case of infringement. The plaintiff’s evidence could be reviewed online by the Copyright Office support staff members, who would ensure that the correct defendant was served with notice of the infringement action. If the plaintiff presents a prima facie case of infringement, the defendant would be required to participate in the administrative proceeding online, instead of being allowed to remove the case immediately to district court.

An initial ruling would be made by a single CIRP judge within sixty days of the complaint. Presentation of any affirmative defenses that the CIRP

114. See discussion *supra* Part I.C.2–3.

115. See Comments from the Copyright Alliance, to Library of Congress, Copyright Off. (Jan 17, 2012) https://copyrightalliance.org/sites/default/files/sites/all/files/u8/small_claims_-_comments_011712.pdf; Initial Comments from Microsoft Corporation, to Maria A. Pallante, Register of Copyrights, U.S. Copyright Off. (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/34_microsoft_corporation.pdf. These groups do not suggest a specific number but encourage the Copyright Office to pick an amount that would allow appropriate recovery for plaintiffs.

116. See Letter from Michael Traynor, Katherine C. Spelman, & Sophie Cohen, to Maria A. Pallante, Register of Copyrights, U.S. Copyright Off. (Jan. 13, 2012), http://www.copyright.gov/docs/smallclaims/comments/52_traynor_michael.pdf. This amount also mirrors the limit on statutory damages for infringement of a single work. 17 U.S.C. § 504(c)(1) (2006).

117. Letter from Robert C. Gilmartin, Attorney, to Copyright Off. (Dec. 28, 2011), http://www.copyright.gov/docs/smallclaims/comments/21_gilmartin.pdf.

118. Memorandum from The American Society of Composers, Authors and Publishers and SESAC, Inc., to U.S. Copyright Off. (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/03_ascap.pdf.

judge finds persuasive would result in the complaint being dismissed without prejudice for the plaintiff to re-file in federal court. If the CIRP judge finds the defendant infringed, the defendant would be able to appeal to any federal district court. Consistent with CRJ rulings and other cases concerning decisions by the Register of Copyrights, an appeal would face a *de novo* standard of review.

If an infringement ruling were granted, the CIRP would have a few remedies to choose from. Although as an administrative body it could not issue injunctions, the CIRP would be able to set monetary damages.¹¹⁹ These would be based on the CIRP's educated estimates of licensing fees in the industry relevant to the infringed work, as well as a demonstration by the plaintiff of either actual profits lost or the amount the defendant was unjustly enriched, or both.¹²⁰ The CIRP could also assess the cost of the administrative proceeding—as limited as it may be compared to traditional litigation—to the infringer.¹²¹

Novel remedies that the CIRP could consider would be enforcing a Creative Commons license for attribution,¹²² if the plaintiff distributed the copyrighted material that was infringed under that license.¹²³ The Creative Commons attribution license provides broad permissions from copyright creators for others looking to build on the original content so long as the follow-up work gives proper attribution to the initial creator.¹²⁴ Enforcing a right of attribution would bring the United States more in line with international copyright and domestic social norms between creators and

119. See discussion *infra* Part III.B (outlining the Supreme Court's test for issuing injunctions).

120. See RUSSELL L. PARR, INTELLECTUAL PROPERTY INFRINGEMENT DAMAGES 107–19 (2d ed. 1999) (listing the fifteen factors for determining a reasonable royalty rate for patents outlined in *Georgia-Pac. Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116 (S.D.N.Y. 1970), *modified*, 446 F.2d 295 (2d Cir. 1971)). Some of the *Georgia Pacific* factors easily translate into the copyright realm. They include: prior royalties the licensor has received, rates previously paid by the licensee for similar work, the nature and scope of the license to the work, the commercial relationship between the parties, the profitability and popularity of the work, the portion of the infringer's profit attributable to the work at issue, and the price the parties would have likely agreed to had they negotiated.

121. See Lemley & Reese, *supra* note 26, at 1422–23 (noting that award of costs is also routine in civil litigation).

122. *Attribution 3.0 Unported*, CREATIVE COMMONS, <http://creativecommons.org/licenses/by/3.0/> (last visited May 7, 2013).

123. See Samuelson et al., *supra* note 50, at 1208 (proposing that the system vindicate breaches of attribution conditions in copyright licenses).

124. *About*, CREATIVE COMMONS, <http://creativecommons.org/about> (last visited May 7, 2013) (“The infrastructure we provide consists of a set of copyright licenses and tools that create a balance inside the traditional ‘all rights reserved’ setting that copyright law creates.”).

users.¹²⁵ The CIRP could interpret the attribution right under a reasonableness standard, based on the context of how the copyrighted material is displayed; it could also rule on whether attribution could be waived by contract.¹²⁶ Additionally, the CIRP could issue letters to ISPs alerting them of infringers who are designated “repeat offenders” after a certain number of actions before the panel.¹²⁷ These letters would serve as a warning of increased liability to the ISPs if they continue to provide access to repeat digital infringers. The potential increase in contributory liability could encourage ISPs to block or monitor infringers who may use the ISP’s services to sell or post infringing works.¹²⁸

Creating a new administrative process to make findings of copyright infringement and giving the CIRP judges the power to enforce rights of attribution would require Congress to amend the Copyright Act. While the Copyright Office will send its final report and recommendations to Congress in September,¹²⁹ the timeline for action is unclear. Congress has been bogged down with difficult budget and economic concerns, and copyright issues may not be a huge priority in 2013. The willingness to act will depend on the pressure from copyright interest groups, but it is not yet clear whether the large industry groups will have an incentive to use a small copyright claims system and, by extension, support changes to the copyright laws.

B. *A Hypothetical Enforcement Action by the CIRP*

This Part exemplifies how the CIRP remedy would apply to a hypothetical copyright infringement of stock photography. Let us follow a photographer down the rabbit hole to “recover” for infringement of her photo under the current system. For example, imagine that an adventure photographer captured a dynamic shot of whitewater kayakers running a river and added the image to the portfolio on her website. A few weeks

125. Samuelson, et al., *supra* note 50, at 1243–45. There is a limited right of attribution protected under the Visual Artists Rights Act, 17 U.S.C. § 106A (2006), but it is only available to visual artists of works in limited production. The Berne Convention, the international copyright treaty created in 1886 that the United States signed in 1989, also provides for a right of attribution. Berne Convention for the Protection of Literary and Artistic Works art. 6bis, *opened for signature* Sept. 9, 1886, 1 B.D.I.E.L. 715, *available at* http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html#P23_530.

126. Samuelson, et al., *supra* note 50, at 1244.

127. *See* discussion *supra* Part I.B.1.

128. Lemley & Reese, *supra* note 26, at 1421–22.

129. *See Remedies for Copyright Small Claims*, U.S. COPYRIGHT OFF., <http://www.copyright.gov/docs/smallclaims/> (last updated Apr. 29, 2013) (outlining the process for recommending changes to Congress).

later, while looking online for customers who might be interested in purchasing her photos or licensing them for their own use, she found one of her photographs with the watermark removed being used as a background on a website advertising rafting trips. The photographer may not morally object to the use of the photo, but since she makes a living licensing her work, she will seek to stop the unlicensed use of the picture. In fact, like many creative professionals, the photographer's intellectual property is the single most valuable asset of her business.¹³⁰

Under the current system, our photographer would hire a lawyer at an average rate of \$340 an hour to pursue the infringer.¹³¹ The lawyer may first send a cease-and-desist letter, but with a recalcitrant infringer reaping the benefits from this dramatic picture on his website, the letter would likely be ineffective. The next step would be for the lawyer to file a complaint in federal district court, where the photographer would face the time delays and costs already outlined.¹³²

But if, instead, the photographer could call upon the CIRP, she may not even need a lawyer to prosecute her infringement complaint. After logging into the CIRP webpage hosted by the Copyright Office, a clear interface that mirrors the updated registration system of the U.S. Patent and Trademark Office¹³³ would allow the photographer to submit a copy of her registration and a written record of the infringement, as well as electronically sign an affidavit swearing that she is submitting a prima facie claim of copyright infringement.¹³⁴ Upon receipt of her claim, CIRP staff would notify the alleged infringer and issue a subpoena to require a written submission of any potential defenses to the infringement within thirty days of notification of the case.¹³⁵ By the end of sixty days after the initial submission, a CIRP judge would have reviewed both the complaint and the written record from the defendant and issued an initial ruling.

Since the photographer does not protest the general use of the photo, but instead is only seeking to get paid for her work, the CIRP judge could remedy the case by requiring the website owner to pay a reasonable

130. See *Business Intellectual Property Theft*, BUSINESSTHEFT.COM, <http://www.business-theft.com/businesstheftintellectualproperty.html> (last visited May 7, 2013) (citing U.S. Department of Justice statistics from 2002 that found more than half of intellectual property theft defendants were convicted of infringement valued at more than \$70,000).

131. AIPLA, REPORT OF THE ECONOMIC SURVEY 2011, 8 (2011), available at <http://www.aipla.org/members/Documents/AIPLA%202011%20Report-%20Summary%20102411.pdf>.

132. See discussion *supra* Introduction and Part I.A.

133. U.S. PATENT & TRADEMARK OFFICE, <http://www.uspto.gov> (last visited May 7, 2013).

134. See Lemley & Reese, *supra* note 26, at 1413–14.

135. See discussion *supra* Part II.A.

licensing fee for the photo, as well as the photographer's costs for pursuing the CIRP action.¹³⁶ In addition, the CIRP judge could mandate that the website owner attribute the photo to the copyright owner so that she gets her due on the Internet.¹³⁷ With minimal time and cost, the CIRP would have remedied a copyright infringement that would have gone unchallenged under the current copyright regime.

III. BENEFITS AND UNRESOLVED PROBLEMS

A. *Efficient Remedies Improve Copyright Protection and Increase the Value of Copyright*

A system that provides better access to remedies for copyright infringement could increase the perceived legitimacy of copyright and garner larger public support for copyright protections.¹³⁸ Increasing the likelihood that any individual copyright owner may pursue an infringement claim could cause infringers to recalculate the risks involved in stealing a photo or copying and pasting from a website.¹³⁹ It also would alleviate the burden on the federal courts.¹⁴⁰

Creating a system that relies more heavily on damage awards rather than injunctive relief for copyright infringement could bring the system

136. See WESTON ANSON, *IP VALUATION AND MANAGEMENT* 119 (2010) (pointing out that “commercial valuation tends to seek a true midpoint in value,” while “[t]he very nature of litigation alters the perception of value” by placing parties in adversarial positions as to the value of the intellectual property at issue).

137. See Mike Linksvayer, *Creative Commons Attribution—ShareAlike License Enforced in Germany*, CREATIVECOMMONS.ORG (Sept. 15, 2011), <http://creativecommons.org/weblog/entry/28644> (mentioning that cases involving Creative Commons licenses have rarely been taken to court).

138. See HARGREAVES, *supra* note 10, at 513 (“Widespread disregard for the law erodes the certainty that underpins consumer and investor confidence. In the most serious cases, it destroys the social solidarity which enables the law abiding majority to unite against a criminal minority.”); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 17 (2010) (arguing that the public may withdraw its support for the copyright system if it sees copyright protections as illegitimate); Joel Reidenberg, *The Rule of Intellectual Property Law in the Internet Economy*, 44 HOUS. L. REV. 1073, 1076–79 (2008) (suggesting that citizens are engaging in a frontal challenge to public policy and the rule of law by flouting copyright).

