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LAW REVIEW

Unjust Enrichment by Algorithm

*Ayelet Gordon-Tapiero & Yotam Kaplan**

Abstract

Social media platforms have become enormously powerful, accumulating wealth at an alarming rate and influencing public opinion with unprecedented efficiency. Platforms use algorithms that promote discriminatory, divisive, extreme, and false content. In recent years, content promoted by social media platforms fueled a series of calamities: the spread of disinformation during the COVID-19 pandemic, the January 6th insurrection, and the establishment of dangerous trends among adolescents and children. The platform crisis is here and is showing no signs of abating.

Platform algorithms recommend divisive, hateful, and inflammatory content because such content encourages users to spend more time on the platform, allows platforms to collect more user data, and presents users with more advertisements, generating more revenue. Thus, the most socially harmful algorithms are the most profitable for platforms. This profitability is fueling the current crisis: as long as harmful algorithms remain the most profitable, new catastrophes are sure to come.

This Article argues that any effective legal response to the platform crisis must address the immense profitability of harmful algorithms. These Authors further suggest that this type of legal response is possible through the doctrine of unjust enrichment. This proposal explains the conditions under which platform profits should be considered unjust, and how the doctrine of unjust enrichment allows courts to strip platforms of such ill-gotten gains. This Article breaks new ground in being the first to study the doctrine of unjust enrichment as a remedy to the platform crisis. Rather than prohibit a particular type of content or a specific optimization metric, this proposal targets platforms' financial incentives, forcing them to consider the broad societal impact of their choices. This is a promising legal venue, offering tools that are unavailable through other frameworks. This Article further details the advantages of this proposal, explains its origins in existing doctrine of the law of unjust enrichment, and provides a rich account of its implementation in practice.

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> [W]e don't want to accept/profit from human exploitation.
> –Internal Facebook memo[1]

Introduction

Content personalization on social media is generating immense societal harms.[2] Recently, the spread of disinformation regarding COVID-19 vaccines caused substantial and dangerous vaccine hesitancy.[3] Claims that the dangers of the pandemic were being overstated,[4] along with bogus cures and arguments that the government and the media were exaggerating the severity of the situation, spread on social media like wildfire.[5] Even U.S. President Joe Biden acknowledged that the disinformation spread on social media platforms was "killing people."[6] Despite this, with a global pandemic raging and claiming the

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1 *See* Justin Scheck, Newley Purnell & Jeff Horwitz, *Facebook Employees Flag Drug Cartels and Human Traffickers. The Company's Response Is Weak, Documents Show.*, Wall St. J. (Sept. 16, 2021, 1:24 PM) (quoting an internal Facebook memo), https://www.wsj.com/articles/facebook-drug-cartels-human-traffickers-response-is-weak-documents-11631812953 [https://perma.cc/H7RR-9KEM].

2 *See* Ayelet Gordon-Tapiero, Alexandra Wood & Katrina Ligett, *The Case for Establishing a Collective Perspective to Address the Harms of Platform Personalization*, 25 Vand. J. Ent. & Tech. L. 635, 651–52 (2023).

3 Neha Puri, Eric A. Coomes, Hourmazd Haghbayan & Keith Gunaratne, *Social Media and Vaccine Hesitancy: New Updates for the Era of COVID-19 and Globalized Infectious Diseases*, 16 Hum. Vaccines & Immunotherapeutics 2586, 2586 (2020) ("As access to technology has improved, social media has attained global penetrance. In contrast to traditional media, social media allow individuals to rapidly create and share content globally without editorial oversight. Users may self-select content streams, contributing to ideological isolation. As such, there are considerable public health concerns raised by antivaccination messaging on such platforms and the consequent potential for downstream vaccine hesitancy, including the compromise of public confidence in future vaccine development . . . .").

4 *See* Ariadne Neureiter, Marlis Stubenvoll, Ruta Kaskeleviciute & Jörg Matthes, *Trust in Science, Perceived Media Exaggeration About COVID-19, and Social Distancing Behavior*, Frontiers Pub. Health, Dec. 1, 2021, at 1, 1 (describing public sentiment that the media was exaggerating the effects and dangers of COVID-19); *see also* Jemma Crew, *Study Reveals One Third of UK Adults Believe Government Is 'Exaggerating' COVID Deaths*, Scotsman (June 1, 2022, 4:55 AM), https://www.scotsman.com/health/study-reveals-one-third-of-uk-adults-believe-government-is-exaggerating-covid-deaths-3715933 [https://perma.cc/42G5-WPKD]; Sofia Bratu, *Threat Perceptions of COVID-19 Pandemic: News Discernment, Media Exaggeration, and Misleading Information*, 19 Analysis & Metaphysics 38, 42 (2020).

5 *See* Alaa Ghoneim, Saiful Salihudin, Isra Thange, Anne Wen, Jan Oledan & Jacob N. Shapiro, *Profiting from Panic: The Bizarre Bogus Cures and Scams of the Coronavirus Era*, Bull. Atomic Scientists (July 24, 2020), https://thebulletin.org/2020/07/profiting-from-panic-the-bizarre-bogus-cures-and-scams-of-the-coronavirus-era/ [https://perma.cc/L4LL-RA4K].

6 Zolan Kanno-Youngs & Cecilia King, *'They're Killing People': Biden Denounces Social Media for Vaccine Disinformation*, N.Y. Times (July 19, 2021), https://www.nytimes.com/2021/07/16/us/politics/biden-facebook-social-media-covid.html [https://perma.cc/NH4S-RWP7].

lives of millions, Facebook's personalization algorithm continued recommending anti-vax content to its users.[7]

Platforms' ability to personalize content for their users is exacerbating distrust in democracy and pushing users to adopt increasingly extreme positions.[8] Social media users are presented with content that reinforces their worldviews and continuously pushes them toward extremism.[9] Some platform users may never encounter a person with opposing views, or conduct a meaningful discussion with them over the platform.[10] Recent changes to platforms' optimization metrics do not promote content that would encourage users to question their beliefs or strengthen their arguments.[11] Instead, platforms' algorithms promote hateful, divisive content, incentivizing content creators to create "outrage bait."[12]

One of the central elements of a functioning democracy is the ability to secure the public's trust in the election process. Mistrust in democratic institutions played a large part in generating the sentiment

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7 *See A Shot in the Dark: Researchers Peer Under the Lid of Facebook's "Black Box," Uncovering How Its Algorithm Accelerates Anti-Vaccine Content*, AVAAZ (July 21, 2021), https://secure.avaaz.org/campaign/en/fb_algorithm_antivaxx/ [https://perma.cc/54XF-MZYU] (finding that Facebook recommended pages promoting antivaccine content to users). On the term "anti-vax," see Staci L. Benoit & Rachel F. Mauldin, *The "Anti-Vax" Movement: A Quantitative Report on Vaccine Beliefs and Knowledge Across Social Media*, 21 BMC PUB. HEALTH, no. 2106, 2021, at 1, 2 ("A vaccine denier or anti-vaxxer will be defined in this study as someone who believes vaccines do not work, are not safe or refuse vaccines for themselves and their children if applicable.").

8 *See* Luke Munn, *Angry by Design: Toxic Communication and Technical Architectures*, 7 HUMANS. & SOC. SCIS. COMMC'NS, no. 53, 2020, at 1, 6 ("Recommending content based on engagement, then, often means promoting incendiary, controversial, or polarizing content."); Joseph B. Bak-Coleman et al., *Stewardship of Global Collective Behavior*, 118 PROC. NAT'L ACAD. SCIS., no. 27, 2021, at 1, 5 (describing how algorithmic decision-making can facilitate and increase polarization, extremism, and inequality).

9 *See Hearing on "Holding Big Tech Accountable: Targeted Reforms to Tech's Legal Immunity" Before Subcomm. on Consumer Prot., Prod. Safety, & Data Sec. of the S. Comm. on Com., Sci. & Transp.*, 117th Cong. 2 (2021) [hereinafter *Hearing*] (statement of Frances Haugen, former Facebook employee) ("The result has been a system that amplifies division, extremism, and polarization—and undermining societies around the world.").

10 *See* Dominic Spohr, *Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media*, 34 BUS. INFO. REV. 150, 151–53 (2017) ("The key issue here is that these groups, convinced of the echo that surrounds them with their own views and preconceptions, in a sense loose [sic] the inclination to proactively discuss ideas with people or groups of a different opinion."); Julie E. Cohen, *Tailoring Election Regulation: The Platform Is the Frame*, 4 GEO. L. TECH. REV. 641, 647 (2020) (claiming that social media users are sorted into "opposing tribes").

11 *See* discussion *infra* Section I.B.1 on the development of optimization metrics.

12 *See* The Journal, *The Facebook Files, Part 4: The Outrage Algorithm*, WALL ST. J., at 17:08 (Sept. 18, 2021), https://www.wsj.com/podcasts/the-journal/the-facebook-files-part-4-the-outrage-algorithm/e619fbb7-43b0-485b-877f-18a98ffa773f [https://perma.cc/2T4N-3WEQ] [hereinafter *Facebook Files*].

that led up to the violent storming of the Capitol on January 6, 2021.[13] The roots of other violent events can be found in content recommended to users by social media platforms.[14] Many are now rightfully concerned with this current state of affairs and fearful of what comes next.[15]

Why is it that platforms recommend such harmful content to their users? After all, they are not in the business of undermining democratic governments. No, the reason is far more prosaic. Platforms recommend divisive, hateful, and extreme content because it is profitable for them to do so.[16] Such content encourages users to spend more time interacting with platforms, allowing platforms to collect more user data, and present users with more advertisements, generating more revenue for them.[17]

This Article offers the first systematic attempt to combat the ongoing platform crisis through the law of unjust enrichment. The law of unjust enrichment allows courts to strip wrongdoers of any ill-gotten gains.[18] This legal tool is meant to ensure that misconduct does not pay

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13 *The January 6 Effect: An Evolution of Hate and Extremism*, Anti-Defamation League, https://www.adl.org/january-6-effect-evolution-hate-and-extremism [https://perma.cc/6G26-E43E] (explaining that conspiracy theories, including those about election fraud and "stolen" elections, motivated the January 6 insurrection).

14 *See, e.g.*, German Lopez, *Pizzagate, the Fake News Conspiracy Theory that Led a Gunman to DC's Comet Ping Pong, Explained*, Vox (Dec. 8, 2016, 11:15 AM), https://www.vox.com/policy-and-politics/2016/12/5/13842258/pizzagate-comet-ping-pong-fake-news [https://perma.cc/99XR-3BYW]; *see also Hearing*, *supra* note 9, at 2 ("In some cases, this dangerous online talk has led to actual violence that harms and even kills people."); Paul Mozur, *A Genocide Incited on Facebook, with Posts from Myanmar's Military*, N.Y. Times (Oct. 15, 2018), https://www.nytimes.com/2018/10/15/technology/myanmar-facebook-genocide.html [https://perma.cc/H6DG-5BLG].

15 *See* Jonathan Haidt, *Why the Past 10 Years of American Life Have Been Uniquely Stupid*, The Atlantic (Apr. 11, 2022), https://www.theatlantic.com/magazine/archive/2022/05/social-media-democracy-trust-babel/629369/ [https://perma.cc/K7D9-QEEV]; Jonathan Haidt, *Yes, Social Media Really Is Undermining Democracy*, The Atlantic (July 28, 2022), https://www.theatlantic.com/ideas/archive/2022/07/social-media-harm-facebook-meta-response/670975/ [https://perma.cc/XCA5-BC4V]; Scott Simon, Opinion, *After Jan. 6, What's Next for Our Democracy?*, NPR (June 11, 2022, 08:05 AM), https://www.npr.org/2022/06/11/1104333161/opinion-after-jan-6-whats-next-for-our-democracy [https://perma.cc/6LC2-PBH7].

16 *See Hearing*, *supra* note 9, at 2 ("I saw that Facebook repeatedly encountered conflicts between its own profits and our safety. *Facebook consistently resolved those conflicts in favor of its own profits*. The result has been a system that amplifies division, extremism, and polarization—and undermining societies around the world. In some cases, this dangerous online talk has led to actual violence that harms and even kills people. In other cases, their profit optimizing machine is generating self-harm and self-hate—especially for vulnerable groups, like teenage girls." (emphasis added)).

17 A huge percentage of the revenue of leading social media platforms is generated from ads. *See* Salomé Viljoen, *A Relational Theory of Data Governance*, 131 Yale L.J. 573, 588–89 (2021) ("In 2019, Google reported $134.81 billion in advertising revenue out of $160.74 billion in total revenue. In the first quarter of 2020, Facebook's total advertising revenue amounted to $17.44 billion, compared to $297 million in revenue from other streams." (footnote omitted)).

18 Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. L. Inst. 2011) (describing the disgorgement remedy as designed to strip wrongdoers of gains).

and to remove the incentive to act in ways that are harmful to others.[19] This Article argues this is precisely the remedy required in the present context, to remove platforms' incentive to promote harmful content.[20]

These Authors propose applying the doctrine of unjust enrichment to platform personalization in three categories of cases. The first includes cases where the personalization of content amounts to discriminatory treatment. This is the case, for example, when job ads are presented exclusively to members of one gender or when a particular ethnic group is excluded from the presentation of housing ads.[21] This type of discrimination is already illegal and is therefore a good starting point for the application of the doctrine. The second category of harmful personalization this Article identifies is the promotion of extreme, divisive, and false content that contributes to democratic erosion or political violence. Third and finally, this proposal identifies cases where platforms knowingly abuse sensitive groups by presenting them with content to which they display a particular vulnerability.

These types of personalized recommendations generate immense profits for platforms, as they allow platforms to collect more data about users and present them with more ads.[22] As long as such harmful personalization allows platforms to become enriched, there is no reason for them to refrain from it.[23] This proposal identifies the enrichment generated by harmful personalization as unjust. The application of the doctrine of unjust enrichment to the case of harmful platform personalization is in line with the reasoning and rationale of the doctrine, and a natural development of it.[24] This court-enforced doctrine is the proper legal tool to combat harmful personalization. Compared to regulatory agencies or other regulatory bodies, courts can be less susceptible to regulatory capture[25] and are more accessible

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19 *See* Ofer Grosskopf, *Protection of Competition Rules Via the Law of Restitution*, 79 TEX. L. REV. 1981, 1997–98 (2001) (explaining that stripping wrongdoers of their gains is necessary to remove incentives for wrongdoing).

20 *See* discussion of the proposal *infra* Section II.B.

21 In the United States, the Fair Housing Act, 42 U.S.C. § 3604, prohibits discrimination in advertising for housing opportunities; the Civil Rights Act of 1964, §§ 703–716, 42 U.S.C. §§ 2000e to 2000e-15, prohibits discrimination in job advertisements based on protected characteristics; the Age Discrimination in Employment Act of 1967, §§ 2–12, 14–15, 17, 29 U.S.C. §§ 621–634, prohibits discrimination in advertising of job opportunities on the basis of age.

22 *See* Gordon-Tapiero et al., *supra* note 2, at 647.

23 *See* Roger McNamee, *Facebook Will Not Fix Itself*, TIME (Oct. 7, 2021, 11:35 AM), https://time.com/6104863/facebook-regulation-roger-mcnamee/ [https://perma.cc/XS9F-5NWN].

24 *See infra* Section II.B.

25 Richard A. Posner, *Regulation (Agencies) Versus Litigation (Courts) An Analytical Framework*, *in* REGULATION VS. LITIGATION: PERSPECTIVES FROM ECONOMICS AND LAW 11, 19 (Daniel P. Kessler ed., 2010) ("Agencies are subject to far more intense interest-group pressures than courts. The agency heads are political appointees and their work is closely monitored by congressional committees. The fact that agency members are specialized, and that they are less insulated from

to unorganized citizens.[26] Regulatory agencies operate by adopting a rule and mandating its implementation. Courts, on the other hand, can apply the doctrine on a case-by-case basis, developing the doctrine and the conditions for its application over time. This measure of flexibility is crucial in the ever-changing world of social media platforms.

The problems caused by harmful platform personalization are frightening. Almost fifty percent of U.S. adults report that they get a large part of their news through social media platforms.[27] Thus, platforms have much control over the type of information they present to individuals, and perhaps, even more importantly, the information they will never expose people to. They have the potential to undermine the way people interact with each other, indeed the very basis upon which democratic societies function. This Article identifies a real opportunity to address these harms. By changing platforms' financial incentives, there is viable potential for change. We cannot allow ourselves as a global society to continue expressing concern over the harms of problematic platform personalization while not taking enough action to prevent them.

This Article makes four novel contributions. The first contribution is *conceptual*. The doctrine of unjust enrichment does not focus exclusively on the harms that personalization generates for individuals and for society. In fact, it is often almost impossible to identify a particular individual harmed by personalization, much less to quantify the damage. Instead, the doctrine focuses on the enrichment experienced by the platform in question. This enrichment is much easier to identify and quantify. Focusing on unjust gains enables the creation of an actionable claim. The second contribution is *doctrinal*. This Article discusses the institutional elements necessary to allow the practical implementation of the doctrine of unjust enrichment to a particular

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the political process than judges are, makes them targets for influence by special-interest groups; hence the term 'regulatory capture.' Historically, the missions of regulatory agencies have often been anticompetitive, as capture theory implies: interest groups seek to influence agencies to insulate the groups' members from competition, as by blocking new entry. Execution of valid regulatory policies is often thwarted by the dependence of regulators on information supplied by the regulated entities and by the perverse incentives created by 'revolving door' behavior."). See, for example, Rajshree Agarwal & Washington Bytes, *Why Amazon Runs Toward Government with HQ2*, Forbes (Nov. 15, 2018, 7:42 AM), https://www.forbes.com/sites/washingtonbytes/2018/11/15/why-amazon-runs-toward-government-with-hq2/?sh=3311f31067a9 [https://perma.cc/RR2X-H7ZJ], for a discussion of the lobbying efforts of companies such as Amazon, Twitter, Facebook, and Apple to impact regulators' policy making.

26 *See* J. Maria Glover, *The Structural Role of Private Enforcement Mechanisms in Public Law*, 53 Wm. & Mary L. Rev. 1137, 1154 (2012).

27 Mason Walker & Katerina Eva Matsa, *News Consumption Across Social Media in 2021*, Pew Rsch. Ctr. (Sept. 20, 2021), https://www.pewresearch.org/journalism/2021/09/20/news-consumption-across-social-media-in-2021/ [https://perma.cc/ZP6T-CT9S] ("A little under half (48%) of U.S. adults say they get news from social media 'often' or 'sometimes,' . . . .").

case of unjust enrichment through personalization. The Article also identifies who may be a potential plaintiff in an unjust enrichment claim made against a social media platform. The third contribution is *analytical*. This Article describes three categories of problematic personalization which generate harms not only for particular individuals, but also for society at large. This proposal identifies not only the harm generated by each category, but, more importantly, the unjust behavior carried out by the platform. For each category the Article also identifies the enrichment mechanism. Finally, this Article makes a *normative* contribution. Based on an analysis of the doctrine of unjust enrichment and its application by courts, the Authors argue that it is legally justified to analyze harmful platform personalization through the lens of unjust enrichment. Despite growing recognition of the severity of the harms driven by platform personalization, regulators and researchers have not yet been able to offer a solution that can effectively prevent platforms from becoming enriched at the expense of the public. Moreover, any attempt to regulate away a particular type of harmful behavior—for example prohibiting the use of downstream Meaningful Social Interaction ("MSI")[28] as an optimization metric—could result in platforms making a slight change so that the new regulation does not directly apply to them. In setting a standard by which platforms' behavior must be examined, this proposal focuses on the way that platforms' incentives are shaped.

The Article proceeds as follows. Part I describes the platform crisis. It explains how information collected from users is used to personalize the content presented to them by describing the development of optimization metrics that guide the activity of platforms' personalization algorithms. The Facebook Files, exposed by Frances Haugen,[29] gives exceptional insight into the behind-the-scenes development of Facebook's personalization algorithm's optimization metric: downstream MSI. The documents not only provide factual information about Facebook's activities, but also expose the concerns raised by Facebook workers that show that they were aware of the harms the platform was causing and were deeply concerned about them.[30] In particular, the quote at the beginning of this Article[31] shows that Facebook workers understood the platform was financially benefitting from exploiting its users. This Part also describes the main harms caused

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28 *See* discussion *infra* Section I.B.

29 *See* Jeff Horwitz, *The Facebook Files*, WALL ST. J. (Oct. 1, 2021), https://www.wsj.com/articles/the-facebook-files-11631713039 [https://perma.cc/LJ7D-7DPF].

30 *See id.*

31 *Supra* note 1 and accompanying text.

by platforms' personalization: discrimination, the spread of disinformation, increased polarization, and ongoing extremism, culminating in an erosion of trust in democracy and its institutions. Part II proposes the Authors' solution—the application of the doctrine of unjust enrichment to harmful platform personalization. This Part reviews the doctrine of unjust enrichment and demonstrates how each of its elements is suited for addressing the gains generated by platforms' damaging personalization processes. This Part details the three categories of harmful personalization that the Article applies the doctrine to: discrimination, the abuse of vulnerable users, and socially harmful personalization undermining trust in democracy. Part III presents the advantages of applying the doctrine of unjust enrichment to harmful platform personalization. It highlights the fact that the doctrine focuses on gains, not on harms, and therefore does not require identifying an injured party. This Part offers tools and guidelines for calculating the level of enrichment and points out the benefit of applying flexible standards and non-bright-line rules to the innovative practice of platform personalization. The Part offers predictions for several steps that platforms may take in response to the adoption of this proposal and how the application of the doctrine may develop in turn to combat these adaptations. The Conclusion expresses the Authors' sincere hope that this proposal will be a constructive tool for stopping the downward spiral society currently faces.

I. The Platform Crisis

Over the past decade, social media platforms such as Facebook, Instagram, X (formerly known as Twitter), TikTok, and YouTube have emerged as a dominant force in our political, economic, and social lives. Social media platforms drive public opinion, replace traditional market environments, and change the way people interact with each other and experience public life. These deep technological and societal changes are shaped by the commercial interests of platforms as profit maximizing firms and by the ability of platforms to use new technologies to optimize their operations and increase their influence and revenues. These processes have led to unprecedented harms in recent years in the form of discrimination, the abuse of vulnerable users by presentation of harmful content, the spread of disinformation, and the erosion of trust in democracy and its institutions. This Part connects these societal ills with the technology driving platform personalization algorithms and tracks the way in which social media platforms' ability to collect and analyze user data is both central to their business models and deeply harmful for both individuals and society at large. This review of the platform crisis sets the stage for this Article's law reform proposal presented in Part II.

A. The Principles of Personalization

Personalization is fundamental to the operation of social media platforms.[32] This Section highlights the bidirectional nature of platform personalization. First, personalization requires data collection along the *outgoing vector* when data flows *from users to the platform*.[33] While social media platforms typically offer their services "free of charge," users effectively pay for platform services by unwittingly allowing platforms to access and control their data.[34] Second, personalization entails the tailoring of content along the *incoming vector*, along which personalized content is presented *by platforms to users*.[35] Coming together, these basic components of personalization allow platforms to utilize user data to personalize the content each user is presented with, to offer highly targeted advertising services, and to maximize the time users spend actively interacting with the platforms. The basic elements of personalization generate immense power in the hands of social media platforms, leading to the creation of "surveillance capitalism" and driving platform profits.[36]

1. Collecting Data and Building a User Profile

Platforms collect user data along the *outgoing vector*, or when data flows from the user to the platform.[37] Such information includes users'

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32 Some platforms offer a hybrid option: while basic access is free, these platforms offer subscription models to access a premium version of their services. YouTube allows all users to watch videos and receive personalized recommendations for videos on its platform. Users who pay a monthly subscription receive access to commercial free videos. *See YouTube Premium*, YouTube, https://www.youtube.com/premium [https://perma.cc/RB36-FDA3]. Users who subscribe to Spotify also receive ad-free access to content as well as other premium services. *See Spotify Premium*, Spotify, https://www.spotify.com/us/premium/ [https://perma.cc/G5BZ-2ELC]. While the Authors view paid services as part of social media platforms as well, the paid premium versions operate under a somewhat different business model and therefore fall outside the scope of the analysis in this Article.

33 *See* Gordon-Tapiero et al., *supra* note 2, at 644.

34 *See* Priscilla M. Regan, *A Design for Public Trustee and Privacy Protection Regulation*, 44 Seton Hall Legis. J. 487, 495–96 (2020) ("In exchange for 'free' services . . . individuals provide their personal information . . . ."); *see also* Eli Pariser, The Filter Bubble 16 (2011) ("In exchange for the service of filtering, you hand large companies an enormous amount of data about your daily life—much of which you might not trust friends with.").

The business model used by leading social media platforms is different from those used by other types of platforms. Thus, marketplace platforms like Amazon's marketplace, eBay, Uber, and Airbnb usually charge a percentage of the sum of the transaction conducted on them. *See* Lina M. Kahn, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973, 987 (2019) (describing the business model of marketplace platforms).

35 *See* Gordon-Tapiero et al., *supra* note 2, at 646.

36 *See* Shoshana Zuboff, The Age of Surveillance Capitalism 197 (2020).

37 *See* Gordon-Tapiero et al., *supra* note 2, at 644; *see also* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183, 1185 (2016) (acknowledging the widespread collection of personal data).

online activity within the platform—posting a tweet, responding to a friend's video, sharing a post viewed in a group, or clicking "like" on certain content—as well as digital activity outside the platform.[38] Some platforms also collect data about their users' offline activity, such as their location or voter registration data.[39] Salome Viljoen highlights the relational nature of data as a meaningful source of information for platforms.[40] Viljoen points out that due to the fact that user data is deeply interconnected, platforms can infer even more data about their users than they were explicitly provided with.[41] When one user uploads a picture of a party they went to, the platform is able to learn that other users appearing in the picture attended the same party whether or not these other users were interested in having this type of information shared and whether or not they were even aware of its existence.[42] A kind neighbor may be unaware they have been captured in their neighbor's smart doorbell or that their conversation was monitored by the neighbor's virtual assistant.[43] Platforms can infer highly personal attributes about users, such as gender, political affiliation, level of income and even medical information despite users actively withholding such

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38 Facebook tracks its users when they sign into third-party services with their Facebook account. It also gathers information about when its users visit a site embedded with the "like" button, even if the user did not click on it. *See* Jonathan R. Mayer & John C. Mitchell, *Third-Party Web Tracking: Policy and Technology*, 2012 IEEE Symp. on Sec. & Priv. 413, 419; Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 Berkeley Bus. L.J. 39, 41 (2019). Google collects information about news articles its users read. *See* Brian X. Chen, *I Downloaded the Information That Facebook Has on Me. Yikes.*, N.Y. Times (Apr. 11, 2018), https://www.nytimes.com/2018/04/11/technology/personaltech/i-downloaded-the-information-that-facebook-has-on-me-yikes.html [https://perma.cc/RB3F-FXF5] ("Google kept a history of many news articles I had read . . . I didn't click on ads for either of these stories, but the search giant logged them because the sites had loaded ads served by Google.").

39 *See, e.g.*, Pauline T. Kim & Sharion Scott, *Discrimination in Online Employment Recruiting*, 63 St. Louis U. L.J. 93, 97 (2018) ("Facebook also purchases information from data brokers to learn about users' offline behavior, including income and spending habits."); *see also* Giridhari Venkatadri, Piotr Sapiezynski, Elissa M. Redmiles, Alan Mislove, Oana Goga, Michelle L. Mazurek & Krishna P. Gummadi, *Auditing Offline Data Brokers via Facebook's Advertising Platform*, 2019 Proc. World Wide Web Conf. 1920, 1920 ("Recently, data brokers and online services have begun partnering together, allowing for the data collected about users online to be linked against data collected offline. This enables online services to provide advertisers with targeting features that concern users' offline information.").

40 *See* Viljoen, *supra* note 17, at 603.

41 *Id.* at 611.

42 *See* Gergely Biczók & Pern Hui Chia, *Interdependent Privacy: Let Me Share Your Data*, Fin. Cryptography & Data Sec., Apr. 2013, at 338, 340 (describing one user tagging another in a photo as an example of the interdependent nature of data online); *see also* Solon Barocas & Karen Levy, *Privacy Dependencies*, 95 Wash. L. Rev. 555, 568 (2020) ("Or perhaps the Observer takes a photo of Alice, knowing that it will capture Bob in the background.").

43 *See* Barocas & Levy, *supra* note 42, at 568.

data.[44] Some platforms even build "shadow profiles" for individuals who have not registered on the platform by analyzing data gathered from other platform users.[45] This is made possible due to the collective, interconnected nature of data, which enables platforms to detect patterns across large groups.[46]

Social media platforms use the data they have collected and analyzed to draw a detailed profile of their users, including information about their personal attributes, social connections, and interests. The richer the data the platforms hold about each user, the more in depth a profile the platforms are able to draw.[47] This detailed profile enables platforms to present users with content tailored specifically for them. The ability to offer a user personalized content based on data generated by the user and by others is one of the central pillars of social media platforms' business model.[48]

2. Creating a Personalized Platform Experience

Based on the large amounts of data collected and analyzed by platforms, the user experience is personalized along the *incoming vector*, whereby platforms present content to users.[49] All content that users view on the platform is personally tailored and presented to each user

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44 *See* Sandra Wachter & Brent Mittelstadt, *A Right to Reasonable Inferences: Re-Thinking Data Protection Law in the Age of Big Data and AI*, 2019 COLUM. BUS. L. REV. 494, 506 (describing how platforms can infer data about individuals even if they did not provide it); E. Fosch-Villaronga, A. Poulsen, R.A. Søraa & B.H.M. Custers, *A Little Bird Told Me Your Gender: Gender Inferences in Social Media*, INFO. PROCESSING & MGMT., May 2021, at 1, 1 (demonstrating that platforms can infer an individual's gender even when they have not provided it); Kristen M. Altenburger & Johan Ugander, *Monophily in Social Networks Introduces Similarity Among Friends-of-Friends*, 2 NATURE HUM. BEHAV. 284, 284 (2018) ("[E]ven if an individual does not disclose private attribute information about themselves (such as their gender, age, race or political affiliation), methods for relational learning can leverage attributes disclosed by that individual's similar friends to possibly predict their private attributes." (footnotes omitted)).

45 For example, when signing up for Facebook Messenger, users permit Facebook to download their entire list of contacts. *See* Chen, *supra* note 38 ("One surprising part of my index file was a section called Contact Info. This contained the 764 names and phone numbers of everyone in my iPhone's address book. Upon closer inspection, it turned out that Facebook had stored my entire phone book because I had uploaded it when setting up Facebook's messaging app, Messenger."). If enough of a person's friends are active on Facebook Messenger, the app can draw a fairly accurate analysis of that person's social circle despite having no contractual connection to that individual.

46 *See* Gordon-Tapiero et al., *supra* note 2, at 647–51; *see also* Viljoen, *supra* note 17, at 573.

47 Chris Jay Hoofnagle & Jan Whittington, *Free: Accounting for the Costs of the Internet's Most Popular Price*, 61 UCLA L. REV. 606, 608–09 (2014) ("The more time the consumer spends using the service and revealing information, the more the service can adjust the product to reveal more information about the consumer and tailor its advertising of products to that consumer's personal information.").

48 *See* Regan, *supra* note 34, at 496 ("The data that companies acquire from their users enables them to refine the services they offer and to offer new or related services.").

49 *See* Gordon-Tapiero et al., *supra* note 2, at 646.

based on their unique profile; not only the content itself is personalized, but also the order in which content is ranked, the timing in which it is presented, and its frequency.[50]

Social media platforms' ability to personalize ads, as well as other content, plays an important role in their business model. Outside of platforms, advertisers must use various proxies to target their desired audience. This can be achieved, for example, by advertising in a particular location, newspaper or magazine, or on the basis of the content of the web page on which the advertisement is presented.[51] While these venues are chosen because there is an increased probability to reach individuals who are likely to find the ad interesting and relevant and hopefully respond to the ads, these methods of advertising also end up reaching many individuals who have no interest in the product or service being advertised.[52] The highly personalized advertising services offered by social media platforms help advertisers cut back on wasted advertising budgets.[53] Based on data, platforms target ads at users likely to find them interesting and relevant, allowing advertisers to maximize the value of their advertising budgets.[54] Moreover, platforms also control *when* ads are presented to users and can present the ad at a time or context when the user is most likely to respond to it.[55] Despite research questioning the increased effectiveness of personalized advertising, it remains a coveted advertising outlet.[56]

3. Keeping Users Engaged

Operating together, the collection of data along the outgoing vector *and* personalized content along the incoming vector is aimed at assuring maximal user engagement with the platform. This allows

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50 *See id.*

51 *See* Veronica Marotta, Vibhanshu Abhishek & Alessandro Acquisti, *Online Tracking and Publishers' Revenues: An Empirical Analysis* 2 (Working Paper, 2019), https://weis2019.econinfosec.org/wp-content/uploads/sites/6/2019/05/WEIS_2019_paper_38.pdf [https://perma.cc/RPW9-J4G2].