139. CARSTEN FINK, *ADVISORY COMM. ON ENFORCEMENT, WORLD INTELLECTUAL PROP. ORG., ENFORCING INTELLECTUAL PROPERTY RIGHTS: AN ECONOMIC PERSPECTIVE* 18 (2009) (“Each individual’s decision to break the law depends on the expected pay off (the profit from selling counterfeit goods), the costs of escaping punishment, the wage rate in an alternative legitimate activity, the probability of apprehension and conviction, the prospective penalty if convicted, and the individual’s (dis-)taste for breaking the law (consisting of a combination of moral values and preference for risk).”).

140. See Greenspoon, *supra* note 83, at 549–552 (suggesting that having a small claims court would “encourage negotiated resolutions for good faith small-scale disputes,” at least in the patent arena, as well as motivate lawsuit avoidance).

more in line with Supreme Court preferences. In *Campbell v. Acuff-Rose Music, Inc.*, the Court suggested that the purposes of copyright law could be better served by granting damage awards instead of injunctions.¹⁴¹ Scholars have suggested that alternative remedies for copyright violations are appropriate in many scenarios because of the disproportionate leverage that copyright owners gain through threats of injunctions.¹⁴² Emphasizing monetary damages through the CIRP could facilitate better use of licensing and expand the lawful use of copyrighted works.

B. Lack of Injunctive Relief and Fair Use Challenges Could Be Stumbling Blocks

A potentially huge stumbling block for plaintiffs is that the CIRP would be unable to grant injunctive relief that would remove infringing material from the marketplace and off the Internet. Defendants, on the other hand, may dislike an administrative process that is less adept than the federal courts at handling complicated affirmative defenses like fair use.

Equitable relief such as injunctions are available through the courts if plaintiffs meet the four-factor test the Supreme Court set out in *eBay Inc. v. MercExchange, LLC*.¹⁴³ In the case of some copyrighted material, such as DVDs, mp3s, or books, the plaintiff may be more concerned with removing infringing material from the marketplace than recovering monetary damages for harm. However, courts are often reluctant to grant injunctions based on the “onerous nature” of the remedy.¹⁴⁴ Justice Anthony Kennedy recognized in the *eBay Inc.* case that “the threat of an injunction [can be] employed simply for undue leverage in negotiations.”¹⁴⁵

In cases where an injunction is truly the only solution to remedy the market harm of a copyright infringement, federal court would still remain an option. The CIRP would not be a mandatory process for copyright owners, but rather an alternative for those who would naturally gravitate

141. 510 U.S. 569, 578 n.10 (1994).

142. Samuelson, et al., *supra* note 50, at 1226. The Copyright Principles Project (CPP) suggests that if courts considered remedies such as payment of a licensing fee or ongoing royalties for use of copyrighted material, then copyright owners and potential infringers may enter into “more appropriate bargaining.” *Id.* at 1225. The group also notes, however, that alternative remedies could be seen as encouraging infringement by imposing a “compulsory license” that defendants will simply calculate in as part of the infringement risk equation. *Id.*

143. 547 U.S. 388, 391 (2006) (stating that the plaintiff must demonstrate he suffered irreparable injury, monetary damages are inadequate to compensate him for the injury, a remedy in equity is warranted—after balancing the hardships between plaintiff and defendant—and the public interest would not be disserved by a permanent injunction).

144. HOWARD C. ANAWALT, IP STRATEGY: COMPLETE INTELLECTUAL PROPERTY PLANNING, ACCESS AND PROTECTION § 1:2 (2012).

145. *eBay Inc.*, 547 U.S. at 396 (Kennedy, J., concurring).

toward the forum that would provide the most efficient remedy at the lowest cost. The CIRP is more likely to provide relief to digital copyright owners. Still, a copyright owner who wanted to have pirated CDs or physical objects removed from the market could still obtain relief in federal court.

Affirmative defenses to claims of copyright infringement include fair use.¹⁴⁶ Fair use analyses can be complicated and fact specific.¹⁴⁷ Prominent consumer protection groups note that the fair use defense “touch[es] on free expression, privacy, and competition policy”—larger, more complex issues that may not be fully heard in a shortened dispute hearing timeframe.¹⁴⁸ Defendants in an administrative proceeding, however, would have the benefit of the CIRP judges’ expertise in copyright law, which should increase the likelihood that even a fact-specific defense like fair use would receive a full hearing. Also, the CIRP process would contain a *de novo* appeal to federal district court, which would give defendants another opportunity to raise a fair use defense.

CONCLUSION

Scholars have noted the challenges in moving past the rhetoric espoused by both content owners and content users to address the toughest, most controversial parts of copyright law.¹⁴⁹ This Article takes aim at the challenge of fairly providing remedies for copyright infringement by advocating for the creation of a small claims remedy process. This process would deter infringements, resolve complaints more quickly, and lower the cost of remedying infringements. Providing for an administrative proceeding within the Copyright Office would take advantage of the substantive knowledge in the office and existing support staff. By realigning remedies for infringement—damages based on licensing calculations, required attribution, and denial of digital access for “repeat infringers”—with social norms for copyright law, the CIRP would increase the value and relevance of copyright law by putting copyrights back in the hands of the creators who most need them.

146. 17 U.S.C. § 107 (2006).

147. See Carroll, *supra* note 112, at 1099–1106 (noting that “[t]he scope of the fair use defense is sufficiently uncertain in light of the potential penalties to scare away a sizeable portion of potential users” before discussing judicial application of fair use factors).

148. Memorandum from Public Knowledge, Electronic Frontier Foundation, and Future of Music Coalition, to U.S. COPYRIGHT OFF. (Jan. 17, 2012), http://www.copyright.gov/docs/smallclaims/comments/46_pk_eff_fm.pdf.

149. Samuelson, et al., *supra* note 50, at 1179. Despite the differences between participants in the CPP that Samuelson describes, the group did agree that a small claims procedure within the Copyright Office was one of its top recommendations.

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“MILITARY PAY CASES”: AN INTRODUCTION

WILLIAM C. BRYSON*

Administrative law, perhaps more than any other field of law, is crowded with separate nooks and crannies, each with its own distinctive history, character, and governing legal rules. Because of the pervasiveness of the administrative state, marked by the growth of the Executive Branch and Congress’s unsuccessful attempt at administrative uniformity, individual claims against the State are adjudicated by a mixture of individual decisionmakers, boards, commissions, and agencies. The distinctive way in which those adjudicative bodies function, and the different way that courts approach judicial review of their decisions, is much of what makes the study of administrative law intriguing.

The two thoughtful Articles set out below deal with a facet of administrative law that is not widely studied, but that has a long history and largely governs the manner in which the civilian judicial system interacts with military personnel decisions. Since the early days of the Court of Claims—and its present-day successor, the Court of Federal Claims—the court has dealt with service member claims relating to personnel decisions, such as denial of promotion, unlawful discharge, involuntary retirement, and failure to make appropriate determinations as to medical condition or disability. Those claims have all been addressed under the rubric of “military pay cases,” based on the fact that the Court of Federal Claims has jurisdiction over those cases stemming from the claimed denial of payments that the service member contends are due.¹ The following two essays, one by Court of Federal Claims Judge Charles Lettow and the other by military law expert Eugene Fidell, set forth some details of the intricate system of

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1. As Judge Lettow explains in detail, the Court of Federal Claims gets its jurisdiction over many of the “military pay cases” from the Military Pay Act, 37 U.S.C. § 204 (2006), which is a “money-mandating” statute that creates a cause of action within the jurisdiction of the Court of Federal Claims under the Tucker Act, 28 U.S.C. § 1491 (2006). In the case of claims for disability pay, the court’s jurisdiction stems from 10 U.S.C. § 1201 (2006). *Chambers v. United States*, 417 F.3d 1218, 1223 (Fed. Cir. 2005); *Fisher v. United States*, 402 F.3d 1167, 1174–75 (Fed. Cir. 2005); *McHenry v. United States*, 367 F.3d 1370, 1378 (Fed. Cir. 2004).

administrative and judicial decisionmaking in this area. Their expertise in the field greatly exceeds my own, and I offer only a few general comments by way of introduction to their more substantive remarks.

The history of military pay cases has been the story of the evolving relationship between the military and the court, with the court struggling to balance its responsibility to provide meaningful review of agency action against the principle that civilian courts may not lightly second-guess military personnel decisions. Over time, there has been a significant change in the role of the court as well as in the role played by the administrative bodies within the military personnel system itself.

In the early years, the Court of Claims acted with what would strike modern jurists as uncommon boldness in dealing with military personnel issues. For example, in 1869, in one of the Court of Claims’ earliest decisions in a military pay case, the court dealt with a pay claim by a union soldier, one Thomas W. Kelly, who had left his unit but later returned and surrendered himself as a deserter.² He was accepted back into his unit with the condition that he “made good the time lost by desertion.”³ He served the extra time and was ultimately given an honorable discharge.⁴ He then sought payment of the \$225 remaining balance of the \$400 bonus he had been promised when he enlisted.⁵ The War Department, however, determined that by deserting he had forfeited his right to the unpaid portion of his enlistment bonus.⁶ Feeling aggrieved, Kelly sued in the Court of Claims and won. After stating the facts, the Court of Claims simply said, “We think the law as applied to these facts authorizes us to render a judgment in favor of the claimant”⁷ While acknowledging the government’s argument that a deserter should forfeit all pay and bonuses, the court found telling that the claimant was accepted back into his unit.⁸ Although it did not “feel inclined to excuse or extenuate the desertion,” the court concluded that “the contract for continuous service between claimant and defendants, which was broken by the claimant, was revived upon terms and conditions proposed to the claimant, accepted by him, and faithfully observed.”⁹ That being the case, the court held that the claimant was entitled to his bonus.¹⁰ The Supreme Court affirmed in a

2. Kelly v. United States, 5 Ct. Cl. 476 (1869), *aff’d*, 82 U.S. (15 Wall.) 34 (1872).

3. *Id.* at 482.

4. *Id.*

5. *See id.* at 481.

6. *Id.* at 484.

7. *Id.* at 482.

8. *Id.* at 483.

9. *Id.*

10. *Id.* at 482.

single paragraph, concluding that the soldier's honorable discharge removed any impediment to receiving his bonus.¹¹

That case would likely strike a modern court as remarkable for the court's willingness to make its own assessment of the reasonableness of a military decision regarding how to treat deserters, even in the absence of statutory or regulatory guidance. Since that time, and particularly during the past thirty years, the Court of Federal Claims, frequently at the behest of its reviewing court, the Court of Appeals for the Federal Circuit, has become substantially more deferential to the military on matters of personnel decisionmaking. As Judge Lettow notes in his Article, part of the court's reluctance is the result of repeated reminders from the Supreme Court that the military is a "specialized society separate from civilian society" that is not subject to the same degree of judicial oversight as civilian agencies.¹² Part of it results from congressional action, which has created new administrative remedies within the military and correspondingly limited the role of judicial review of military personnel decisions in several important respects.¹³ Part of it also comes from the courts' willingness to defer to the military's internal administrative procedures. Some reasons for this evolution toward increased deference are less doctrinal and more intangible. For example, the creation of the Federal Circuit as the reviewing court for the Court of Federal Claims meant the circuit saw military pay cases much less frequently than did the former Court of Claims. While it may not be true that judicial familiarity breeds contempt, it may be the case that judicial *lack* of familiarity gives rise to a greater willingness to defer. Not surprisingly, courts are typically more willing to act on matters that raise the kinds of issues the courts deal with every day, and less willing to act when they feel the subject matter is out of

11. *United States v. Kelly*, 82 U.S. (15 Wall.) 34, 36 (1872).

12. *Weiss v. United States*, 510 U.S. 163, 174 (1994) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974)); *see also* *Chappell v. Wallace*, 462 U.S. 296, 300, 303-04 (1983); *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953).

13. Judge Lettow describes the legislative creation of the boards for the correction of military records (correction boards) in 1946. In 1980, Congress enacted legislation that created special selection boards to make military promotion decisions when it was determined that the officer's record before the original promotion board contained faulty information. *See* 10 U.S.C. § 628(a) (2006). In 2001, Congress enacted 10 U.S.C. § 1558, which addressed the responsibilities of correction boards and selection boards in recommending and reviewing personnel actions; among other things, the statute required a service member to exhaust remedies before a "special board" (including correction boards) before seeking judicial review. *Id.* § 1558. At the same time, Congress amended § 628 to impose similar restrictions on judicial review of decisions not to convene a special selection board, decisions of the special selection boards, and decisions not to select a service member for promotion. *Id.* § 628(g)-(h).

their area of expertise. In the context of military personnel cases, the courts have been willing to give close attention to procedural questions, such as whether the military has followed its own regulations in taking action affecting a service member, but less willing to question the underlying personnel decisions, such as whether the service member’s medical condition was disabling or whether the service member was qualified for promotion.

Several themes have emerged from the cases brought before the Court of Federal Claims and the Federal Circuit over the past three decades. First, while the courts have traditionally treated recourse to boards for the correction of military records (correction boards) within each military branch as optional, they have held that when former service members seek relief from those correction boards, the boards’ decisions are reviewed under standards normally applied to judicial review of agency action under the Administrative Procedure Act (APA).¹⁴ Second, the courts “presume that actions taken by the Correction Board are valid, and the burden is upon the complainant to show otherwise.”¹⁵ Third, the courts have held that, in cases coming to the Court of Federal Claims after the completion of correction board proceedings, claims not raised before the correction boards are deemed waived.¹⁶ Fourth, and relatedly, the Court of Federal Claims ordinarily will not accept new evidence in cases in which the service member previously sought relief from a correction board; if particular evidence could have been submitted to the correction board but was not, the Court of Federal Claims ordinarily will exclude it from consideration, as the court’s review is typically limited to the administrative record.¹⁷ Those principles are essentially borrowed from the APA and reflect what could be called the “APA-ification” of the system of judicial review of military personnel decisions. That has occurred even though, as Eugene Fidell points out, an argument can be made that the administrative proceedings before the correction boards are not sufficiently formal to be

14. 5 U.S.C. §§ 701–06 (2006). As Judge Lettow notes, when judicial review of correction board decisions is sought in the district courts, it is well settled that the Administrative Procedure Act (APA) governs the review proceeding. *See Coburn v. McHugh*, 679 F.3d 924, 929 (D.C. Cir. 2012); *Gillan v. Winter*, 474 F.3d 813, 817 (D.C. Cir. 2007). It is only in recent years, however, that the Federal Circuit has explicitly held the APA judicial review provisions applicable to correction board decisions when review is sought in the Court of Federal Claims. *See, e.g., Walls v. United States*, 582 F.3d 1358, 1367 (Fed. Cir. 2009).

15. *Melendez Camilo v. United States*, 642 F.3d 1040, 1045 (Fed. Cir. 2011) (citing *Cooper v. United States*, 203 Ct. Cl. 300, 304 (1973)).

16. *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006).

17. *See Walls*, 582 F.3d at 1367–68; *Metz*, 466 F.3d at 998; *see also Barnick v. United States*, 591 F.3d 1372, 1382 (Fed. Cir. 2010).

entitled to the deference the APA reserves for formal agency adjudications.

The combined effect of these trends is that the courts have increasingly deferred to military administrative bodies in military personnel cases, at least with respect to substantive decisionmaking responsibility. That is particularly true for military decisions regarding promotion, which have been viewed as uniquely committed to the discretion of the military branches (and to the President).¹⁸ While courts will still sometimes reverse the military's substantive personnel decisions, those cases are rare in the modern era.¹⁹ The courts have increasingly viewed their responsibility as ensuring military administrative bodies follow procedures prescribed by statute and the military's own regulations, rather than delving deeply into the merits of underlying decisions. As the Federal Circuit put it in *Adkins v. United States*,²⁰ "although the *merits* of a decision committed wholly to the discretion of the military are not subject to judicial review, a challenge to the particular *procedure* followed in rendering a military decision may present a justiciable controversy."²¹ Moreover, although the correction board remedy is still held to be optional,²² the correction boards have assumed an increasingly central role in the decisionmaking process, rather than simply being an informal alternative mechanism for obtaining administrative relief from military personnel decisions. Whether exhaustion of administrative remedies before a correction board is ultimately made a prerequisite to any review in the Court of Federal Claims (by statute, by regulatory change, or by judicial decision) remains to be seen.²³

18. *Lewis v. United States*, 458 F.3d 1372, 1377 (Fed. Cir. 2006); *Dysart v. United States*, 369 F.3d 1303, 1317 (Fed. Cir. 2004).

19. In connection with appointments to military positions, the Federal Circuit has described the availability of judicial relief as limited to cases in which "an individual has a 'clear cut legal entitlement' to a position, but subordinate officials in the government misinterpret the Constitution, statutes, or regulations, and improperly decline to recommend that individual for nomination or appointment." *Lewis*, 458 F.3d at 1377 (quoting *Smith v. Sec'y of the Army*, 384 F.3d 1288, 1294–95 (Fed. Cir. 2004)). With respect to decisions such as discharge decisions, the courts have employed the arbitrary and capricious standard to decisions by the military branches; consequently, such claims are rarely successful, but success is not unknown. *See, e.g., Doe v. United States*, 132 F.3d 1430, 1434 (Fed. Cir. 1997).

20. 68 F.3d 1317 (Fed. Cir. 1995).

21. *Id.* at 1323; *see also Lewis*, 458 F.3d at 1377.

22. *Martinez v. United States*, 333 F.3d 1295, 1306 (Fed. Cir. 2003) (en banc).

23. As Judge Lettow points out, the putatively optional nature of correction board proceedings may be illusory in certain situations. First, as noted, the Federal Circuit's decision in *Metz* effectively requires exhaustion of remedies when the claimant first seeks relief before the correction board. *Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006). In addition, in disability retirement pay cases, the rule that claims do not accrue until

The increasing judicial deference to the military administrative review process—mainly in the form of correction board review—may or may not be wise. The descriptions of correction board proceedings provided by both Judge Lettow and Eugene Fidell give reason for pause about whether the correction boards are suited to perform an adjudicative rather than an investigative function and whether their proceedings are sufficiently formal and reliable to warrant the degree of deference accorded. But, wise or not, there is no question that the role of the courts in military personnel decisionmaking has dramatically changed since the early days of the Court of Claims, when the court could say, as it did in *Kelly*, that notwithstanding his desertion, Mr. Kelly should receive his enlistment bonus over the objection of the military because the court concluded that it was “equitable and just.”²⁴

a military board denies the claim or refuses to hear it may mean that at least some claimants will be required to submit their claims to a correction board before seeking review in the Court of Federal Claims. *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). Moreover, the Court of Federal Claims has statutory authority to require exhaustion of correction board remedies in cases in which the court considers exhaustion to be beneficial. *Martinez*, 333 F.3d at 1309–10. As Judge Lettow notes, that authority can be exercised to allow the correction board to consider new evidence on remand if the record before the court is incomplete, consistent with the Supreme Court’s guidance in other administrative law contexts. *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985). Finally, as noted above, Federal Circuit decisions have prohibited the introduction of new evidence in judicial proceedings that was not presented to the correction board when judicial review is sought after relief is requested from a correction board. The Federal Circuit has held that the exhaustion requirement is equally applicable when the administrative process is initiated after judicial relief has been sought and is still pending. *See Richey v. United States*, 322 F.3d 1317, 1325 (Fed. Cir. 2003).

24. *Kelly v. United States*, 5 Ct. Cl. 476, 482 (1869), *aff’d*, 82 U.S. (15 Wall.) 34 (1872).

SUITS FOR MILITARY PAY AND DISABILITY BENEFITS IN THE COURT OF FEDERAL CLAIMS

CHARLES LETTOW*

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INTRODUCTION

As the Supreme Court has said, “[J]udges are not given the task of running the Army [or any other military service].”¹ Additionally: “The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments”² That said, the Court of Federal Claims and its predecessors have, for many years, considered and decided military pay

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1. Orloff v. Willoughby, 345 U.S. 83, 93 (1953).
2. Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

and disability cases.

In the Court of Federal Claims, suits by current and former members of the military services necessarily depend upon the Tucker Act for jurisdiction.³ As a consequence, the actions must focus on monetary relief, even though the claims may have a nonmonetary impetus, such as a contested separation, a failure of promotion, or a challenged court-martial conviction. To some extent, federal district courts share this caseload because purely equitable claims and monetary claims of \$10,000 or less may be brought in district courts.⁴

For well over a century, a steady flow of these cases has reached the

3. In pertinent part, the Tucker Act provides:

The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1) (2006).

4. See Little Tucker Act, 28 U.S.C. § 1346(a) (providing that district courts shall have jurisdiction “concurrent with the United States Court of Federal Claims” of civil actions against the United States not exceeding \$10,000 and not sounding in tort). As a result, claims by soldiers and ex-soldiers may be brought in federal district courts via two distinct routes, one of which is comparable to that available in the Court of Federal Claims, and one of which is not. So long as the monetary relief sought in a military pay case does not exceed the threshold of the Little Tucker Act, jurisdiction would be proper in the district court under that statute. Alternatively, if no monetary relief were sought, jurisdiction would be available in district court under the general federal question statute, 28 U.S.C. § 1331 (2006), and the Administrative Procedure Act (APA), 5 U.S.C. § 702, so long as the claim had first been before a corrections board or other relevant military board. In that circumstance, the district court would have available the remedies appropriate for judicial review of administrative action.

Disputes about jurisdiction have arisen where a service member sought only equitable relief in circumstances in which a monetary recovery would be a logical outcome of a grant of that relief. The D.C. Circuit has held that the district court would have jurisdiction over such claims so long as “the sole remedy requested [in the complaint] is declaratory or injunctive relief that is not ‘negligible in comparison’ with the potential monetary recovery.” *Kidwell v. Dep’t of the Army*, 56 F.3d 279, 284 (D.C. Cir. 1995) (citing *Hahn v. United States*, 757 F.2d 581, 589 (3d Cir. 1985)); see also *Tootle v. Sec’y of the Navy*, 446 F.3d 167, 176 (D.C. Cir. 2006) (quoting *Kidwell*, 56 F.3d at 284). In that event, the D.C. Circuit opined that “any monetary benefits that might flow if [the plaintiff] prevails on his nonmonetary claims will not come from the District Court’s exercise of jurisdiction.” *Tootle*, 446 F.3d at 175. Rather, the monetary recovery would flow “from the structure of statutory and regulatory requirements governing compensation when a service member’s files change.” *Id.* (quoting *Kidwell*, 56 F.3d at 285–86).

For cases brought in district courts invoking the APA as a basis for review of action by a corrections board or other military board, exhaustion of administrative remedies has also been a significant issue. For a discussion of the varied precedents of the regional circuits regarding exhaustion, see *infra* note 47.