52 *See* Zhinan Gan & Sang-Bing Tsai, *Research on the Optimization Method of Visual Effect of Outdoor Interactive Advertising Assisted by New Media Technology and Big Data Analysis*, MATHEMATICAL PROBS. IN ENG'G, Dec. 15, 2021, at 1, 1–2 (stating that traditional advertising media is less effective because it is geared toward larger audiences, with less segmentation).

53 *See id.*

54 *See* Marotta et al., *supra* note 51.

55 *See* Muhammad Ali, Piotr Sapiezynski, Miranda Bogen, Aleksandra Korolova, Alan Mislove & Aaron Rieke, *Discrimination Through Optimization: How Facebook's Ad Delivery Can Lead to Biased Outcomes*, PROC. ACM ON HUM.-COMPUT. INTERACTION, Nov. 2019, at 1, 5 ("[P]latforms try to avoid showing ads from the same advertiser repeatedly in quick succession to the same user; thus, the platforms will sometimes disregard bids for recent winners of the same user. *Second*, the platforms often wish to show users relevant ads . . . .").

56 *See* Marotta et al., *supra* note 51, at 1 (finding that personalized advertising increases advertiser's revenue by only about four percent).

platforms to collect even more information, improve the accuracy of user profiles, and thus offer even more accurately personalized content, present even more ads, and so on. In this vicious cycle, there are only two types of players: winners and users.

Platforms try to monopolize their users' time and attention.[57] They do so by using a variety of addictive features in their interface design.[58] These are reportedly highly successful in generating addiction, especially among younger users.[59] Platforms strive to present users with content they are likely to interact with by liking, retweeting, sharing, commenting, or tagging, among other actions. Users who simply scroll through their feed provide the platform with limited insight into their interests and preferences. Such users are also more likely to leave the platform.[60]

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57 *See, e.g.*, Rabbit Hole, *Four: Headquarters*, N.Y. TIMES (May 7, 2020), https://www.nytimes.com/2020/05/07/podcasts/rabbit-hole-youtube-susan-wojcicki-virus.html [https://perma.cc/2XR7-75BP]. In this podcast, *New York Times* reporter Kevin Roose suggests that within YouTube, "there was sort of this obsession with growth. There was a very strong push to expand the watch time on the platform and that any challenges that were brought to management around that, that these things just weren't given a real hearing." *Id.* at 11:29.

58 *See* Christian Montag, Bernd Lachmann, Marc Herrlich & Katharina Zweig, *Addictive Features of Social Media/Messenger Platforms and Freemium Games Against the Background of Psychological and Economic Theories*, INT'L J. ENV'T RSCH. & PUB. HEALTH, July 23, 2019, at 1, 4; Catherine Price, *Trapped—the Secret Ways Social Media is Built to be Addictive (and What You Can Do to Fight Back)*, BBC: SCI. FOCUS (Oct. 29, 2018, 4:00 AM), https://www.sciencefocus.com/future-technology/trapped-the-secret-ways-social-media-is-built-to-be-addictive-and-what-you-can-do-to-fight-back/ [https://perma.cc/724X-7LJA] (highlighting that users' feeds are ongoing, never coming to a natural stop or break, thus encouraging users to continuously watch as more and more content appears). Notifications that pop up periodically encourage users to repeatedly check their profiles for new updates, likes, or notifications. *See* ADAM ALTER, IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED 109–12 (2017); *see also* Mattha Busby, *Social Media Copies Gambling Methods 'to Create Psychological Cravings*,' THE GUARDIAN (May 8, 2018, 2:00 PM), https://www.theguardian.com/technology/2018/may/08/social-media-copies-gambling-methods-to-create-psychological-cravings [https://perma.cc/6XG3-C8WC]. This mechanism builds on individuals' fear of missing out and on the body's natural release of dopamine when encountering an experience worth repeating. In nature, dopamine is released in response to rewarding activities such as eating. *See* R.A. Wise & P.-P. Rompre, *Brain Dopamine and Reward*, 40 ANN. REV. PSYCH. 191, 219 (1989); *see also* Ian McKay, *Up In Smoke: Why Regulating Social Media like Big Tobacco Won't Work (Yet!)*, 97 NOTRE DAME L. REV. 1669, 1680 (2022); Jamie Waters, *Constant Craving: How Digital Media Turned Us All into Dopamine Addicts*, THE GUARDIAN (Aug. 22, 2021, 4:00 PM), https://www.theguardian.com/global/2021/aug/22/how-digital-media-turned-us-all-into-dopamine-addicts-and-what-we-can-do-to-break-the-cycle [https://perma.cc/2NQC-3EZ7].

59 *See* Nandakishor Valakunde & Srinath Ravikumar, *Prediction of Addiction to Social Media*, IEEE INT'L CONF. ELEC., COMPUT. & COMMC'N TECHS., 2019, at 1, 1 ("Social media addiction is a huge problem among the youth."); *see also* Abdullah J. Sultan, *Fear of Missing Out and Self-Disclosure on Social Media: the Paradox of Tie Strength and Social Media Addiction Among Young Users*, 22 YOUNG CONSUMERS 555, 556 (2021) ("[T]he likelihood of becoming addicted to these applications is very high giving [sic] the social benefits that these applications provide for young users.").

60 *See Facebook Files*, *supra* note 12.

Thus, increasing the time and level of interaction of users allows platforms to achieve two main goals: it increases the time available to present users with ads, both personalized and generic, and generates more meaningful data for platforms to use in learning more about their users' interests and preferences.

B. Algorithms of Personalization

Personalized content is generated by an algorithm. Therefore, to understand why users are presented with certain content and to anticipate what type of content is likely to be promoted by a platform, it is important to understand what the algorithms' optimization metrics are.

This Section describes the algorithmic optimization mechanisms that Facebook utilizes in its personalization process along the incoming vector. Platforms' algorithms are highly protected trade secrets, and platforms are reluctant to publicly disclose information about them. In October of 2021, however, Frances Haugen, a former Facebook employee, disclosed a trove of internal Facebook documents to *The Wall Street Journal* in what is now known as "The Facebook Files."[61] These documents revealed new information about internal Facebook operations. Much of the material in the following Sections is based on documents exposed as part of the Facebook Files. In cases where relevant information is available, the Authors also give examples regarding the activity of other social media platforms. There is no reason to believe that the operation of social media platforms other than Facebook is substantially different.

1. Algorithmic Optimization

When it was first launched in 2006, Facebook users had to actively search for their friends' profiles in order to see content other than their own profile.[62] A year later Facebook introduced the "like" button and also enabled users to mark an "X" on content they did not want to see more of in the future.[63] This enabled Facebook to tailor the content each user was presented with to their particular preferences. In 2009, content began being ranked based on its popularity, gauged by the number of "likes" a post had.[64] Posts with the most "likes" were ranked higher in

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61 *See* Horwitz *supra* note 29; Jeff Horwitz, *The Facebook Whistleblower, Frances Haugen, Says She Wants to Fix the Company, Not Harm It*, WALL ST. J. (Oct. 3, 2021, 7:36 PM), https://www.wsj.com/articles/facebook-whistleblower-frances-haugen-says-she-wants-to-fix-the-company-not-harm-it-11633304122 [https://perma.cc/85VG-6TRT].

62 *See Facebook News Feed Algorithm History*, WALLAROO (Mar. 9, 2023), https://wallaroomedia.com/facebook-newsfeed-algorithm-history/ [https://perma.cc/N7VQ-4JV9].

63 *See id.*

64 *Id.*

users' news feeds.[65] In 2014, Facebook began tracking the time users spent on links they accessed through the platforms.[66] If a user left the outside link immediately, Facebook learned that the user did not like that type of content and would rank similar content lower in the user's newsfeed in the future.[67] Similarly, if the platform detected that a user was spending a lot of time interacting with a certain type of content, it would rank it higher in the future.[68] In 2015 Facebook allowed users not only to mark content that they did not wish to see, but also to select content they wanted to be ranked high in their newsfeed—known as "See First."[69]

The year 2017 was not a good one for Facebook.[70] While users were still spending the same amount of time on the platform, they were becoming increasingly more passive, spending more time watching video content but generating less active engagement.[71] Facebook executives were concerned that users would notice the zombie-like state they were slipping into and leave the platform.[72] Facebook wanted to find a way to encourage users to be more active during the time they spent on the platform: to post more original content, to respond to friends' posts, and to share content they found interesting and relevant.[73] In 2018 Facebook publicly announced that it would be making a change to its algorithm aimed at helping users have more "meaningful interactions," thus promoting users' well-being.[74]

2. Meaningful Social Interaction

To promote users' active engagement with the platform, Facebook changed the metrics that its algorithms were optimizing for. MSI was

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65 *Id.*

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 *See* Stephen Maher, *Facebook's Algorithm Comes Under Scrutiny*, CTR. FOR INT'L GOVERNANCE INNOVATION (Oct. 8, 2021), https://www.cigionline.org/articles/facebooks-algorithm-comes-under-scrutiny/ [https://perma.cc/DH6Z-C9EE].

71 *See* Keach Hagey & Jeff Horwitz, *Facebook Tried to Make Its Platform a Healthier Place. It Got Angrier Instead*, WALL ST. J. (Sept. 15, 2021, 9:26 AM), https://www.wsj.com/articles/facebook-algorithm-change-zuckerberg-11631654215 [https://perma.cc/FU3D-773U]; *see also* Rachel Metz, *Likes, Anger Emojis and RSVPs: The Math Behind Facebook's News Feed—and How it Backfired*, CNN BUS. (Oct. 27, 2021, 9:51 AM), https://edition.cnn.com/2021/10/27/tech/facebook-papers-meaningful-social-interaction-news-feed-math/index.html [https://perma.cc/UPN6-VHWL] (depicting a document titled "Pre-MSI Trends: Engagement Was Broadly Declining Until 2018H1" as redacted for Congress, which reports a decline in reshares starting in 2017).

72 Hagey & Horwitz, *supra* note 71.

73 *Id.*

74 Adam Mosseri, *News Feed FYI: Bringing People Closer Together*, META (Jan. 11, 2018), https://www.facebook.com/business/news/news-feed-fyi-bringing-people-closer-together [https://perma.cc/L23F-3KHU].

selected as the new optimization criteria.[75] MSI consists of two parameters: the number of interactions content receives across users and how close the users interacting with the content are with each other. Content created by a close connection—for example, somebody with many friends in common with the user in question—and content that generated a high level of engagement across users received a higher MSI score.[76] Presenting users with more content created by close friends and family and less content created by businesses and media was expected to increase users' engagement with the platform while also increasing their well-being.[77]

A post's MSI ranking is determined by summing up the value of each user's interaction with it. Thus, a like by any single user is worth one point, while a reaction emoji or a reshare generates five points.[78] More significant engagement, such as commenting, adds another thirty points to the post's score.[79] A post's MSI score is generated per *post* and not for each *user*.[80] Facebook determined that the level of engagement was to be given more weight compared to closeness in determining a post's MSI score.[81] Thus, the overall number of points generated by the various engagements with a particular post was multiplied by a number that was supposed to serve as a proxy for the level of closeness between the people interacting.[82] For an interaction with a close friend, the engagement score would be multiplied by 0.5, while interaction with a complete stranger would be multiplied only by 0.3.[83] The result of this calculation was the content's MSI score for a specific user.[84]

Content with a high MSI score would be promoted and shown to users in their newsfeed based on the expectation that they too were likely to find it interesting and to interact with it.[85] At the same time, content with a low MSI score would not be promoted by the platform as it was deemed uninteresting and unlikely to encourage engagement.[86] Indeed, switching optimization metrics from optimizing for likes or emojis to optimizing for engagement generated a newsfeed that users

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75 Hagey & Horwitz, *supra* note 71.

76 *See Facebook Files*, *supra* note 12, at 10:00.

77 *See* Seth Fiegerman & Laurie Segall, *Facebook to Show More Content from Friends, Less from Publishers and Brands*, CNN Bus. (Jan. 11, 2018, 8:41 PM), https://money.cnn.com/2018/01/11/technology/facebook-news-feed-change/index.html [https://perma.cc/6DU3-Q49F].

78 Metz, *supra* note 71.

79 *Id.*

80 *See id.*

81 *See id.*

82 *See id.*

83 *See id.*

84 *See id.*

85 *See id.*

86 *See id.*

were interacting with more.[87] When announcing these changes to the algorithm's optimization metrics, Mark Zuckerberg, Facebook CEO, stated, "By making these changes, I expect the time people spend on Facebook and some measures of engagement will go down. But I also expect the time you do spend on Facebook will be more valuable."[88]

Reality was much removed from this expectation. Contrary to Facebook's public position, there was absolutely no sign that this change had been successful in increasing users' well-being or making the time users spent on the platform more valuable to them.[89] If anything, the opposite was true. The MSI criterion did not ask what and whose content users would *enjoy* seeing and interacting with. Rather, this optimization metric effectively asked what content would *elicit a response* from users. Unfortunately, it turned out that content with a high MSI score was not high-quality, thought-provoking, dialogue-encouraging content but rather tended to be content that was negative, outrageous, toxic, and divisive.[90] Content creators, who wanted their content to continue being promoted and reach a broad audience, were therefore incentivized to generate "outrage bait" to increase the likelihood of their content being promoted by the algorithm.[91] Facebook prioritized content that sparked controversy, not well-being.

Internal Facebook documents show that the company was well aware of the detrimental effects optimizing for MSI had on the type of content that was being promoted. An internal Facebook memo from 2018 titled, "Does Facebook reward outrage? Posts that generate negative comments get more clicks," reported that angry comments on content posted by *BuzzFeed* led to more engagement with it.[92] In another internal post, a Facebook employee reported that "[p]olitical parties across Europe claim that Facebook's algorithm change in 2018 . . . has changed the nature of politics. For the worse."[93]

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87 *See Facebook Files*, *supra* note 12, at 10:55.

88 Fiegerman & Segall, *supra* note 77.

89 *See Facebook Files*, *supra* note 12, at 11:20.

90 *See* Keith Zubrow, Maria Gavrilovic & Alex Ortiz, *Whistleblower's SEC Complaint: Facebook Knew Platform was Used to "Promote Human Trafficking and Domestic Servitude*," CBS NEWS (Oct. 4, 2021, 6:16 PM), https://www.cbsnews.com/news/facebook-whistleblower-sec-complaint-60-minutes-2021-10-04/ [https://perma.cc/D7VX-XQ27].

91 *See Facebook Files*, *supra* note 12, at 17:08; *see also* Metz, *supra* note 71.

92 Metz, *supra* note 71.

93 David Ingram, Olivia Solon, Brandy Zadrozny & Cyrus Farivar, *The Facebook Papers: Documents Reveal Internal Fury and Dissent over Site's Policies*, NBC NEWS (Oct. 25, 2021, 2:16 PM) (quoting a Facebook employee), https://www.nbcnews.com/tech/tech-news/facebook-whistleblower-documents-detail-deep-look-facebook-rcna3580 [https://perma.cc/M3GN-RQ59]. Scott Simms, a Canadian parliament member expressed similar sentiments. *See* Maher, *supra* note 70.

3. Downstream MSI

Throughout the first year during which MSI was implemented, Facebook found that it was successful in increasing most types of user engagement.[94] Next in the development of its optimization metrics, Facebook began rating content based on the *expected* engagement it was anticipated to generate and called this new optimization metric "downstream MSI."[95] This new metric was made possible because the platform had analyzed the type of content that ranked high on the MSI score in the past and became confident in its ability to predict the type of content that would generate high MSI scores in the future.[96]

Optimizing for downstream MSI further increased the promotion of toxic, divisive, and polarizing content. Users were indeed more likely to engage with content with a high downstream MSI score, for example, by fighting with each other in the comments section.[97] The Facebook Files revealed that Facebook was aware that downstream MSI was facilitating the promotion of even more harmful, divisive, conspiratorial, and fake content.[98]

The Civic Integrity Team at Facebook, a team whose task was to combat hate speech and disinformation on the platform,[99] expressed concern over the type of content that was being promoted by adopting downstream MSI as the optimization metric. They highlighted that the content being promoted was often harmful, negative, divisive, and false.[100] While Facebook implemented suggestions the team made on how to slow the spread of harmful content, as well as potential changes to the algorithm in certain countries and in particular contexts, they were not broadly implemented across the platform.[101] Facebook was concerned that slowing down the virality of content would lower user engagement and adversely affect the platforms' income.[102]

During the same period of time, YouTube also started making changes to its recommendation algorithm. Rather than just presenting users with random new videos or creators, YouTube wanted to be in a position to recommend content to a user that they would find interesting, even before that user themselves knew that they would likely

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94 *See* Metz, *supra* note 71.

95 *See* Hagey & Horwitz, *supra* note 71.

96 *See Facebook Files*, *supra* note 12, at 15:50.

97 *Id.*

98 *Id.* at 16:55.

99 *Id.* at 18:55.

100 *Id.* at 11:50.

101 *See id.* at 20:30; *see also* Mozur, *supra* note 14 (explaining the larger political impact of Facebook on Myanmar).

102 *Facebook Files*, *supra* note 12, at 22:50.

be interested in a particular type of video.[103] The change in YouTube's algorithm resulted in the promotion of more extreme and polarizing views.[104] In an interview with *New York Times* reporters Kevin Roose and Andy Mills, former YouTube CEO, Susan Wojcicki, acknowledged that YouTube was concerned about the state of their recommendation algorithm and the content it was promoting.[105]

Ultimately, optimizing for downstream MSI achieves platforms' goal of increasing user engagement. There is no denying the fact that divisive, inflammatory content encourages users to spend more time generating engagement and traffic for platforms.[106] This increased activity allows platforms to collect more data points for each user and provides them with a better ability and opportunity to increasingly fine tune the ads presented to these users. Presenting the right user with the ad they are most likely to respond to at a time when they are most likely to be susceptible to the content of the ad is what drives these platforms' business model.

C. The Harms of Personalization

Personalization has now become ubiquitous. Local supermarkets send personalized coupons,[107] and navigation apps show users restaurants that they might like as users approach them.[108] Netflix offers recommended shows based on past choices,[109] and Spotify can introduce users to new artists they are likely to enjoy.[110] Personalization online as well as offline has become part of everyday life and offers multiple

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103 In Rabbit Hole, *supra* note 57, at 07:28, Susan Wojcicki, former CEO of YouTube, explained that understanding what people will be interested in is "the hardest area for us to discover. Interests that you haven't necessarily told us that you're interested in . . . or you might not know . . . . [W]e certainly have gotten better at predicting what people are interested in."

104 *See generally id.*

105 *Id.* at 9:30.

106 *See Facebook Files*, *supra* note 12, at 18:55.

107 These can sometimes cause embarrassing results. In 2012, retail giant Target sent one of their young shoppers coupons for baby-related products after their "'pregnancy prediction' score" determined she was pregnant. Her father found out about his daughter's pregnancy after seeing the coupons. *See* Charles Duhigg, *How Companies Learn Your Secrets*, N.Y. Times Mag. (Feb. 16, 2012), https://www.nytimes.com/2012/02/19/magazine/shopping-habits.html [https://perma.cc/RCG8-KSAT].

108 *See, e.g.*, Shelby Brown, *7 Google Features to Use When You Don't Know What's for Dinner*, CNET (Nov. 28, 2022, 4:00 AM), https://www.cnet.com/tech/services-and-software/7-google-feature-to-use-when-you-dont-know-whats-for-dinner/ [https://perma.cc/TS3Q-CBDC].

109 *How Netflix's Recommendations System Works*, Netflix, https://help.netflix.com/en/node/100639 [https://perma.cc/6JNW-PWCY].

110 Charlotte Hu, *Why Spotify's Music Recommendations Always Seem So Spot On*, Popular Sci. (Dec. 2, 2021, 8:00 PM), https://www.popsci.com/technology/spotify-audio-recommendation-research/ [https://perma.cc/B6RL-8B5K]; Nick Seaver, Computing Taste: Algorithms and the Makers of Music Recommendation 49–71 (2022).

benefits.[111] At the same time, personalization is also a form of manipulation. Platforms use personalization to constantly try to nudge their users to act in ways that will benefit the platform. Not all manipulative platform behavior is cause for the same level of concern.[112] While suggesting a user wish their mother happy birthday seems to rank low on a scale of manipulative behavior, experimenting with users' emotions ranks high on this scale and compromises users' autonomy.[113]

Evidence accumulated over recent years demonstrates that, in practice, platforms' ability to manipulate their users through content personalization gives rise to a variety of harms. These harms, extensively researched and analyzed in the literature, are reviewed below.

1. Discrimination

Systematic personalization of content may result in illegal discrimination.[114] Discriminatory personalization is particularly relevant in the context of ads for jobs and housing opportunities where it is already recognized as illegal.[115] Even differential personalization that does not amount to strictly illegal discrimination can be harmful. If teenage boys on social media are presented with content about the recent scientific discoveries of the Webb telescope while girls are presented with makeup tutorials, this could be viewed as harmful and risks perpetuating gender biases, even though it is not currently illegal. It is similarly

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111 *See* David Doty, *A Reality Check on Advertising Relevancy and Personalization*, Forbes (Aug. 13, 2019, 12:51 PM), https://www.forbes.com/sites/daviddoty/2019/08/13/a-reality-check-on-advertising-relevancy-and-personalization/?sh=24abc3837690 [https://perma.cc/VAL9-FNMV].

112 *See* T. M. Wilkinson, *Nudging and Manipulation*, 61 Pol. Stud. 341, 342 (2013) (recognizing that there are different levels of manipulation); *see also* Yochai Benkler, The Wealth of Networks: How Social Production Transforms Markets and Freedom 141 (2006) ("We experience some decisions as being more free than others . . . .").

113 *See generally* Adam D.I. Kramer, Jamie E. Guillory & Jeffrey T. Hancock, *Experimental Evidence of Massive-Scale Emotional Contagion Through Social Networks*, 111 Proc. Nat'l Acad. Scis. 8788 (2014) (reporting the experiment and its outcomes). *See also* Evan Selinger & Woodrow Hartzog, *Facebook's Emotional Contagion Study and the Ethical Problem of Co-opted Identity in Mediated Environments Where Users Lack Control*, 12 Rsch. Ethics 35, 35 (2016) (highlighting the problematic aspects of the Facebook experiment); Yochai Benkler, *Degrees of Freedom, Dimensions of Power*, 145 Daedalus 18, 23 (2016) (giving the Facebook experiment as an example of the power platforms wield over their users).

114 While discriminating based on gender in the context of job and housing opportunities is illegal, there are other contexts where differential treatment based on protected attributes is not considered illegal discrimination, though this does not mean that it should be allowed. On the disparate impact of algorithms see generally Sandra Wachter, Brent Mittelstadt & Chris Russell, *Why Fairness Cannot Be Automated: Bridging the Gap Between EU Non-Discrimination Law and AI*, Comput. L. & Sec. Rev. Mar. 2020, at 1, 64. *See also* Sigal Samuel, *Why It's So Damn Hard to Make AI Fair and Unbiased*, Vox (Apr. 19, 2022, 6:00 AM), https://www.vox.com/future-perfect/22916602/ai-bias-fairness-tradeoffs-artificial-intelligence [https://perma.cc/T3DQ-YVVV].

115 *See* sources cited *supra* note 21.

wrong if members of one race are presented with advertisements for beer and fast food while members of another race are presented with content promoting healthy eating. This could contribute to disturbing health disparities.[116] Differential treatment based on protected attributes harms both the particular individual being targeted and society at large.

2. Disinformation

In recent years, the intentional spread of disinformation has expanded and caused increased concern.[117] The term "disinformation" is used to describe content which is fake, purposely misleading, and manipulative.[118] It also includes content generated by an imposter claiming to be a reliable source.[119] Disinformation is yet another form of manipulation as it attempts to overcome individuals' judgment, tricking them to believe false content, confusing them about what is real or what source they can rely on, and making them generally doubtful and unbelieving.[120] While the spread of disinformation is, by its very nature, harmful and deceitful, its effects are substantially exacerbated by platforms' ability to personalize content for different users: platforms are financially incentivized to determine precisely which users are more

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116 *See* Jennifer L. Harris & Willie Frazier III, Rudd Ctr. for Food Pol'y & Obesity, Increasing Disparities in Unhealthy Food Advertising Targeted to Hispanic and Black Families 1, 6–8, 11 (2019).

117 Edson C. Tandoc Jr., Zheng Wei Lim & Richard Ling, *Defining "Fake News" A Typology of Scholarly Definitions*, 6 Digit. Journalism 137, 139 (2018) (providing a typology of types of fake news).

118 *See id.* at 140.

119 *See* Eleni Kapantai, Androniki Christopoulou, Christos Berberidis & Vassilios Peristeras, *A Systematic Literature Review on Disinformation: Toward a Unified Taxonomical Framework*, New Media & Soc'y, 2020 at 1, 23; *see also* David M.J. Lazer et al., *The Science of Fake News*, 359 Science 1094, 1094 (2018) ("Fake news has primarily drawn recent attention in a political context but it also has been documented in information promulgated about topics such as vaccination, nutrition, and stock values."); Gilad Lotan, *Fake News Is Not the Only Problem*, Points (Nov. 23, 2016), https://medium.com/datasociety-points/fake-news-is-not-the-problem-f00ec8cdfcb [https://perma.cc/JPD4-2KWE] ("Biased information—misleading in nature, typically used to promote or publicize a particular political cause or point of view—is a much more prevalent problem than fake news.").

120 *See* Yochai Benkler, Casey Tilton, Bruce Etling, Hal Roberts, Justin Clark, Robert Faris, Jonas Kaiser & Carolyn Schmitt, Berkman Klein Ctr., Mail-In Voter Fraud: Anatomy of a Disinformation Campaign 2–3 (2020) (discussing how fake news also facilitates distrust in democracy and basic democratic processes such as elections, pointing to the U.S. presidential elections as an example); *see also* Mallory Newall, *More than 1 in 3 Americans Believe a 'Deep State' Is Working to Undermine Trump*, Ipsos (Dec. 30, 2020), https://www.ipsos.com/en-us/news-polls/npr-misinformation-123020 [https://perma.cc/S57R-CZX9] ("[F]ewer than half (47%) are able to correctly identify that this statement is false: 'A group of Satan-worshipping elites who run a child sex ring are trying to control our politics and media.' Thirty-seven percent are unsure whether this theory backed by QAnon is true or false, and 17% believe it to be true.").

likely to engage with specific types of disinformation and can then present them with such content. Targeting disinformation at susceptible users massively amplifies its spread and impact and generates more data and revenue for platforms.[121]

3. Extremism and Polarization

Personalized content on social media platforms becomes increasingly extreme and polarizing over time.[122] This personalization process can encourage a radicalization of thought processes. For example, an individual who shows an initial propensity to conspiracy theories can expect to be presented with a growing number of recommendations for content reaffirming and accentuating such beliefs.[123] Users presented with conspiracy theories online have carried out violent acts offline based on their belief of such theories that platforms continuously

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121 *See* Peter Cohan, *Does Facebook Generate Over Half of Its Ad Revenue from Fake News?*, FORBES (Nov. 25, 2016, 10:36 AM), https://www.forbes.com/sites/petercohan/2016/11/25/does-facebook-generate-over-half-its-revenue-from-fake-news/?sh=27c547f3375f [https://perma.cc/7JDS-QT76].

122 Zeynep Tufekci, *YouTube, the Great Radicalizer*, N.Y. TIMES (Mar. 10, 2018), https://www.nytimes.com/2018/03/10/opinion/sunday/youtube-politics-radical.html [https://perma.cc/MB9J-YR9V] ("It seems as if you are never 'hard core' enough for YouTube's recommendation algorithm. It promotes, recommends and disseminates videos in a manner that appears to constantly up the stakes. Given its billion or so users, YouTube may be one of the most powerful radicalizing instruments of the 21st century."); Jeff Horwitz & Deepa Seetharaman, *Facebook Executives Shut Down Efforts to Make the Site Less Divisive*, WALL ST. J. (May 26, 2020, 11:38 AM), https://www.wsj.com/articles/facebook-knows-it-encourages-division-top-executives-nixed-solutions-11590507499?mod=hp_lead_pos5 [https://perma.cc/9WM3-ABUT] ("Our algorithms exploit the human brain's attraction to divisiveness. . . . If left unchecked [Facebook's users would be presented with] more and more divisive content in an effort to gain user attention & increase time on the platform." (quoting a 2018 Facebook presentation)).

123 *See* Panagiotis Metaxas & Samantha Finn, *The Infamous #Pizzagate Conspiracy Theory: Insight from a TwitterTrails Investigation*, WELLESLEY COLL. FAC. SCHOLARSHIP, 2017, at 1, 4 (arguing that echo chambers, promoted by platforms, create a perfect environment for the spreading of conspiracy theories); Brandy Zadrozny, *Fire at 'Pizzagate' Shop Reignites Conspiracy Theorists Who Find a Home on Facebook*, NBC NEWS (Feb. 1, 2019, 5:55 PM), https://www.nbcnews.com/tech/social-media/fire-pizzagate-shop-reignites-conspiracy-theorists-who-find-home-facebook-n965956 [https://perma.cc/7PEA-NM3S] ("In the case of conspiracy content, Facebook's recommendation engine says, 'If you like pseudoscience, I'll show you chemtrails and flat earth.'" (quoting Renée DiResta, director of research at New Knowledge)); *see, e.g.*, Brandy Zadrozny & Ben Collins, *How Three Conspiracy Theorists Took 'Q' and Sparked Qanon*, NBC NEWS (Aug. 14, 2018, 12:25 PM), https://www.nbcnews.com/tech/tech-news/how-three-conspiracy-theorists-took-q-sparked-qanon-n900531 [https://perma.cc/RA8Z-ML6G] ("There are now dozens of commentators who dissect "Q" posts . . . but the theory was first championed by a handful of people who worked together to stir discussion of the "Q" posts, eventually pushing the theory on to bigger platforms and gaining followers—a strategy that proved to be the key to Qanon's spread and the originators' financial gain.").

presented to them.[124] Individuals that have different starting points and are pushed in opposite extremes become increasingly polarized.[125] Presenting users with extreme content keeps them engaged and generates ongoing profits for platforms.[126]

4. Democratic Erosion

The various types of harms described above raise special concerns regarding their impact on political discourse and democratic stability worldwide.[127] In the days and hours leading up to the January 6th storming of the Capitol, social media platforms became a stage for QAnon.[128] Facebook's decision to dissolve the civic integrity team after the 2020 elections has been cited as a decision that made it harder for the platform to identify and prevent the spread of harmful content that contributed to the January 6th insurrection.[129]

The fact that people are not exposed to opinions different from their own thwarts their ability to form a perception of the distribution of public opinion that would be "likely to promote a sense of legitimacy

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124 *Man Pleads Guilty to Setting Fire at 'Pizzagate' Restaurant in D.C.*, NBC NEWS (Dec. 18, 2019, 8:00 AM), https://www.nbcnews.com/news/us-news/man-pleads-guilty-setting-fire-pizzagate-restaurant-d-c-n1103691 [https://perma.cc/T3ZD-7XJA] (describing a violent attack carried out by a conspiracy theory believer).

125 Moran Yarchi, Christian Baden & Neta Kligler-Vilenchik, *Political Polarization on the Digital Sphere: A Cross-platform, Over-time Analysis of Interactional, Positional, and Affective Polarization on Social Media*, 38 POL. COMMC'N 98 (2021) (explaining that interactional polarization "focuses on a process whereby participants in a debate increasingly interact with like-minded individuals, while disengaging from interactions with others who hold opposing viewpoints").

126 *See* Lina M. Kahn & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 505 (2019) ("Divisive and inflammatory content is good for business."); John Naughton, *Extremism Pays. That's Why Silicon Valley Isn't Shutting It Down*, THE GUARDIAN (Mar. 18, 2018, 3:00 AM), https://www.theguardian.com/commentisfree/2018/mar/18/extremism-pays-why-silicon-valley-not-shutting-it-down-youtube [https://perma.cc/HB4E-BW75] ("[U]nderpinning the implicit logic of [YouTube's] recommender algorithms is evidence that people are drawn to content that is more extreme than what they started with . . . .").

127 Democracy and democratic stability have been on the decline globally for over a decade. *See generally* Larry Diamond, *The Democratic Rollback: The Resurgence of the Predatory State*, 87 FOREIGN AFFS. 36 (2008); Arch Puddington, *The 2008 Freedom House Survey: A Third Year of Decline*, 20 J. DEMOCRACY 93 (2009); Arch Puddington, *The Freedom House Survey for 2009: The Erosion Accelerates*, 21 J. DEMOCRACY 136 (2010); Joshua Kurlantzick, *The Great Democracy Meltdown*, NEW REPUBLIC (May 19, 2011), https://newrepublic.com/article/88632/failing-democracy-venezuela-arab-spring [https://perma.cc/UE2Y-Z3LQ].

128 *See* Craig Timberg, Elizabeth Dwoskin & Reed Albergotti, *Inside Facebook, Jan. 6 Violence Fueled Anger, Regret over Missed Warning Signs*, WASH. POST (Oct. 22, 2021, 7:36 PM), https://www.washingtonpost.com/technology/2021/10/22/jan-6-capitol-riot-facebook/ [https://perma.cc/Y3H6-WEGZ].

129 Billy Perrigo, *How Facebook Forced a Reckoning by Shutting Down the Team that Put People Ahead of Profits*, TIME (Oct. 7, 2021, 11:35 AM), https://time.com/6104899/facebook-reckoning-frances-haugen/ [https://perma.cc/7629-GL6Z].

for democratic outcomes, [an increase in] people's ability to generate reasons for their political opinions and their ability to differentiate among ideologically distinct attitudes, and a stimulus effect on political participation."[130] Thus, polarization can decrease trust in elected officials, in democratic institutions, and, more generally, in democracy as a legitimate form of government.[131] The storming of the Capitol was another frightening reminder that words online can translate into real world violence.

Frances Haugen, the Facebook whistleblower, sums up the central challenge in the context of these harms:

> The thing I saw at Facebook over and over again was there were conflicts of interest between what was good for the public and what was good for Facebook. And Facebook, over and over again, chose to optimize for its own interests like making more money. . . . [Facebook's] incentives are misaligned, right? Like, Facebook makes more money when you consume more content. . . . [O]ne of the consequences of how Facebook is picking out that content today is it is—optimizing for content that gets engagement, or reaction. But its own research is showing that content that is hateful, that is divisive, that is polarizing, it's easier to inspire people to anger than it is to other emotions.[132]

To sum, the current freedom given to platforms to collect data and personalize content in a way that serves their financial purposes is generating immense societal harm.

II. Platform Personalization as Unjust Enrichment

This Part explores the possibility of contending with the platform crisis through the conceptual framework offered by the law of unjust enrichment. Under the current structure of platform personalization, certain elements of platform revenues should be considered unjust enrichment and thus be subject to restitution. It starts by offering a general overview of the relevant elements of the law of unjust

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130 Dominic Spohr, *Fake News and Ideological Polarization: Filter Bubbles and Selective Exposure on Social Media*, 34 Bus. Info. Rev. 150, 152 (2017) (alteration in original) (quoting J Brundidge, *Encountering "Difference" in the Contemporary Public Sphere*, 60 J. Commc'n 680 (2010)).

131 *See* Julie E. Cohen, *Tailoring Election Regulation: The Platform Is the Frame*, 4 Geo. L. Tech. Rev. 641, 659 (2020) (suggesting that the way that public discourse occurs on platforms undermines the structure necessary for a stable democracy).

132 Scott Pelley, *Whistleblower: Facebook Is Misleading the Public on Progress Against Hate Speech, Violence, Misinformation*, CBS News: 60 Minutes (Oct. 4, 2021, 7:32 AM), https://www.cbsnews.com/news/facebook-whistleblower-frances-haugen-misinformation-public-60-minutes-2021-10-03 [https://perma.cc/9XW9-GWER].

enrichment and then applies them to three categories of harmful platform personalization.

A. The Law of Unjust Enrichment

A person unjustly enriched at the expense of another must make restitution of any undeserved benefits.[133] This is the general maxim of the law of restitution,[134] also known as the law of unjust enrichment.[135] This maxim is considered a basic moral principle, and a fundamental element of the legal system.

The practical legal applications of this general principle are numerous and varied.[136] For instance, a recipient of a mistaken payment is typically considered to have been unjustly enriched at the payer's expense.[137] In such a case, the recipient is made to make restitution of the sums mistakenly received,[138] subject to some defense rules.[139] The law of unjust enrichment also operates when goods or services are provided without a contract.[140] Thus, an individual who received lifesaving treatment in the case of an emergency can be considered to have been unjustly enriched at the expense of the medical services provider.[141] In such a case, the beneficiary is typically obligated to pay fair market price for the services they received, even when no contract was formed between the parties.[142]

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133 Restatement (Third) of Restitution and Unjust Enrichment § 1 (Am. Law Inst. 2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution."); Ward Farnsworth, Restitution: Civil Liability For Unjust Enrichment 1–2 (2014).

134 *See* Douglas Laycock, *The Scope and Significance of Restitution*, 67 Tex. L. Rev. 1277, 1278 (1989).

135 *Id.*

136 *See* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 Tex. L. Rev. 2083, 2108–12 (2001) (noting the multiplicity of legal categories cohabitating under the broad umbrella of "unjust enrichment").

137 Peter Birks, Unjust Enrichment 3 (2d ed. 2005).

138 Restatement (third) of Restitution and Unjust Enrichment § 57 (Am. L. Inst. 2011); *see also* Hanoch Dagan, The Law and Ethics of Restitution 11–25, 37–85 (2004); Andrew Burrows, *Restitution of Mistaken Enrichments*, 92 B.U. L. Rev. 767, 767 (2012); Birks, *supra* note 137, at 3.

139 *See* Restatement (Third) of Restitution and Unjust Enrichment § 65 cmt. a (Am. L. Inst. 2011); Andrew Kull, *Defenses to Restitution: The Bona Fide Creditor*, 81 B.U. L. Rev. 919, 921–22 (2001). The doctrine of change of position is one central defense in such cases, used to limit restitution when the recipient of a mistaken payment relied on the mistaken payment in good faith, such that returning it to the payer would cause the recipient loss. *See* Restatement (Third) Of Restitution and Unjust Enrichment § 65 cmts. a, d (Am. L. Inst. 2011).

140 Birks, *supra* note 137, at 39–40.

141 *See id.*

142 *See, e.g.*, K.A.L. v. S. Med. Bus. Servs., 854 So. 2d 106, 107–08 (Ala. Civ. App. 2003) (an unconscious patient was brought to the hospital after a failed suicide attempt; the patient's life was saved and the hospital was entitled to restitution for reasonable costs); *In re* Est. of Boyd, 8 P.3d 664, 669 (Idaho Ct. App. 2000) (a patient was admitted to the hospital by his wife and stepson and refused to pay medical bills; the court granted restitution); *In re* Crisan Est., 107 N.W.2d 907, 910–11

The key normative question in all unjust enrichment cases is the extent to which an enrichment caused an "injustice."[143] Thus, in the mistaken payment case, the recipient's enrichment is considered unjust as it was unintentional.[144] In the emergency medicine case, the beneficiary's enrichment is unjust as it constitutes a windfall and the beneficiary-defendant did not pay for it.[145] In both cases, the defendant can be obligated to pay restitution, and their enrichment is considered "unjust," even though there is no wrongful conduct by the defendant. That is, the defendant did not breach a promise to pay—as they made no promise at all—and similarly did not breach a duty of care and therefore cannot be liable in tort. The defendant committed no crime and violated no regulatory order but can still be liable based on their unjust enrichment.

Yet, in other cases, the defendant's enrichment is considered unjust because it was obtained through the defendant's wrongful conduct or even through the defendant's crime.[146] For instance, in the classic case of *Riggs v. Palmer*,[147] the defendant, Elmer Palmer, murdered his grandfather, Francis Palmer.[148] In his will, Francis left most of his estate to Elmer; fearing Francis might change his will, Elmer preemptively poisoned him.[149] Although Elmer faced a significant prison sentence, New York law at the time did not include an explicit provision stating that Elmer could not inherit his grandfather's estate.[150] Faced with this injustice, the New York Court of Appeals declared that Elmer could not be allowed to benefit through his wrongdoing, and his share of the estate was given to his two aunts, the daughters of the late Francis Palmer.[151] *Riggs v. Palmer* established the general notion that a person must not be enriched through their own wrongdoing, and any

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(reaffirming the general restitutionary rule that consent is not required to establish duty to pay in emergency cases in which the patient was unable to express her medical need); *see also* BIRKS, *supra* note 137, at 39–40.

143 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (AM. L. INST. 2011) (noting the flexibility of the requirement for the "unjust" enrichment of the defendant); *see* Mark P. Gergen, *What Renders Enrichment Unjust?*, 79 TEX. L. REV. 1927, 1947 (2001). *See generally* Lionel Smith, *Restitution: A New Start?*, *in* THE IMPACT OF EQUITY AND RESTITUTION IN COMMERCE 91 (Peter Devonshire & Rohan Havelock eds., 2018).

144 *See* Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1809–10 (2001); *see also* Ernest J. Weinrib, *Correctively Unjust Enrichment*, *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 31, 44 (Robert Chambers et al. eds., 2009).

145 *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 20 cmt. a (AM. L. INST. 2011).

146 *See id.* § 51(4) (explaining the liability of wrongdoers in unjust enrichment).

147 22 N.E. 188 (N.Y. 1889).

148 *Id.* at 188–89.

149 *Id.*

150 *Id.* at 189.

151 *Id.* at 191.

enrichment generated through a wrong or a crime is to be stripped away from the malfeasor.

In other cases, courts made similar use of the *disgorgement* remedy, used to strip a wrongdoer of any gains obtained through wrongful or harmful activity.[152] The *constructive trust* is an analogous legal instrument.[153] When the defendant unlawfully takes another's asset, the court can construct a legal fiction according to which the defendant is holding the asset as a trustee for the benefit of the true owner.[154] This means that any benefits the defendant made through unlawfully holding the asset are to be given to the original owner in order to prevent unjust enrichment.[155]

Although liability in restitution can exist even without a wrong, any degree of fault by the defendant typically makes the claim stronger, reducing the availability of defenses and allowing augmented remedies. For instance, in a mistaken payment case when the defendant is not a wrongdoer, the defendant-recipient must return any money they received by mistake, but also enjoys robust defense rules. To illustrate, assume a recipient received a large sum of money by mistake but honestly believed the money was a gift from a family member and spent it on an expensive vacation. In such a case, the recipient is considered to have changed their position in good faith in reliance on the payment and is therefore exempt from full restitution.[156] Of course, this type of defense is not available to a wrongdoer, such as a defendant who knowingly took funds that did not belong to them.[157] This defendant can never be considered to have believed, in good faith, that they had a valid legal claim to the money so they cannot enjoy the change of position defense.[158]

Similarly, augmented remedies such as disgorgement of profits or constructive trusts are more commonly available when the defendant is

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152 Restatement (Third) of Restitution and Unjust Enrichment § 51(Am. L. Inst. 2011) (defining disgorgement as a restitutionary remedy designed to strip a wrongdoer of all ill-gotten gains and characterizing it as typically available in cases where the defendant's intentional wrong enriched her at the expense of another).

153 *See generally* Lionel Smith, *Constructive Trusts and the No-Profit Rule*, 72 Cambridge L.J. 260 (2013).

154 *See id.*

155 *See id.*; Andrew Kull, *Restitution in Bankruptcy: Reclamation and Constructive Trust*, 72 Am. Bankr. L.J. 265, 287 (1998).

156 *See* Restatement (Third) of Restitution and Unjust Enrichment § 65 (Am. L. Inst. 2011).

157 *Id.* at cmt. a; Maytal Gilboa & Yotam Kaplan, *The Costs of Mistakes*, 122 Colum. L. Rev. F. 61, 73 (2022) (explaining the requirements of good faith as an element of the change of position defense).

158 *See* Restatement (Third) of Restitution and Unjust Enrichment § 65 cmt. a (Am. L. Inst. 2011); Gilboa & Kaplan, *supra* note 157, at 73.

a wrongdoer.[159] For instance, a wrongdoer who took another's asset will be liable to return not only the stolen asset, but also any profit illegally obtained through the use of this asset. This form of supracompensatory remedy that is used through a constructive trust is not typically available against a defendant who was enriched through no fault of their own.[160] Thus, if a recipient of a mistaken payment used the sum they received to make a profit, they will usually only be obligated to return the original sum they received and not the profits they obtained by using it, assuming they held and used the sums in good faith.[161]

The rationale behind this basic structure of the law of unjust enrichment is simple. When the defendant is a wrongdoer, a harsher legal response is justified to induce deterrence.[162] As long as wrongdoers can benefit through their wrongs, they have an incentive to act in harmful, wrongful, or illegal ways. To remove such incentive, the law of unjust enrichment operates to strip wrongdoers of their unlawful gains.[163] The more severe the offense, the more important it is to generate deterrence and make sure the harmful behavior is not allowed to be profitable.[164]

The law of unjust enrichment leaves significant room for judicial discretion and creativity.[165] Thus, the defendant's enrichment can be considered "unjust" for many reasons and courts are free to develop this legal category as both new cases and new problems arise.[166] This is a necessary feature of the doctrine as it proves instrumental in the effort to assure deterrence and circumvent opportunism. As we can learn from *Riggs v. Palmer*, wrongdoers will attempt to find loopholes or illegitimate ways to make a profit that are not explicitly forbidden by law;[167] the law of unjust enrichment operates as a safety valve designed to assure such conduct is not allowed to remain profitable.

B. Platform Enrichment

Personalization is key to the business model of social media platforms and to their immense profitability. These platforms charge a

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159 Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. L. Inst. 2011).

160 *Id.*

161 *See id.* § 51 cmt. a.

162 Grosskopf, *supra* note 19, at 1997–98.

163 *Id.*

164 Deterrence has been recognized as one of the central goals of restitutionary remedies. *See, e.g.*, Restatement (Third) of the Law of Restitution and Unjust Enrichment § 3 cmt. c (Am. L. Inst. 2011) ("Restitution requires full disgorgement of profit by a *conscious wrongdoer*, not just because of the moral judgment implicit in the rule of this section, but because any lesser liability would provide an inadequate incentive to lawful behavior." (emphasis added)).

165 Sherwin, *supra* note 136, at 2107.

166 *Id.* at 2107–08.

167 *See* Riggs v. Palmer, 22 N.E. 188, 188–89 (N.Y. 1889).

premium from advertisers as they are able to specifically target various types of content to users who are likely to find them interesting.[168] Platforms' ability to personalize content makes advertising much more effective and allows advertisers to spend their budgets more efficiently.[169] In the past, advertisers had broad targeting capabilities: advertising beer[170] and cars[171] during the Super Bowl or a bread maker in a housekeeping magazine. Targeted advertising allows advertisers to be much more effective in their advertising by picking much more specific targeting criteria.[172] Platforms enable advertisers to target their tennis shoe ads at people who have actively expressed an interest in tennis, uploaded videos of themselves working out, and have a certain level of income.[173] Data collected along the outgoing vector allows platforms to learn about their users in order to optimize their ability to present users with relevant ads along the incoming vector.[174] From the perspective of the law of restitution, these benefits constitute a form of enrichment.

The data of each individual collected by platforms is worth very little on its own. However, the data of large groups of users are a very valuable resource.[175] In fact, user data is so valuable today that it has even been dubbed "the new oil."[176] Leading platforms have generated substantial gains from user data they collect and analyze.[177] At the same time, individual users are not financially remunerated for the use of their data.[178] Glen Weyl and Eric Posner have used the term

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168 *See* Marotta et al., *supra* note 51, at 4.

169 *See id.* at 27.

170 *See, e.g.*, Lora Kelley, *Floodgates Open for Beer Ads During Super Bowl*, N.Y. Times (Feb. 10, 2023), https://www.nytimes.com/2023/02/10/business/media/beer-ads-super-bowl.html [https://perma.cc/PSR6-7LWM].

171 *See, e.g.*, Michael Wayland, *Why You Won't See Many Car Ads During Sunday's Super Bowl*, CNBC (Feb. 11, 2024, 5:06 PM), https://www.cnbc.com/2023/02/10/gm-jeep-kia-super-bowl-ads.html [https://perma.cc/A6UJ-W2W7].

172 *See* Leslie K. John, Tami Kim & Kate Barasz, *Ads That Don't Overstep*, Harv. Bus. Rev., Jan.–Feb. 2018, https://hbr.org/2018/01/ads-that-dont-overstep [https://perma.cc/YAJ4-3VS6].

173 *See* Caitlin Dewey, *98 Personal Data Points That Facebook Uses to Target Ads to You*, Wash. Post (Aug. 19, 2016, 10:13 AM), https://www.washingtonpost.com/news/the-intersect/wp/2016/08/19/98-personal-data-points-that-facebook-uses-to-target-ads-to-you/ [https://perma.cc/UQP4-ZF9R].

174 *See* Gordon-Tapiero et al., *supra* note 2, at 647.

175 *See id.* at 647–51.

176 Nisha Talagala, *Data as the New Oil Is Not Enough: Four Principles for Avoiding Data Fires*, Forbes (Mar. 2, 2022, 5:48 PM), https://www.forbes.com/sites/nishatalagala/2022/03/02/data-as-the-new-oil-is-not-enough-four-principles-for-avoiding-data-fires/?sh=3e76a899c208 [https://perma.cc/RA4E-JAYH]; *see The World's Most Valuable Resource is No Longer Oil, but Data*, Economist (May 6, 2017), https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data [https://perma.cc/6P5V-43LP].

177 *See* Eric A. Posner & E. Glen Weyl, Radical Markets: Uprooting Capitalism and Democracy for a Just Society 231–32 (2018).

178 *See id.*

"technofeudalism"[179] to describe this reality where the value of user data is "distributed to a small number of wealthy savants rather than to the masses."[180]

Not only do users not share in the monetary value of their data,[181] but platforms' problematic personalization processes also generate the harms discussed in Section I.C. These harms are externalized to individual users and to society. This incentive structure allows platforms to continue reaping financial benefits from wrongful, dangerous, and destructive activity. This proposal offers three categories in which platform enrichment can be considered unjust based on problematic personalization processes. The Authors suggest that profits derived from these types of activities should be disgorged. It is important to note that for a gain to be considered *unjust*, a rather high bar must be crossed: not just any gain that makes one feel slightly uncomfortable constitutes *unjust enrichment*. The Authors feel confident, however, that the types of enrichment described here do cross this threshold. The courts will further develop the precise criteria for the unjust enrichment test on a case-by-case basis.

1. Illegal Discrimination

The advertising process on social media platforms allows advertisers to specify a target audience for any ad.[182] Pauline T. Kim and Sharion Scott highlight three mechanisms by which targeting criteria as chosen by the advertiser may generate discriminatory presentation of the ads.[183] First, advertisers can choose their target audience on the platform by specifying personal attributes of users they want to target, as well as attributes of users they want to exclude from seeing their ads.[184] If an advertiser specifies a particular gender or age group as a targeting criterion, the result will be discriminatory.[185] Similarly, if an advertiser decides to exclude people speaking a particular language or of a particular ethnicity, the ad will be presented in a discriminatory fashion.[186]

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179 *See id.* at 231.

180 *See id.* at 209.

181 *See generally* RadicalxChange Foundation Ltd., *The Data Freedom Act*, RadicalxChange (May 27, 2020), https://www.radicalxchange.org/media/papers/data-freedom-act.pdf [https://perma.cc/4LLC-SXDG].

182 *See* Ali et al., *supra* note 55, at 2.

183 *See* Kim & Scott, *supra* note 39, at 98.

184 *See id.*

185 *See id.*

186 In 2016, *ProPublica* reported that Facebook allowed discriminatory presentation of housing ads. *See* Julia Angwin & Terry Parris Jr., *Facebook Lets Advertisers Exclude Users by Race*, ProPublica (Oct. 28, 2016, 1:00 PM), https://www.propublica.org/article/facebook-lets-advertisers-exclude-users-by-race [https://perma.cc/V24U-UT2S]. Despite Facebook's commitment to preventing discriminatory presentation of such ads in the future, research found that the phenomenon

Second, an advertiser may pick a seemingly neutral targeting criterion that turns out to be highly correlated with a protected attribute and produces a discriminatory outcome.[187] For example, a user's zip code, as well as their membership in ethnic culture groups, are highly correlated with their race.[188] While the correlation between zip code and membership in ethnic culture groups are well established, other attributes may seem innocuous *ex ante*, though analysis of the distribution of their presentation *ex post* may reveal a discriminatory pattern.

Third, advertisers can use what is known as the '"lookalike' audience" tool.[189] This tool allows the advertiser to specify a custom audience and to request that the platform target the ad at users whom the platform determines to be similar to the predefined group.[190] If the sample group defined by the advertiser is biased, the lookalike audience will also be biased.[191]

Targeting criteria as specified by the advertiser, however, are not the only source of bias in advertising. Carefully constructed experiments conducted on Facebook identified discriminatory presentation of ads, even in cases where the criteria specified by the advertiser were

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persisted. *See* Julia Angwin, *Facebook Says It Will Stop Allowing Some Advertisers to Exclude Users by Race*, ProPublica (Nov. 11, 2016, 10:00 AM), https://www.propublica.org/article/facebook-to-stop-allowing-some-advertisers-to-exclude-users-by-race [https://perma.cc/JY57-FPZS] (highlighting Facebook's commitment to stop discriminatory presentation); *see also* Julia Angwin, Ariana Tobin & Madeleine Varner, *Facebook (Still) Letting Housing Advertisers Exclude Users by Race*, ProPublica (Nov. 21, 2017, 1:23 PM), https://www.propublica.org/article/facebook-advertising-discrimination-housing-race-sex-national-origin [https://perma.cc/6XVH-Z4Z2].

187 Kim & Scott, *supra* note 39, at 98; Till Speicher, Muhammad Ali, Giridhari Venkatadri, Filipe Nunes Ribeiro, George Arvanitakis, Fabrício Benevenuto, Krishna P. Gummadi, Patrick Loiseau & Alan Mislove, *Potential for Discrimination in Online Targeted Advertising*, 81 Procs. Mach. Learning Rsch. 1, 2 (2018) ("An intentionally malicious—or unintentionally ignorant—advertiser could leverage such data to preferentially target (i.e., include or exclude from targeting) users belonging to certain sensitive social groups (e.g., minority race, religion, or sexual orientation)."). Nondiscrimination law does not consider those who receive unfair treatment in the context of incoming vector personalization, such as "tennis players." *Cf.* Sandra Wachter, *Affinity Profiling and Discrimination by Association in Online Behavioral Advertising*, 35 Berkeley Tech. L.J. 367, 369 (2020) (acknowledging that nondiscrimination law provides protection to certain recognized categories of individuals, but does not take into account "new" categories that may receive unfair treatment).

188 In areas with a high degree of residential segregation, a user's zip code may serve as a proxy for race. *See* Kim & Scott, *supra* note 39, at 98; *see also* Jinyan Zang, *Solving the Problem of Racially Discriminatory Advertising on Facebook*, Brookings Inst. (Oct. 19, 2021), https://www.brookings.edu/research/solving-the-problem-of-racially-discriminatory-advertising-on-facebook/ [https://perma.cc/J8VS-HK6L] (detailing some of the effects of algorithmic discrimination).

189 Kim & Scott, *supra* note 39, at 98.

190 *See* Speicher et al., *supra* note 187, at 11.

191 *See id.* (showing that targeting potential employees based on a "look-alike" audience criterion could also be seen as similar to recruiting via word of mouth).

neutral.[192] For example, despite having the advertiser—in this case the researchers—use the same targeting criteria, ads for cashier positions in supermarkets were presented predominantly to women based on criteria introduced by the platforms in the ad delivery process, as opposed to considerations introduced by the advertiser in the targeting stage.[193] This insight calls for careful consideration of the challenge created by the current structure of the platforms' advertising mechanisms and the financial incentives driving them.[194]

Regardless of how it is generated, discrimination is highly profitable for platforms.[195] Facebook's targeting mechanism enables advertisers to specifically detail the attributes they want to have in their target audience.[196] As explained above, advertisers have a strong interest in targeting their advertisements to people likely to find them relevant and interesting. The fact that platforms allow advertisers to target their ads to users based on data collected about them along the incoming vector makes them an attractive advertising outlet.[197] Thus, platforms are able to charge a higher price for the targeted, discriminatory presentation of such content.

Yet this type of discrimination is illegal. This means that any profits derived from discriminatory ad presentation constitute unjust enrichment. Under section 2000e of Title VII of the Civil Rights Act of 1964,[198] it is illegal to discriminate in the presentation of job ads based on protected attributes such as race, gender, and age.[199] Despite this clear legal standard, leading platforms were found to enable the presentation of job ads in a discriminatory fashion.[200] In 2019, the U.S. Equal Employment

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192 *See, e.g.*, Ali et al., *supra* note 55, at 19–22; Muhammad Ali, Piotr Sapiezynski, Aleksandra Korolova, Alan Mislove & Aaron Rieke, *Ad Delivery Algorithms: The Hidden Arbiters of Political Messaging*, 2021 Web Search and Data Mining 13, 20 ("Our findings suggest that Facebook is wielding significant power over political discourse through its ad delivery algorithms . . . .").

193 *See* Ali et al., *supra* note 55, at 21.

194 *See id.* at 24–25 (calling to consider the policy implications of the study's findings).

195 *See* Viljoen, *supra* note 17, at 588 (Google reported 134.81 billion dollars in advertising revenue in 2019); *Advertising Revenues Generated by Facebook Worldwide from 2017 to 2027*, Statista (Aug. 2023), https://www.statista.com/statistics/544001/facebooks-advertising-revenue-worldwide-usa/ [https://perma.cc/69JQ-PWK7] (Facebook generated 113.64 billion dollars in advertising revenues worldwide in 2022); Jacqueline Zote, *Instagram Statistics You Need to Know for 2023*, Sprout Soc. (Mar. 6, 2023), https://sproutsocial.com/insights/instagram-stats/ [https://perma.cc/ST3A-UMJV] (Instagram made 43.2 billion dollars on advertisements in 2022).

196 *See* Zang, *supra* note 188.

197 *See id.*

198 42 U.S.C. § 2000e.

199 The Civil Rights Act of 1964 §§ 703–716, 42 U.S.C. § 2000e.

200 *See, e.g.*, Basileal Imana, Aleksandra Korolova & John Heidemann, *Auditing for Discrimination in Algorithms Delivering Job Ads*, 2021 The Web Conf. 3767, 3769 (demonstrating that presentation of ads on Facebook and LinkedIn can be skewed by gender); *see also* Alexia Fernández Campbell, *Job Ads on Facebook Discriminated Against Women and Older Workers, EEOC Says*, Vox (Sept. 25, 2019, 2:20 PM), https://www.vox.com/identities/2019/9/25/20883446/

Opportunity Commission found that ads presented on Facebook discriminated against women and older workers.[201] Numerous other platforms have also been found to present housing and employment ads in a discriminatory manner.[202] As explained below, this proposal to treat gains from discriminatory platform advertising as unjust enrichment is necessary to remove the profitability of this practice and platforms' incentive from participating in it. It is, however, not meant to replace any existing regulatory mechanism designed to combat discrimination, but rather is meant as an additional tool in the legal antidiscriminatory arsenal.

2. The Abuse of Vulnerable Users

This Section argues that platforms' profits must be considered unjust enrichment when they originate from predatory practices that target vulnerable users and attempt to monetize their vulnerability. Children and teens are among the most vulnerable groups of users of social media. They are at an age when they are "less privy to marketing techniques and so more susceptible to the tactics of online marketers and their deceptive trade practices."[203] Thus, they "may be deceived by an image or a message that likely would not deceive an adult."[204] This explanation reflects a recognition that at times content presented to an adult may not be troubling or cause harm, but that the very same

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facebook-job-ads-discrimination [https://perma.cc/827S-JFYH] (finding that Facebook presented ads in a way that discriminated against women and older users); Anja Lambrecht & Catherine Tucker, *Apparent Algorithmic Discrimination and Real-Time Algorithmic Learning in Digital Search Advertising* (Apr. 15, 2021) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3570076 [https://perma.cc/8UKY-36HV] (finding that Google presented ads for disadvantageous jobs to users who had previously searched for Black names compared to the jobs advertised to users who had previously searched for White names).

201 Press Release, ACLU, In Historic Decision on Digital Bias, EEOC Finds Employers Violated Federal Law when They Excluded Women and Older Workers from Facebook Job Ads (Sept. 25, 2019), https://www.aclu.org/press-releases/historic-decision-digital-bias-eeoc-finds-employers-violated-federal-law-when-they [https://perma.cc/74QM-MFFD] (reporting on the decision); *Letters of Discrimination*, U.S. Equal Emp. Opportunity Comm'n (July 5, 2019), https://www.onlineagediscrimination.com/sites/default/files/documents/eeoc-determinations.pdf [https://perma.cc/4LNE-F3N5].

202 *See* Ali et al., *supra* note 55, at 20–22 (observing significant skews in the presentation of ads for housing and employment along gender and racial lines); Imana et al., *supra* note 200, at 3774–75 (demonstrating that presentation of ads on Facebook and LinkedIn can be skewed by gender).

203 Shannon Finnegan, *How Facebook Beat the Children's Online Privacy Protection Act: A Look into the Continued Ineffectiveness of COPPA and How to Hold Social Media Sites Accountable in the Future*, 50 Seton Hall L. Rev. 827, 829 (2020).

204 J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective That Advises the Present*, 12 Geo. Mason L. Rev. 873, 873 (2003).

content shown to a child may be harmful.[205] The Federal Trade Commission has been quite successful in enforcing the prohibition on deceptive practices in the context of advertising targeted at children.[206] On social media, many of the products or services being promoted do not appear in the form of an advertisement. Instead, products are promoted through what is known as "stealth advertising"—the presentation of seemingly organic content by influencers.[207] Such mechanisms have been used, for example, to circumvent rules limiting the advertising of cigarettes to teens.[208] Instead of targeting a potential audience through regular ads, influencers are now paid to present content promoting cigarette use, enabling them to avoid direct application of advertising restrictions.

Another way that social media platforms unjustly enrich themselves involves the viral spread of "challenges" among younger crowds. This genre of content has spread on platforms such as TikTok, Instagram, and YouTube and often includes children and teens participating in dangerous activities and self-harm.[209] Famous challenges include the

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205 Raffaello Rossi & Agnes Nairn, *How Children Are Being Targeted with Hidden Ads on Social Media*, Conversation (Nov. 3, 2021, 8:24 AM), https://theconversation.com/how-children-are-being-targeted-with-hidden-ads-on-social-media-170502 [https://perma.cc/VF8K-6THY] (acknowledging the vulnerability of children); Raffaello Rossi & Agnes Nairn, What Are the Odds? The Appeal of Gambling Adverts to Children and Young Persons on Twitter 4 (2021), https://www.bristol.ac.uk/media-library/sites/management/documents/what-are-the-odds-rossi-nairn-2021.pdf [https://perma.cc/MPK8-ZXEG] (finding gambling advertisements are far more appealing to children and young people than adults).

206 *See In re* Lewis Galoob Toys, Inc., No. C-3324, 114 F.T.C. 187, 214–15 (1991) (settled by consent order); *In re* Hasbro, Inc., No. C-3447, 116 F.T.C. 657, 667 (1993) (settled by consent order); *see also In re* Mattel, Inc., No. C-2071, 79 F.T.C. 667, 671–72 (1971) (settled by consent order). Along the outgoing vector, the collection of data from children is restricted by the Children's Online Privacy Protection Act. 15 U.S.C. §§ 6501–6506 (2018); 16 C.F.R. § 312.9 (2019).

207 *See* Rossi & Nairn, *supra* note 205 (detailing how stealth advertising is particularly dangerous when targeted at children).

208 Megan Cerullo, *Health Groups Call Out Tobacco Marketing Aimed at Teens on Social Media*, CBS News (May 22, 2019, 7:00 PM), https://www.cbsnews.com/news/health-groups-call-out-tobacco-and-e-cigarette-marketing-aimed-at-teens-on-social-media/ [https://perma.cc/P5WQ-ECFG]; *see The Effect of Social Media Ads on Teen Behavior*, Stop Med. Abuse (Mar. 29, 2018), https://stopmedicineabuse.org/blog/details/the-effect-of-social-media-ads-on-teen-behavior/ [https://perma.cc/XMP9-QM6F]; Lisa Rapaport, *Click Bait Ads Are Tied to Teen Smoking*, Reuters (Jan. 3, 2018, 3:57 PM), https://www.reuters.com/article/us-health-teens-tobacco-ads/click-bait-ads-are-tied-to-teen-smoking-idUSKBN1ES1XH [https://perma.cc/F9HC-3F72]; *see also Just How Harmful Is Social Media? Our Experts Weigh-In*, Columb. Mailman Sch. Pub. Health (Sept. 27, 2021), https://www.publichealth.columbia.edu/public-health-now/news/just-how-harmful-social-media-our-experts-weigh [https://perma.cc/QW3G-WRP6] (describing the dangers of social media more generally).