Court of Federal Claims and its predecessor.⁵ In the past few years, an influx of cases stemming from military service in Iraq or Afghanistan has been evident:

Military Pay & Disability Cases Filed in the Court of Federal Claims⁶

	<u>2007</u>	<u>2008</u>	<u>2009</u>	<u>2010</u>	<u>2011</u>
Back Pay	5	10	9	10	8
Correct Records & Reinstatement	10	12	12	21	17
Retirement, Disability & Other	7	16	19	17	24
Totals	22	38	40	48	49

The role of the court in addressing these cases has changed markedly over a span of decades. Years ago, cases were brought as de novo actions in which the Court of Claims undertook a traditional fact-finding role. In practical terms, that changed when military correction and review boards were instituted in 1946.⁷ The formation of military correction boards was designed primarily “to relieve Congress of the burden of considering private bills to correct” claimed errors in military personnel actions.⁸ Service members had frequently turned to Congress as an alternative to the Court of Federal Claims’s predecessor in seeking redress and relief. Congress’s remedy, however, not only pushed many cases to a military administrative body and then to this court, but also worked a significant change in the court’s posture in the cases. Relatively few cases were filed in court as de novo actions. Most cases came to the court after first being presented to a military board, and the court’s function was largely converted into one of reviewing administrative action by boards. Even then, the court carried over some elements of de novo consideration of

5. *See, e.g.*, *United States v. Kelly*, 82 U.S. (15 Wall.) 34, 36 (1872) (ruling on an appeal by the government from a judgment of the Court of Claims, predecessor to the Court of Federal Claims, in a military pay case).

6. E-mail from Lisa Reyes, Chief Deputy Clerk for Operations, Court of Fed. Claims, to the Hon. Charles Lettow, Court of Fed. Claims (Sept. 10, 2012, 01:15 EDT) (on file with author).

7. *See* *Martinez v. United States*, 333 F.3d 1295, 1306 (Fed. Cir. 2003) (en banc) (citing the Legislative Reorganization Act of 1946, Pub. L. No. 79-601, § 207, 60 Stat. 812, 837).

8. *Id.* at 1306–07.

evidence, at least in certain circumstances. In recent years, however, changing precedents in the United States Court of Appeals for the Federal Circuit have removed many, if not all, of those elements.

Notwithstanding that procedural evolution, some principles have remained constant. The six-year statute of limitations for cases filed in the court under the Tucker Act⁹ begins to run upon the service member's separation or discharge.¹⁰ The court accords a presumption of regularity to a military service's actions respecting military personnel, and a claimant must overcome that presumption to prevail.¹¹ The most common ground for relief invoked by successful claimants involves a procedural irregularity or failure to comply with applicable regulations by a military authority, if the flaw has operated to the prejudice of the claimant.¹²

9. 28 U.S.C. § 2501.

10. *See Martinez*, 333 F.3d at 1309–10. In district courts, the six-year statute of limitations in 28 U.S.C. § 2401(a) applies to APA-based claims, but the accrual date of the claim depends on whether it relates to an underlying cause or a board determination. The underlying cause accrues at the time of the harm, but claims based on board action may not accrue until final disposition by the board (which may occur as long as fifteen years after a discharge). 10 U.S.C. § 1553(a); *see Smith v. Marsh*, 787 F.2d 510, 511–12 (10th Cir. 1986) (affirming both the district court's dismissal of the plaintiff's claim on the underlying discharge and its finding of timeliness on board action related to that discharge); *Geyen v. Marsh*, 775 F.2d 1303, 1308–10 (5th Cir. 1985) (holding that a discharge eleven years prior to filing of the suit could not be addressed in district court, but that board review of that discharge, which occurred only one year prior, could be); *Dougherty v. U.S. Navy Bd. for Corr. of Naval Records*, 784 F.2d 499, 500–02 (3d Cir. 1986) (holding that the statute of limitations began to run when a board issued its final decision rather than when a former serviceman was discharged); *Bittner v. Sec'y of Def.*, 625 F. Supp. 1022, 1029 (D.D.C. 1985) (dismissing claims of plaintiffs who failed to pursue board review because the underlying discharge occurred more than six years prior, while allowing the claims of similarly situated plaintiffs who had pursued board review fewer than six years prior). This distinction between the underlying cause of action and a board-derived cause of action could potentially lead to a situation where a discharged plaintiff takes the maximum available time to file with the board—fifteen years—and the maximum time to file suit in district court on the board's decision—six years—resulting in an action filed twenty-one years after the discharge actually occurred. Such a scenario is briefly described in *Walters v. Secretary of Defense*, 725 F.2d 107, 114 (D.C. Cir. 1983), which notes that a plaintiff who had waited ten years after his discharge to file suit in court could rescue his claim by pursuing a remedy from a board first. If the board decision was unfavorable, the plaintiff in *Walters* could *then* have proceeded to district court with a claim of the board's action, though not on the underlying discharge itself. *Id.*

11. *See Melendez Camilo v. United States*, 642 F.3d 1040, 1045 (Fed. Cir. 2011) (holding the absence of a specific discussion of evidence is inadequate to overcome the presumption that the board considered the evidence).

12. *See Fisher v. United States*, 402 F.3d 1167, 1176–77 (Fed. Cir. 2005).

When the question is one of physical or mental fitness for service in the military, courts are loath to interfere with decisions made by the President and his designated

I. STANDARDS FOR DECISION

In general, “a member of a uniformed service who is on active duty” is “entitled to the basic pay of the pay grade to which assigned.”¹³ When a military pay claim is at issue, and the matter has been before a correctional board, “the scope of . . . review for [a] challenge[] to [a] military correction board decision[] is ‘limited to determining whether [the] decision . . . is arbitrary, capricious, unsupported by substantial evidence, or contrary to applicable statutes and regulations.’”¹⁴ When appropriate, the court may accompany an award of monetary relief with an order “directing restoration to office or position, placement in appropriate duty or retirement status, [or] correction of applicable records.”¹⁵ Nonetheless, the Military Pay Act, with two exceptions, cannot be used to obtain the salary of a higher rank for which the claimant was not selected.¹⁶ Instead, “a service member is entitled only to the salary of the rank to which he [or she] is appointed and in which he [or she] serves.”¹⁷ The two exceptions occur when: (1) the plaintiff “has satisfied all the legal requirements for promotion, but the military has refused to recognize his [or her] status,” or (2) “the decision not to promote the service member leads to the service

agents. . . . This deference to Executive authority does not extend to ignoring basic due process considerations, however. When there is a question of whether reasonable process has been followed, and whether the decision maker has complied with established procedures, courts will intervene, though only to ensure that the decision is made in the proper manner.

Id.

13. 37 U.S.C. § 204(a). This statute has been determined to be “money-mandating” by the Federal Circuit. *Chambers v. United States*, 417 F.3d 1218, 1224 (Fed. Cir. 2005). Standing alone, the Tucker Act does not create a substantive right to relief, nor is it, by itself, sufficient to confer jurisdiction on the Court of Federal Claims. *See United States v. Testan*, 424 U.S. 392, 398 (1976); *Martinez*, 333 F.3d at 1303. Rather, “A substantive right must be found in some other source of law” *United States v. Mitchell*, 463 U.S. 206, 216 (1983). Thus, the Tucker Act essentially acts to waive the government’s sovereign immunity with respect to claims deriving from a money-mandating source of law. *See id.* Accordingly, to establish that this court has subject matter jurisdiction under the Tucker Act, the plaintiff must first point to an independent, substantive source of law that may be interpreted as mandating payment from the United States for the injury suffered, and upon successfully doing so, the plaintiff must then present “a nonfrivolous assertion that [he or she] is within the class of plaintiffs entitled to recover under th[at] money-mandating source.” *Jan’s Helicopter Serv., Inc. v. FAA*, 525 F.3d 1299, 1307 (Fed. Cir. 2008).

14. *Melendez Camilo*, 642 F.3d at 1044 (quoting *Heisig v. United States*, 719 F.2d 1153, 1156 (Fed. Cir. 1983)).

15. 28 U.S.C. § 1491(a)(2).

16. *See Smith v. Sec’y of the Army*, 384 F.3d 1288, 1294 (Fed. Cir. 2004).

17. *Id.* (citing *James v. Caldera*, 159 F.3d 573, 582 (Fed. Cir. 1998); *Dodson v. United States*, 988 F.2d 1199, 1208 (Fed. Cir. 1993); *Skinner v. United States*, 594 F.2d 824, 830 (Ct. Cl. 1979)).

member's compelled discharge."¹⁸

Provisions of Chapter 5 of Title 37 of the United States Code authorizing "special and incentive pays" for members of the uniformed services¹⁹ can pose significant issues of statutory interpretation. A number of those provisions state that an incentive pay or bonus "may" be made to a qualifying soldier.²⁰ Ordinarily, by using the permissive "may," these statutory authorizations are presumptively discretionary, not mandatory.²¹ Discretionary payments are not money-mandating for purposes of the Tucker Act.²² Certain of these statutes have a long history, however, that rebuts this presumption.²³ The Supreme Court drew upon that history in *United States v. Larionoff*,²⁴ a military pay case in which the Court observed that "[f]rom early in our history, Congress has provided by statute for payment of a re-enlistment bonus to members of the Armed Services who re-enlisted upon expiration of their term of service, or who agreed to extend their period of service before its expiration."²⁵ Accordingly, the Court assumed that a statute providing for payment of a re-enlistment bonus was money-mandating and that eligible service members who met the statutory requirements for payment of the bonus were entitled to receive it. In short, some military pay statutes that use the permissive word "may" nonetheless qualify as money-mandating provisions for purposes of the Tucker Act, by virtue of long-standing usage and history.

Disability claims rest on a somewhat different footing than pay claims. To receive compensation or retirement benefits for military disability, a service member must suffer a permanent disability manifesting itself during

18. Smith, 384 F.3d at 1294–95 (citing *Dysart v. United States*, 369 F.3d 1303, 1315–16 (Fed. Cir. 2004); *Law v. United States*, 11 F.3d 1061, 1065 (Fed. Cir. 1993)).

19. 37 U.S.C. ch. 5 (quoting title).

20. See, e.g., 37 U.S.C. § 308i(a) (providing that a prior-service enlistment bonus "may be paid" to a former enlisted member of an armed force who enlists in the Selected Reserve of the Ready Reserve).

21. See *Doe v. United States*, 463 F.3d 1314, 1324 (Fed. Cir. 2006) ("There is a presumption that the use of the word 'may' in a statute creates discretion.").

22. See *Deggins v. United States*, 39 Fed. Cl. 617, 620 (1997) ("[T]he [plaintiff's] claim for military pay and allowances based on a statute that provides only for a discretionary payment of money is fatally flawed."), *aff'd*, 178 F.3d 1308 (Fed. Cir. 1998); *Adair v. United States*, 648 F.2d 1318, 1322–23 (Ct. Cl. 1981) (holding that 37 U.S.C. § 313, providing that physicians in the Public Health Service "may" receive a variable incentive amount of special pay for each year of an active duty agreement, is only discretionary and not money-mandating).

23. Most of these statutes are found in Chapter 5 of Title 37, entitled "Special and Incentive Pays." 37 U.S.C. §§ 301–330.

24. 431 U.S. 864 (1977).

25. *Id.* at 865.

active service.²⁶ A service member has a physical examination prior to separation or discharge, but that may not be a sufficient basis for a decision regarding a disability determination. A Physical Evaluation Board (PEB), formerly known as a Retiring Board, “determines a service member’s fitness for duty and entitlement to disability retirement [or a medical separation payment] once a Medical Evaluation Board . . . finds the soldier does not meet the [applicable] standards for retention.”²⁷ Often the dispute in military disability claims filed in court concerns whether the service member’s medical profile upon separation or discharge should have triggered an evaluation by a Medical Evaluation Board and a PEB.²⁸ Where the service member has not proceeded via a PEB, his or her claim does not accrue until final action by a correction board, which has authority to act in the place of a PEB as the proper tribunal to determine eligibility for a disability separation payment or retirement.²⁹ Although a correction board is empowered to act as a PEB and make a fitness determination in the first instance,³⁰ a correction board can alternatively refer a post-separation or post-discharge claim to a PEB for action.³¹ If a service member’s condition is not “of a permanent nature and stable,”³² a uniformed service may put the member on a temporary disability retired list, pending a further determination of permanency and stability.³³ A disability of less than 30% under the standard schedule of rating disabilities entitles the service member to a separation payment rather than a disability

26. See 10 U.S.C. § 1201(a)–(b)(2).

27. *Chambers v. United States*, 417 F.3d 1218, 1225 n.2 (Fed. Cir. 2005); see also *McHenry v. United States*, 367 F.3d 1370, 1373 (Fed. Cir. 2004) (“In order to determine the existence and extent of disability, the Secretary established a [Physical Evaluation Board] in 1990 ‘to act on behalf of the Secretary of the Navy . . . in making determinations of fitness for duty, entitlement to benefits, and disposition of service members referred to the Board.’” (quoting SEC’Y OF THE NAVY, SECNAV INSTRUCTION 1850.4C, DEPARTMENT OF THE NAVY DISABILITY EVALUATION MANUAL ¶ 6A (1990), *superseded by* SEC’Y OF THE NAVY, SECNAV INSTRUCTION 1850.4E, DEPARTMENT OF THE NAVY DISABILITY EVALUATION MANUAL ENCLOSURE (1), at 1–6 (2002)).

28. See, e.g., *Colon v. United States*, 71 Fed. Cl. 473, 482 (2006), *aff’d sub nom. Acevedo v. United States*, 216 F. App’x 977 (Fed. Cir. 2007).

29. See 10 U.S.C. § 1201 (allowing the Secretary to make a determination of disability).

30. See *Barnick v. United States*, 591 F.3d 1372, 1380 (Fed. Cir. 2010) (stating that the board is capable of making retroactive disability determinations).

31. See *Sawyer v. United States*, 930 F.2d 1577, 1582 (Fed. Cir. 1991) (“There is sufficient flexibility in the system to permit the boards to complement or supplement one another in the interest of reaching a just result.”); *Peoples v. United States*, 101 Fed. Cl. 245, 263 (2011) (gauging an appeal from the Board for Correction of Naval Records on the sufficiency of the administrative record).

32. 10 U.S.C. § 1201(b)(1).

33. *Id.* § 1202.

retirement benefit.³⁴

A number of recent cases have involved claims of improper separation or discharge of service members alleged to have suffered post-traumatic stress disorder (PTSD). These cases have focused on provisions of the National Defense Authorization Act for Fiscal Year 2008.³⁵ Those provisions specify that “[i]n making a determination of disability of a member of the armed forces for purposes of this chapter, the Secretary concerned . . . shall, to the extent feasible, utilize the schedule for rating disabilities in use by the Department of Veterans Affairs [(VA)].”³⁶ In effect, the statutory revision extends prior provisions that required the uniformed services to apply the Veterans Affairs Schedule for Rating Disabilities (VASRD) when assessing disability ratings.³⁷

Consequently, for some time, the uniformed services have applied the same rating system as that developed by the VA. The equivalence does not mean, however, that the results obtained will be the same. “The military uses the VASRD, ‘to determine fitness for performing the duties of office, grade, and rank, whereas . . . the VA uses the VASRD [after discharge] to determine the disability ratings based on an evaluation of the individual’s capacity to function and perform tasks in the civilian world.”³⁸

II. PROCEDURES

A. Discharge and Separation Back-Pay Claims

In military board cases, the court has consistently employed a “substantial evidence” standard of review that “does not require a reweighing of the evidence, but a determination whether *the conclusion being reviewed* is supported by substantial evidence.”³⁹ Under this standard, the court may not “substitute [its] judgment for that of the military

34. See *id.* § 1203(b)(4) (describing that a service member may be separated from the member’s uniformed service and entitled to severance pay).

35. Wounded Warrior Act, Pub. L. No. 110-181, § 1642, 122 Stat. 430, 465 (codified at 10 U.S.C. § 1216a(a)(1) (Supp. IV 2011)).

36. *Id.*

37. See, e.g., SEC’Y OF THE AIR FORCE, AIR FORCE INSTRUCTION 36-3212, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, AND SEPARATION § 1.7 (2006); SEC’Y OF THE ARMY, ARMY REGULATION 635-40, PHYSICAL EVALUATION FOR RETENTION, RETIREMENT, OR SEPARATION § 3-5(a) (2006); SEC’Y OF THE NAVY, SECNAV INSTRUCTION 1850.4E, DEPARTMENT OF THE NAVY DISABILITY EVALUATION MANUAL ENCLOSURE (3) § 3801(b) (2002). These regulations state that the Air Force, Army, and Navy will all use Veterans Affairs Schedule for Rating Disabilities ratings.

38. *Sabree v. United States*, 90 Fed. Cl. 683, 695–96 (2009) (quoting *Haskins v. United States*, 51 Fed. Cl. 818, 826 (2002)).

39. *Heisig v. United States*, 719 F.2d 1153, 1157 (Fed. Cir. 1983).

departments when reasonable minds could reach differing conclusions on the same evidence.”⁴⁰

In the years immediately following the establishment of military correction boards, the court clung to rudiments of its earlier *de novo* consideration of military pay and benefits claims. Specifically, the court often accepted and considered *de novo* evidence to supplement its review of the boards’ decisions, allowing it latitude to reach a conclusion contrary to that of the military board.⁴¹ As the court explained in *Brown v. United States*, the boards served as nonadversarial, investigatory bodies—not as “tribunals adjudicating disputes between adverse parties.”⁴² The court reasoned:

[T]he administrative system, as a whole, is not designed to collect and evaluate for itself all the evidence . . . , nor is it geared to produce records comparable to those of the regulatory agencies. There is, in short, less need and less warrant for deferring to the administrative fact-finding process, as all-inclusive, self contained, and final.⁴³

Thus, while the court exercised a limited power of review in military board cases, it had the freedom to accept *de novo* evidence and use a supplemented record when addressing a military board’s conclusions.

This procedure was altered after the Supreme Court explicitly stated in *Florida Power & Light Co. v. Lorion* that a lower court reviewing an agency action should generally remand the case to the agency to consider new evidence if the record before the court is incomplete.⁴⁴ In light of *Florida Power*, the Federal Circuit modified its stance to require the court to remand a case to a board to consider relevant evidence that was omitted in the first instance, rather than continuing to allow the court to consider new evidence put forth in a supplemented record.⁴⁵ Under this procedural regimen, the court’s review is limited to the administrative record, and if

40. *Id.* at 1156.

41. *See id.* at 1157 (“[A]ll of the competent evidence must be considered, whether original or supplemental, and whether or not it supports the challenged conclusion [of the military board].” (citing *Consolo v. Fed. Mar. Comm’n*, 383 U.S. 607, 620 (1966); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 483, 490 (1951)); *see also* *Brown v. United States*, 396 F.2d 989, 991–94, 996 (Ct. Cl. 1968) (detailing the court’s “established practice of accepting *de novo* evidence in [the military correction] area”).

42. 396 F.2d at 995.

43. *Id.* at 996.

44. 470 U.S. 729, 744 (1985) (“If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation.”).

45. *See* *Walls v. United States*, 582 F.3d 1358, 1367–68 (Fed. Cir. 2009) (holding that except for rare cases a court must remand a case to an agency if its record is inadequate).

the court finds that a particular claim was not adequately addressed, it should order a remand to the military board.⁴⁶

Notably, any involvement of a military board may significantly limit a plaintiff's ability to raise new claims and arguments before the court. In *Metz v. United States*, the Federal Circuit held that a plaintiff who brings a claim in court after a decision by a military board waives the claims or arguments he or she does not raise in initial or reconsideration petitions before the board.⁴⁷

46. See *Riser v. United States*, 93 Fed. Cl. 212, 217–18 (2010) (remanding a suit for back pay to the Army Correction Board so it could consider relevant resignation correspondence that had not been considered by the Board); see also *Hale v. United States*, No. 10-822C, 2011 WL 2268961, at *2 (Fed. Cl. June 9, 2011) (remanding claims for back pay and medical disability payments to a military board because plaintiff raised procedural issues that had not been considered by a board).

47. 466 F.3d 991, 999 (Fed. Cir. 2006). *Metz* effectively imposes a categorical exhaustion requirement on a military pay claimant who first seeks relief from a corrections board. The institution of such a requirement constitutes a significant departure from the earlier decisions of the Court of Claims in *Brown* and the Federal Circuit in *Heisig*, allowing submission of de novo evidence and supplementary materials in an action filed in court. See *supra* notes 4, 41–42.

Suits brought under the APA in district courts necessarily are predicated upon review of action by a military board or official. Some circuits have adopted an approach similar to that in *Metz*, requiring plaintiffs to exhaust their claims at the administrative level. See *Coburn v. McHugh*, 679 F.3d 924, 930 (D.C. Cir. 2012) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 584 F.3d 1076, 1079 (D.C. Cir. 2009), which held that a district court could not review an administrative determination based upon claims which were not presented to the administrative body); *Schwalier v. Panetta*, 839 F. Supp. 2d 75, 80 (D.D.C. 2012) (conditioning jurisdiction over APA-based claims on whether those claims had first been raised before and ruled on by an agency); *Bittner v. Sec'y of Def.*, 625 F. Supp. 1022, 1026 (D.D.C. 1985) (noting the D.C. Circuit's "strong preference for presuit exhaustion of intramilitary administrative remedies" because of the agency expertise such proceedings provide to courts); see also *Duffy v. United States*, 966 F.2d 307, 311 (7th Cir. 1992) (holding that a service member's failure to file a claim with a correction board constituted a failure to exhaust intramilitary administrative remedies such that the related claim had to be dismissed pending exhaustion of available administrative remedies).

Other circuits have not been so categorical in requiring complete exhaustion of remedies in APA cases brought through actions in district court. For example, the Ninth Circuit has held,

[T]here are four circumstances in which exhaustion is not required: (1) if the intraservice remedies do not provide an opportunity for adequate relief; (2) if the petitioner will suffer irreparable harm if compelled to seek administrative relief; (3) if administrative appeal would be futile; or (4) if substantial constitutional questions are raised.

Wenger v. Monroe, 282 F.3d 1068, 1073 (9th Cir. 2002) (citing *Muhammad v. Sec'y of the Army*, 770 F.2d 1494, 1495 (9th Cir. 1985)). In essence, the Ninth Circuit treats "[e]xhaustion of administrative remedies, when not made mandatory by statute . . . [as] a prudential doctrine," not a limitation on subject matter jurisdiction. *Santiago v. Rumsfeld*,

Former service members have another valid procedural option that they may pursue to allow the court to undertake a full evidentiary review. Since their inception, military boards have been regarded as a “permissive administrative remedy . . . [,] not a mandatory prerequisite to filing a Tucker Act suit challenging the discharge.”⁴⁸ Therefore, a plaintiff may opt to file suit directly in the Court of Federal Claims instead of seeking relief first before a military correction board.⁴⁹ According to *Martinez v. United States*, this flexibility provides benefits to both parties:

[R]equiring resort to a correction board would necessarily extend the period within which a discharge claim for back pay could be brought. Such an extension would naturally increase the risk that discharge claims would be stale, along with the risk of lost evidence, unavailable witnesses, and faded memories. In addition, the passage of time would increase the potential liability of the United States for back pay and would make the availability of corrective action more difficult to effect. . . .