209 *See* J. Ortega-Baron, J.M. Machimbarrena, I. Montiel & J. González-Cabrera, *Viral Internet Challenges Scale in Preadolescents: An Exploratory Study*, 42 Current Psych. 12530 (2023).

tide pod challenge,[210] the blackout challenge,[211] cinnamon challenge,[212] blue whale challenge,[213] ice and salt challenge,[214] and many more equally extremely dangerous challenges.[215] TikTok's algorithm promotes videos with trending hashtags which enables the poster to get more views and engagement as these videos will be pushed higher up in users' feeds.[216] The virality of such challenges is, of course, highly profitable for platforms by increasing user engagement.[217] This would explain platforms' support and promotion of such content. The Authors argue that the clear harmfulness of such activities must mean the enrichment that follows should be considered unjust and be stripped away from platforms. Anything less will maintain the profitability of such practices for platforms and thus perpetuate these harmful occurrences.

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210 Lindsey Bever, *Teens Are Daring Each Other to Eat Tide Pods. We Don't Need to Tell You That's a Bad Idea*, WASH. POST (Jan. 17, 2018, 8:07 PM), https://www.washingtonpost.com/news/to-your-health/wp/2018/01/13/teens-are-daring-each-other-to-eat-tide-pods-we-dont-need-to-tell-you-thats-a-bad-idea/ [https://perma.cc/UJF5-7CTY]; Claire McCarthy, *Why Teenagers Eat Tide Pods*, HARV. HEALTH PUBL'G (Jan. 30, 2018), https://www.health.harvard.edu/blog/why-teenagers-eat-tide-pods-2018013013241 [https://perma.cc/7MLY-RHPP].

211 Seren Morris, *10-Year-Old Girl Dies in 'Blackout Challenge' Circulating on TikTok*, NEWSWEEK (Jan. 22, 2021, 11:36 AM), https://www.newsweek.com/girl-dies-blackout-challenge-circulating-tiktok-1563705 [https://perma.cc/QSZ5-ZEDS] (describing the challenge, "which encourages people to try and pass out by restricting their airflow").

212 *"Cinnamon Challenge" Dangerous to Lungs, New Report Warns*, CBS NEWS (Apr. 22, 2013, 12:49 PM), https://www.cbsnews.com/news/cinnamon-challenge-dangerous-to-lungs-new-report-warns/ [https://perma.cc/8BXR-2BKJ] (providing that the cinnamon challenge involved trying to swallow a spoonful of cinnamon within sixty seconds).

213 Ortega-Baron et al., *supra* note 209, at 12531 (describing the Blue Whale Challenge, "which consists of a chain of challenges that contain self-harming acts that lead up to the person's suicide"); *see also* Mahesh Mahadevaiah & Raghavendra B. Nayak, *Blue Whale Challenge: Perceptions of First Responders in Medical Profession*, 40 INDIAN J. PSCYH. MED. 178, 179 (2018).

214 Forrest Saunders, *'Salt and Ice Challenge' Leaves Iowa Kids with Severe Burns*, KCRG (Jan. 25, 2019, 12:03 AM), https://www.kcrg.com/content/news/Salt-and-ice-challenge-leaves-Iowans-with-severe-burns--504847271.html [https://perma.cc/RR8Q-VPSP] (detailing the salt and ice challenge, which involved putting table salt on the skin and then pressing ice into it, gave teens second- and third-degree burns).

215 *See Dangerous Social Media Challenges: Understanding Their Appeal to Kids*, HEATHY CHILDREN (Sept. 11, 2023), https://www.healthychildren.org/English/family-life/Media/Pages/Dangerous-Internet-Challenges.aspx [https://perma.cc/4VFA-2EVL].

216 Jami Reetz, *TikTok Trends: How to Find Them and Make Them Your Own*, BAZAAR VOICE (Nov. 6, 2023), https://www.bazaarvoice.com/blog/tiktok-trends-how-to/ [https://perma.cc/PX9T-GXBA]; Christina Newberry, *The TikTok Algorithm Explained + Tips to Go Viral*, HOOTSUITE: BLOG (Feb. 8, 2023), https://blog.hootsuite.com/tiktok-algorithm/ [https://perma.cc/HU86-JWEQ]; Marcus Johnson & Aran Sonnad-Joshi, *Are Social Media Challenges a Force for Good or Evil?*, S. ONLINE (Oct. 20, 2021), https://thesoutherneronline.com/85043/front-slideshow/are-social-media-challenges-a-force-for-good-or-evil/ [https://perma.cc/36LJ-MHMH]; Katie Elson Anderson, *Getting Acquainted with Social Networks and Apps: It's Time to Talk About TikTok*, 37 LIBR. HI TECH NEWS 7, 9 (2020) (describing that TikTok users who access the "Discover" icon on the platform's interface will be presented with current trending hashtags).

217 *See supra* Section I.B.

The current harmful dynamic and the unwillingness of platforms to act decisively can be observed in the self-regulation of challenges by platform. Thus, when a certain trend causes what is seen to be "too much" damage or generates "too much" negative publicity for the platform, TikTok has taken action.[218] Yet, before a trend reaches such extremity, it is allowed to continue undisturbed. Despite claims by platforms such as YouTube and TikTok that they would act against the spread of such challenges,[219] the first half of 2022 saw their continued spread.[220] Kate Tilleczek has called attention to the revenue generated by TikTok from the spread of such content, saying, "You leave [regulation] in the hands of folks who are making billions of dollars to do the right thing by kids, and I'm always thinking: 'They're not going to do that.'"[221] Tillaczek echoes similar sentiments expressed by Frances Haugen: expecting platforms to hurt their revenue by limiting the enrichment they generate from wrongful practices is like leaving the cat to guard the cream.[222] A legal doctrine that prevents platforms from wrongfully becoming enriched at the expense of vulnerable groups is thus necessary to bring about a real change in the way platforms design their algorithms.

Another vulnerable group suffering due to the use of social media includes people who were the subject of human trafficking.[223] The

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218 For example, when TikTok determined that a viral hashtag promoted a challenge that was deemed dangerous, it removed the hashtag promoting the challenges, lowering its spread. *See* Michael Ordoña, *TikTok Bans Milk Crate Challenge (Because It's Super-Dangerous to Fall off Crates?)*, L.A. Times (Aug. 27, 2021, 3:43 PM), https://www.latimes.com/entertainment-arts/story/2021-08-27/tiktok-bans-milk-crate-challenge [https://perma.cc/2P5F-366E]. In another case, TikTok accompanied videos of a dangerous challenge with a warning. *See* Jamie Harris, *Ticked Off TikTok Will Now Warn Teens About Dangerous Viral Challenges They're Searching*, The Sun (Feb. 23, 2022, 12:13 PM), https://www.thesun.co.uk/tech/17735154/tiktok-warn-teens-dangerous-viral-challenges/ [https://perma.cc/HE6X-4CFA].

219 *See* McCarthy, *supra* note 210; Michelle Toh, *Tide Pod Challenge: YouTube Is Removing 'Dangerous' Videos*, CNN Bus. (Jan. 18, 2018, 8:25 AM), https://money.cnn.com/2018/01/18/technology/tide-pod-challenge-video-youtube-facebook/ [https://perma.cc/B2JQ-RCX4]; *TikTok Says It's Cracking Down on Dangerous Challenges. Will It Be Enough?*, CBC Kids News (Nov. 18, 2021) [hereinafter CBC Kids News], https://www.cbc.ca/kidsnews/post/tiktok-announces-plan-to-address-dangerous-challenges-and-hoaxes [https://perma.cc/TUF8-5465].

220 *See* Rebecca Rhodes, *The Worst (and Most Dangerous) TikTok Challenges of June 2022*, Know Your Meme (June 14, 2022), https://knowyourmeme.com/editorials/meme-insider/the-worst-and-most-dangerous-tiktok-challenges-of-june-2022 [https://perma.cc/QK6Q-LQZJ].

221 *See* CBC Kids News, *supra* note 219.

222 *See Hearing*, *supra* note 9.

223 As early as 2017, reports surfaced of ads on Facebook being used to recruit members for a Mexican drug cartel. *See* Zorayda Gallegos, *Mexico's Jalisco Drug Cartel Uses Facebook to Recruit New Hitmen*, El Pais (Aug. 3, 2017, 4:39 PM), https://english.elpais.com/elpais/2017/08/01/inenglish/1501585590_499112.html [https://perma.cc/E3S6-ZXQR]; *see also*, Scheck et al., *supra* note 1. For an in-depth discussion of how human traffickers use social media, see Nicola A. Boothe, *Traffickers' "F"ing Behavior During a Pandemic: Why Pandemic Online Behavior Has Heightened*

Facebook Files revealed not only that human traffickers widely used Facebook for trafficking purposes, but also that Facebook was aware of this practice dating back to at least 2018.[224] It was only once Apple threatened to remove Facebook and Instagram from the App Store that the platform took action and removed troubling content.[225]

To ensure that platforms' incentives are more aligned with the public interests, they must be stripped of wrongful gains generated from harmful personalization using the law of unjust enrichment.

3. Socially Harmful Personalization

Finally, this Article suggests that platform profits can additionally be considered unjust enrichment when personalization is connected with the promotion of socially harmful content. At this point in time, several years after implementing the downstream MSI optimization metric, platforms are aware of the type of content their personalization algorithm promotes. They are knowingly and actively promoting harmful, divisive, and extreme content that contributes to extremism, polarization, and democratic erosion. Platforms utilize problematic personalization techniques as it enables them to increase the time users spend on the platform as well as users' interaction with the platform.

This type of enrichment should be considered unjust, taking into account the broad societal harms caused by problematic personalization algorithms. The spread of disinformation promotes distrust and blurs users' ability to differentiate between what is true and what is false. Pushing users to polarizing extremes is harmful as it creates an ever-increasing divide between users with different starting points. It pushes people to adopt extreme positions and dangerous conspiracy theories. Platforms' choices regarding what content to present to users causes them to become locked into filter bubbles that preclude meaningful discourse, which is central to a functioning and flourishing democracy. Users locked into an echo chamber surrounded by people reinforcing their positions and pushing them to further extremes—no longer being able to differentiate between reality and conspiracy—may be pushed to take extreme, violent actions offline.

Moreover, platforms' problematic personalization structure allowed for the promotion of an organized disinformation campaign by foreign governments in the months leading up to the 2016 U.S. presidential election. The Russian government in particular used social media

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the Urgency to Prevent Traffickers from Finding, Friending and Facilitating the Exploitation of Youth via Social Media, 22 GEO. J. GENDER. L. 533 (2021).

224 *See* Scheck et al., *supra* note 1.

225 Clare Duffy, *Facebook Has Known It Has a Human Trafficking Problem for Years. It Still Hasn't Fully Fixed It*, CNN BUS. (Oct. 25, 2021, 7:33 AM) https://edition.cnn.com/2021/10/25/tech/facebook-instagram-app-store-ban-human-trafficking/index.html [https://perma.cc/US3Z-E7K9].

during this period to attempt to manipulate the outcome of the election. They operated thousands of fake profiles for purposes of "sowing discord in the US political system,"[226] while targeting individuals who would be most susceptible to their messages.[227]

The fact that bad actors are able to spread their harmful, manipulative content so effectively to users who are likely to be susceptible to it is based on platforms' algorithms and their optimization metrics. The algorithms actively promote such harmful content, suggesting that susceptible users join groups, like pages, or follow trending hashtags promoting such content. By structuring their algorithms in such a way, platforms are actively and knowingly becoming unjustly enriched at the expense of society and their users.

III. Comparative Advantages & Implications

This Part offers a discussion of the proposal as outlined in Part II. It explains the rationale of using the law of unjust enrichment in the case of wrongful gains generated by platforms' harmful personalization and details the advantages of this proposal. This Part also offers prediction of platforms' possible responses to the implementation of this proposal.

A. The Comparative Advantages of Unjust Enrichment Law

The challenges highlighted in Section I.C are well known and widely researched. They have been recognized for several years as a harmful byproduct of the way platforms personalize content for their users.[228] Much thought has been given to overcoming them. This Article does not argue that the law of unjust enrichment is the only way to contend with these issues or that other legal routes should be abandoned. The Authors do posit, however, that addressing these harms through the lens of unjust enrichment offers significant advantages that other tools do not and seems appropriate for several reasons.

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226 1 Robert S. Mueller III, Report on the Investigation Into Russian Interference in the 2016 Presidential Election 14 (2019) ("The IRA conducted social media operations targeted at large U.S. audiences with the goal of sowing discord in the U.S. political system.").

227 *Id.* at 19 ("The IRA's U.S. operations sought to influence public opinion through online media and forums."). *See generally* S. Select Comm. on Intel., 116th Cong., Rep. on Russian Active Measures Campaigns and Interference in the 2016 U.S. Election (2020).

228 *See, e.g.*, Ashley Smith-Roberts, *Facebook, Fake News, and the First Amendment*, 95 Denv. L. Rev. F. 118, 119 (2018); Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 Colo. Tech. L.J. 203, 203 (2015); Christopher A. Bail et al., *Exposure to Opposing Views on Social Media Can Increase Political Polarization*, 115 Proc. Nat'l Acad. Scis. 9216, 9216 (2018); Daniel Susser, Beate Roessler & Helen Nissenbaum, *Technology, Autonomy, and Manipulation*, 8 Internet Pol'y Rev. 1, 1 (2019).

1. Harms Versus Gains

The law of unjust enrichment generally focuses on gains rather than on harms.[229] This can offer several advantages. The first advantage relates to deterrence. Through the disgorgement remedy, courts can strip wrongdoers of any ill-gotten gains;[230] such measure of recovery is often necessary to assure that the wrongful activity does not remain profitable and therefore does not persist.[231] Personalization is an immense profit engine for social media platforms.[232] The main income source of these platforms stems from selling personalized advertising services.[233] In the case of Facebook, alarming percentages of these astronomical profits come from fake news.[234] As long as platforms are allowed to benefit through abusing personalization technologies, they will continue to do so, and the harms of malevolent personalization, as described above, will persist. The most effective way to appropriately deter platforms and assure that such activities cease is to strip them of any gains obtained through harmful personalization tactics.

The second advantage of using gains-based recovery pertains to situations in which harms are difficult to measure, but gains can be more easily identified and quantified.[235] Harms such as political polarization and democratic erosion are real and horrifying, but they are probably too abstract and spread over too many unidentified victims to be a basis for a tort, harm-based, claim. To establish such a claim, some identified victim of harm must prove the magnitude of harm caused to them.[236] Even if this identification would be possible in some cases, difficulties in proving harms, their magnitudes, and the identity of victims would make suits prohibitively costly, thus crippling their deterrent effect.

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229 *See* Laycock, *supra* note 134, at 1283 (observing the essential differences that distinguish restitution from compensation); Maytal Gilboa & Yotam Kaplan, *The Mistake About Mistakes: Rethinking Partial and Full Restitution*, 26 Geo. Mason L. Rev. 427, 427–28 (2018).

230 Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (Am. L. Inst. 2011).

231 Grosskopf, *supra* note 19, at 1997–98.

232 *See* Viljoen, *supra* note 17, at 588–89 ("In 2019, Google reported $134.81 billion in advertising revenue out of $160.74 billion in total revenue. In the first quarter of 2020, Facebook's total advertising revenue amounted to $17.44 billion, compared to $297 million in revenue from other streams.").

233 *See id.*

234 *See* Cohan, *supra* note 121.

235 For an explanation of the prevalence of gains-based remedies in contract law, see Steve Thel & Peter Siegelman, *You* Do *Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 Wm. & Mary L. Rev. 1181, 1181–82 (2011).

236 *See* Maytal Gilboa & Yotam Kaplan, *Loser Takes All: Multiple Claimants & Probabilistic Restitution*, 10 U.C. Irvine L. Rev. 907, 911 (2020).

Conversely, the law of unjust enrichment focuses on the behavior of the actor causing the harms and on the enrichment generated by it.[237] The unjust enrichment doctrine does not require identifying an individual harmed by the activity.[238] Most important, as the monetary focus is on the profit generated, it does not require quantifying the harms caused. Of course, this is not to be taken to mean that measuring unjust platform profits in cases of unfair personalization is costless or even easy. But it is possible and well within the reach of routine practices of civil litigation.

2. Calculating Gains

Calculating compensation for damages is never an easy task. It requires asking what would have happened if the harmful action had not occurred, thus assessing the value of an alternative sequence of events. Despite the complexity, courts conduct such calculations on a regular basis in a variety of civil proceedings. In many cases, calculating gains can be significantly easier. For example, in cases of democratic erosion or political polarization, harms are spread among large segments of the population or suffered by society as a whole and are practically impossible to measure and quantify in monetary terms. By comparison, gains in such cases are much easier to assess and are monetary in nature. The relevant gains are accumulated by just one relevant and easily identifiable party: the gains of a specific platform generated by a particular type of activity—that is, the harmful personalization. Although the public does not have access to detailed accounts of platforms' revenue, platforms do indeed hold information regarding the revenue they made from the personalization of different types of content to various audiences.[239] Courts can mandate the disclosure of such documentation as necessary for a precise calculation of platforms gains.

In some cases, calculating gains is quite straightforward. Ads that target vulnerable groups and present them with harmful content allow platforms to become unjustly enriched at the expense of members of these vulnerable groups. This was the case regarding advertisements promoting human trafficking on Facebook. As detailed in Section II.B.2, Facebook knew it was being used to facilitate human trafficking.

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237 See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 cmts. a–c (AM. L. INST. 2011) (explaining that disgorgement of profits can be granted even when plaintiff did not prove any loss); Gilboa & Kaplan, *supra* note 236, at 911 (explaining that unjust enrichment claims focus on the enrichment by the defendant, who is relatively easier to identify compared to the plaintiff).

238 *E.g.*, RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. a (AM. L. INST. 2011) (explaining that the formula "at the expense of another" does not require plaintiffs to show that they have suffered loss but rather to focus on the defendants' benefit instead).

239 *See, e.g.*, Duffy, *supra* note 225.

Despite Facebook's commitment to fight human trafficking on its platforms, a Facebook report found that the company sold over $150,000 worth of advertisements facilitating the sale and sexual exploitation of victims of human trafficking.[240] This is a clear example in which the platform has become unjustly enriched and this enrichment was indeed measured by the platform itself. By comparison, the precise harms suffered by human trafficking victims as a result of this campaign are much more difficult to identify and measure.

Another category of advertisements that allows platforms to become unjustly enriched include profiles abusing the social media platforms in order to manipulate the public, purposely promote disinformation, and undermine democratic processes. For example, in the period leading up to the 2016 U.S. presidential election, the Russian Government posted paid ads on Facebook with the goal of sowing discord and mistrust within the American public.[241] In 2018, Congress released over 3,500 such ads.[242] Income generated from the publication of such ads can be considered unjust enrichment generated at the expense of society and should be disgorged. In June 2022, Facebook identified and removed profiles engaged in coordinated inauthentic behavior ("CIB"). CIB is when "groups of pages or people work together to mislead others about who they are or what they're doing."[243] The ads presented to such profiles generated income for the platform while allowing the continued activity of profiles engaged in CIB to the detriment of society. Revenue generated by advertisements presented to profiles later removed due to CIB should be viewed as unjust enrichment generated at the expense of society. Research conducted by *Wired* found that Facebook's parent company, Meta, made at least $30.3 million between July 2018 and April 2022 from advertisements posted by profiles which were later removed from the platforms due to CIB.[244] Again, the harms of Facebook activity in such a case are impossible to estimate, but the gains are easily calculated by researchers.

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240 *See id.*

241 Kurt Wagner, *Congress Just Published All the Russian Facebook Ads Used to Try and Influence the 2016 Election*, Vox (May 10, 2018, 12:48 PM), https://www.vox.com/2018/5/10/17339864/congress-russia-advertisements-facebook-donald-trump-president [https://perma.cc/J4PU-MHFB].

242 *Social Media Advertisements*, U.S. House of Representatives Permanent Select Comm. on Intel., https://democrats-intelligence.house.gov/social-media-content/social-media-advertisements.htm [https://perma.cc/SG3C-J7FL] (including links to all advertisements posted by the Russian government in the period leading up to the 2016 U.S. Presidential election).

243 Nathanial Gleicher, *Coordinated Inauthentic Behavior Explained*, Meta (Dec. 6, 2018), https://about.fb.com/news/2018/12/inside-feed-coordinated-inauthentic-behavior/ [https://perma.cc/Q24R-FGX2].

244 Vittoria Elliott, *Meta Made Millions in Ads from Networks of Fake Accounts*, Wired (June 23, 2022, 7:00 AM), https://www.wired.com/story/meta-is-making-millions-from-fake-accounts/ [https://perma.cc/PFQ5-6Z6P].

When discussing the promotion of increasingly extreme content on social media, YouTube's recommendation algorithm is often identified as "one of the greatest engines of extremism."[245] Often before users can watch a video on YouTube, they must watch the ad presented before the video. Ads for companies like Adidas, Amazon, and Hershey were presented to users on YouTube before videos promoting extreme content.[246] Ads presented before an extreme, polarizing video generate gains for platforms while causing harm to society. Since these ads can easily be connected to the precise type of content presented to a user, the calculation of the platform's gains is a relatively simple challenge.

As discussed in Section I.A, platforms promote content to users in order to increase the time they spend interacting with the platform. Not only does the increased engagement allow platforms to learn more about their users, but during the increased time spent on the platform, users can be presented with more ads. When the personalized content is harmful—whether because of the content itself or because of the nature of the audience it is presented to—the added revenue that platforms make from their extended ability to present more ads should be viewed as unjust enrichment, generated at the expense of vulnerable users and of society at large. While the calculation of this type of enrichment is more complex than simply adding numbers of payments made by advertisers, it is not outside the scope of calculations that courts conduct on a daily basis.

3. Rules Versus Standards

The basic maxim of the law of unjust enrichment provides a flexible standard rather than a clear-cut rule.[247] The distinction between rules and standards is central to legal design.[248] Rules provide sharp dichotomies between two legal categories and leave little room for discretion.[249] Standards on the other hand provide a fuzzier distinction, allow for more discretion in their application, and are more sensitive to context and to the specific detail of each case.[250] Naturally, a mature legal system

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245 Rabbit Hole, *supra* note 57, at 16:00; *see also id.* at 16:57 ("YouTube was, essentially, built to pull people into these polarizing rabbit holes . . . it's happening not by accident but by design."); Tufekci, *supra* note 122.

246 *See* Rabbit Hole, *supra* note 57, at 15:38 ("CNN reports that YouTube ran ads from large brands like Adidas, Amazon, and Hershey before videos which promoted extreme content.").

247 *See* Sherwin, *supra* note 136, at 2086–87.

248 For an analysis of this distinction, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 Duke L.J. 557 (1992).

249 Kennedy, *supra* note 248, at 1685.

250 *Id.*

utilizes both rules and standards as each form of legal norm offers other types of advantages.

In the present context, the law of unjust enrichment offers a flexible standard under which cases of harmful personalization can be decided. At this stage it is not appropriate to have a central regulator offer a single clear-cut distinction that would determine when platform personalization constitutes unjust enrichment. Any such determination would be arbitrary and insufficiently sensitive to context and detail. Rather, the Authors see it as preferable to leave those determinations to the discretion of the courts in specific cases, thus allowing the distinction to naturally develop over time while incorporating information from various cases. As demonstrated above, it is easier to say, in *specific instances*, that platform personalization has been unjust. Rather than try to generalize such cases into a strict rule at this stage, it would be more prudent to display patience and allow the law to develop organically through the courts.

Several attempts have been made to regulate the personalization process on platforms.[251] Attention has been focused on limiting the spread of disinformation—with particular attention on health disinformation—especially in the context of the harms disinformation has generated to democracy and democratic institutions.[252] Attempts have been made to limit platforms' ability to manipulate users by presenting them with personalized content, for example, in the context of experimentation.[253] Another type of regulatory attempt to overcome harms of platforms' personalization appears in the form of increased transparency requirements.[254] While the Authors commend such regulatory attempts, these attempts have their inherent limitations. Social media platforms operate in a highly innovative and rapidly changing environment. The slow and cumbersome process of regulation is ill fitted to address the challenges created by the rapid changes and dynamic character of innovative developments.[255] Information gaps introduce similar difficulties. While innovators are typically well acquainted with their innovation and the market conditions in which they operate, regulators' acquaintance often lags behind.[256] This can make it hard for regulators to understand how their decisions will impact the innovative practice and the market

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251 *See* Justice Against Malicious Algorithms Act, H.R. 5596, 117th Cong. (2021); Health Misinformation Act, S. 2448, 117th Cong. (2021); Algorithmic Justice and Online Platform Transparency Act, S. 1896, 117th Cong. (2021).

252 *See, e.g.*, S. 2448.

253 *See* Deceptive Experiences To Online Users Reduction (DETOUR) Act, S. 1084, 116th Cong. (2019); S. 2448.

254 *See* S. 1896.

255 *See* Sofia Ranchordás, *Innovation-Friendly Regulation: The Sunset of Regulation, the Sunrise of Innovation*, 55 JURIMETRICS J. 201, 206 (2015).

256 *See id.* at 203.

it operates within.[257] The doctrine of unjust enrichment, as a common law doctrine, can be applied by courts to the details of a particular case brought before them. Thus, the court can focus on the unjust enrichment in a particular case using information brought forth by relevant plaintiffs without the need to examine the overall functioning of platforms. This allows flexibility to decide on the merits of a particular lawsuit and allows courts to tailor the response to the facts of a particular case.

The other advantage of a court applied common law doctrine, as opposed to regulation, has to do with the rigid nature of regulation as opposed to the flexible nature of platform personalization. If regulation would prohibit a certain type of personalization or limit the use of a particular optimization metric, platforms could find a way to tweak their activity to ensure it was no longer covered by the regulation. Under the doctrine of unjust enrichment, a court would examine the platforms' behavior. If it finds that the personalization process has been unjust, it can then disgorge any profits generated by it regardless of the tools that the platforms used for their unjust behavior. Applying the doctrine of unjust enrichment to platform personalization does not require platforms to behave in a particular way. Instead, it seeks to disincentivize them from using optimization metrics or personalization algorithms that allow them to become unjustly enriched at the expense of society. Application of this doctrine shifts the responsibility back to platforms and allows them to pick any personalization process and metrics as long as they do not unjustly harm society.

4. The Diversity of Plaintiffs

A key advantage of the use of unjust enrichment doctrine is that claims in unjust enrichment can be brought to the courts by various types of plaintiffs. This can assist in avoiding regulatory capture[258] and in utilizing comparative informational and institutional advantages of diverse potential plaintiffs.[259]

First, a claim in unjust enrichment can be brought to court by a plaintiff at whose expense the defendant was unjustly enriched. In the case of platform enrichment, any user will probably satisfy these

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257 *See id.*

258 *See* Glover, *supra* note 26, at 1154.

259 *Id.* ("Moreover, public civil enforcers in some regulatory areas suffer informational disadvantages. Those disadvantages arise for a simple reason: the best sources of information about private wrongs are often the parties themselves, because they tend to have superior knowledge regarding the costs and benefits of given activities, the costs of reducing risks of harm, and the probability or severity of risk." (footnote omitted)); *see also* Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 359–65 (1984) (highlighting informational advantages of private versus public regulation).

requirements as the platform benefits by misusing its users' data.[260] Naturally, the platform's enrichment at the expense of a specific individual user is marginal; platform profits come from the aggregation of the data of hundreds of millions of users.[261] To bridge this gap, some form of aggregated legal claim akin to a class action[262] will have to be used to strip the platform of the full amount of its ill-obtained gains. Under such a scheme, the actual plaintiff, representing the group of users, will receive a part of any monetary reward granted by the court at the end of the proceedings.[263] This reward, as in a typical class action scenario, is meant to encourage the group representative to bring the claim to the court, acting as a "private attorney general" and promoting the overall social interest.[264] This incentive is beneficial in recruiting individual plaintiffs to act for the greater good; this is advantageous in the common instances in which such individuals enjoy informational advantages over central regulators.[265] It will often be the case, for instance, when online "challenges" trending among adolescents cause personal injury; private plaintiffs more easily obtain information in such cases than central regulators.[266]

The share of the award going to the representative plaintiff will usually remain relatively small. The court will divide the lion's share of any award equally among platform users. This just outcome not only deters platforms from abusing their power, but it also makes intuitive sense concerning the implicit bargain between the parties. Social media platforms provide services free of charge with users effectively paying by allowing the platforms to mine and use their data. Once a plaintiff shows that a platform misuses this data to generate forbidden profits, it only makes sense that it will disgorge these profits to the original owners of the data. In this way, the platforms pay the full value of the data

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260 Of course, the harms caused by platforms are borne by society at large and not exclusively by users. Therefore, it might be possible to allow nonusers to sue as individual plaintiffs under some circumstances. The Authors do not focus on this option here as this additional step seems largely unnecessary. The suggested claim is based on gains rather than harms, so the fact that nonusers are also harmed is of lesser importance. Additionally, limiting individual claims to users does not hinder litigation in any significant way as platform users are easy enough to come by.

261 *See* Gordon-Tapiero et al., *supra* note 2, at 647–51. It is estimated that in 2022, Facebook had more than 240 million users in the United States. Stacy Jo Dixon, *Number of Facebook Users in the United States From 2019 to 2028*, Statista (Jan. 30, 2024), https://www.statista.com/statistics/408971/number-of-us-facebook-users/ [https://perma.cc/FJK8-FHVZ].

262 For an explanation of such mechanisms, see, for example, Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 Yale L. & Pol'y Rev. 69, 71 (2004).

263 *See id.*

264 *See id.* at 122 (quoting John C. Coffee, *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 Colum. L. Rev. 370, 398 (2000)).

265 Glover, *supra* note 26, at 1154.

266 Shavell, *supra* note 259, at 359, 365.

they acquire, thus restoring the balance to the parties' bargain regarding an equal and fair exchange of assets.

In some cases, when distribution of class action awards to individual users is impracticable or inappropriate, courts can use cy pres relief as an alternative to traditional class action remedies.[267] Under this doctrine, courts can have the class defendant donate part of the award to a charitable cause related to the substance of the lawsuit.[268] In the context of platform personalization, such charitable causes might include digital literacy and online safety among vulnerable groups. Another venue for recovery would be for courts to order *fluid class recovery*.[269] Under this doctrinal alternative, courts can obligate the platform to award users with goods, services, future price reductions, or other monetary equivalents as a substitute to a monetary award.[270]

An additional solution for the implementation of these claims involves not using private plaintiffs at all but initiating claims through state actors who would be allowed to pursue an unjust enrichment claim against a platform in civil litigation. Such power can be used, for instance, by state attorneys general who have been known to utilize unjust enrichment claims in the name of public interest in other contexts.[271] Similarly, nongovernmental organizations dedicated to relevant issues such as media literacy could bring claims to courts. Such courses of action can prove useful when private plaintiffs are unwilling, or unable,[272] to bring their own claims; when informational advantages favor more public actors; or when the nature of the claim is such that a public plaintiff seems more appropriate to the court—for instance, when harms are spread over the population as a whole.

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267 *See* Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 634 (2010).

268 *Id.* ("In its current form as used in the federal courts, cy pres relief in class actions has involved the donation of a portion of the settlement or award fund to charitable uses which are in some loose manner connected to the substance of the case."). A 1972 student note pioneered the use of cy pres as a class action remedy. *See* Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 448 (1972).

269 *See* Redish et al., *supra* note 267, at 662 (explaining the difference between cy pres relief and fluid class recovery); Gregory A. Hartman, Comment, *Due Process and Fluid Class Recovery*, 53 OR. L. REV. 225, 227 (1974).

270 *See* Redish et al., *supra* note 267, at 662.

271 In fact, attorneys general already have the power to do this. *See* Doug Rendleman, *Common Law Restitution in the Mississippi Tobacco Settlement: Did the Smoke Get in Their Eyes?*, 33 GA. L. REV. 847, 848 (1999) (describing such involvement of forty state attorneys general in the context of unjust enrichment tobacco litigation).

272 *See* Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIA. L. REV. 111, 113 (1991) (explaining how the costliness of litigation can bar plaintiffs from suing); Yotam Kaplan & Ittai Paldor, *Social Justice and the Structure of the Litigation System*, 101 N.C. L. REV. 469, 470–89 (2023) (highlighting the challenges private plaintiffs face in litigating against corporate litigants).

Thus, in some cases, private plaintiffs might enjoy an informational advantage or be more motivated to sue; in other cases, financial barriers may favor public plaintiffs. Overall, the flexibility in the identity of parties capable of initiating legal action against platforms will maximize deterrence and the probability that claims will arrive at court.

B. Predicted Outcomes

This proposal may seem to place a heavy burden on the activity of social media platforms. The Authors are not overly concerned, however, regarding the ability of platforms to survive despite these new burdens. As Paul Ohm aptly explains, "We couldn't kill [the internet] if we tried."[273] This Article anticipates that if the doctrine of unjust enrichment is applied to unjust platform profits as described above, platforms may choose to improve their way of doing business in one of several ways.

1. Updated Optimization Metrics

First, platforms may choose to adjust their optimization metrics. Engagement-based optimization metrics have had a detrimental effect on the type of content promoted to users.[274] There is no inherent reason to optimize for engagement other than maximizing potential profits from advertising. Once the incentive structure changes, and platforms can no longer expect to maintain profits generated by socially harmful practices, they are likely to find other optimization metrics. New optimization metrics will likely allow platforms to reach a new equilibrium whereby they are still able to generate profits but are more mindful of the way they generate them and the impact their activity has on society. Such an equilibrium will take time and experience to reach, but even the process of striving to achieve it is likely to have a positive societal impact.

Changing its algorithm's optimization metric is not new to Facebook. In the days following the 2020 U.S. presidential election, Facebook wanted to ensure it did not turn into an arena for people spreading false claims about the elections being stolen.[275] Facebook decided that its algorithm would prioritize news from sources deemed to be reliable by the platforms.[276] The news feed algorithm was therefore optimized

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273 Paul Ohm, *We Couldn't Kill the Internet If We Tried*, 130 HARV. L. REV. F. 79, 85 (2016).

274 See *supra* Section I.C.

275 *See* Timberg et al., *supra* note 128.

276 Kevin Roose, *Facebook Reverses Postelection Algorithm Changes that Boosted News from Authoritative Sources*, N.Y. TIMES (Dec. 16, 2020), https://www.nytimes.com/2020/12/16/technology/facebook-reverses-postelection-algorithm-changes-that-boosted-news-from-authoritative-sources.html [https://perma.cc/7QJR-MW2N].

for an internal publisher score known as N.E.Q.—news ecosystem quality.[277] The change resulted in the prioritization of mainstream news outlets, such as *The New York Times* and *NPR*, and in substantially lower levels of promotion of disinformation.[278]

2. The Establishment of Civil Integrity Teams

This would not be the first time that leading social media platforms would take societal concerns into consideration in their content moderation decisions. Many view Facebook's involvement in the period leading up to the 2016 U.S. presidential election as problematic—allowing manipulative political ads, enabling the interference of foreign governments, and promoting disinformation to unsuspecting users.[279] Following this experience, Facebook arrived at the 2020 presidential election better prepared. It took several actions to ensure the integrity of the elections.[280] For example, Facebook's security team was entrusted with investigating and removing "coordinated networks of inauthentic accounts, Pages and Groups that [sought] to manipulate public debate."[281] It identified and removed fake accounts and took steps to secure "the accounts of elected officials, candidates and their staff."[282] The platforms also worked with "governments, law enforcement agencies, nonprofits, civil rights groups and other tech companies to stop emerging threats."[283] These efforts were coordinated by Facebook's civic integrity team.[284] The team's members were said to have subscribed to

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277 *Id.*

278 *See id.*

279 *See* Alexis C. Madrigal, *What Facebook Did to American Democracy*, The Atlantic (Oct. 12, 2017), https://www.theatlantic.com/technology/archive/2017/10/what-facebook-did/542502/ [https://perma.cc/FND4-YVRQ]; Dipayan Ghosh & Ben Scott, *Facebook's New Controversy Shows How Easily Online Political Ads Can Manipulate You*, Time (Mar. 19, 2018, 12:38 PM), https://time.com/5197255/facebook-cambridge-analytica-donald-trump-ads-data/ [https://perma.cc/5QWD-6PA9]; Philip Bump, *All the Ways Trump's Campaign Was Aided by Facebook, Ranked by Importance*, Wash. Post (Mar. 22, 2018, 2:19 PM), https://www.washingtonpost.com/news/politics/wp/2018/03/22/all-the-ways-trumps-campaign-was-aided-by-facebook-ranked-by-importance/ [https://perma.cc/97NG-N27V; *see also* Mark Zuckerberg, Facebook (Sept. 27, 2017, 5:38 PM), https://www.facebook.com/zuck/posts/10104067130714241 [https://perma.cc/9968-3SNW] (denying President Trump's accusation that Facebook had always been against him).

280 Mike Isaac, *Facebook Moves to Limit Election Chaos in November*, N.Y. Times (Sept. 22, 2020), https://www.nytimes.com/2020/09/03/technology/facebook-election-chaos-november.html [https://perma.cc/ZNJ3-UPFB].

281 *Meta Policies and Safeguards for Elections Around the World*, Meta, https://about.facebook.com/actions/preparing-for-elections-on-facebook/ [https://perma.cc/RWZ7-2L9X].

282 *Id.*

283 *Our Approach to Elections*, Meta (Nov. 27, 2023), https://transparency.fb.com/features/approach-to-elections/ [https://perma.cc/6VZR-LX9G].

284 *See* Timberg et al., *supra* note 128.

an informal oath to "serve the people's interests first, not Facebook's."[285] Indeed, Facebook was very pleased with the way it had coped with the 2020 election, crowning its efforts to prevent manipulation of the election a success.[286] A month after the election, Facebook took actions to dissolve the civic integrity team, assigning its workers to other teams.[287] Frances Haugen, the Facebook whistleblower, was one of the Facebook workers who had high hopes for the civic integrity team especially after its success during the period leading up to the election.[288] She, along with other workers, was concerned that the dismantling of the team reflected an end to Facebook's willingness to forgo a certain level of profitability in favor of the protection of broader societal interests.[289] Five weeks later, Facebook users used the platform to both spread the conspiracy that the election had been rigged and stolen and to coordinate parts of the January 6th storming of the Capitol.[290] One way platforms may react if the doctrine of unjust enrichment is applied to harmful personalization may be to reinstate civic integrity teams where such existed or to establish similar bodies where they have not yet existed.

3. Tools to Combat Disinformation

There are several tools that platforms could use in order to curb the spread and prevalence of disinformation. One of the ways that Facebook combatted disinformation in the days following the 2020 presidential election was by closing groups promoting #stopthesteal and other elections-related conspiracy theories.[291] Platforms like Facebook offered personalized services such as suggesting groups to a user who may find their content interesting. An internal Facebook memo uncovered as part of *The Wall Street Journal's* Facebook Files shows that in August 2020 the platform was aware that 70 of the 100 top civic Facebook groups were full of "hate, bullying, harassment, [and] misinformation," and yet the platform continued recommending these groups to users.[292] Refraining from promoting hateful, dangerous groups

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285 *See* Perrigo, *supra* note 129.

286 *See* Timberg et al., *supra* note 128.

287 *Id.*

288 Horwitz, *supra* note 61.

289 *See id.*; Timberg et al., *supra* note 128.

290 *See* Timberg et al., *supra* note 128; *see also* Sheera Frenkel, *The Storming of Capitol Hill Was Organized on Social Media*, N.Y. Times (Jan. 6, 2021), https://www.nytimes.com/2021/01/06/us/politics/protesters-storm-capitol-hill-building.html [https://perma.cc/H8UA-VPT5].

291 Shannon Bond, *Facebook Removes Pro-Trump Group Urging 'Boots on the Ground,'* NPR (Nov. 5, 2020, 2:57 PM), https://www.npr.org/2020/11/05/931794937/facebook-removes-pro-trump-group-urging-boots-on-the-ground [https://perma.cc/2C8U-VNUY].

292 Shannon Bond & Bobby Allyn, *How the 'Stop the Steal' Movement Outwitted Facebook Ahead of the Jan. 6 Insurrection*, NPR (Oct. 22, 2021, 9:50 PM), https://www.npr.org/2021/10/22/1048543513/facebook-groups-jan-6-insurrection [https://perma.cc/7DHZ-G6WG].

seems like a simple step that platforms could take in order to minimize their exposure to claims of unjust enrichment. Another way that these hateful groups can grow is by members sending out mass invites to their entire contact list.[293] Limiting the number of people each user can invite to such groups per day could limit their growth. Facebook implemented this recommendation in the period leading up to the 2020 election as it constrained the possible daily invitations to 100 and tightened this restriction as #stopthesteal gained traction after the election, limiting the permitted daily invitations to thirty.[294]

To ensure the integrity of the elections, Facebook utilized various "break glass" measures on the platform, most of which were removed following the end of the election process.[295] These measures were found to be effective in limiting the spread of disinformation. While reinstating them may indeed lower some users' engagement with the platforms, they are likely to be an effective way to overcome the societal costs that stem from the widespread dissemination of disinformation.[296] Disgorging profits generated by platforms based on the promotion of disinformation will change platform's incentives in a way that is likely to substantially lower the promotion of disinformation.

One of the meaningful ways that Facebook combats disinformation is by identifying, reviewing, and removing hate speech and other illegal content.[297] Facebook offers access to its platforms in 111 officially supported languages.[298] Other languages, not officially supported, are also in use on the platform.[299] At the same time, Facebook only has workers fluent in approximately fifty languages and its automated hate speech identification tools only operate in thirty languages.[300] Lack of fluency in some of the languages in which the platform operates could have dire consequences. For example, a *Reuters* report found that hate

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293 *Id.*

294 *Id.*

295 Roose, *supra* note 276.

296 For a discussion of similar tools, see Erin Simpson & Adam Conner, *Fighting Coronavirus Misinformation and Disinformation*, Ctr. for Am. Progress (Aug. 18, 2020), https://www.americanprogress.org/article/fighting-coronavirus-misinformation-disinformation/ [https://perma.cc/VPK2-CYMZ].

297 *AI Advances to Better Detect Hate Speech*, Meta (May 12, 2020), https://ai.facebook.com/blog/ai-advances-to-better-detect-hate-speech/ [https://perma.cc/BW3W-2B7R]; *Detecting Violations*, Meta, https://transparency.fb.com/enforcement/detecting-violations/ [https://perma.cc/XT7G-KXQH].

298 Maggie Fick & Paresh Dave, *Facebook's Flood of Languages Leave it Struggling to Monitor Content*, Reuters (Apr. 23, 2019, 3:01 AM), https://web.archive.org/web/20230707164622/https://www.reuters.com/article/us-facebook-languages-insight-idUSKCN1RZ0DW [https://perma.cc/2QTJ-MAE9].

299 *Id.*

300 *Detecting Violations*, Meta, https://transparency.fb.com/enforcement/detecting-violations/ [https://perma.cc/XCE4-YMCE].

speech promoting ethnic cleansing posted on Facebook was unchecked because "the company's operation for monitoring content in Burmese was meagre."[301] In order to combat disinformation worldwide, platforms should ensure that they have workers who are fluent in all of the languages being used on the platform in different countries around the world. Focusing on removing disinformation appearing in English, while leaving users in other countries exposed to disinformation, sends a very problematic message in terms of Facebook's priorities. It is no doubt unjust to protect some users of the platforms while leaving the more vulnerable ones to defend themselves against the platform's incentive to promote engagement generating content. Reports show that Facebook workers gathered in 2019 to decide what election integrity measures would be implemented in each country.[302] Countries placed in tier zero would enjoy continuous monitoring of content by Facebook, while countries placed in tier three would only receive attention if certain content was reported to moderators.[303] Dal Yong Jin identifies this type of differential treatment as "platform imperialism," reflecting a reality whereby leading platforms have developed within a social and historical power context which they reinforce.[304] Thus, leading Western platforms act to ensure the safety and freedom of speech of users in certain countries, including the United States, while neglecting to provide the same level of protection for users in other countries.[305] Providing a different level of protection for the basic rights and safety of users based on their country of origin and the language they use creates a strong sense of injustice and discrimination, and any profits generated from doing so should be viewed as wrongful enrichment.

During the COVID-19 pandemic, disinformation regarding the virus, its dangers, and the vaccine and its potential effects were widespread. Numerous studies have pointed at YouTube as a source of both true and false information.[306] One study found that over twenty-seven percent of YouTube's most watched videos contained disinformation

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301 Steve Stecklow, *Hatebook: Inside Facebook's Myanmar Operation*, Reuters (Aug. 15, 2018, 3:00 PM), https://www.reuters.com/investigates/special-report/myanmar-facebook-hate/ [https://perma.cc/7CSK-JUYA].

302 Casey Newton, *The Tier List: How Facebook Decides Which Countries Need Protection*, Verge (Oct. 25, 2021, 7:00 AM), https://www.theverge.com/22743753/facebook-tier-list-countries-leaked-documents-content-moderation [https://perma.cc/X4LJ-T2QG].

303 *Id.*

304 Dal Yong Jin, *The Construction of Platform Imperialism in the Globalization Era*, 11 Commc'n, Capitalism & Critique 145, 146 (2013).

305 *See* Sara Bannerman, *Platform Imperialism, Communications Law and Relational Sovereignty*, New Media & Soc'y, 2022, at 3.

306 *See, e.g.*, Charles E. Basch, Corey H. Basch, Grace C. Hillyer, Zoe C. Meleo-Erwin & Emily A. Zagnit, *YouTube Videos and Informed Decision-Making About COVID-19 Vaccination: Successive Sampling Study*, JMIR Pub. Health Surveillance, May 2021, at 1.

regarding the pandemic.[307] The platform's policy regarding COVID-19 related disinformation included two main tools. The first was the removal of "content that falsely alleges that approved vaccines are dangerous and cause chronic health effects."[308] The second step that the platform took was to accompany COVID-19 and vaccine-related content with links to where users could access reliable information, namely the Center for Disease Control's and the World Health Organization's websites.[309] Reinstating such tools may help platforms in an unjust enrichment claim brought against them.

The law should not permit platforms to continue profiting from the promotion of disinformation that has a real potential to harm the health and safety of society and individuals within it.

Conclusion

The platform crisis has pushed democracies toward the edge of the precipice. As long as harmful personalization practices generate profits for platforms, they will continue implementing them. Something must be done soon if we are to pull ourselves back and survive this crisis. A fundamental change to platforms' incentive structure is required. This Article proposes this change through the law of unjust enrichment by removing platforms' gains when they are obtained in ways that are clearly socially harmful. This solution is not only necessary as a matter of policy, but also follows naturally from existing doctrines of the law of unjust enrichment.

This proposal is a game changer in terms of the ability of the legal system to contend with the current crisis. The proposed framework enjoys several significant advantages. First, the law of unjust enrichment can assure effective deterrence by removing the profits platforms obtain through their wrongful activities. Second, the harms of platforms' practices are often difficult to identify and measure. Therefore, harm-based remedies are often unavailable or impossible to operate. Conversely, platform profits are all too real and much easier to measure. Third, the doctrinal tests embodied in the law of unjust enrichment offers the level of flexibility required to regulate the ever-changing landscape of platform activity. Fourth, the law of unjust enrichment draws on the

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307 Heidi Oi-Yee Li, Adrian Bailey, David Huynh & James Chan, *YouTube as a Source of Information on COVID-19: A Pandemic of Misinformation?*, BMJ Glob. Health, May 2020, at 1, 3.

308 The YouTube Team, *Managing Harmful Vaccine Content on YouTube*, YouTube: Off. Blog (Sept. 29, 2021), https://blog.youtube/news-and-events/managing-harmful-vaccine-content-youtube/ [https://perma.cc/KCL8-XVPE].

309 *Topical Context in Information Panel*, YouTube Help, https://support.google.com/youtube/answer/9004474?hl=en [https://perma.cc/KUL9-YXL2].

comparative advantages of diverse actors, including private plaintiffs, courts, regulators, and experts, and can therefore generate effective and informed legal action. The proposal detailed in this Article has the power to meaningfully change the financial incentives of platforms, thereby protecting individuals and society as a whole.

Modernizing the Power of the Purse Statutes

*Eloise Pasachoff**

Abstract

Two foundational statutes limit the executive branch's important and necessary work in executing the budget against the backdrop of congressional control: the Antideficiency Act, dating back to the post-Civil War era, and the Impoundment Control Act, which emerged from the Nixon years. This Article, originally written as an invited contribution to The George Washington Law Review*'s annual issue on administrative law, calls these the Power of the Purse statutes. While these statutes have been generally successful in responding to the problems that first prompted them, this Article illustrates gaps in the statutes that have become apparent in an era of expanded presidential control and proposes reforms to fix them. The reforms largely—although not entirely—map onto legislation proposed by Democrats in recent years. This Article argues that these proposals are commonsense reforms that ought to be supported by bipartisan majorities—as underscored by, among other things, their support from a remarkably bipartisan coalition of civil society organizations during both the Trump and Biden Administrations and the enactment of several of the reforms with bipartisan support through consecutive Consolidated Appropriations Acts. This Article thus reframes both the problems and the proposals as institutional rather than partisan and urges that the reforms ought to become law.*

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* Agnes Williams Sesquicentennial Professor of Law, Georgetown University Law Center. This Article grew out of testimony I presented at a congressional hearing in 2020 as the House Budget Committee was initially considering what it would subsequently introduce as the Congressional Power of the Purse Act. *See Protecting Congress's Power of the Purse and the Rule of Law: Hearing Before the H. Comm. on the Budget*, 116th Cong. 75–84 (2020) (statement of Eloise Pasachoff). I am grateful for the invitation to testify there and for opportunities to present different stages of this project at a Georgetown University Law Center faculty workshop, the American Bar Association Administrative Law Annual Conference, the Legislation Roundtable, and Stanford's Public Law Workshop. I benefitted from many helpful conversations in those settings and elsewhere, including with Pam Bookman, Josh Chafetz, Bridget Dooling, Abbe Gluck, Kevin Kosar, Matt Lawrence, Tony McCann, Gillian Metzger, Zach Price, Dave Rapallo, Emily Satterthwaite, Kate Shaw, David Super, David Vladeck, Dan Walters, and others. For excellent research assistance, I thank Grayson Kuehl and Max Rosenthal, in addition to the wonderful Georgetown Law Library staff. I am grateful to *The George Washington Law Review* team for the invitation to contribute to the Administrative Law Issue and for their flexibility in shifting the publication of this Article to the subsequent volume in light of my father's death right as the Administrative Law Issue essays were due. This Article is dedicated to the memory of Jay M. Pasachoff (1943–2022), Field Memorial Professor of Astronomy at Williams College for fifty years, whose example as a dedicated teacher and researcher has shaped so much of my life.

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Introduction

It is a truism that Congress holds the power of the purse in our constitutional structure.[1] As James Madison wrote in Federalist 58, the purse is a "powerful instrument" when it comes to "reducing . . . all the overgrown prerogatives of the other branches of the government."[2] In fact, he went on, "[t]his power over the purse may . . . be regarded as the most complete and effectual weapon with which any constitution can arm the immediate representatives of the people, for obtaining a redress of every grievance, and for carrying into effect every just and salutary measure."[3] The power of the purse derives from the Appropriations Clause, which declares that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law . . . ."[4]

Yet at the same time, the executive branch has always played an important role in executing the budget.[5] This role has become even more critical and visible as the size of the government has grown and the sums to support the government's tasks have expanded.[6] The modern era of presidential control has added another layer to this work as presidents have claimed more and more authority in general[7] and have expanded the institutional apparatus to do so over the budget in particular.[8]

Current high-profile controversies pose questions about some of the outer dimensions of this balance of power, from the debt ceiling crisis[9] to the issue of mass executive cancellation of student loans[10] to whether the Consumer Financial Protection Bureau's ("CFPB") funding from the Federal Reserve rather than annual appropriations

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1 Kate Stith, *Congress' Power of the Purse*, 97 Yale L.J. 1343, 1344 (1988).

2 The Federalist No. 58, at 359 (Alexander Hamilton, James Madison & John Jay) (Clinton Rossiter ed., 1961).

3 *Id.*

4 U.S. Const. art. I, § 9, cl. 7.

5 Louis Fisher, Presidential Spending Power 3 (1975).

6 Paul C. Light, The Government-Industrial Complex: The True Size of the Federal Government, 1984–2018 (2018); Jonathan S. Gould, A Republic of Spending (Sept. 2023) (unpublished manuscript) (on file with author).

7 Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2248 (2001); Blake Emerson & Jon D. Michaels, *Abandoning Presidential Administration: A Civic Governance Agenda to Promote Democratic Equality and Guard Against Creeping Authoritarianism*, 68 UCLA L. Rev. 104, 109–16 (2021).

8 Eloise Pasachoff, *The President's Budget as a Source of Agency Policy Control*, 125 Yale L.J. 2182 (2016); Zachary S. Price, *Funding Restrictions and Separation of Powers*, 71 Vand. L. Rev. 357, 369–70 (2018).

9 *See, e.g.*, Conor Clarke, The Debt Limit 4–5 (May 21, 2023) (unpublished manuscript) (on file with author), https://ssrn.com/abstract=4454798 [https://perma.cc/FY3T-UXP4] (discussing "'constitutional trilemma,' in which the Executive Branch must choose between three unenviable options" in response to a congressional refusal to raise the debt ceiling).

10 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2362 (2023).

violates the Appropriations Clause.[11] But a more prosaic, underappreciated set of statutes provides the backdrop for the routine operations of this balance of power: the Antideficiency Act,[12] which prevents agencies from spending or committing themselves to spend in the absence of appropriations,[13] and the Impoundment Control Act,[14] which limits the executive branch's ability to refuse to spend appropriated sums.[15]

Together, these framework statutes implement the constitutional dimensions of the balance between Congress and the executive branch in everyday spending.[16] They do so by making congressional spending choices mandatory in both directions. Under the Antideficiency Act, the executive branch cannot obligate or expend beyond what Congress has appropriated, while under the Impoundment Control Act, the executive branch cannot ordinarily obligate or expend less. Executive spending discretion is limited within the range set by these two statutes.

This Article calls the Antideficiency Act and the Impoundment Control Act the Power of the Purse statutes because of their importance in cabining executive authority and affirming congressional control over spending. The need to modernize these statutes for the era of presidential control is the subject of this Article.[17]

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11 *Compare* Cmty. Fin. Servs. Ass'n, Ltd. v. CFPB, 51 F.4th 616, 623 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 981 (2023) (agency's funding structure violates the Appropriations Clause), *with* CFPB v. L. Offs. of Crystal Moroney, P.C., 63 F.4th 174, 177 (2d Cir. 2023) (agency's funding structure does not violate the Appropriations Clause).

12 31 U.S.C. § 1341.

13 Antideficiency Act, 31 U.S.C. §§ 1341, 1342, 1517; *see also* U.S. Gov't Accountability Off., GAO-06-382SP, Principles of Federal Appropriations Law 6-34 to -158 (3d ed. 2006) (describing the operations of this Act).

14 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344 (codified at 2 U.S.C. §§ 681–688).

15 *Id.*; *see also* U.S. Gov't Accountability Off., GAO-16-464SP, Principles of Federal Appropriations Law 2-47 to -51 (4th ed. 2016) (describing the operations of this Act).

16 U.S. Gov't Accountability Off., *supra* note 13, at 6-34 (describing the Antideficiency Act as "one of the major laws in the statutory scheme by which Congress exercises its constitutional control of the public purse"); Allen Schick, Congress and Money: Budgeting, Spending and Taxing 401 (1980) (describing the Impoundment Control Act as providing a statutory structure to resolve questions of "legislative domination versus executive discretion" in power of the purse questions).

17 In addition to these framework statutes, a series of individual provisions scattered throughout Title 31 (Money and Finance) further circumscribe the executive branch's authority during budget execution. For example, these provisions hold that appropriations must be expressly stated, not implied; that "[a]ppropriations may be used only for their intended purposes"; that appropriations made for a definite time period may be used only for expenses properly incurred during that time period; that agencies must generally deposit any money received from nonappropriated sources into the Treasury rather than keeping it for themselves; and that all obligations agencies incur must be properly documented and recorded. U.S. Gov't Accountability Off., GAO-16-463SP, Principles of Federal Appropriations Law 1-8 to -9 (4th ed. 2016) (describing these and other "permanent fiscal statutes"). This Article does not focus on these provisions as they are generally functioning well and are not in need of statutory updating.

Part I of the Article first explains what each Act does and how each has generally been successful at achieving the goals that originally prompted it.[18] It next shows how executive branch action in an era of presidential control has revealed important gaps in each Act that demonstrate the need for statutory updating.[19] Just as administrative lawyers talk about the need to modernize the Administrative Procedure Act[20] as the foundational statute governing rulemaking, adjudication, and judicial review in the administrative state,[21] so, too, do we need to talk about modernizing these foundational statutes governing the power of the purse.

Part II of the Article then turns to identifying how the statutes ought to be revised. It proposes reforms to improve transparency;[22] to constrain certain activities by the Office of Management and Budget ("OMB") and agencies themselves;[23] to enhance the ability of the Government Accountability Office ("GAO") to provide relevant information to Congress and the public about agency spending;[24] and to include features that are currently missing but deserve attention in the modern era.[25]

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18 *See infra* Sections I.A.1, I.B.1.

19 *See infra* Sections I.A.2, I.B.2. To be sure, issues relating to the Antideficiency Act and the Impoundment Control Act are not the only contemporary power of the purse issues related to statutory design that deserve attention. In another work, for example, I address the scope of executive branch control over federal grants, arguing that such control over policy decisions implemented through federal grants raises fewer concerns than executive control over grant awards and grant enforcement because the latter categories receive less oversight by courts and Congress; in addition to proposing miscellaneous revisions to legislation governing federal grants, I suggest ways for Congress to use its already-existing appropriations and oversight authority to respond better. Eloise Pasachoff, *Executive Branch Control of Federal Grants: Policy, Pork, and Punishment*, 83 Ohio State L.J. 1113 (2022) [hereinafter Pasachoff, *Executive Branch Control of Federal Grants*]. I have also elsewhere addressed the scope of executive branch power over transfer and reprogramming funds, arguing that this power is generally beneficial and that in response to abuse, Congress need only use tools it already has rather than revising the tools themselves. Eloise Pasachoff, *The President's Budget Powers in the Trump Era*, *in* Executive Policymaking: The Role of the OMB in the Presidency 69, 78–82 (Meena Bose & Andrew Rudalevige eds., 2020) [hereinafter Pasachoff, *The President's Budget Powers in the Trump Era*]. In this Article, I focus on the Antideficiency Act and the Impoundment Control Act as two areas where the framework statutes themselves need attention.

20 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.).

21 *See, e.g.*, Christopher J. Walker, *Modernizing the Administrative Procedure Act*, 69 Admin. L. Rev. 629 (2017); Ronald M. Levin, *The Regulatory Accountability Act and the Future of APA Revision*, 94 Chi.-Kent L. Rev. 487 (2019).

22 *See infra* notes 310–41 and accompanying text.

23 *See infra* notes 342–68 and accompanying text.

24 *See infra* notes 370–97 and accompanying text.

25 *See infra* notes 398–420 and accompanying text.

Recent authorizing legislation initially proposed by Democrats in the 116th[26] and 117th[27] Congresses sought to address some of these recommendations. While the legislation received support from a wide array of civil society groups across the political spectrum,[28] it ultimately failed to become law. In the House, the authorizing committee that considered the legislation became caught up in anti-Trump rhetoric, resulting in party-line votes.[29] In the Senate, the legislation never made it out of the authorizing committee at all.[30]

Yet a subset of these reforms—one permanent change and two temporary reporting requirements—actually were enacted into law through several appropriations provisions.[31] The appropriations committees, in some ways the congressional stakeholders with the most at stake institutionally in the power of the purse reforms, took the lead in successfully pushing for passage of these reforms with some degree of bipartisan support through the appropriations process.[32] Approaching these reforms from an institutional perspective was key to their success.

This Article takes up the institutional rather than partisan call in urging that the work of modernizing the Power of the Purse statutes be completed. Democrats in the 118th Congress have once more offered a legislative vehicle to do so: the Congressional Power of the Purse Act provisions of the broader Protecting Our Democracy Act.[33] Yet while this bill once more has only Democratic sponsors,[34] and while the reforms were initially introduced by Democrats during the Trump Administration as responses to that administration's actions,[35] they are not, in fact, fairly characterized as simply Democratic efforts to constrain a Republican president. Instead, they are best seen as

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26 Congressional Power of the Purse Act, H.R. 6628, 116th Cong. (2020); Congressional Power of the Purse Act, S. 3889, 116th Cong. (2020).

27 Protecting Our Democracy Act, H.R. 5314, Title V, Reasserting Congressional Power of the Purse, 117th Cong. (2021); Protecting Our Democracy Act, S. 2921, Title V, Reasserting Congressional Power of the Purse, 117th Cong. (2021).

28 *See infra* note 291 and accompanying text.

29 *See infra* notes 295–96 and accompanying text.

30 *See infra* notes 297–98 and accompanying text.

31 Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, §§ 204, 748, 136 Stat. 49, 256–57, 306–07; Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, §§ 204, 748, 749, 136 Stat. 4459, 4667, 4718 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, §§ 748, 749, H.R. 2882, 118th Cong. §§ 748, 749; *see also infra* note 83 and accompanying text.

32 *See infra* note 300 and accompanying text.

33 Protecting Our Democracy Act, H.R. 5048, Title V, Congressional Power of the Purse Act, 118th Cong. (2023).

34 *See Cosponsors: H.R. 5048—118th Congress (2023–2024)*, Congress.Gov, https://www.congress.gov/bill/118th-congress/house-bill/5048/cosponsors?s=1&r=1&q=%7B%22search%22%3A%5B%22hr5048%22%5D%7D [https://perma.cc/W2XL-6FFX].

35 *See infra* notes 295–96 and accompanying text.

congressional efforts to assert the power of the purse against overreaching presidents of either party. This Article thus reframes the interventions through this institutional lens.

While arguing for modernizing the Power of the Purse statutes, this Article does not suggest that the executive branch plays a generally inappropriate role in budget execution. To the contrary, it would be impossible to operate modern government without the executive branch's important work in executing the budget, and some discretion is both inevitable and to the good.[36] But executive branch spending has several characteristics that make robust and effective congressional oversight and control particularly important. There are few opportunities for public participation in priority setting and policymaking anywhere in the executive spending process, in contrast to the widespread availability of public participation throughout other administrative processes.[37] Executive spending decisions are also far less transparent than other final administrative decisions.[38] And executive spending decisions are far less subject to judicial review because of the many justiciability hurdles that such decisions present.[39] I take up these normative claims at more length in other work.[40] The goal of this Article is simply to illustrate the need for rebalancing the power of the purse through reforms to the Antideficiency Act and Impoundment Control Act and to show how these reforms are both commonsense and nonpartisan.

I. The Antideficiency Act and Impoundment Control Act: Promises and Pitfalls

This Part introduces the Antideficiency Act and the Impoundment Control Act as two core statutes that play an important role in protecting Congress's power of the purse. For each Act, this Part first explains what it requires and how it constrains the executive branch before identifying

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36 *See, e.g.*, Fisher, *supra* note 5, at 261 ("[T]he impulse to deny discretionary authority altogether should be resisted."); Pasachoff, *Executive Branch Control of Federal Grants*, *supra* note 19, at 1117–18 (explaining why, "for the most part, robust Executive Branch control over federal grants is good").

37 *See, e.g.*, Gillian E. Metzger, *Taking Appropriations Seriously*, 121 Colum. L. Rev. 1075, 1118–20 (2021); Pasachoff, *supra* note 8, at 2279–80.

38 Metzger, *supra* note 37, at 1119–20; Pasachoff, *supra* note 8, at 2251–62; Mila Sohoni, *On Dollars and Deference: Agencies, Spending, and Economic Rights*, 66 Duke L.J. 1677, 1712–15 (2017).

39 Pasachoff, *Executive Branch Control of Federal Grants*, *supra* note 19, at 1166–71; Metzger, *supra* note 37, at 1120–27; Sohoni, *supra* note 38, at 1706–07; Matthew B. Lawrence, *Second-Class Administrative Law*, 101 Wash. U. L. Rev. (forthcoming 2024).

40 In addition to my articles and book chapter cited in *supra* notes 8 and 19, I have a book project under development: Eloise Pasachoff, All the President's Money? Executive Branch Spending in an Era of Presidential Control (on file with author).

the gaps and problems with the Act that have become apparent in the era of presidential administration.

A. The Antideficiency Act: Limiting Executive Branch Spending

The earliest version of the Antideficiency Act dates back to 1870, when Congress addressed the problem of coercive deficiencies, whereby agencies would overspend their appropriated sums and then come back to Congress for more.[41] This had been a problem almost since the country's founding,[42] but reached a particular height following the Civil War.[43] Over the years, Congress has revised the Act numerous times in an effort to constrain executive branch attempts to work around its proscriptions.[44] While today, the Act is generally successful at accomplishing its original goals, it has weaknesses in responding to contemporary executive strategies.

1. What the Antideficiency Act Does

The Antideficiency Act contains three core substantive prohibitions, all of which support one bottom line: that "[g]overnment officials may not make payments or commit the United States to make payments at some future time for goods or services unless there is enough money in the 'bank' to cover the cost in full," where the "'bank' . . . is the available appropriation."[45]

First, "[a]n officer or employee" of an agency may neither make nor authorize an expenditure or obligation exceeding an appropriation (that is, sums already in an account) or in advance of an appropriation (such as at the end of the fiscal year, before the new fiscal year's appropriations are made), "unless authorized by law."[46]

Second, "[a]n officer or employee" may neither "accept voluntary services" on behalf of the United States nor "employ personal services exceeding that authorized by law" except in cases of "emergencies involving the safety of human life or the protection of property."[47] Such emergencies, Congress clarified in 1990, do "not include ongoing, regular

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41 FISHER, *supra* note 5, at 232–33; Herbert L. Fenster & Christian Volz, *The Antideficiency Act: Constitutional Control Gone Astray*, 11 PUB. CONT. L.J. 155, 160 (1979).