Second, it is by no means clear that an exhaustion requirement would be favorable to service members generally. . . . [M]any service members might prefer to have the option of seeking an immediate judicial remedy rather than having to go through a correction board before having access to a court. A mandatory exhaustion requirement would make that course of action unavailable.⁵⁰

A service member may preserve access to “both the judicial remedy and the right to a reviewable decision by the correction board [by filing suit]

425 F.3d 549, 554 (9th Cir. 2005) (citing *Acevedo-Carranza v. Ashcroft*, 371 F.3d 539, 541 (9th Cir. 2004)); *see also* *Aikens v. Ingram*, 652 F.3d 496, 508 (4th Cir. 2011) (King, J., dissenting) (requiring exhaustion except where resort to a board would be futile); *Winck v. England*, 327 F.3d 1296, 1304 (11th Cir. 2003) (quoting *Linfors v. United States*, 673 F.2d 332, 334 (11th Cir. 1982) (per curiam), (requiring exhaustion except “where no genuine opportunity for adequate relief exists, irreparable injury will result if the complaining party is compelled to pursue administrative remedies, or an administrative appeal would be futile” (citations omitted)); *Von Hoffburg v. Alexander*, 615 F.2d 633, 638 (5th Cir. 1980) (same). Courts of appeals that take a similar approach have held that district courts could take jurisdiction of cases absent exhaustion, but stay judicial proceedings until a correction board considered the service member’s claims. *See* *Montgomery v. Rumsfeld*, 572 F.2d 250, 252–55 (9th Cir. 1978); *Nelson v. Miller*, 373 F.2d 474 (3d Cir. 1967).

In actions jurisdictionally predicated on the Little Tucker Act, district courts presumably would be governed by the precedents of the Federal Circuit because appeals in those cases would be to the Federal Circuit, not the pertinent regional circuit. The exhaustion rule of *Metz* would accordingly apply to such actions in district courts.

48. *Martinez v. United States*, 333 F.3d 1295, 1303–04 (Fed. Cir. 2003) (citing *Richey v. United States*, 322 F.3d 1317, 1325 (Fed. Cir. 2003); *Heisig v. United States*, 719 F.2d 1153, 1155 (Fed. Cir. 1983)).

49. *Id.*

50. *Id.* at 1309 (citation omitted).

within six years of the date of discharge and request[ing] that the court action be stayed until the correction board proceeding is completed.”⁵¹ *Metz*, in effect, would require that a service member file suit in the Court of Federal Claims before filing claims with a military board if he or she wished to raise issues before the court rather than before a military board.⁵²

Additionally, because correction boards do not employ adversarial procedures, they are not well suited to handle certain types of claims. A personal appearance or argument may or may not be allowed by the board, at its discretion. As a result, fact-finding may be problematic in some circumstances. The classic example is a claim by a service member of ineffective assistance of counsel in an administrative discharge hearing or court martial. In *Helferty v. United States*,⁵³ the service member raised his claim of ineffective assistance of counsel before a correction board, which eventually requested that military counsel and officials provide a series of advisory opinions to assist in its review. Included in those opinions was a statement by the prior counsel who had been alleged to have been ineffective. Notwithstanding the bar on ex parte communications to the board,⁵⁴ the prior counsel’s statement was withheld from the claimant and his counsel on privacy grounds.⁵⁵ In court, the government sought a remand to the board, attaching the prior counsel’s statement that previously had been provided to the board on an ex parte basis, and that motion was granted.⁵⁶ As the case has developed on remand, the board reportedly is struggling with competing affidavits, filed *seriatim*, one after the other, responsively describing and contesting prior counsel’s investigatory activities and actions at the administrative discharge hearing. Consequently, the board is faced with finding facts on a convoluted paper record, unaided by direct testimony, cross-examination, or an opportunity to assess credibility. In short, the correction board as structured cannot find facts in a typical trial-type setting, and the adequacy of its proceedings might well be questioned in certain situations.

B. Disability Retirement Pay Claims

In disability retirement pay cases, claims of entitlement to benefits “do

51. *Id.*

52. Otherwise, a claimant would lose the ability to submit some claims directly to the court or to adduce some evidence directly to the court.

53. 101 Fed. Cl. 224 (2011).

54. See 10 U.S.C. § 1556 (2006) (prohibiting ex parte communications to boards, subject to exceptions that include “[c]lassified information” and “[i]nformation the release of which is otherwise prohibited by law”).

55. *Helferty*, 101 Fed. Cl. at 226.

56. *Id.* at 229.

not accrue until the appropriate [military] board either finally denies such a claim or refuses to hear it.”⁵⁷ As a result, the board proceeding “becomes a *mandatory* remedy.”⁵⁸ Among other things, the six-year statute of limitations for the Court of Federal Claims’s cases under the Tucker Act does not automatically begin to run upon the service member’s discharge: “The decision by the first statutorily authorized board which hears or refuses to hear the claim is the triggering event.”⁵⁹ A limited exception to this rule exists: if a “service member has sufficient actual or constructive notice of his disability, and hence, of his entitlement to disability retirement pay, at the time of discharge,” then “the service member’s failure to request a hearing board prior to discharge has . . . the same effect as a refusal by the service to provide board review,” thus triggering the start of the six-year statute of limitations.⁶⁰ In such a case, the court must look to “[w]hether the veteran’s knowledge of the existence and extent of his condition at the time of his discharge was sufficient to justify concluding that he waived the right to board review of the service’s finding of fitness.”⁶¹ The court determines the service member’s knowledge by reference to the statutory requirements for disability retirement benefits, contained in 10 U.S.C. § 1201.⁶²

Correction boards have had difficulty addressing disability claims raised considerably after discharge or separation, where no PEB was convened prior to discharge and the medical information gathered before discharge was not comprehensive.⁶³

III. CLASS ACTIONS

In a few circumstances, prior service members have presented military pay or disability claims in suits that were certified as class actions under Rule 23 of the Rules of the Court of Federal Claims. The most recent such case was *Sabo v. United States*, involving disabled veterans who had served in the wars in Iraq and Afghanistan and who suffered PTSD.⁶⁴ Another

57. *Real v. United States*, 906 F.2d 1557, 1560 (Fed. Cir. 1990) (citing *Friedman v. United States*, 310 F.2d 381 (Ct. Cl. 1962)).

58. *Chambers v. United States*, 417 F.3d 1218, 1225 (Fed. Cir. 2005) (internal quotation marks omitted).

59. *Real*, 906 F.2d at 1560.

60. *Chambers*, 417 F.3d at 1226 (citing *Real*, 906 F.2d at 1560, 1562).

61. *Real*, 906 F.2d at 1562.

62. *Id.* at 1562–63; *see also Chambers*, 417 F.3d at 1226.

63. *See, e.g., Peoples v. United States*, 101 Fed. Cl. 245, 263–65 (2011) (approving a board’s denial of a disability retirement claim because the Physical Evaluation Board did not have all of the information it needed to determine the claimant’s fitness for duty at the time of discharge).

64. 102 Fed. Cl. 619, 621 (2011).

notable set of examples occurred roughly a decade earlier, when military officers who were involuntarily separated or retired for failure of promotion successfully brought reverse-discrimination suits in this court that were also certified as class actions.⁶⁵ The facts and procedural circumstances of the two types of cases are instructive for other situations in which a number of veterans may have similar claims arising out of their military service.

A. *The PTSD Class Action*

In *Sabo*, seven veterans filed suit, averring that they suffered from PTSD incurred as a result of their service in Iraq and Afghanistan and contending that their respective service branches had not assigned sufficient disability ratings.⁶⁶ The court granted the plaintiffs' motion to proceed as a class action, certified the class, delineated the claims to be decided, appointed class counsel, and approved a notice to be supplied to all potential class members.⁶⁷ As in any class action, great care was taken to ensure that adequate notice be given to potential class members. Counsel sent notices directly to approximately 4,300 potential members and established a website to expand the reach of information about the suit.⁶⁸ Given the issuance of new and more lenient criteria in 2008 for rating a disability based upon PTSD,⁶⁹ the government enabled plaintiffs who opted in to apply for priority review of their PTSD disability rating by a Physical Disability Board of Review or a correction board.⁷⁰ When that process proved to be slow and cumbersome, the parties undertook settlement discussions. Ultimately, 2,176 individuals opted into the suit, and the parties reached a proposed settlement on conceptual terms for nine discrete categories of claimants, separated according to those who had or had not received a military board decision, had received severance pay or disability retirement or were placed on the Temporary Disability Retirement List (TDRL), or had received a disability rating from the VA.⁷¹ The proposed settlement agreement provided that each class member would at least be

65. See *Christian v. United States*, 337 F.3d 1338, 1339 (Fed. Cir. 2003); *Berkley v. United States*, 287 F.3d 1076, 1081 (Fed. Cir. 2002); *Christensen v. United States*, 60 Fed. Cl. 19 (2004).

66. *Sabo*, 102 Fed. Cl. at 621–23.

67. *Id.* at 623. The court allows only opt-in class actions; opt-out class actions are not permitted. See U.S. Ct. Fed. Claims R. 23 rules committee notes, available at http://www.usfc.uscourts.gov/sites/default/files/court_info/20120702_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf.

68. *Sabo*, 102 Fed. Cl. at 623.

69. See *supra* notes 35–37 and accompanying text.

70. See *Sabo*, 102 Fed. Cl. at 622–24.

71. *Id.* at 624–25.

placed on the TDRL at a 50% disability rating for the first six months after separation or retirement and be granted additional relief, dependent upon individual circumstances.⁷²

The court approved the settlement after giving each class member the opportunity to respond.⁷³ Fourteen class members indicated disapproval, while seven responding members neither approved nor disapproved.⁷⁴ Attorneys' fees for class counsel were deferred, although the parties agreed that attorneys' fees would not be paid out of settlement proceeds to claimants.⁷⁵

B. *The Reverse-Discrimination Class Actions*

Christian v. United States involved male, nonminority former lieutenant colonels in the Army whom a board had selectively retired early using race- and gender-based retention goals.⁷⁶ *Berkley v. United States* concerned a certified class comprised of Air Force officers whom a board had involuntarily separated based partly on race- and gender-based criteria.⁷⁷ In *Christensen v. United States*, the class plaintiffs were colonels in the Air Force whom a board had selected for involuntary retirement on the basis of unconstitutional race and gender preferences.⁷⁸

In these three sets of reverse-discrimination cases, the disputes ultimately centered on remedy. The government urged the court to remand the cases to the pertinent service secretaries for a "harmless error" analysis, calling for reconsideration by reconstituted service boards to make new separation and early retirement decisions using criteria that had no discriminatory elements. The Federal Circuit adopted this remedial approach in *Christian v. United States*.⁷⁹

Subsequently, however, the parties reached settlement agreements that provided payments of standard lump-sum amounts to each class member and did not entail sets of "harmless error" determinations.⁸⁰ Class counsel would be paid fees out of the total award but at rates that amounted to less than 10% of the award.⁸¹ In *Berkley*, some class plaintiffs elected to be considered by a special board, and some were granted retention with

72. *Id.* at 625.

73. *Id.* at 629–30.

74. *Id.* at 629.

75. *Id.* at 630.

76. 46 Fed. Cl. 793, 816–17 (2000).

77. 45 Fed. Cl. 224, 225–26, 235 (1999).

78. 60 Fed. Cl. 19, 20 (2004).

79. 337 F.3d 1338, 1349 (Fed. Cir. 2003).

80. *See, e.g.*, *Christensen v. United States*, 65 Fed. Cl. 625, 627–28 (2005).

81. *Id.* at 628.

back-pay and allowances.⁸²

C. Remedial Issues

As *Sabo* and the reverse-discrimination cases illustrate, class actions can and should be certified in military pay and disability cases where liability issues apply broadly to all members of the class. Nonetheless, where liability is established in class actions, the remedial stage can be troublesome. Pay and declaratory relief in the form of correction of military records is heavily dependent upon the individual circumstances of class members. Despite that inherent difficulty, counsel achieved settlements in these exemplars, using a template that was either applicable to all class members or to members on a category-by-category basis, with individual adjustments as appropriate. Creative remedial solutions can ensure fairness for all class members.

CONCLUSION

The Court of Federal Claims continues to provide a viable forum for suits seeking military pay and benefits brought by current and former members of military services. Indeed, it is the only judicial avenue available to claimants seeking direct monetary relief in amounts greater than \$10,000. The procedure applied by the Court of Federal Claims to these suits should be readily comprehensible to anyone familiar with federal trial practice generally. Nonetheless, some quirks exist, a few of which are attributable to the accumulated precedents derived from the court's consideration of those cases over a century and one-half. Others, however, are derived from changes in the law reflected in decisions by the Federal Circuit during the past decade, as that court has moved away from certain earlier decisions that allowed flexibility in presentation of claims toward a more formulaistic adherence to doctrines developed for judicial review of agency actions under the Administrative Procedure Act.

82. 45 Fed. Cl. 224.

THE BOARDS FOR CORRECTION OF MILITARY AND NAVAL RECORDS: AN ADMINISTRATIVE LAW PERSPECTIVE

EUGENE R. FIDELL*

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INTRODUCTION

Military pay cases are one of the hardy perennials of the jurisdiction of the United States Court of Federal Claims, yet few practitioners are familiar with this obscure corner of the court's work. The Boards for Correction of Military and Naval Records often figure in these cases but rarely surface in the professional literature.¹ A brief summary may show

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1. The sparse literature includes John J. Field, *Military Personnel Law: Waiving the Discretionary Statute of Limitations Governing the Boards for Correction of Military Records*, 62 GEO. WASH. L. REV. 920, 920 (1994); Jeffrey M. Glosser & Keith A. Rosenberg, *Military Correction Boards: Administrative Process and Review by the United States Court of Claims*, 23 AM. U. L. REV. 391 (1973); Robert H. Joost & Nancy Battaglia, *The Board for Correction of Military Records of the Coast Guard: A Unique Dispute Resolution Mechanism*, 41 ADMIN. L. REV. 441, 441-42 (1989); John A. Wickham, *Federal Court Developments in Military Personnel Law: Protecting Service Members*, 55 NAVAL L. REV. 337, 337-38 (2008). I have written a number of short articles about the Coast Guard Board for readers in that branch of the armed forces. *E.g.*, Eugene R. Fidell, *DOT and Your Career: What's Up at the BCMR?*, U.S. COAST GUARD ACAD. ALUM. BULL., Aug. 2002, at 31.

these boards and their work in a new light.

Congress created the correction boards in 1946 to take over the task it had been performing of correcting error and removing injustice in military records by private bill.² The boards operate under a single statute,³ and their procedures, while promulgated by the various service secretaries, must be approved by the Secretary of Defense.⁴

The theory of the record-correction statute is that the record-correction function is being performed by the Secretary, acting through boards of civilians. So what are we in fact dealing with? In administrative law terms, the boards conduct informal adjudication. That is, they decide matters that are in the past, and they do so without using “on the record” proceedings associated with formal adjudication within the meaning of the Administrative Procedure Act (APA).⁵ What that means, on one level, is that the correction boards are not required to use administrative law judges (ALJs), and in fact they do not. One might think it *also* means the boards’ decisions are not subject to judicial review for substantial evidence, since that requirement also arises only if the proceeding is required to be made “on the record.”⁶ In *Chappell v. Wallace*,⁷ however, where the Supreme Court ruled that military personnel could not sue their superiors for racial discrimination, the Court pointed out that Congress has provided for record corrections that would be subject to judicial review for, among other things, substantial evidence.⁸ As authority, the Court cited several Tucker Act cases,⁹ rather than the APA. In my opinion, that part of *Chappell* is wrong. Nonetheless, it has never been questioned and remains the law.

The Court of Federal Claims lacks the district courts’ general federal question jurisdiction.¹⁰ The APA is not a basis for Tucker Act judicial

2. See Legislative Reorganization Act of 1946, Pub. L. No. 79-601, §§ 131, 207, 60 Stat. 812, 831, 837. See generally *Ogden v. Zuckert*, 298 F.2d 312, 314 (D.C. Cir. 1961).

3. 10 U.S.C. § 1552 (2006 & Supp. II 2008).

4. *Id.* § 1552(a)(3). Procedures of the Coast Guard and Public Health Service commissioned corps correction boards are not subject to review by the Defense Department, as those uniformed services are located in the Departments of Homeland Security and Health and Human Services, respectively. See *id.* § 1552(a)(1); 42 U.S.C. § 213a(b) (2006).

5. See 5 U.S.C. §§ 554(a), 556(a) (2006).

6. *Id.* § 554(a).

7. 462 U.S. 296 (1983).

8. *Id.* at 303.

9. *Grieg v. United States*, 640 F.2d 1261, 1268 (Ct. Cl. 1981); *Sanders v. United States*, 594 F.2d 804 (Ct. Cl. 1979). The Tucker Act, 28 U.S.C. § 1491(a)(1) (2006), authorizes actions in the Court of Federal Claims against the United States for money claims not sounding in tort. The Little Tucker Act, 28 U.S.C. § 1346(a)(2), authorizes such actions in district court for cases seeking damages of \$10,000 or less.

10. 28 U.S.C. § 1331.

review,¹¹ but it cannot be denied that it applies to the correction boards as federal agencies that are not exempt from its strictures.¹² So if the APA does not require substantial-evidence review or the use of ALJs, what does it demand of the correction boards? For informal adjudication, all that is required of an agency is “a brief statement of the grounds for denial.”¹³

Rarely in American law have so few words spawned so much law. Read with the familiar tests for judicial review of agency action, the agency’s “brief statement of the grounds for denial” may not be so terse or cryptic that a reviewing court cannot tell why the agency did what it did. A reviewing court is entitled to have an explanation that it can test for compliance with the usual standards of judicial review—is it arbitrary and capricious, an abuse of discretion, or otherwise contrary to law?¹⁴

The case law boils down to a handful of core propositions. Has the correction board addressed nonfrivolous arguments an applicant has made to it?¹⁵ If not, a remand is required. Has it given “a ‘reason that a court can measure’”?¹⁶ Has it explained its decision in a coherent manner?¹⁷ Has it committed an error of law, such as applying an inapposite statute or regulation or failing to apply one that *is* applicable? Has it decided like cases inconsistently?¹⁸ Has it departed from precedent without explanation?¹⁹ Has it followed an impermissible procedure in adjudicating a case?²⁰ There are other, equally familiar administrative law pitfalls, all of which increasingly—and usefully—figure in judicial review of board decisions.

The correction boards decide thousands of cases per year. The success rates naturally vary from board to board, but many, and at some boards, most, applications are denied.²¹ This may not be mass administrative

11. *E.g.*, *Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006).

12. 5 U.S.C. § 551(1) (2006).

13. *Id.* § 555(e).

14. *Id.* § 706(2)(A).

15. *E.g.*, *Frizelle v. Slater*, 111 F.3d 172, 174, 177 (D.C. Cir. 1997).

16. *Kreis v. Sec’y of the Air Force*, 866 F.2d 1508, 1514–15 (D.C. Cir. 1989).

17. *Coburn v. McHugh*, 679 F.3d 924, 934–35 (D.C. Cir. 2012) (citing *Kreis*, 866 F.2d at 1514–15; *Tripoli Rocketry Ass’n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 437 F.3d 75, 77 (D.C. Cir. 2006)) (no deference owed to incoherent agency explanation).

18. *E.g.*, *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162–63 (D.D.C. 2011).

19. *E.g.*, *Kreis v. Sec’y of the Air Force*, 406 F.3d 684, 686–87 (D.C. Cir. 2005) (citing *Indep. Petroleum Ass’n of Am. v. Babbitt*, 92 F.3d 1248, 1258 (D.C. Cir. 1996)); *Wilhelmus*, 796 F. Supp. 2d at 162–63.

20. *E.g.*, *Lipsman v. Sec’y of the Army*, 335 F. Supp. 2d 48, 53–54 (D.D.C. 2004).

21. For example, in 2011, the Board for Correction of Naval Records (BCNR) denied relief in 64% of the cases. 2011 Annual Report, Board for Correction of Naval Records (Jan. 3, 2012) [hereinafter BCNR Annual Report] (on file with author). In the same year, the Coast Guard board denied relief in 72 of the 158 cases it decided. E-mail from Julia

justice along the lines of the Niagara of social security, veterans, and immigration cases, but it is still a sizable caseload—the Army board alone received 17,674 applications in fiscal year 2012, of which 9,314 were considered by three-member panels; the Board for Correction of Naval Records (BCNR) received 13,204 applications in calendar year 2011²²—and one in which the vast majority of applicants represent themselves.

Important consequences flow from the size of the caseload and the frequency of self-representation. For one thing, cases are often not presented fully, logically, cogently, or in a way that connects with governing case law. For another, they take a good deal of time to adjudicate—even if the applicant is properly represented. Congress has responded to the problem of delay, at least, by setting targets for the completion of agency action in record-correction cases.²³

Another result of the caseload is that the boards rarely exercise their power to conduct evidentiary hearings.²⁴ The Army Board for Correction of Military Records conducted no live hearings in fiscal year 2012. The BCNR has not conducted one in the last twenty years. The Coast Guard board has not conducted one in the last ten years. The Court of Federal Claims has rarely, if ever, directed a correction board to conduct an evidentiary hearing,²⁵ and the same is true of the district courts, which also review corrections boards' decisions. While the absence of live hearings harms applicants, who bear the burden of proof (in contrast to the government's highly advantageous presumption of regularity),²⁶ the agency can also suffer. This is so because the lack of an evidentiary hearing may make it more difficult for a correction board to render the kind of credibility judgments that can make a difference if and when the time comes for judicial review. Of course, if there were more live hearings, there would also presumably be higher public confidence in the boards' administration of justice.

Finally, and most disturbingly, one of the correction boards—the BCNR—is given to short-form letter rulings that are often little more than

Andrews, Deputy Chair, Coast Guard Bd. for the Corr. of Military Records, to author (Oct. 2, 2012, 15:18 EDT) (on file with author).

22. Letter from Jose L. Burgos, Chief, Freedom of Info. Act Program, Office of the Admin. Assistant to the Sec'y of the Army, to author (Oct. 22, 2012) (on file with author); BCNR Annual Report, *supra* note 21.

23. 10 U.S.C. § 1557 (2006).

24. Hearings are permitted, but not required, in cases under the Military Whistleblower Protection Act. 10 U.S.C. § 1034(f)(2)(C).

25. *See Helferty v. United States*, 101 Fed. Cl. 224, 228–29 (2011) (implying that refusal to conduct an evidentiary hearing on remand is reviewable for arbitrariness).

26. *E.g.*, *Richey v. United States*, 322 F.3d 1317, 1326–27 (Fed. Cir. 2003).

boilerplate. To be sure, many record-correction cases are not very complicated or the applicant or counsel may not have bothered to respond to the uniformed service's advisory opinion.²⁷ In such cases, a letter ruling ought to suffice, especially given the low bar the APA creates for decisions in informal adjudications. The problem is that the BCNR also uses letter rulings in cases that no reasonable observer would consider straightforward. Often, these letter rulings merely cross reference and adopt positions taken in the advisory opinion. Rote advisory opinions invite—and often lead to—remands. The BCNR should use letter rulings far more sparingly.