42 *See, e.g.*, 1 Stat. 342, 343 (1794) ("For making good a deficiency in the appropriation of the year one thousand seven hundred and ninety-three, for extra-services of clerks in the office of the Secretary of State . . . eight hundred dollars.").

43 Fenster & Volz, *supra* note 41, at 160.

44 *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 13, at 6-34 to -36.

45 *Id.* at 6-37.

46 31 U.S.C. § 1341(a)(1)(A)–(B).

47 *Id.* § 1342.

functions of government the suspension of which would not imminently threaten the safety of human life or the protection of property."[48]

Third, "[a]n officer or employee" may neither make nor authorize an expenditure or obligation exceeding an "apportionment"—that is, OMB's division of appropriations by program, by time period, or by both[49]—or the agency's own rules on accounting for apportionments.[50] Strictly, the Antideficiency Act delegates to the President herself the apportionment power, but by longstanding practice, OMB takes on this task in her stead, typically by a senior civil servant.[51]

Unlike the Administrative Procedure Act, the Antideficiency Act does not enforce its requirements at the level of the agency.[52] Instead, the Antideficiency Act prohibits *officers or employees* of agencies from taking these steps.[53] This distinction is critical. As GAO explains, "The Antideficiency Act is the only fiscal statute that includes both civil and criminal penalties for a violation."[54] As to the former, an officer or employee who violates any of the Act's prohibitions may face "appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office."[55] As to the latter, an officer or employee who violates any of the Act's prohibitions "knowingly and willfully . . . shall be fined not more than $5,000, imprisoned for not more than 2 years, or both."[56] The goal of these consequences is deterrence; an individual agency employee may work harder to stay within fiscal lines, even pushing back at improper orders from above, if she is concerned about these individual consequences.[57]

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48 *Id.*

49 *Id.* §§ 1512–1513.

50 *See id.* § 1517(a)(1)–(2).

51 *See id.* §§ 1512(b)(2), 1513(b)(1); *see also* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 73.

52 *See* 5 U.S.C. § 553(b)–(c) ("[W]hen *the agency* for good cause finds"; "the agency shall give interested persons an opportunity to participate"; "*the agency* shall incorporate in the rules adopted a concise general statement of their basis and purpose." (emphasis added)); § 554 ("The *agency* shall give all interested parties opportunity for . . . the submission and consideration of facts, arguments . . . ." (emphasis added)).

53 31 U.S.C. §§ 1341(a)(1), 1342, 1517(c) ("An *officer or employee* of the United States government . . . may not . . . ." (emphasis added)).

54 U.S. Gov't Accountability Off., GAO-19-372T, Application of the Antideficiency Act to a Lapse in Appropriations: Testimony Before the Subcomm. on Interior, Environment, and Related Agencies, Comm. on Appropriations 2 (2019), https://www.gao.gov/assets/gao-19-372t.pdf [https://perma.cc/MJ3S-QHYT].

55 31 U.S.C. § 1349(a); *accord id.* § 1518.

56 31 U.S.C. § 1350; *accord id.* § 1519.

57 *See* U.S. Gov't Accountability Off., *supra* note 13, at 6-143 to -44; Philip J. Candreva, *The Federal Antideficiency Act at 150—Where Do We Stand?*, 39 Pub. Budgeting & Fin. 75, 90 (2019); Gordon Gray, *The Antideficiency Act: A Primer*, Am. Action F. (Aug. 3, 2016), https://www.americanactionforum.org/research/antideficiency-act-primer/ [https://perma.cc/MDS3-S7Z2].

The Antideficiency Act also requires transparency about its violations and their aftermath. "If an officer or employee" violates the Act, the head of the relevant agency "shall report immediately to the President and Congress all relevant facts and a statement of actions taken."[58] The agency head must transmit a copy of the report to GAO's Comptroller General on the same day.[59] For almost twenty years, at the direction of Congress, GAO has compiled annual summaries of these reports and released them to the public.[60] Reported violations each year since 2005 have ranged from under ten to under thirty.[61]

These reports illustrate that the Antideficiency Act has been generally successful in preventing agencies from overspending or from spending in unauthorized ways.[62] A recent study of hundreds of reported violations between fiscal years 2006 and 2017 found that most of the violations were "neither pervasive nor material," concluding that even where "agency preventive controls" failed to avoid a violation, "detective controls are working and responsible parties apparently feel safe self-reporting."[63] The revisions Congress made to the Act over the first half of the twentieth century in response to executive branch efforts to get around it have also largely avoided the problem of coercive deficiencies that led to the Act's creation in the first place.[64] GAO's heightened role in overseeing violations has also played an important role in the Act's success over the last twenty years.[65] Moreover, the assumption that the Antideficiency Act, particularly the threat of its penalties, plays an important role in motivating compliance with the law underlies other recommendations for improving congressional oversight.[66]

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58 31 U.S.C. § 1351; *accord id.* § 1517(b).

59 31 U.S.C. §§ 1351, 1517(b).

60 U.S. Gov't Accountability Off., B-333630, Fiscal Year 2021 Antideficiency Act Reports Compilation (2022); *see also* Consolidated Appropriations Act, 2005, Pub. L. No. 108-447, § 1401, 118 Stat. 2809, 3192 (2004); S. Rep. No. 108-307, at 43 (2004).

61 *See Antideficiency Act Resources*, U.S. Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/resources [https://perma.cc/Y96A-7TGF].

62 Candreva, *supra* note 57, at 76 ("With respect to congressional control over the executive, the ADA is effective at stopping overspending and unauthorized spending . . . .").

63 *Id.*

64 *Id.* at 76–77.

65 *Compare* U.S. Gov't. Accountability Off., *supra* note 61 (illustrating depth of GAO's attention since 2004 to Antideficiency Act enforcement), *with* Fenster & Volz, *supra* note 41, at 157 (critiquing GAO and Congress as of 1979 for insufficient attention to Antideficiency Act enforcement).

66 *See, e.g.*, Kevin M. Stack & Michael P. Vandenbergh, *Oversight Riders*, 97 Notre Dame L. Rev. 127, 133 (2021).

2. *Gaps and Problems in the Antideficiency Act*

While the Antideficiency Act has been generally successful at accomplishing the aims of the statute's original goals, it has proved less successful in achieving those goals as applied to the problems presented in an era of presidential control. Five gaps and problems in the Antideficiency Act have emerged as particularly salient for power of the purse issues in the twenty-first century.

a. Apportionment Authority

First, nothing in the Antideficiency Act explicitly defines the outer limits of OMB's apportionment authority, even though complying with OMB's apportionments is one of the core requirements of the Act. Can OMB apportion funds while placing additional legally binding limits on agency action to ensure compliance with the President's priorities? In other words, to what extent is apportionment solely a function of efficient funds management as opposed to being a source of authority or otherwise providing space for presidential policies?[67]

The language of the statute and the overall context of its history and purpose suggest that efficient funds management is the goal.[68] That is, funds appropriated for "a definite period" must be apportioned in a manner to prevent the need for "a deficiency or supplemental appropriation for the period," while funds appropriated "for an indefinite period" must be apportioned "to achieve the most effective and economical use."[69] In addition, the Act specifies limited circumstances in which an apportionment may be used to reserve funds, and none of these circumstances involve policy development.[70] Contrast this restrictive language

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67 To be clear, "efficient funds management" and "presidential policies" are best thought of as on a continuum rather than as a dichotomy; different administrations may well have different views on what it means to manage funds efficiently. *Cf.* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 59 (1983) (Rehnquist, J., concurring in part and dissenting in part) ("A change in administration brought about by the people casting their votes is a perfectly reasonable basis for an executive agency's reappraisal of the costs and benefits of its programs and regulations."). The distinction here is the difference between using apportionments to accommodate the "inevitable contingencies that arise in administering congressionally-funded agencies and programs" (efficient funds management) and using apportionments to "advance the broader fiscal policy objectives of the Administration" while "*negat[ing]* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation" (presidential policies). City of New Haven v. United States, 809 F.2d 900, 901 (D.C. Cir. 1987); see also *infra* notes 243–46 and accompanying text for more on this distinction in the context of the Impoundment Control Act.

68 Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 74.

69 31 U.S.C. § 1512(a).

70 *Id.* § 1512(c)(1)(A)–(C) (allowing an apportionment to reserve funds only "to provide for contingencies," "achieve savings made possible by or through changes in requirements or great efficiency of operations," and "as specifically provided by law").

with an earlier version of the provision giving open-ended authority to the President to "'apportion' funds where justified by 'other developments subsequent to the date on which such appropriation was made available.'"[71] As the D.C. Circuit explained in a case examining the intersection of apportionment and deferral under the Impoundment Control Act—discussed in more detail below[72]—the "purpose of the amendment" to the apportionment provision in the Antideficiency Act "was to preclude the President from invoking the Act as authority for implementing 'policy' impoundments."[73] Together, this language and history make clear that the apportionment power provides no general delegation of policy authority.

Yet, by longstanding practice, OMB can attach "footnotes" to apportionments that direct agency officials to take or not to take certain actions.[74] Sometimes, these footnotes can have significant policy effect. For example, an apportionment footnote might condition the availability of funds on some subsequent OMB action, such as approving an agency's "spend plan"; detail policy goals that should be achieved in a spend plan; or preclude an agency from obligating funds that were previously available to the agency to use.[75] Apportionment footnotes are not merely precatory; as OMB explains, they "become part of the apportionment and are subject to the Antideficiency Act," so agency actors face the possibility of individual sanctions if they ignore the instructions in such footnotes.[76]

The lack of clarity around the extent of OMB's authority during the apportionment process has meant, in an era of presidential control, that presidents have the functional ability to use apportionments to enhance their power. For example, apportionment footnotes provided the vehicle for the controversy underlying the first Trump impeachment, as it was

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71 *City of New Haven*, 809 F.2d at 906 n.18 (quoting 31 U.S.C. § 665(c)(2) (1970)) (internal alteration omitted).

72 *See infra* notes in Section I.B.2.d.

73 *City of New Haven*, 809 F.2d at 906 n.18; *see also* U.S. Gov't Accountability Off., *supra* note 15, at 2-48 n.56 (explaining that the provisions governing the reserve of funds under the apportionment power in the Antideficiency Act are identical to the provisions specifying permissible circumstances for deferral under the Impoundment Control Act, and noting that "[d]eferrals for policy reasons are not authorized").

74 Off. of Mgmt. & Budget, Exec. Off. of the President, OMB Circular No. A-11, Preparation, Submission, and Execution of the Budget, § 120.34–.38 (2016) ("Footnotes appear as textual descriptions on specific tabs in the apportionment file, and typically provide additional information or direction associated with one or more lines on the request."). OMB further distinguishes between purely "informational" footnotes, which have no legal effect, and those that provide authority or limits, which do. *Id.*

75 *See, e.g.*, Protect Democracy, *Experts Explain How to Read Apportionments and Navigate OMB's New Apportionment Website*, YouTube 40:00–60:00 and accompanying slides (Oct. 17, 2022), https://www.youtube.com/watch?v=XEDz8Wg2wx0#t=39m58s [https://perma.cc/4NER-RNK3].

76 *Id.*; *see also* Off. of Mgmt. & Budget, *supra* note 74, § 120.36.

through apportionment footnotes that OMB placed a hold on the ability of the Department of Defense and the State Department to transmit funds to Ukraine.[77] OMB's general counsel defended this use of apportionment power as necessary "to ensure that funds were not obligated prematurely in a manner that could conflict with the President's foreign policy," suggesting that apportionment is itself a tool of presidential control.[78] Indeed, one of the Trump Administration's arguments for changing the funding structure of the CFPB was that it ought to be "subject to OMB apportionment" in order to "facilitat[e] additional oversight by the President."[79]

While the apportionment power has been in the Antideficiency Act for over a hundred years,[80] its use to enhance presidential power appears to be largely a modern invention; the seminal work on the presidential spending power from the founding through the Nixon Administration was almost entirely silent on this tool.[81]

b. Apportionment Transparency

The ability of presidents to use apportionment to enhance presidential power was enhanced, until recently, by the lack of transparency around apportionment.[82] This is the second gap in the Antideficiency Act itself—although this gap was recently narrowed by the Consolidated Appropriations Act of 2023, which made permanent the temporary disclosure requirements of the previous year's appropriations act.[83] Because this remedy is so new, it is worth highlighting the reason for its existence in addition to noting how it can still be improved.

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77 Dan Mangan & Kevin Breuninger, *Trump Administration Broke Law in Withholding Ukraine Aid, Watchdog Says As Senate Prepares for Impeachment Trial*, CNBC: Politics (Jan. 16, 2020, 10:05 AM), https://www.cnbc.com/2020/01/16/trump-administration-broke-law-in-withholding-ukraine-aid.html?&qsearchterm=trump%20administration%20broke%20law [https://perma.cc/XSG5-EVRK]; U.S. Gov't Accountability Off., B-331564, Office of Management & Budget—Withholding of Ukraine Security Assistance (2020) [hereinafter B-331564], https://www.gao.gov/products/b-331564 [https://perma.cc/YM29-79N5]; U.S. Gov't Accountability Off., B-331564.1, Office of Management & Budget—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing (2022) [hereinafter B-331564.1], https://www.gao.gov/assets/720/718986.pdf [https://perma.cc/UEV5-3N9E].

78 Letter from Mark R. Paoletta, Gen. Couns., Off. Mgmt. & Budget, to Tom Armstrong, Gen. Couns., GAO, at 9 (Dec. 11, 2019) (writing in regards to B-331546, *Office of Management and Budget—Withholding of Ukraine Security Assistance*).

79 U.S. Dep't Treasury, A Financial System That Creates Economic Opportunities 89 (2017); *see* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 74.

80 U.S. Gov't Accountability Off., *supra* note 13, at 6-35.

81 *See* Fisher, *supra* note 5, at 337 (mentioning apportionment on a few scattered pages, in contrast to other tools that received full-length chapter treatment).

82 *See* Pasachoff, *supra* note 8, at 2259, 2262–63.

83 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, 136 Stat. 4459 (2022); *see infra* notes 86–88 and accompanying text.

OMB's apportionments are final legal documents with real effect, and yet, until this recent change, there was no easy way for Congress or the public to see what OMB's directions were. If OMB was overstepping, or if presidents were imposing troublingly unrelated restrictions on agencies through apportionment, it might take a whistleblower or active noncompliance for anyone to know.[84] Apportionment secrecy thus impeded both Congress's ability to control the power of the purse and the public's ability to hold the executive branch accountable for its spending.[85] Nor was there any systematic way to assess the balance between technical apportionment decisions and policy-laden ones, or to compare apportionment actions across administrations or agencies. To what extent are apportionment footnotes used, and are they the primary source of policy direction, or are there ways that apportionments themselves have similar effect? To what extent were the Trump Administration's actions outliers? The lack of answers to these questions has enhanced presidential power at the expense of congressional oversight.

The Consolidated Appropriations Act for 2023 did not amend the Antideficiency Act to require disclosure, but it did make permanent what the previous year's appropriations act had required only for the 2022 fiscal year:[86] that OMB "post each document apportioning an appropriation . . . including any associated footnotes" on a public website.[87] It also required each agency to notify the House and Senate Committees on Appropriations and the Budget if an apportionment was delayed beyond the limited time period specified by the Antideficiency Act, which "conditions the availability of an appropriation on further action," or "may hinder the prudent obligation of such appropriation or the execution of" one of the agency's activities.[88] While these notification requirements are temporary in that they apply only to that

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84 *See, e.g.*, Brandon Carter, *House Intel Committee Releases Whistleblower Complaint on Trump-Ukraine Call*, NPR (Sept. 26, 2019, 8:52 AM), https://www.npr.org/2019/09/26/764071379/read-house-intel-releases-whistleblower-complaint-on-trump-ukraine-call [https://perma.cc/3NK7-XQMD] (reporting that a whistleblower disclosed the phone call that triggered concern about improper conditions on apportionment for aid to Ukraine, which ultimately led to the first Trump impeachment); *cf.* U.S. Gov't Accountability Off., B-310108, Forest Service—Apportionment Limitation for Aviation Resources (2008) (assessing the agency's noncompliance with OMB's apportionment footnote after the agency's repeated requests to modify the footnote). OMB-imposed rules limiting agency communication about budget-related matters with anyone in Congress or outside the executive branch also reduced incentives to let appropriators know directly about apportionment issues. *See* Off. of Mgmt. & Budget, *supra* note 74, § 22; Pasachoff, *supra* note 8, at 2224–27.

85 *See* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 88–91.

86 *See* Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, § 204(b), 136 Stat. 49, 256–57.

87 *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 204, 136 Stat. 4459, 4667 (2022).

88 *Id.* § 749(a)(1)–(3).

year's appropriations act, the fact that these temporary reporting requirements have now appeared in three appropriations acts in a row suggests that they may have staying power.[89]

These new requirements go a long way toward remedying this gap in the Antideficiency Act, acknowledging the importance of the apportionment power while also relying on disclosure, rather than a substantive limit on that power, as a means to reassert congressional control.

At the same time, the disclosure requirement has not fully solved the problem of apportionment transparency. It is difficult to understand how to read apportionments because they appear largely as a series of acontextual numbers.[90] It is not easy to find the apportionment for a given program as the website provides links agency-by-agency only by a Treasury Appropriation Fund Symbol rather than alongside names that a member of Congress, a staff member, or a member of the public would recognize as a program of interest.[91] It requires downloading, as opposed to being able to open and view online directly, and discrete Excel or JavaScript Object Notation files.[92] And it is not easy to find apportionment footnotes or their rationales, buried as they are deep within various apportionments rather than flagged externally or summarized anywhere more comprehensibly.[93] The OMB apportionment website is thus an example of transparency without simplicity or context, making it difficult to use as an accountability resource.

A number of the civil society organizations that supported the initial iterations of the Congressional Power of the Purse Act have developed a series of helpful Apportionment Resources for Congress to aid in understanding how to use the material on the website.[94] These resources include videos from former OMB and agency budget officials, PowerPoint slides, and step-by-step instructions for finding relevant

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89 *See supra* note 31.

90 For example, click any link at *Approved Apportionments*, Off. of Mgmt. & Budget, https://apportionment-public.max.gov/ [https://perma.cc/ZE4K-KHK6].

91 For example, the Department of Agriculture's links include almost 150 discrete apportionment documents for the first five months of FY 2023 with titles like "FY2023_Agency=AG_18_TAFS_2023-01-24-21.38.xlsx." *Id.*

92 *Id.* (provides two folders per agency per fiscal year, one with Excel files and another with JSON files to download).

93 *See id.*

94 *Using OMB's Apportionment Website: Resources for Congress*, Protect Democracy (Nov. 3, 2022), https://protectdemocracy.org/work/using-ombs-apportionment-website-resources-for-congress/#finding-an-apportionment [https://perma.cc/V7YC-TWK3] (noting that training was sponsored by Protect Democracy, American Action Forum, Demand Progress, FreedomWorks, National Taxpayers Union, Project on Government Oversight, R Street Institute, and Taxpayers for Common Sense); *see also infra* note 291 and accompanying text (identifying the Power of the Purse coalition).

apportionments.[95] Yet helpful as these resources are, they still reflect significant limits on ready understanding of the material on OMB's apportionment website. For example, the Apportionment Resources website explains how to find a relevant apportionment in eleven steps, walking through sequential references to the relevant fiscal year's appropriation act provision, the Treasury Department's Federal Account Symbols and Titles Book, and an excel spreadsheet on OMB's website.[96] The website then provides an 85-page slide deck explaining how to read a given apportionment![97]

While Congress has taken significant steps in support of apportionment transparency, more work remains to be done in order to make that transparency readily comprehensible.

c. Shutdown Spending

The third gap in the Antideficiency Act involves the two statutory exceptions to the prohibitions on obligating in advance of appropriations: the "unless authorized by law" exception[98] and the emergency exception to the prohibition on receiving voluntary services on behalf of the United States.[99]

In principle, these provisions mean that the only reasons for agencies to take limited actions during a lapse in appropriations are either where Congress has otherwise authorized those actions or for true emergencies involving "the safety of human life or the protection of property," not those involving "ongoing, regular functions of government."[100] The President herself may be able to take additional actions in keeping with the view of the Office of Legal Counsel ("OLC") that "authorized by law" includes "not only those obligations in advance of appropriations for which express or implied authority may be found

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95 *See Using OMB's Apportionment Website: Resources for Congress*, *supra* note 94.

96 *Id.*

97 Lester Cash, Ed Martin, & Charlotte (Charlie) McKiver, *How to Read Apportionments and Use OMB's Website: A Video Training*, Protect Democracy (Oct. 13, 2022), https://protectdemocracy.org/work/using-ombs-apportionment-website-resources-for-congress/#finding-an-apportionment [https://perma.cc/U8NK-HDH8]; Lester Cash, Ed Martin, & Charlotte (Charlie) McKiver, *Approved Apportionments: Using OMB's Public Apportionment Website*, Protect Democracy (Oct. 13, 2022), https://docs.google.com/presentation/d/12XLFJ7Bhljt5r8JbE35nu0wrLVXD_O2a/edit#slide=id.p1 [https://perma.cc/5LRX-HPBX] (the slide deck accompanying the training).

98 31 U.S.C. § 1341(a)(1)(B) ("An officer or employee . . . may not . . . involve [the] government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law.").

99 *Id.* § 1342.

100 *See* Government Operations in the Event of a Lapse in Appropriations, 1995 WL 17216091 (O.L.C. Aug. 16, 1995); *see also* Authority for the Continuance of Government Functions During a Temporary Lapse in Appropriations, 43 Op. Att'ys Gen. 293, 5 Op. O.L.C. 1 (1981) [hereinafter Authority for the Continuance of Government Functions]; Applicability of the Antideficiency Act Upon a Lapse in an Agency's Appropriations, 43 Op. Att'ys Gen. 224, 4A Op. O.L.C. 16 (1980).

in the enactments of Congress, but also those obligations necessarily incident to presidential initiatives undertaken within [the President's] constitutional powers."[101]

In practice, however, as shutdowns have become more common, different administrations have made vastly different choices about how and whether to keep different parts of the government open during shutdowns, sometimes with questionable links to any exception, and typically without any clear articulation of a legal rationale.[102] There is no reliable way for courts to assess the legality of these choices since a shutdown is likely to be over long before a court would be able to reach a final decision, rendering the case moot.[103] Nor is there any systematic way for Congress or the public to assess the legal or policy rationales for these choices. OMB requires agencies to submit shutdown plans, and in recent years, these plans have been posted on a centralized website, but these are high-level plans that do not permit the kind of legal or policy oversight that other kinds of final executive branch action receive when challenged in court.[104] OLC may have issued formal legal opinions opining on the permissibility of certain choices before the agencies took action,[105] but not all OLC opinions are made public.[106] Ex post, GAO can investigate, at Congress's request, whether an agency's choices complied with the emergency exception and the agency's statutory authorities, but agencies do not always comply with GAO efforts to obtain information, and so GAO's decisions may not have all of the

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101 *See* Authority for the Continuance of Government Functions, *supra* note 100, at 7; Price, *supra* note 8, at 361–63.

102 *See, e.g.*, Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 83–84.

103 *See, e.g.*, Nat'l Treasury Emps. Union v. United States, 444 F. Supp. 3d 108, 118 (D.D.C. 2020) (dismissing a shutdown case as moot while noting the IRS's "dubious claim" that its recall of employees to process tax returns during the shutdown was "somehow necessary for 'the safety of human life or the protection of property'" rather than simply a choice made in order "to avoid the anticipated political heat that would have no doubt been generated as to both Executive and Legislative officeholders had the shutdown caused delays in the disbursement of taxpayer refunds"); *see also* Avalos v. United States, 54 F.4th 1343, 1349 (Fed. Cir. 2022) (holding that the Fair Labor Standards Act is not violated when the government does not pay federal employees who work during a government shutdown until after the lapse in appropriations has been resolved).

104 *See* Pasachoff, *supra* note 8, at 2233; *see also Agency Contingency Plans*, OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, https://www.whitehouse.gov/omb/information-for-agencies/agency-contingency-plans/ [https://perma.cc/WBE6-FPFM] (providing a list of agency shutdown plans).

105 *See, e.g.*, Authority for the Continuance of Government Functions, *supra* note 100.

106 *See, e.g.*, *The OLC's Opinions*, KNIGHT FIRST AMEND. INST. AT COLUM. U., https://knightcolumbia.org/reading-room/olc-opinions [https://perma.cc/YJE8-25TT] (providing "comprehensive public database" of OLC opinions released to date, "including those released in response to [Knight's] FOIA lawsuit"); Melissa Wasser, *Fact Sheet: Office of Legal Counsel Transparency*, PROJECT ON GOV'T OVERSIGHT (Nov. 3, 2021), https://www.pogo.org/resource/2021/11/fact-sheet-office-of-legal-counsel-transparency [https://perma.cc/P7MD-KQKV].

full context.[107] GAO investigations may also not capture the full scope of executive branch actions during a shutdown, but only what managed to become public enough that it rose to Congress's attention in the first place.[108]

There is thus an informational deficit as Congress considers, in the aftermath of a shutdown, what choices the executive branch actually made and whether any legal authorities need to be expanded or restricted, either through modifications to substantive statutes or through riders in the next year's appropriations law. To the extent that the choices a President made are truly incident to her constitutional powers and cannot lawfully be constrained by Congress,[109] the absence of information hinders accountability to the people. And finally, the uncertainty around the executive branch's choices and the absence of public information about those choices can increase the likelihood of shutdowns happening in the first place,[110] making information even more valuable.

d. Violations and Sanctions

The fourth gap in the Antideficiency Act involves the processes for reporting violations of the Act and assessing the possibility of sanctions for such violations.

There are two ways that violations of the Act are identified. Agencies themselves may learn of an action taken by one of their employees and determine that an Antideficiency Act violation has occurred.[111] Alternatively, GAO may investigate a potential violation of the Act at the request of a member of Congress, agency head, or other accountable officer and determine that the action was indeed a violation.[112] The Antideficiency Act states that "If an officer or employee of an executive agency . . . violates" one of the substantive prohibitions in the Act, the agency head must "report immediately to the President and

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107 *See infra* notes 128–36 and accompanying text.

108 *See, e.g.*, U.S. Gov't Accountability Off., B-331132, Office of Management and Budget—Regulatory Review Activities during the Fiscal Year 2019 Lapse in Appropriations (2019); U.S. Gov't Accountability Off., B-331091, National Archives and Records Administration—Publication of Federal Register During the Fiscal Year 2019 Lapse in Appropriations (2020).

109 *See supra* note 101 and accompanying text.

110 *See* Matthew B. Lawrence, *Disappropriation*, 120 Colum. L. Rev. 1, 71 (2020).

111 *See* U.S. Gov't Accountability Off., *supra* note 13, at 6-144 to -45.

112 *See* 31 U.S.C. §§ 712(1), 712(4); *see also* U.S. Gov't Accountability Off., GAO-06-1064SP, Procedures and Practices for Legal Decisions and Opinions 3–6 (2006), https://www.gao.gov/assets/gao-06-1064sp.pdf [https://perma.cc/F3YM-K6T9]. GAO will also investigate possible Antideficiency Act violations without a request from Congress or an agency if GAO finds information that appears to suggest a possible Antideficiency Act violation during an ongoing GAO audit. *See* 31 U.S.C. § 717(b).

Congress all relevant facts and a statement of actions taken," with a copy of the report sent to GAO.[113] But what happens if the agency and GAO disagree about whether a violation has actually taken place?

GAO has taken the consistent position that when it finds a violation has occurred, the agency must report that finding to the President and Congress.[114] OMB has taken different positions during different administrations. For the most part, its view has been that even though GAO opinions do not bind the executive branch, agencies must still report GAO findings of Antideficiency Act violations to the President and to Congress even if "the agency does not agree that a violation has occurred," while "explain[ing] the agency's position" about why the action was not a violation.[115] During the Trump Administration, however, OMB revised its view of the reporting requirement, concluding that agencies need not report any GAO determinations of a violation unless they, "in consultation with OMB," agreed that such a violation occurred.[116] The Biden Administration's OMB reverted to the ordinary position of requiring reporting even in cases of disagreement.[117]

The lack of clarity in the Antideficiency Act around reporting violations accrues power to the President. When agencies do not provide Congress with their views of why GAO's finding is wrong, Congress is left with GAO's thoughtful analysis of the facts and law on the one hand and the executive branch's terse recalcitrance on the other. Both of OMB's positions on the reporting requirement are rooted in the same constitutional separation of powers view that "a legal opinion by a Legislative Branch agency cannot bind the Executive Branch,"[118] so the difference is not rooted in different views of constitutional requirements. The difference instead is rooted in the value of rational explanation and comity as opposed to assertions of power without

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113 31 U.S.C. § 1517(b); *see also id.* § 1351.

114 U.S. Gov't Accountability Off., GAO-21-538T, Testimony Before the House Committee on the Budget—Proposals to Reinforce Congress's Constitutional Power of the Purse 4–5 (2021), https://www.gao.gov/assets/gao-21-538t.pdf [https://perma.cc/GBW8-XGEJ] (testimony of Emmanuelli Perez, GAO Deputy Counsel); U.S. Gov't Accountability Off., *supra* note 13, at 6-145 to -46.

115 Off. of Mgmt. & Budget, *supra* note 74, § 145.8; *see also* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 85.

116 Memorandum from Mark Paoletta, General Couns. of Off. of Mgmt. & Budget, to Agency Gen. Couns. 2 (Nov. 5, 2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/11/Memo-to-Agencies-on-A-11.pdf [https://perma.cc/RFR4-9R4U]; *see also* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 85.

117 Off. of Mgmt. & Budget, *supra* note 74, § 145.8; H.R. Rep. No. 117-79, at 13 (2021), https://www.congress.gov/117/crpt/hrpt79/CRPT-117hrpt79.pdf [https://perma.cc/5U2A-KWZ5].

118 Memorandum from Mark Paoletta, *supra* note 116, at 1; *see also* Off. of Mgmt. & Budget, *supra* note 74, § 145.8 (expressing a similar view).

analysis.[119] Congress is thus left not only with an informational deficit as it evaluates what to do with GAO's finding but also with the executive branch's refusal to participate in one of the core remedial aspects of the Antideficiency Act.

Congress faces a related informational deficit with respect to the other remedial aspects of the Antideficiency Act: the administrative penalties and criminal sanctions available for violations. Every year since 2004, GAO has produced an overall report for Congress on the executive branch's violations of the Act with a case-by-case explanation of the circumstances of the violation and the remedial steps the agency took in response both to prevent the violation from happening again and the consequences imposed on the agency actor committing the violation.[120] What Congress does not know, however, is whether the Attorney General investigated any of these violations as "knowing[] and willful[]," which would trigger criminal sanctions.[121]

This lack of information is a problem. The threat of criminal sanctions for intentionally violating the Antideficiency Act serves an important deterrent function, enhancing Congress's power of the purse by making the potential consequences for violating Congress's spending directions quite serious.[122] Yet there is no record of any prosecution of violations of the Act.[123] This absence may, of course, mean that the threat of prosecution is serving the deterrent effect as intended. But in conjunction with the potential for agency refusals to report GAO findings of violations, the absence may also undercut the value of the deterrent effect to the extent that agency employees may see that there is no chance that they will be prosecuted if their agency head, "in consultation with OMB,"[124] directs them to make spending decisions that violate the Act.

e. GAO and Documents

The fifth gap in the Antideficiency Act involves GAO's authority to obtain documents relevant to its assessment of potential violations of that Act.

While the Antideficiency Act itself does not provide a specific investigatory role for GAO, Congress has tasked GAO generally with "investigat[ing] all matters related to the receipt, disbursement, and use of public money" and investigating or otherwise assisting any committee

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119 *Compare* Memorandum from Mark Paoletta, *supra* note 116, at 1–2, *with* OFF. OF MGMT. & BUDGET, *supra* note 74, § 145.8.

120 *See supra* note 60 and accompanying text.

121 31 U.S.C. § 1350; *accord id.* § 1519.

122 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 114, at 6.