Oddly, the BCNR also does not *sua sponte* reveal the names and votes of the members when it has denied relief. Instead, it informs applicants and counsel that this information will be provided on request. This compels applicants to write a follow-up letter seeking information that ought to be included in the decisional document as a matter of routine. This rigmarole is an inexplicable and pointless bureaucratic hurdle.

I. A CASE FROM HELL

It may be instructive to describe an APA case I handled for several years in the United States District Court for the District of Columbia.²⁸ It lasted years and is thankfully now over. In the end, the agency action was upheld and no appeal was taken. Along the way, the BCNR and the Marine Corps's intramural enlisted remedial selection board probably violated every bedrock rule of administrative law. Let me count the ways.

The controversy between this career-enlisted Marine and the government began in 1994, went through several cycles of administrative action, both within the Marine Corps and at the correction board, and wound up in the district court in 2005. At issue was whether the plaintiff should have been remedially promoted to a higher enlisted pay grade. As it happens, the case lasted so long that he retired before it was over.

In April 2006, faced with a motion for summary judgment, the Secretary of the Navy requested that the case be remanded. After further administrative proceedings, the case returned to the district court, which in 2008 remanded for a second time when it became apparent that the Marine Corps's enlisted remedial selection board—not the correction board—had acted without the minimum number of voting members required by the governing regulation.²⁹

27. "Advisory opinion" is the term used for the uniformed service's response to a correction board application. It is, in effect, a brief.

28. *Pettiford v. Sec'y of the Navy*, 858 F. Supp. 2d 86 (D.D.C. 2012).

29. During the litigation the Marine Corps changed the regulation to reduce the required number.

Thereafter, the BCNR rendered a further decision upholding the Marine Corps's action. Unfortunately, the panel members were laboring under a misimpression as to whether the Marine Corps's internal board had actually compared Gunnery Sergeant Pettiford's service record with those of other Marines when deciding whether he should be remedially promoted. This led to a third remand.

Two months later, there was a fourth remand when we learned that the correction board had engaged in improper *ex parte* contacts³⁰ about the case with the Marine Corps.

A further BCNR decision ensued, but that decision neglected to respond to one of the plaintiff's nonfrivolous arguments. As a result, in 2011—six years into the litigation—the case was remanded a fifth time. This time Judge Huvelle left nothing to chance—or so she must have thought—by giving the agency specific questions to address.³¹

It did not work. The correction board failed to respond to several of the questions that had been put to it in the order of remand. This compelled a sixth remand.

The seventh and final remand—the third of three in 2011 alone—was required when we learned that the board's voting members had never reconvened for the purpose of responding to Judge Huvelle's earlier order. The staff had simply made up a response and made it seem like the board members had functioned.

In the end, the correction board assigned a new, previously uninvolved staff member to review the file and work with yet another panel of voting members. The result was a lengthy ruling which once again denied relief. Although an appealable issue was presented, the plaintiff, who by now was overseas, holding a responsible civilian position in the Department of State, decided, not surprisingly, that enough was enough. By then it was 2012.

Most lawyers prefer to talk about their victories. That includes me. But readers ought to know about this case. Through the prism of the APA, it vividly shows how the correction board process can work even when an applicant is represented by counsel and has the patience and resources to do battle over a protracted period, and even under the watchful eye of a tenacious federal judge.

In describing this case, I want to be very clear that I do not believe this sad tale of informal adjudication is typical of the BCNR, much less of any of the other correction boards. Nonetheless, and regardless of the correctness of the final outcome, what I have described did happen and is far from ancient history. It could happen again, especially to the countless

30. 10 U.S.C. § 1556 (2006).

31. *Pettiford v. Sec'y of the Navy*, 774 F. Supp. 2d 173 (D.D.C. 2011).

correction board applicants who lack proper representation or are not represented at all.

II. RECOMMENDATIONS

Summing up (and recognizing that I have not developed all of the points that follow), I have a few suggestions for the Court of Federal Claims, the Executive Branch, and Congress.

For the court, I recommend that judges take a hard look at whether there are times when a remand should include instruction to conduct an evidentiary hearing. I also recommend that whether by rule change³² or by order in individual cases, the deadline for agency action on remands should be shortened. Somewhat more broadly, I would hope that the correction boards should be treated like any other federal agency when it comes to judicial review, whether that review takes place under the rubric of the Tucker Act or of the APA. I know there are cases galore that take a different view, but I have come to believe no one should grow misty-eyed simply because a case has something to do with national defense.

For the Executive Branch, a greater effort should be made to achieve uniformity in the correction boards' rules and jurisprudence. Why is it, for example, that some correction boards believe they have the power to recommend the directed promotion of a commissioned officer (i.e., without referral to a special selection board), while others do not? Why do some refer reconsideration requests to the voting members while others rely on staff to rule on such matters?³³ Why do some require voting members to sign or initial decisions while others do not? After all, the governing statutes apply to all of the military services. The Defense Department should revisit its *laissez faire* correction board regulation and mandate standardization among the boards.³⁴

32. See U.S. Ct. Fed. Claims R. 52.2(b)(1)(B) (remand for up to six months), available at http://www.uscfc.uscourts.gov/sites/default/files/court_info/20120702_rules/12.07.02%20FINAL%20VERSION%20OF%20RULES.pdf. Six-month remands seem to be the norm. *But see* Mendez v. United States, 103 Fed. Cl. 370, 384 (2012) (ninety-day remand). The remand period can also be extended. U.S. Ct. Fed. Claims R. 52.2(d)(1).

33. *E.g.*, Schmidt v. United States, 89 Fed. Cl. 111, 124 (2009) (BCNR); Lipsman v. Sec'y of the Army, 335 F. Supp. 2d 48, 54 (D.D.C. 2004) (Army Board for Correction of Military Records (ABCMR)); Mosley v. Dep't of the Navy, No. 7:10-CV-973, 2011 U.S. Dist. LEXIS 149258, at *3-4 (N.D.N.Y. Dec. 29, 2011) (BCNR). *But see* 33 C.F.R. § 52.67(b) (2012) (Coast Guard).

34. Directive 1332.41, Department of Defense, Boards for Correction of Military Records (BCMRS) and Discharge Review Boards (Mar. 8, 2004), <http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf>. The directive imposes virtually no duties on the BCMRS. All it demands, in ¶ 3.2, is that the services' correction board procedures comply with it and the governing statutes and:

The services should also improve their systems for access to decisions of the correction boards. The decisions—some of them—are online, but they seem to be posted at irregular intervals and at a leisurely pace. Moreover, there is no effort to summarize in a useful way—as the Court of Federal Claims’ own website does very nicely—what each case is about. There is no overall online index.³⁵ The result is that only those with time on their hands will a-hunting go for pertinent precedents.³⁶ All of this makes it needlessly difficult for an applicant to situate his or her case within the relevant board’s decisions and frame an argument based on precedent.³⁷

[A]t a minimum, require that:

3.2.1. The boards consider applications individually and fashion relief appropriate to the facts and circumstances of each case.

3.2.2. Applications be submitted by the individual seeking relief or by an appropriate representative as defined in reference (c), as applicable.

3.2.3. Before granting relief, sufficient evidence justifying the relief must be on the record or provided by the applicant. Relief shall be denied if there is insufficient material evidence in the record or provided by the applicant to warrant relief.

Id. ¶ 3.2.

The only other requirement the Defense Department has imposed is that service secretaries must ensure that BCMR applicants are “provided a copy of all correspondence to or from the agency or board with an entity outside the agency or board,” *id.* ¶ 4.2.2., as required by 10 U.S.C. § 1556, and that the time standards set in 10 U.S.C. § 1557 are met. The directive does not require the service secretaries to submit their BCMR regulations to the Secretary of Defense for approval. *Id.* ¶ 4.2.1.

35. For example, the online link to the index of Air Force board decisions leads nowhere. See *Air Force Boards*, DEP’T OF THE AIR FORCE, <http://boards.law.af.mil/AFboards.htm> (last updated Apr. 12, 2012) (follow “BCMR/BRD Index” hyperlink). The Army BCMR does not even have such a link, broken or otherwise. See *Army Board for the Correction of Military Records (BCMR)*, DEP’T OF THE ARMY, http://boards.law.af.mil/ARMY_BCMR.htm (last updated Apr. 3, 2013).

36. That is not to say that it is impossible to find the precedential needle in the adjudicatory haystack. See, e.g., *Kreis v. Sec’y of the Air Force*, 406 F.3d 684 (D.C. Cir. 2005); *Wilhelmus v. Geren*, 796 F. Supp. 2d 157 (D.D.C. 2011). Sometimes it may happen that counsel for an applicant will have handled a similar case and therefore know about an otherwise undiscoverable precedent. The BCNR seems not to believe in precedent, notwithstanding settled administrative law on the point. Thus, the web page for its decisions recites: “*Disclaimer: This site is not intended to provide technical support for submission of an application. Each application is decided upon based on it’s [sic] own merit.*” See *Navy Boards*, DEP’T OF THE NAVY, <http://boards.law.af.mil/NAVYboards.htm> (last updated Apr. 12, 2012).

37. One would like to think that correction board members in one military department would also take respectful note of decisions of another service’s board if called to their attention, but my impression is that citation across service lines is rare, and I know of no case in which a correction board has, *sua sponte*, invoked a decision of a sister board. In a perfect universe, indeed, there would be only one correction board, operating under one set of procedures. Perhaps attention will be given to this kind of radical surgery as the armed services increasingly face austerity budgets. Happily, Congress has already demonstrated its hostility to any degradation in the processing of correction board cases as a result of

Since agency action can be set aside on the basis that like cases must be treated alike, the effect is to deny applicants a potentially potent tool.

As for Congress, I would like to take a leaf from Judge Bruggink's excellent 1999 article in the *Public Contract Law Journal*³⁸ and recommend a serious effort to rationalize the allocation of responsibility between the Court of Federal Claims and the district courts for correction board cases.³⁹ While appellate review of Little Tucker Act litigation lies with the Federal Circuit,⁴⁰ many correction board cases are quite properly, and without so much as a whiff of artful pleading, framed as APA matters. These cases will wind up in the geographical circuits.⁴¹ Since correction board cases are probably way down there with longshore and harbor workers' cases when it comes to the chances of a grant of certiorari, there is little prospect that divergent approaches will be resolved by the Supreme Court. For all these reasons, Congress should examine the current allocation of jurisdiction over correction board cases. This is emphatically not to say either that all correction board cases belong in the Court of Federal Claims or that they all belong in the district courts, but it *is* to say that the current state of affairs is a legal minefield, with far too much risk of wasted effort all around. Our active duty and former military personnel—the vast majority of whom cannot afford much civilian lawyering—deserve better.

personnel reductions. *See* 10 U.S.C. § 1559 (2006).

38. Eric Bruggink, *A Modest Proposal*, 28 PUB. CONT. L.J. 529, 531–32, 543 (1999).

39. Irrationally, the same correction board case may be subject to different periods of limitation depending on whether review is sought under the Tucker or Little Tucker Acts, on the one hand, or under the Administrative Procedure Act (APA), on the other. *See* 28 U.S.C. §§ 2401, 2501 (2006). Similarly, notwithstanding *Darby v. Cisneros*, 509 U.S. 137 (1993), or John A. Wickham, *Federal Courts in the District of Columbia Resurrect Service Members' Right to Direct Judicial Review of Personnel Actions*, 55 ADMIN. L. REV. 23 (2003), the exhaustion doctrine is still likely to be invoked in correction board APA litigation in the district court, whereas correction board remedies need not be exhausted in the Court of Federal Claims (unless the plaintiff voluntarily applies to the board and then decides not to wait for final agency action).

40. 28 U.S.C. § 1295(a)(2).

41. *Id.* § 1291.