123 *Id.*

124 *See* Memorandum from Mark Paoletta, *supra* note 116, at 2.

with jurisdiction over spending, or either House of Congress as a whole, with its inquiries.[125] To support this investigative work, GAO is also "authorized to obtain such agency records as the Comptroller General requires to discharge the duties of the Comptroller General (including audit, evaluation, and investigative duties)."[126] In turn, "[e]ach agency shall give the Comptroller General information the Comptroller General requires about the duties, powers, activities, organization, and financial transactions of the agency."[127]

What happens if an agency declines to provide such information? GAO is directed to make a written request to the head of the agency, specifying the information requested and the reason for the request.[128] The head of the agency then has twenty days to respond.[129] If GAO is not granted access to the information within that time period, GAO "may file a report with the President, the Director of the Office of Management and Budget, the Attorney General, the head of the agency, and Congress."[130] If that action does not prompt the agency to provide the information within an additional twenty days, GAO may subsequently file a lawsuit in the D.C. District Court to require the agency to produce the record, with certain exceptions for sensitive information.[131]

Recent events in which agencies have failed to provide GAO with the requested information have revealed that these provisions could usefully be strengthened.[132] For one thing, the absence of specific reference to GAO's investigatory powers under the Antideficiency Act or other budget and appropriations laws puts GAO in an odd position. Even though the reference to its investigatory powers over "all matters related to . . . use of public money" unquestionably covers budget and appropriations law, the fact that the records request section references only GAO's "audit, evaluation, and investigative duties" in its "including" clause appears to put budget and appropriations law investigations in a less favored category.[133]

For another thing, there is no deadline for agencies to respond to GAO requests initially, before GAO turns to the agency head.[134]

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125 31 U.S.C. § 712(1), (4)–(5).

126 *Id.* § 716(a)(1).

127 *Id.* § 716(a)(2).

128 *Id.* § 716(b)(1).

129 *Id.*

130 *Id.*

131 *Id.* § 716(b)(2), (d).

132 *See, e.g.*, U.S. Gov't Accountability Off., *supra* note 114, at 14 (describing difficulties in obtaining information in Antideficiency Act inquiries from the Department of Interior, the Department of Defense, and the Environmental Protection Agency in six different episodes across the three previous administrations).

133 *See supra* notes 125–26 and accompanying text.

134 U.S. Gov't Accountability Off., *supra* note 114, at 14.

This absence allows responses to be strung out indefinitely, hindering GAO's ability to provide Congress information in a timely manner.[135] At times, GAO has not even been able to obtain sufficient information to analyze the issue in response to a congressional request at all.[136] Congress's ability to oversee spending is hampered when agencies do not share relevant material that GAO requests.

B. The Impoundment Control Act: Limiting Executive Branch Failure to Spend

If the Antideficiency Act has its roots in the nineteenth century, the Impoundment Control Act has a much more recent vintage, growing out of conflicts during the Nixon Administration.[137] The Nixon Administration took the occasionally used presidential tool of impoundment—that is, precluding the obligation or expenditure of budget authority appropriated by Congress—to a new level, one generally understood to be so different in degree as to be different in kind.[138] The core of previous impoundments had been for efficiency or lack of necessity; the core of the Nixon Administration's impoundments were based in policy disagreements.[139] If the Administration had failed to achieve its policy goals during the appropriations process, it would simply use the budget execution process to do so.[140] In response, Congress included the Impoundment Control Act as Title X of its overhaul of the federal budget process.[141] This Act, too, has been generally successful, but, as with the Antideficiency Act, there is room for improvement.

1. What the Impoundment Control Act Does

The Impoundment Control Act defined and cabined two types of potential impoundment actions: deferral and rescission.[142]

Under deferral, the President proposes to withhold or delay the obligation or expenditure of budget authority for a specific, limited period of time.[143] The President must submit a formal "special message" to Congress explaining the amount he is planning to defer, the reason,

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135 *See id.*

136 *See, e.g.*, U.S. Gov't Accountability Off., B-330776, Department of the Interior—Activities at National Parks During the Fiscal Year 2019 Lapse in Appropriations 2 (2020).

137 Allen Schick, The Federal Budget: Politics, Policy, Process 285 (3d ed. 2007).

138 Josh Chafetz, Congress's Constitution: Legislative Authority and the Separation of Powers 64 (2017).

139 Fisher, *supra* note 5, at 147–48; *see also* Chafetz, *supra* note 138.

140 *See* Chafetz, *supra* note 138.

141 Congressional Budget and Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 297; *see also* Chafetz, *supra* note 138, at 65.

142 2 U.S.C. § 682(1), (3).

143 *Id.* § 684(a).

the time period of deferral (which must remain within the current fiscal year), and all of the relevant facts and circumstances of the proposal.[144] The Impoundment Control Act narrowly prescribes acceptable reasons for deferral: "(1) to provide for contingencies; (2) to achieve savings made possible by or through changes in requirements or greater efficiency of operations; or (3) as specifically provided by law."[145] Policy disagreements are not a proper basis for deferral. As the Impoundment Control Act underscores, "[n]o officer or employee of the United States may defer any budget authority for any other purpose."[146]

The Impoundment Control Act had originally permitted deferrals based on policy disagreements because Congress had been allowed to reject deferrals with a one-house veto.[147] After the Supreme Court held that a one-house veto violated the Constitution's requirement of bicameralism and presentment in *INS v. Chadha*,[148] the D.C. Circuit invalidated the deferral provision in its entirety as inseverable from the one-house veto,[149] and Congress subsequently amended the Act.[150] It removed the President's ability to defer based on policy disagreements and, instead of allowing either chamber to veto the deferral unilaterally, provided a fast-track mechanism for each chamber to consider an "'impoundment resolution' . . . which only expresses its disapproval of a proposed deferral."[151] Regardless of whether the House or Senate disapproves of the deferral, the deferral may not extend beyond the current fiscal year.[152]

Under rescission, the President proposes in another "special message" not just to delay but actually to cancel budget authority.[153] The permissible reasons for proposed rescissions are much broader: "[w]henever the President determines that all or part of any budget authority will not be required to carry out the full objectives or scope of programs for which it is provided or that such budget authority should be rescinded for fiscal policy or other reasons . . . ."[154] In other words, if the President has a policy disagreement with an appropriation, rescission allows him to propose to cancel it. Congress may then use the same fast-track mechanism to consider the proposed rescission in a rescission

144 *Id.* § 684(a)(1)–(6).
145 *Id.* § 684(b)(1)–(3).
146 *Id.* § 684(b).
147 SCHICK, *supra* note 137, at 286.
148 462 U.S. 919, 959 (1983).
149 City of New Haven v. United States, 809 F.2d 900, 909 (D.C. Cir. 1987).
150 *See* Pub. L. No. 100-119, § 206, 101 Stat. 754, 785 (1987) (codified at 2 U.S.C. § 684(b)).
151 2 U.S.C. § 682(4); *see also id.* § 688 (providing the fast-track procedures).
152 *Id.* § 684(a).
153 *Id.* § 683(a).
154 *Id.*

bill.[155] If it does not approve such a bill within forty-five session days, the President must release the funds.[156]

GAO has statutory authority to review proposed rescissions and deferrals for compliance with the statute as well as to investigate potential violations of the Act, such as when agencies fail to release for obligation funds after Congress declined to approve a rescission proposal or when agencies withhold funds without submitting a special message for deferral.[157] After conducting its review, GAO is authorized to bring a civil action "against any department, agency, officer, or employee" failing to make available required budget authority, after first filing an "explanatory statement" with the Speaker of the House and the President of the Senate about the underlying circumstances and then letting twenty-five session days pass for congressional consideration.[158] In practice, however, GAO has essentially never been in the position of filing such a lawsuit, because agencies routinely release the funds.[159]

In evaluating compliance with the Act's deferral provision, GAO has developed a third category of impoundment-like action that it deems permissible and outside the scope of the Impoundment Control Act: what it calls a "programmatic delay."[160] According to GAO, a "programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program."[161] For example, GAO has identified as permissible programmatic delays those "precipitated by legal requirements," such as the need to perform

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155 *See id.* § 688.

156 *See id. §* 683(b).

157 *See id.* § 685(b).

158 *Id.* § 687.

159 GAO makes note of the release in a published appropriations law decision. *See, e.g.*, U.S. Gov't Accountability Off., B-330045.3, Impoundment Control Act of 1974–Release of Withheld Amounts Due to Expiration of 45-day Period (2018) [hereinafter B-330045.3]. GAO did bring one lawsuit in an effort to get an agency to release funds improperly withheld under the Impoundment Control Act after the Department of Housing and Urban Development ("HUD")—initially in the Nixon Administration, continued in the Ford Administration—suspended a low-income housing program and refused to release the funds even after Congress refused to approve the suspension as a rescission and affirmatively rejected the suspension as a deferral. *See* U.S. Gov't Accountability Off., OGC-77-20, Review of the Impoundment Control Act of 1974 After 2 Years 218–20 (1977) [hereinafter OGC-77-20]; *see also* Staats v. Lynn, No. 75-0551 (D.D.C. 1975), discussed and briefs of the parties reprinted in *Hearing on GAO Legislation Before the Subcomm. on Reports, Accounting, and Management of the Senate Government Operations Comm.*, 94th Cong., 1st Sess. 184–256 (1975). After the briefing was complete, however, the Ford Administration decided to revive the program, at which point the parties stipulated, and the court agreed, that the case should be dismissed as moot. *See* OGC-77-20, *supra* note 159, at 224. This case is discussed more below with respect to the question of GAO's standing. *See infra* note 397.

160 U.S. Gov't Accountability Off., *supra* note 15, at 2-50 to -51.

161 *Id.* at 2-50.

environmental reviews and consult with stakeholders as required by statute,[162] and those due to delays in receiving contract proposals or loan applications.[163]

Unlike the penalties for violating the Antideficiency Act, the Impoundment Control Act contains no penalties for its violation—no administrative penalties and no criminal penalties alike. If GAO determines that a particular action was an improper deferral or rescission, it simply reports the matter to Congress and directs the agency to release the funds.[164]

The Act has been generally successful in restricting illegal impoundments.[165] For example, impoundments dropped dramatically from the decade preceding the Act to the decade following the Act.[166] When President Ford attempted to continue President Nixon's impoundment efforts shortly after the Act was passed, Congress quickly rebuffed him under the Act's new procedures, and he complied.[167] The same pattern held under President Reagan.[168] Neither President George W. Bush nor President Obama proposed any rescissions at all.[169] When President Trump proposed a rescission package for the first time in eighteen years, Congress swiftly rejected it,[170] and he released the funds in compliance with the Act.[171] More generally, even where impoundments have taken place without going through the proper channels as established by the Act, agencies have regularly complied with congressional pushback

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162 U.S. Gov't Accountability Off., B-333110, Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations 1 (2021).

163 U.S. Gov't Accountability Off., *supra* note 15, at 2-51.

164 2 U.S.C. §§ 683(b), 686(a).

165 Chafetz, *supra* note 138, at 65–66.

166 Christopher Wlezien, *The Politics of Impoundments*, 47 Pol. Rsch. Q. 59, 64 (1994). To be sure, the executive branch faced significant losses in court in the pre-Impoundment Control Act era under the language of individual substantive statutes and appropriations laws; the Impoundment Control Act was an effort to move beyond "ad hoc efforts to restore individual programs," no matter how successful those efforts ultimately were. Fisher, *supra* note 5, at 184–98; *see also* Train v. City of New York, 420 U.S. 35, 41–42 n.8 (1975) (rejecting an effort to impound funds appropriated under an individual statute before the Impoundment Control Act took effect).

167 Schick, *supra* note 16, at 403–05.

168 *See* City of New Haven v. United States, 809 F.2d 900, 902–03 (D.C. Cir. 1987) (describing President Reagan's effort to impound funds appropriated for four separate housing assistance programs, Congress's rejection of that effort, and subsequent presidential compliance); *see also* Joseph Jucewicz, *Cooperation Altered by Adjudication: The Impoundment Process Since Nixon*, 3 J.L. & Pol. 665, 688 (1987) ("Like Nixon, Reagan today finds himself stymied by legislative and judicial barriers to the use of his impoundment power.").

169 U.S. Gov't Accountability Off., B-330828, Updated Rescission Statistics, Fiscal Years 1974–2020 3–4 (2020).

170 *Id.* at 3.

171 *See* B-330045.3, *supra* note 159, at 2.

or GAO's instructions to release improperly impounded funds.[172] While the Act did not entirely prevent all impoundments from taking place, then, the framework provided by the Act is generally understood to have "successfully shifted an important budget authority from the executive branch to the legislative branch."[173]

The Act is not uniformly appreciated, however. The day before President Trump left office, senior officials in his Office of Management and Budget—Russell Vought, OMB Director, and Mark Paoletta, OMB General Counsel—issued a letter to the Democratic chair of the House Budget Committee calling the Impoundment Control Act "unworkable in practice" because it "micromanages the President's execution of the laws with predictably terrible results."[174] More recently, as part of his campaign for re-election in 2024, President Trump pledged to "restore executive branch impoundment authority to cut waste, stop inflation, and crush the Deep State," saying that he would both challenge the constitutionality of the Impoundment Control Act in court and also work with Congress to "overturn" it.[175]

The evidence does not support these critiques or claims of authority. For example, Vought and Paoletta argue that the Act "[d]iscourage[s] [e]fficiency, [t]ransparency, and [a]ccountability" because the Act's requirements are so "onerous" that "[a]dministrations have undoubtedly found it easier to simply find unnecessary or redundant uses for excess funds rather than go through the ICA's deferral and rescission processes."[176] But the Act does not interfere with the many sources of executive spending discretion that remain available to administrations, including the opportunity to transfer and reprogram funds,[177] the greater

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172 *See* Metzger, *supra* note 37, at 1102.

173 Sam Berger, Seth Hanlon & Galen Hendricks, Ctr. for Am. Progress, Reflections on the Congressional Budget Act (2018), https://www.americanprogress.org/article/reflections-congressional-budget-act/ [https://perma.cc/Q6RT-RPFG].

174 Letter from Russell Vought, Dir., OMB, & Mark Paoletta, Gen. Couns., OMB, to Chairman John Yarmuth, H. Comm. on the Budget 1, 9 (Jan. 19, 2021) [hereinafter Letter from Vought & Paoletta], https://trumpwhitehouse.archives.gov/wp-content/uploads/2021/01/Response-to-House-Budget-Committee-Investigation.pdf [https://perma.cc/U6U4-G6AS].

175 *Agenda 47: Using Impoundment to Cut Waste, Stop Inflation, and Crush the Deep State*, Donald J. Trump (June 20, 2023), https://www.donaldjtrump.com/agenda47/agenda47-using-impoundment-to-cut-waste-stop-inflation-and-crush-the-deep-state [https://perma.cc/FCM2-5BZW].

176 Letter from Vought & Paoletta, *supra* note 174, at 9–10.

177 A transfer shifts funds between appropriations and requires express statutory authority, while a reprogramming shifts funds "within an appropriation to purposes other than those contemplated at the time of appropriation," and is generally available subject to particular limitations that Congress may place on an individual appropriation or agency. U.S. Gov't Accountability Off., *supra* note 15, at 2-44; *see also id.* at 2-30 to -37 (discussing the concept of executive spending discretion more generally); Wlezien, *supra* note 166, at 69 (suggesting that impoundment and transfers may in certain circumstances be substitutes).

authority over no-year or multi-year funds,[178] and the GAO-blessed exception for programmatic delay.[179] If administrations truly think that a particular set of spending is wasteful, they can attempt to justify its elimination or restriction in the next year's budget proposal as well. If Congress rejects that claim, the rejection does not make Congress "an [u]nreliable [p]artner," as Vought and Paoletta suggest,[180] but rather indicates that Congress has different policy priorities and a different sense of what constitutes waste.

Moreover, *any* effort on the part of Congress to control executive branch budget execution could be disparaged as micromanaging, as opposed to appropriate efforts to ensure that the executive does not thwart congressional direction.[181] Vought and Paoletta point to nothing specific in the Impoundment Control Act to justify this concern as especially significant under the Act.

As for the 2024 Trump campaign's suggestion that impoundment authority is a necessary tool to "cut waste" and "stop inflation,"[182] the claim is hard to square either with the realities of the federal budget or with the law. The campaign's commitment to "maintaining the same level of funding for defense, Social Security, and Medicare"[183] means that it is leaving out some of the largest categories of the budget in its efforts.[184] The remaining categories would require drastic cuts to accomplish the campaign's avowed spending goals,[185] and the

178 Congress appropriates no-year funds when it makes sums "available for obligation without fiscal year limitation," typically by indicating that the appropriation is "to remain available until expended," while Congress appropriates multi-year funds when it makes sums "available for obligation for a definite period in excess of one fiscal year." U.S. Gov't Accountability Off., GAO 05-261SP, Principle of Federal Appropriations Law 5-7 to -9 (observing that no-year funds have "obvious" advantages to agencies, given the increase of flexibility that they provide).

179 *See supra* notes 160–63.

180 Letter from Vought & Paoletta, *supra* note 174, at 10.

181 *See, e.g.*, Cong. Budget Off., Biennial Budgeting 44 (1988), https://www.cbo.gov/sites/default/files/100th-congress-1987-1988/reports/doc02-entire.pdf [https://perma.cc/BPX5-UT77] (discussing claim that annual budgeting itself turns Congress into micromanagers and noting that biennial budgeting could cause Congress to micromanage even more in each appropriation bill because it would review budgets less frequently); Kurt Couchman & Russ Duerstine, *DoD's Biggest Problems with a Continuing Resolution Come from Congress*, The Hill (Jan. 10, 2022, 7:00 PM), https://thehill.com/blogs/congress-blog/economy-budget/589101-dods-biggest-problems-with-a-continuing-resolution-come/ [https://perma.cc/8Z3H-JUBK] (listing the Impoundment Control Act as only one example of congressional micromanagement).

182 *Agenda 47*, *supra* note 175.

183 *Id.*

184 *See* Cong. Budget Off., The Federal Budget in Fiscal Year 2022 (Mar. 28, 2023), https://www.cbo.gov/publication/58888 [https://perma.cc/X64Y-ZNUS].

185 The campaign position explains, "This is the ONLY way we will ever return a balanced budget: Impoundment." *Agenda 47*, *supra* note 175. Yet the nonpartisan Center for a Responsible Federal Budget estimates that leaving out spending on defense, veterans, Social Security, and Medicare would require cuts as much as eighty-five percent to everything else to achieve

evidence suggests that leaving it to the President alone to decide what to cut would likely lead to picking partisan favorites rather than careful assessment of how to stop waste.[186] This is not to say that there is no waste in government spending; in fact, GAO has identified major categories of waste in defense spending and Medicare spending,[187] even though the Trump campaign has pledged not to touch those categories. But the sledgehammer of impoundment is not the right way to fix the problem of waste as compared to the hard work of policymaking and administration.

With respect to inflation, economists disagree about the extent to which government spending causes inflation.[188] But even assuming that some degree of spending is connected to inflation, that does not mean that unilateral impoundment is a better tool to control inflation or spending—whether as a matter of economics or democracy—than the Federal Reserve's levers,[189] the spending caps negotiated as part of the 2023 debt ceiling crisis,[190] or the various mechanisms for sequestration

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a balanced budget within ten years, "the equivalent of *ending* all nondefense appropriations and *eliminating* the entire Medicaid program." *What Would It Take to Balance the Budget?*, Comm. for a Responsible Fed. Budget (Jan. 12, 2023), https://www.crfb.org/blogs/what-would-it-take-balance-budget [https://perma.cc/PRP7-66TQ].

186 *See* Douglas L. Kriner & Andrew Reeves, The Particularistic President: Executive Branch Politics and Political Inequality 11 (2015); John Hudak, Presidential Pork: White House Influence Over the Distribution of Federal Grants 4 (2014).

187 *See, e.g.*, U.S. Gov't Accountability Off., GAO-23-106203, High-Risk Series: Efforts Made to Achieve Progress Need to Be Maintained and Expanded to Fully Address All Areas 9 (2023) (identifying six Department of Defense operations as among the thirty-seven areas across the federal government that are most vulnerable to waste, fraud, and abuse); U.S. Gov't Accountability Off., GAO-23-106285, Improper Payments: Fiscal Year 2022 Estimates and Opportunities for Improvement 9 (2023) (identifying Medicare as reflecting nineteen percent of all improper payments in Fiscal Year 2022, for a total of $46.8 billion).

188 *Compare, e.g.*, Robert J. Barro, *Understanding Recent US Inflation*, AEI (Aug. 30, 2022), https://www.aei.org/op-eds/understanding-recent-us-inflation/ [https://perma.cc/7ZQQ-AKLB] (arguing that "the likely main culprit behind the recent high inflation was an extraordinarily expansionary fiscal policy"), *with* Joseph E. Stiglitz & Ira Regmi, The Causes of and Responses to Today's Inflation 3 (2022), https://rooseveltinstitute.org/wp-content/uploads/2022/12/RI_CausesofandResponsestoTodaysInflation_Report_202212.pdf [https://perma.cc/K9DS-7X2Z] (arguing that "excessive spending during the pandemic is *not* the principal cause of today's inflation").

189 *See generally* Gauti B. Eggertsson & Donald Kohn, *The Inflation Surge of the 2020s: The Role of Monetary Policy* (Hutchins Ctr., Working Paper No. 87, 2023), https://www.brookings.edu/articles/the-inflation-surge-of-the-2020s-the-role-of-monetary-policy/ [https://perma.cc/J6HP-G7VV].

190 *See, e.g.*, *How Much Would the Fiscal Responsibility Act Save?*, Comm. for a Responsible Fed. Budget (June 1, 2023), https://www.crfb.org/blogs/how-much-would-fiscal-responsibility-act-save [https://perma.cc/AW5U-UWRT]; David Reich, *Debt Ceiling Deal Squeezes Non-Defense Appropriations, Even With Agreed-Upon Adjustments*, Ctr. on Budget & Pol'y Priorities (June 21, 2023), https://www.cbpp.org/research/federal-budget/debt-ceiling-deal-squeezes-non-defense-appropriations-even-with-agreed-upon [https://perma.cc/E95Y-QL47].

and pay-as-you-go requirements that already exist in federal law.[191] Focusing solely on cutting government spending to limit inflation also ignores the complicated issue of government spending in order to prevent or mitigate recession—a topic on which the Trump campaign's impoundment announcement is silent.[192]

Meanwhile, in the legal arena, no court has ever ruled that the President has any inherent constitutional authority to impound, while courts during and immediately following the Nixon era routinely rejected statutory authority to do so.[193] Some Nixon officials did try to present constitutional arguments in support of impoundment based in the President's Take Care authority and historical practice.[194] As others have shown, however, these arguments unsuccessfully tried to bootstrap controversial attempts to reject congressional policy choices onto earlier instances of routine, limited, and ultimately congressionally approved instances of presidential failure to spend.[195] Indeed, no less than William Rehnquist, while serving as President Nixon's Assistant Attorney General at the Office of Legal Counsel, opined that "With respect to the suggestion that the President has a constitutional power to decline to spend appropriated funds, we must conclude that existence of such a broad power is supported by neither reason nor precedent."[196] To the extent that some limited impoundment authority may conceivably be located in the President's commander-in-chief powers,[197] President Trump's campaign has explicitly disavowed his interest in using impoundment on defense spending.[198]

Rather than a serious critique of the merits of the Impoundment Control Act, then, the Trump campaign's lambasting of the Act is better understood through the lens of its longstanding goal to "crush the Deep

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191 *See, e.g.*, Walter J. Oleszek, Mark J. Oleszek, Elizabeth Rybicki, & Bill Heniff Jr., Congressional Procedures and the Policy Process 83–85 (11th ed. 2020).

192 *See, e.g.*, Philipp Carlsson-Szlezak, Paul Swartz & Martin Reeves, *Weighing the Risks of Inflation, Recession, and Stagflation in the U.S. Economy*, Harv. Bus. Rev. (June 10, 2022), https://hbr.org/2022/06/weighing-the-risks-of-inflation-recession-and-stagflation-in-the-u-s-economy [https://perma.cc/3WBF-73TA].

193 *See* Metzger, *supra* note 37, at 1115–16.

194 Fisher, *supra* note 5, at 150; Christian I. Bale, Note, *Checking the Purse: The President's Limited Impoundment Power*, 70 Duke L.J. 607, 609–10 (2020).

195 *See* Fisher, *supra* note 5, at 148, 165, 171; Price, *supra* note 8, at 434–35.

196 Presidential Auth. to Impound Funds Appropriated for Assistance to Federally Impacted Schools, 1 Supp. Op. O.L.C. 303, 309 (1969).

197 *Id.* at 310–11 (noting that it would be a different situation "if a congressional directive to spend were to interfere with the President's authority in an area confided by the Constitution to his substantive direction and control, such as his authority as Commander in Chief of the Armed Forces and his authority over foreign affairs"); *see also* Bale, *supra* note 194, at 627–35; Price, *supra* note 8, at 435 n.281.

198 *See Agenda 47*, *supra* note 175.

State."[199] If the President can pick and choose what to fund and what to starve, no matter what Congress says, that would be a powerful tool to accomplish this aim.[200]

Similarly, the Vought & Paoletta letter is instead better seen as a political document defending President Trump against a host of appropriations law violations, including under the Impoundment Control Act, as he left office.[201] This meaning becomes especially clear when read in conjunction with Paoletta's subsequent testimony before the House Budget Committee opposing the Congressional Power of the Purse Act (discussed more below[202]). In this testimony, he relied on the Vought & Paoletta letter while also lambasting President Biden for alleged violations of the Impoundment Control Act and accusing both GAO and Democrats in Congress for ostensibly looking the other way.[203]

Yet while the Vought & Paoletta letter and Trump campaign critiques of the Impoundment Control Act are best seen as political statements, that does not mean that defense of the Impoundment Control Act is itself partisan. Presidents of both parties take up the tools of previous presidents and seek to expand them.[204] Expanding the impoundment power would not redound to Republicans' benefit in a Democratic administration. Republicans would not want a Democratic president to unilaterally refuse to spend money appropriated for, for example, the

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199 *Id.*; *see also* Tom Rogan, *Mick Mulvaney: 'The Deep State Is Real, and It's Our Job to Go Out and Fix It'*, WASH. EXAM'R (Feb. 19, 2020, 1:38 PM), https://www.washingtonexaminer.com/?p=2719810 [https://perma.cc/LH6Q-STPE].

200 *See* Jody Freeman & Sharon Jacobs, *Structural Deregulation*, 135 HARV. L. REV. 585, 609–11 (2021).

201 *See* Letter from Vought & Paoletta, *supra* note 174, at 1 ("This letter responds to the report and accompanying statements, released by the House Budget Committee . . . on November 20, 2020, concerning the Office of Management and Budget's . . . exercise of its statutory and delegated authorities to manage Executive Branch spending over the past four years. The purpose of this letter is to correct the false and misleading record portrayed by the Committee's statements . . . ."); *House Budget Committee Investigation Exposes Trump Administration's Systemic Abuse of Executive Spending Authority*, HOUSE COMM. ON THE BUDGET (Nov. 20, 2020), https://democrats-budget.house.gov/OMB-Abuse [https://perma.cc/LY9E-T7PK]; Paul M. Krawzak, *Trump Budget Office Slams 1974 'Impoundment' Law on Way Out*, ROLL CALL (Jan. 19, 2021, 2:16 PM), https://rollcall.com/2021/01/19/trump-budget-office-slams-1974-impoundment-law-on-way-out/ [https://perma.cc/U6U6-239Y].

202 *See infra* note 236 and accompanying text.

203 *Protecting our Democracy: Reasserting Congress' Power of the Purse: Hearing Before the H. Comm. on the Budget*, 117th Cong. 32–34 (2021) [hereinafter *Protecting our Democracy*] (statement of Mark R. Paoletta, Senior Fellow, Center for Renewing America); *see also* Sean Moran, *Paoletta: Joe Biden '100 Percent' Violated Federal Law by Withholding Border Wall Funds*, BREITBART (Apr. 30, 2021), https://www.breitbart.com/politics/2021/04/30/joe-biden-percent-violated-federal-law-withholding-border-wall-funds/ [https://perma.cc/L23H-D6ED].

204 *See* PETER M. SHANE, DEMOCRACY'S CHIEF EXECUTIVE: INTERPRETING THE CONSTITUTION AND DEFINING THE FUTURE OF THE PRESIDENCY 16–19 (2022).

Space Force—one of President Trump's signature creations[205]—or on subsidies traditionally more favored by Republicans than Democrats.[206]

Analyzing the gaps in the Impoundment Control Act revealed by the era of presidential control is thus an institutional, not a partisan, task. This next Section turns to that analysis. Along the way, this Article discusses, and largely rejects, specific claims Vought and Paoletta make. There is one point they make, however, that this Article generally supports: a critique of the Impoundment Control Act's failure to distinguish between an improper deferral and a permissible programmatic delay. As explained below, this exception has in some sense swallowed the rule.[207]

2. Gaps and Problems in the Impoundment Control Act

Like the Antideficiency Act, the Impoundment Control Act has been generally successful in accomplishing the goals for which it was designed. But also like the Antideficiency Act, the Impoundment Control Act has not kept pace with the way those goals respond to the challenges of presidential control in the twenty-first century. In the Impoundment Control Act, too, five gaps and problems have emerged.

a. Pocket Rescissions

The first gap is the underspecification of a deadline by which a President must propose to rescind funds before the end of the fiscal year on September 30. The Act says that no deferral may take place that would run beyond the end of the fiscal year but is silent about such a deadline for rescission proposals.[208] Does that mean that a President may propose rescission right up until the end of the fiscal year, thereby unilaterally letting the funds expire without giving Congress a real chance to consider the proposal?[209]

Vought and Paoletta argue yes, concluding that the Act's silence on the deadline for rescission proposals gives the President the opportunity

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205 *See* Samantha Masunaga, *What Happens to the Space Force After the Trump Administration?*, L.A. Times (Dec. 15, 2020, 5:00 AM), https://www.latimes.com/business/story/2020-12-15/space-force-biden-trump [https://perma.cc/RE5D-WU48].

206 *See* Veronique de Rugy, *GOP to Taxpayers: We're Against Subsidies, Except If They're for Rich Farmers*, Mercatus Ctr. (July 15, 2013), https://www.mercatus.org/economic-insights/expert-commentary/gop-taxpayers-were-against-subsidies-except-if-theyre-rich [https://perma.cc/EFL9-HL9E].

207 *See infra* notes 243–67 and accompanying text.

208 *Compare* 2 U.S.C. § 684(a) ("A deferral may not be proposed for any period of time extending beyond the end of the fiscal year in which the special message proposing the deferral is transmitted to the House and the Senate."), *with id.* § 683 (silence).

209 *See* Letter from Vought & Paoletta, *supra* note 174, at 3.

for what they term a "pocket rescission."[210] But this argument seems at odds with the statutory language, as GAO has concluded.[211] The Impoundment Control Act says that the funds proposed to be rescinded "shall be made available" unless Congress has approved the rescission within the forty-five-day period of consideration.[212] This mandatory language admits no exceptions, indicating that Congress expects the funds to be used as intended before the end of the fiscal year if it does not approve the proposed rescission.[213] This reading makes good sense, as the whole point of the rescission provision is to make sure that the executive branch follows Congress's directions in appropriations laws.

Vought and Paoletta point to a 1975 opinion in which GAO appeared to reach the opposite conclusion.[214] In that opinion, GAO reviewed late-year rescission proposals by President Ford and observed that the funds would lapse before the end of the forty-five-day period.[215] To prevent such a reoccurrence, GAO proposed that Congress amend the rescission provision to parallel the then-operative deferral provision by allowing a one-house veto.[216] While Vought and Paoletta say that it is "unclear . . . why GAO suddenly jettisoned its own decades-long precedent and declared that such proposals now violate the ICA,"[217] GAO explained why in its 2018 opinion overruling the 1975 ones: "This interpretation would, in effect, give the President power to amend or to repeal previously enacted appropriations merely by calibrating the timing of the submission of a special message. This interpretation is clearly contrary to the Supreme Court's rulings in *Chadha* and *Clinton*."[218]

This gap in the Impoundment Control Act has given rise to unnecessary conflicts at the end of the fiscal year and ought to be remedied.[219]

b. Penalties

The second gap in the Impoundment Control Act is the lack of consequences for violating it.

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210 *Id.* at 3–4, 3 n.12 ("a pocket rescission occurs when the President submits a rescission proposal under the Act within 45 days of the end of the fiscal year and Congress fails to act on the proposal, causing the funds to lapse.").

211 U.S. Gov't Accountability Off., B-330330, Impoundment Control Act—Withholding of Funds Through Their Date of Expiration 8–9 (2018).

212 2 U.S.C. § 683(b).

213 U.S. Gov't Accountability Off., *supra* note 211, at 4–5.

214 Letter from Vought & Paoletta, *supra* note 174, at 3–4.

215 U.S. Gov't Accountability Off., B-115398.33 (1976).

216 *Id.*

217 Letter from Vought & Paoletta, *supra* note 174, at 4.

218 U.S. Gov't Accountability Off., *supra* note 211, at 11.

219 *See* Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 77, 89 (describing end-of-year conflict in 2019); U.S. Gov't Accountability Off., *supra* note 215 (describing end-of-year conflict in 1976).

Imagine a scenario in which a political official directs a civil servant to obligate funds in a manner that the civil servant believes, in accordance with longstanding agency practice, would violate the Antideficiency Act. The civil servant can point to the risk of personal consequences for violating the Act as a means to push back against the direction.[220] In contrast, if a political official directs a civil servant to withhold funds in a manner that the civil servant believes, in accordance with longstanding agency practice, would constitute an improper deferral under the Impoundment Control Act, there are no such consequences to point to.[221] The existence of consequences in the Antideficiency Act coupled with the absence of consequences in the Impoundment Control Act skews compliance toward the former, which in turn gives presidents more leeway in improper impoundments than in unauthorized spending.

Vought and Paoletta object to importing penalties into the Impoundment Control Act, suggesting that agencies will be caught between a rock and a hard place if individuals face consequences in both directions.[222] A budget manager would be in an impossible position were she to face penalties for improper withholding if she prudently sets aside some funding to avoid an Antideficiency Act violation in the future, and then that funding lapses without being used.[223]

The Antideficiency Act's penalties are not rooted in strict liability, however, nor would equivalent penalties in the Impoundment Control Act need to be.[224] GAO's annual reports on Antideficiency Act violations are full of minor administrative penalties or even just warnings.[225] The specter of serious punishment for minor Impoundment Control Act violations ignores the way the absence of any penalties undercuts

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220 *See* Jason Miller, *Should You Be Concerned over OMB's Decision that GAO's Antideficiency Determinations Are Non-Binding?*, Fed. News Network (Dec. 16, 2019, 12:32 PM), https://federalnewsnetwork.com/reporters-notebook-jason-miller/2019/12/should-you-be-concerned-over-ombs-decision-that-gaos-antideficiency-determinations-are-non-binding/ [https://perma.cc/32KV-6BN3] (suggesting to federal employees, in light of potential Antideficiency Act penalties for noncompliance, that disregarding the agency's own determination of a violation in favor of OMB's contrary determination "becomes much more risky and probably not worth endangering your career"); Gray, *supra* note 57 (describing how threat of penalties enhances compliance with the Antideficiency Act).

221 *See, e.g.*, Kate Brannen, *Exclusive: Unredacted Ukraine Documents Reveal Extent of Pentagon's Legal Concerns*, Just Sec. (Jan. 2, 2020), https://www.justsecurity.org/67863/exclusive-unredacted-ukraine-documents-reveal-extent-of-pentagons-legal-concerns/ [https://perma.cc/ZW27-5N85] (highlighting repeated but unsuccessful efforts by civil servants to raise Impoundment Control Act problems with political officials).

222 *See* Letter from Vought & Paoletta, *supra* note 174, at 12.

223 *See Protecting our Democracy*, *supra* note 203, at 41.

224 *See supra* note 56 and accompanying text.

225 *See* Candreva, *supra* note 57, at 86–87.

the Act's ability to prevent improper impoundments. That is, the goal of a penalty regime need not be to punish but to incentivize compliance.[226]

c. GAO's Authority

The third gap in the Impoundment Control Act involves the scope of GAO's authority as it relates to providing information to Congress.

GAO is tasked with reporting to Congress if it discovers an ongoing improper impoundment, but nothing in the Act explicitly requires it to report to Congress if it discovers an improper impoundment for which the funds have already been released.[227] Yet Congress may well be interested in such information, whether to assess the functionality of the executive branch's internal controls or to determine whether additional provisions should be made to prevent similar improper impoundments in the future. GAO has of its own accord started to report now-settled impoundments based on its judgment that doing so in a particular matter "would enhance congressional oversight,"[228] but this practice does not necessarily capture every instance, nor can it be consistently counted on. General instructions to report even settled impoundments would provide Congress with ongoing information and would parallel the scope of GAO's authority to report on Antideficiency Act violations even once they have been fixed.[229]

Relatedly, the same provision of the Impoundment Control Act says that if GAO identifies an impoundment for which the President failed to transmit the required "special message" to Congress, then GAO's report to Congress itself qualifies as a special message triggering the Act's provisions for fast-track review.[230] The problem with this equivalence is that GAO's report has the effect of ratifying the President's improper action, even if GAO finds the impoundment was improper.[231] This is so because the special message not only triggers the fast-track provisions but also authorizes the withholding during the period of congressional review, making the impoundment lawful during that period, even though the President failed to follow the required notification provision in the first place.[232] This equivalence provision thus undercuts Congress's goal of obtaining information about proposed rescissions and deferrals without automatically approving them.

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226 *Cf.* Eloise Pasachoff, *Agency Enforcement of Spending Clause Statutes: A Defense of the Funding Cut-Off*, 124 YALE L.J. 248, 318 (2014) (describing the purpose of a funding cutoff mechanism as "[r]ehabilitation and deterrence").

227 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 114, at 10; *see* 2 U.S.C. § 686(a).

228 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 114, at 11.

229 *See id.*; *see also supra* note 60 and accompanying text.

230 2 U.S.C. § 686(a).

231 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 114, at 11.

232 2 U.S.C. § 686(a).

In addition, while GAO is required under the Antideficiency Act to provide annual reports on violations of the Act, Congress has no ready source of information about why certain accounts with sums still available have been allowed to expire.[233] Yet more information about such accounts might alert Congress to Impoundment Control Act problems and might either prevent their lapsing in the first place or provide information that justifies their lapse.

Another gap related to GAO's authority in providing information to Congress stems from the absence of clarity around the steps GAO is authorized to take in investigating possible Impoundment Control Act violations. GAO's authority to investigate such violations is part of the authority outlined in its organic statute, as described above for Antideficiency Act violations.[234] Yet while the Impoundment Control Act prescribes a number of steps for GAO to take under the Act, it does not clearly explain its authority to obtain information or records as part of its assessment of whether there has been a violation.[235] This absence is a puzzling omission in light of how critical GAO's role is in ensuring Impoundment Act agency compliance and congressional oversight.

Paoletta objects to the idea that GAO should be further authorized "to demand information and interviews of federal employees" as an affront to the separation of powers, saying that such matters are for political negotiation rather than a lawsuit.[236] But one need not agree that such matters should end up in court to see that spelling out routine expectations for the ordinary investigative process would be helpful, and in many instances uncontroversial. GAO and agencies have countless routine interactions within the scope of GAO's authority.[237] Indeed, agencies regularly reach out to GAO to obtain GAO's views on appropriation law issues,[238] and GAO regularly conducts training for federal employees on appropriations law.[239] Agencies participate with GAO in part against the backdrop of its litigating authority. Defining the scope of GAO's authority to investigate Impoundment Control Act matters

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233 *Compare Antideficiency Act Resources*, Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/resources [https://perma.cc/A9VN-MJCL] (explaining that Act's requirements and providing comprehensive annual reports), *with* Gov't Accountability Off., *supra* note 114, at 12 (describing value of additional transparency requirements on potential Impoundment Act violations).

234 *See supra* notes 125–31 and accompanying text.

235 *See* 2 U.S.C. §§ 686–687 (outlining numerous steps for GAO under the Act but not indicating its investigative authority).

236 *Protecting our Democracy*, *supra* note 203, at 40.

237 U.S. Gov't Accountability Off., GAO-19-55G, GAO's Agency Protocols 7 (2019), https://www.gao.gov/products/gao-19-55g [https://perma.cc/CF96-UATF].

238 U.S. Gov't Accountability Off., *supra* note 15, at 1-12 to -15; U.S. Gov't Accountability Off., *supra* note 237, at 7–8.

239 *Appropriations Law Training*, U.S. Gov't Accountability Off., https://www.gao.gov/legal/appropriations-law/appropriations-law-training [https://perma.cc/WKY9-8RRJ].

would also help prevent violations, as civil servants asked to take steps they believe violate the Act would be able to point to such investigations as a potential reason not to take the steps.

The final problem with respect to GAO's authorities under the Act relates to the timing of potential lawsuits to require agencies to make budget authority available for obligation. The Act currently allows such lawsuits after giving Congress twenty-five days to consider the circumstances,[240] essentially providing time for agencies to release the funds of their own accord and for Congress to tell GAO to stand down if it so chooses.[241] But this length of time presents a problem when administrations try to run out the clock on the fiscal year, letting funds expire without congressional approval when there is no reasonable way that Congress can act before the fiscal year ends.[242] Shortening this time frame and providing flexibility would both incentivize agencies to release the funds in a timely fashion and allow Congress to bless the filing of a lawsuit that would require the release of the funds before they expire.

d. Programmatic Delay

The fourth gap in the Impoundment Control Act is the lack of discussion of the nonstatutory category of "programmatic delay" that GAO has developed.

This gap is a problem for two reasons. First, the exception is in some tension with the statutory language yet appears to have sidestepped and even superseded the process for congressional consideration of deferrals. Second, the primary question for evaluating an action as a permissible programmatic delay revolves around motive and intent, which is both hard for GAO to evaluate and incommensurate with Congress's rationale for assessing deferrals in the first place.

First, as to the statutory language, as originally passed, the Impoundment Control Act contemplated two kinds of deferrals, both programmatic deferrals and policy deferrals. As the D.C. Circuit explained of that initial regime,

> The majority of proposed deferrals are routine "programmatic" deferrals, by which the Executive Branch attempts to meet the inevitable contingencies that arise in administering congressionally funded agencies and programs. Occasionally, however, the President will seek to implement "policy" deferrals, which are intended to advance the broader fiscal policy objectives of the Administration. The critical distinction

240 2 U.S.C. § 687.

241 *See supra* notes 158–59 and accompanying text.

242 U.S. Gov't Accountability Off., *supra* note 114, at 13–14.

> between "programmatic" and "policy" deferrals is that the former are ordinarily intended to *advance* congressional budgetary policies by ensuring that congressional programs are administered efficiently, while the latter are ordinarily intended to *negate* the will of Congress by substituting the fiscal policies of the Executive Branch for those established by the enactment of budget legislation.[243]

When the D.C. Circuit struck down the deferral provision in its entirety as inseverable from the unconstitutional one-house veto provision, Congress revised the Impoundment Control Act to eliminate the potential for policy deferrals.[244] That left, apparently, deferrals of the programmatic kind.

This is exactly the kind of deferral that GAO now treats as a programmatic delay falling outside the Impoundment Control Act. Compare the D.C. Circuit's example of a programmatic deferral under the Act against GAO's definition of a programmatic delay that falls outside the Act. The D.C. Circuit explained, "consider a congressional appropriation of $10,000,000 to construct a new highway between Washington, D.C. and New York. If inclement weather threatened completion of the construction project, the President might seek to defer the expenditure of the appropriated funds for 'programmatic' reasons."[245] But GAO might now treat this as a programmatic delay rather than a deferral: "A programmatic delay is one in which operational factors unavoidably impede the obligation of budget authority, notwithstanding the agency's reasonable and good faith efforts to implement the program."[246] That is, the inclement weather would likely constitute an "operational factor[]" that, under GAO's interpretation, would take this out of the Impoundment Control Act altogether, meaning that the agency would not need to send a special message to Congress reporting it.[247]

This reading seems to ignore the definition of a deferral in the statute that allows agencies to defer "to provide for contingencies."[248] In other words, Congress did not *ban* deferrals on this ground; it simply wants to know about them. GAO's current treatment of programmatic delay allows agencies to sidestep the notice requirements of the Act. It is notable that there have been no deferral notices to Congress in

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243 City of New Haven v. United States, 809 F.2d 900, 901 (D.C. Cir. 1987).

244 *See supra* notes 147–52 and accompanying text; *see also* H.R. Rep. No. 100-313, at 67 (1987) (Conf. Rep.), https://budgetcounsel.files.wordpress.com/2016/10/1987-09-21-bbedcra-pl100-119-c-rpt-100-313-hjr324.pdf [https://perma.cc/FT6G-KZB3] (noting that the revised deferral provision "codifies the *New Haven* decision").

245 *City of New Haven*, 809 F.2d at 901 n.2.

246 U.S. Gov't Accountability Off., *supra* note 15, at 2-50.

247 *See* U.S. Gov't Accountability Off., *supra* note 15, at 2-50.

248 2 U.S.C. § 684(b)(1).

the twenty-first century,[249] even though it is inconceivable that agencies have not had to routinely adjust their spending to provide for contingencies during this time.

The point of the special notice under the Impoundment Control Act is that Congress might want to express its disapproval of a deferral, even if the executive branch made it for legally permissible reasons.[250] Consider GAO's assessment of three recent high-profile, rather than routine, inquiries into whether a delay was a permissible programmatic delay or an impermissible policy deferral, none of which was reported to Congress under the Act.

GAO investigated the Trump Administration's controversial holds on funds meant for Ukraine in the summer of 2019 in two separate inquiries. In the first inquiry, GAO determined that OMB's actions in withholding from obligation Department of Defense funds meant for Ukraine constituted an improper policy-based deferral.[251] This finding was based on OMB's explanation that the withholding was in order to make sure that the funds were spent in alignment with the President's foreign policy, while the statute itself did not confer discretion in spending on the President.[252] In the second inquiry, GAO determined that OMB's actions in withholding from obligation State Department funds meant for Ukraine during exactly this same time period constituted a permissible programmatic delay.[253] This finding was based in part on the substantial statutory discretion granted to the President to award these funds, making the time spent on interagency policy discussions over the best uses for these funds programmatic.[254]

In other words, the permissibility of the very same kinds of activities—the administration's pause in order to assess the use of funds intended for Ukraine against the President's policy goals—turned on a technicality, the amount of discretion in the underlying statutes. But nothing turned on whether Congress would want to know about these plans to delay spending the funds, whether as a "contingenc[y]" or "as

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249 Office of Management and Budget, Analytical Perspectives: Budget of the U.S. Government Fiscal Year 2017 103, https://obamawhitehouse.archives.gov/sites/default/files/omb/budget/fy2017/assets/ap_9_concepts.pdf [https://perma.cc/5FWT-6UZ2] ("The last time the President initiated the withholding of funds was in fiscal year 2000.").

250 *See id.*

251 B-331564, *supra* note 77, at 6.

252 *Id.* at 6–7.

253 B-331564.1, *supra* note 77, at 1; U.S. Gov't Accountability Off., 331564.2, Office of Management and Budget—Reconsideration—Application of the Impoundment Control Act to 2019 Apportionment Letters and a Congressional Notification for State Department Foreign Military Financing 1 (2022), https://www.gao.gov/assets/b-331564.2.pdf [https://perma.cc/MQ6P-9HH8].

254 B-331564.1, *supra* note 77, at 12–13; U.S. Gov't Accountability Off., *supra* note 253, at 3–5.

specifically provided by law,"[255] which is the point of the Impoundment Control Act's provisions governing special notices for deferrals.

In the other example of recent examinations into potential Impoundment Control Act violations, GAO considered the Biden Administration's contested "pause" on the obligation of funds to build the wall at the southern border that the Trump Administration had begun.[256] Here, GAO determined that the delay was a permissible programmatic delay rather than an impermissible policy-based deferral.[257] It did so because the Biden Administration had decided not to waive certain statutory requirements that the Trump Administration had waived, and thus the statutory requirements constituted programmatic reasons for the delay[258]—even though the decision not to waive was itself a policy choice, and even though these programmatic reasons are easily characterized as "to provide for contingencies" or "as specifically provided by law" under the Impoundment Control Act.[259] In this instance, too, the Act contemplates that Congress should have the opportunity to reject the administration's slow-walking.

The second problem with the nonstatutory category of programmatic delay involves its connection to motive and intent. GAO's determination that "intent is a relevant factor" in distinguishing impermissible deferrals from permissible programmatic delays brings its own problems.[260] Vought and Paoletta argue that "[s]uch a subjective inquiry is not a helpful tool for Congress's oversight of Federal spending."[261] They are right. The Impoundment Control Act provides that Congress should have the opportunity to reject delays even based on proper motive.

In fact, intent or motive are unusual considerations in legal evaluations of executive branch actions. Instead, courts typically assess whether such actions were "arbitrary and capricious," which, in its classic formulation, requires the agency to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[262] The closest

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255 2 U.S.C. § 684(b)(1), (3).

256 U.S. Gov't Accountability Off., *supra* note 162, at 2.

257 *Id.* at 1.

258 *Id.* at 10–11, 16.

259 2 U.S.C. § 684(b)(1), (3).

260 U.S. Gov't Accountability Off., *supra* note 15, at 2-50 ("Since intent is a relevant factor, the determination requires a case-by-case evaluation of the agency's justification in light of all of the surrounding circumstances."); *see also* Schick, *supra* note 16, at 407 ("GAO cannot always distinguish between delays caused by prudent management and delays prompted by policy motives.").

261 Letter from Vought & Paoletta, *supra* note 174, at 12.

262 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

the Supreme Court has come to importing a motive standard into this review is in *Department of Commerce v. New York*,[263] where a bare majority—which no longer sits on the Court—held that a pretextual but otherwise rational explanation could render agency action illegitimate, sufficing to make an otherwise acceptable explanation arbitrary and capricious.[264] But even this standard, should it survive the change in the Court's membership, is difficult to meet, requiring that an explanation be entirely "contrived" in order to be deemed unacceptably pretextual, and permitting agencies to have "both stated and unstated reasons for a decision."[265]

The analogy is imperfect, as GAO is not a court, and is not reviewing potential impoundments under the Administrative Procedure Act in any event. In addition, the Administrative Procedure Act's arbitrary and capricious standard does not apply to presidential or OMB actions,[266] even though GAO's review of potential impoundments is often an inquiry into such actions. But the standard does show some of the difficulties in determining the intent of a multimember decision, which is likely to have different rationales; even courts using legislative history to construct congressional "intent" rely on published documents rather than interviews of individual legislators.[267]

Even more important, however, is that purity of motive might from Congress's perspective be irrelevant to whether it would want to reject delays in spending. Consider the Trump Administration's hold on Ukraine spending, one aspect of which GAO deemed permissible in motive and the other of which GAO deemed impermissible in motive.[268] From Congress's perspective, however, the question is the same: Does Congress want the funding to go to Ukraine speedily or not? The same is true of the Biden Administration's pause on border wall construction. Clearly the pause aligned with the administration's substantive rejection of the previous administration's policy choices. Even if the delay is permissible as "specifically provided by law" in light of the administration's decision not to waive certain statutory requirements, however, the Impoundment Control Act still explicitly provides Congress the opportunity to reject the deferral and hurry the administration along.[269]

The nonstatutory category of programmatic delay thus seems to have taken over the notice requirement for deferrals and therefore undercut an important lever for congressional control of executive branch spending discretion.

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263 139 S. Ct. 2551 (2019).

264 *Id.* at 2574.

265 *Id.* at 2575–76.

266 *See* Franklin v. Massachusetts, 505 U.S. 788, 800–01 (1992).

267 *See* Victoria F. Nourse, *Elementary Statutory Interpretation: Rethinking Legislative Intent and History*, 55 B.C. L. Rev. 1613, 1615–17 (2014).

268 *See supra* notes 251–54 and accompanying text.

269 *See supra* note 259 and accompanying text.

e. Underinclusiveness

The final gap in the Impoundment Control Act concerns its sole focus on impoundments as the central problem of aggressive executive branch budget execution.

This focus makes sense given the statute's origin as a response to Nixon's use of impoundments as a key policy strategy.[270] In the twenty-first century, however, it is aggressive types of presidential *spending*, not presidential *nonspending*, that is the core issue.

Consider, for example, the Obama Administration's controversial reading of statutory language in the Affordable Care Act to authorize it to provide tax credits for purchases of health insurance plans on federal exchanges, to enable it to use a permanent tax credit appropriation to fund cost-sharing reduction payments to health insurance companies, and to prioritize making payments to insurance companies for a transitional reinsurance program over allocating payments to the Treasury.[271] Or consider the Trump Administration's boundary-pushing reading of a host of statutory provisions to permit transferring billions of dollars from other accounts to fund wall building at the southern border.[272] Or consider the Biden Administration's expansive reading of the post-9/11 HEROES Act[273] to enable it to provide across-the-bar student debt relief, adding billions to the deficit in so doing.[274]

Each of these instances represents a classic example of presidential power of the purse issues in the twenty-first century. Yet the Impoundment Control Act, although designed to return the power of the purse to Congress after aggressive executive action, has nothing to say about them.

To be sure, there is some backstop to these executive actions in the form of judicial review. But not always; judicial review over spending decisions can flounder over justiciability problems like standing, cause of action, and reviewability.[275] Even when a court gets to the merits of such a case, it can sometimes take years to resolve.[276] Even if a court strikes down a spending decision as inconsistent with the statute the

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270 *See supra* notes 137–41 and accompanying text.

271 *See* Sohoni, *supra* note 38, at 1688–93.

272 *See, e.g.*, Metzger, *supra* note 37, at 1169–71.

273 Higher Education Relief Opportunities for Students Act of 2003, Pub. L. No. 108-76, 117 Stat. 904 (codified at 20 U.S.C. §§ 1098aa–1098ee).

274 *See* Biden v. Nebraska, 143 S. Ct. 2355, 2363–65 (2023); *see also* Letter from Phillip Swagel, Dir., Cong. Budget Off., to Hon. Richard Burr, Ranking Member, S. Comm. on Health, Educ., Lab., & Pensions, & Hon. Virginia Foxx, Ranking Member, H. Comm. on Educ. & Lab., 2–3 (Sept. 26, 2022), https://www.cbo.gov/system/files/2022-09/58494-Student-Loans.pdf [https://perma.cc/3GDT-XGNY] (discussing effect of plan on deficit).

275 Sohoni, *supra* note 38, at 1706–07; Metzger, *supra* note 37, at 1120–24; Lawrence, *supra* note 39.

276 Pasachoff, *The President's Budget Powers in the Trump Era*, *supra* note 19, at 88.

administration claims authorizes it, persistent administrations work to find other means to accomplish the same policy goals.[277] And even though courts were able to weigh in on Nixon-era impoundments, Congress nevertheless saw a need to design a fast-track method for itself to respond to impoundments.[278] The Impoundment Control Act even specifies that nothing in the Act "shall be construed as . . . affecting in any way the claims or defenses of any party to litigation concerning any impoundment,"[279] underscoring that Congress viewed the fast-track mechanisms for its own review of proposed rescissions and deferrals to complement lawsuits. The fact that courts can sometimes play a role in cabining executive overreach does not undercut the value of Congress protecting its own prerogatives through its own powers.[280]

In addition, judicial review will only cabin actions that are actually in conflict with the underlying statute. So, too, will GAO's review under the Antideficiency Act or any other appropriations law requirement. That an action is permissible as a matter of law is no answer to the question of whether Congress would approve of it as a matter of policy.

For example, GAO concluded that the Trump Administration's transfer of funds to build the wall was consistent with statutory requirements.[281] Yet Congress still used its fast-track authority under the National Emergencies Act[282] to reject the President's emergency declaration on which the transfer in part relied, even though it did not ultimately have enough votes to override the President's veto.[283]

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277 *See, e.g.*, The White House, *FACT SHEET: President Biden Announces New Actions to Provide Debt Relief and Support for Student Loan Borrowers* (June 30, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/06/30/fact-sheet-president-biden-announces-new-actions-to-provide-debt-relief-and-support-for-student-loan-borrowers/ [https://perma.cc/X34V-DBT6] (announcing new actions the same day the Supreme Court invalidated the administration's initial plan). *Compare* U.S. Gov't Accountability Off., B-285066, HUD Gun Buyback Initiative (2000) (finding that HUD did not have appropriations authority to pursue a certain gun buyback initiative), *with* U.S. Gov't Accountability Off., B-285066.2, Operation Safe Home (2000) (finding that HUD did have appropriations authority to pursue a different gun buyback initiative); *cf.* Fisher, *supra* note 5, at 192 (explaining that even though the Supreme Court struck down one of Nixon's impoundments, "[t]he Administration achieved its purposes even while losing in court" because, since "litigation had lasted for two years . . . [t]he program had been stretched out[] [and] the deadlines established by Congress were now impossible to meet").

278 Train v. City of New York, 420 U.S. 35 (1975); Fisher, *supra* note 5, at 189–201.

279 2 U.S.C. § 681(3).

280 *See* Chafetz, *supra* note 138, at 1–6.

281 U.S. Gov't Accountability Off., B-330862, Department of Defense—Availability of Appropriations for Border Fence Construction 6–15 (2019), https://www.gao.gov/assets/b-330862.pdf [https://perma.cc/GGX5-E6AK].

282 50 U.S.C. § 1601.

283 *See* Tamara Keith, *If Trump Declares An Emergency To Build The Wall, Congress Can Block Him*, NPR (Feb. 11, 2019, 5:00 AM), https://www.npr.org/2019/02/11/693128901/

Or take another example outside the context of appropriations law that is well known to administrative law practitioners: the Department of Transportation's decision to implement as a motor vehicle safety standard an option for an "ignition interlock," part of the background to the agency's action considered in *State Farm*.[284] There was no doubt that this was a permissible option under the statute.[285] But because this option was "highly unpopular" with consumers, Congress swiftly amended the Act to prohibit the agency from offering that regulatory option.[286]

Congress can, in principle, always enact new legislation, as it did with ignition interlock, to forbid the executive branch from taking a previously allowable action.[287] But it is harder and harder for Congress to enact laws under its ordinary processes in the contemporary era given the interaction between various institutional and political barriers.[288] This is one reason for framework statutes such as the National Emergencies Act or the Impoundment Control Act that modify Congress's ordinary procedures: to act as a coordination device that solves collective action problems.[289] And this was exactly the purpose of the Impoundment Control Act's fast-track procedures: to provide Congress with an easy path for a speedy response to the executive branch's impoundment efforts.[290] This is why, in an era where aggressive presidential spending, rather than presidential nonspending, an important area of power of the purse conflicts, the absence of a ready opportunity for Congress to respond swiftly is a problem.

II. Modernizing the Antideficiency Act and the Impoundment Control Act

In 2023, House Democrats reintroduced legislation that would address many of the problems with the Antideficiency Act and the

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if-trump-declares-an-emergency-to-build-the-wall-congress-can-block-him [https://perma.cc/FYV9-EWWY]; Reuters Staff, *U.S. Senate Fails to Override Trump Veto of Bill to End Border Emergency*, Reuters (Oct. 17, 2019, 9:51 PM), https://www.reuters.com/article/us-usa-trump-congress-emergency/u-s-senate-fails-to-override-trump-veto-of-bill-to-end-border-emergency-idUSKBN1WW32R [https://perma.cc/VFT3-KNTT].

284 Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 35–36 (1983).

285 *Id.* at 33–36.

286 *Id.* at 36.

287 *See* Todd D. Rakoff, Gillian E. Metzger, David J. Barron, Anne Joseph O'Connell & Eloise Pasachoff, Gellhorn & Byse's Administrative Law: Cases and Comments 895 (13th ed. 2023).

288 *Id.* at 895–97.

289 *See* Elizabeth Garrett, *The Purposes of Framework Legislation*, 14 J. Contemp. Legal Issues 717, 733, 741 (2005).

290 *See* Chafetz, *supra* note 138, at 65.

Impoundment Control Act discussed above.[291] The proposed reforms are commonsense, nonpartisan changes that reasonably seek to impose a few substantive limits on the executive branch while providing Congress with sufficient information to know what is taking place in budget execution. The reforms have received wide approval from a broad array of civil society organizations from across the political spectrum.[292]

As noted earlier, this is not the first time these reforms have been contemplated. The last two Congresses also considered similar legislation, two standalone bills and three riders incorporated into appropriations bills, to achieve these goals.[293] While the standalone legislation has not yet passed, the riders proposed as part of the appropriations process have passed multiple times.[294] One critical provision mandating apportionment transparency was also made permanent through a rider.[295] The comparative success of the riders thus far suggests that congressional stakeholders adopting an institutional stance as they engaged in the give-and-take between Congress and OMB over control of congressional spending may have been more inclined—or able to come together quietly—to support these reforms. The institutionalist approach thus appears to be especially important to passage of this legislation, both within and beyond the appropriations context.

However, the standalone reform bills got caught up in partisan crosshairs in the previous two Congresses, particularly in the House, which was much more active on these issues. First, rather than frame the power of the purse proposals solely as institutional reforms that would constrain presidents and empower Congress regardless of party, the Democratic chair of the House Budget Committee also framed the initial Congressional Power of the Purse Act as responding to the "Trump [Administration]'s Systemic Abuse of Executive Spending Authority."[296]

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291 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. (2023). The bill was referred to nine relevant committees, where it has remained. *See* H.R. 5048, 118th Cong. (July 27, 2023), https://www.congress.gov/bill/118th-congress/house-bill/5048/all-actions?q=%7B%22search%22%3A%5B%22hr5048%22%5D%7D&s=1&r=1 [https://perma.cc/R6B6-BSHU].

292 *See, e.g.*, *Power of the Purse Coalition Shares 2022 Priorities With Congress*, Nat'l Taxpayers Union (Jan. 31, 2022), https://www.ntu.org/publications/detail/power-of-the-purse-coalition-shares-2022-priorities-with-congress [https://perma.cc/28YR-EJHT] (explaining that this "ideologically diverse collection of civil society groups focused on helping Congress reclaim and effectively reassert its traditional purview over tax and spending matters" supports the Power of the Purse Act); *Letter Announcing the Power of the Purse Coalition*, Protect Democracy (July 1, 2020), https://protectdemocracy.org/work/power-of-the-purse-coalition/ [https://perma.cc/26SW-SVLQ] ("Organizations across the ideological spectrum announce the formation of a coalition to support Congress in asserting its own power over the purse.").

293 *See supra* notes 26–31 and accompanying text.

294 *See infra* note 315 and accompanying text.

295 *See supra* notes 86–88 and accompanying text.

296 *See House Budget Committee Investigation Exposes Trump Administration's Systemic Abuse of Executive Spending Authority*, House Comm. on the Budget (Nov. 20, 2020),

Second, the Congressional Power of the Purse Act subsequently became incorporated into one of the House Democrats' major pieces of omnibus legislation, the Protecting Our Democracy Act, which passed the House in December 2021 on an almost entirely party line vote.[297] In the Senate, the Democratic chair of the Senate Appropriations Committee initially led introduction of the power of the purse reforms with support from every Senate Democratic member of that committee, blending the institutional focus of the appropriations committee with partisan alignment.[298] In the next Senate, the legislation was similarly introduced only by Democrats, this time in the authorizing committee.[299]

Yet that the standalone legislation has been framed in partisan ways does not mean that its reforms have a partisan valence. In addition to the support for the reforms across left-, right-, and center-leaning organizations,[300] the reforms enacted in consecutive Consolidated Appropriations Acts could not have become law without buy-in from congressional Republicans throughout the appropriations process.[301] It is also telling that Republican statements opposing the Protecting Our Democracy Act made no mention of the power of the purse reforms at all, perhaps indicating that these were not the subject of Republican concern.[302]

This inference is strengthened by the Biden Administration's negative response to apportionment transparency, one of the reforms that subsequently became permanent law[303]—a reform that the

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https://democrats-budget.house.gov/news/press-releases/house-budget-committee-investigation-exposes-trump-admin-s-systemic-abuse [https://perma.cc/2M4G-XCN6].

297 Protecting Our Democracy Act, H.R. 5314, 117th Cong. (2021). Representative Adam Kinzinger (R-IL), joined all of the Democrats as the sole Republican supporter of the Act. *Roll Call 440 | Bill Number: H.R. 5314*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES (Dec. 9, 2021, 4:07 PM), https://clerk.house.gov/Votes/2021440 [https://perma.cc/33WB-8N7Q]. The Senate considered a related bill, but it did not make it out of committee. S. 2921, 117th Cong. (2021), https://www.congress.gov/bill/117th-congress/senate-bill/2921/all-actions [https://perma.cc/XSR2-VL2W].

298 *See* Cosponsors, S. 3889, 116th Cong. (2020), https://www.congress.gov/bill/116th-congress/senate-bill/3889/cosponsors [https://perma.cc/48SY-SYSH]; *Shelby, Leahy Announce Senate Appropriations Subcommittee Leadership for 116th Congress*, U.S. SENATE COMM. ON APPROPRIATIONS (Jan. 9, 2019), https://www.appropriations.senate.gov/news/shelby-leahy-announce-senate-appropriations-subcommittee-leadership-for-116th-congress [https://perma.cc/42KM-Y2S6].

299 *See* Protecting Our Democracy Act, S. 2921, 117th Cong. (2021).

300 *See supra* note 292.

301 *See* Ron Elving, *Departing Senate Budget Chiefs Leave a Legacy of Bipartisanship in a Fraught Era*, NPR (Jan. 2, 2023, 5:02 AM), https://www.npr.org/2023/01/02/1146335491/departing-senate-budget-chiefs-leave-a-legacy-of-bipartisanship-in-a-fraught-era [https://perma.cc/HVU9-WLZE].

302 *See* 167 CONG. REC. H7560 (daily ed. Dec. 9, 2021) (Statements of Reps. Crawford, Stewart, Miller, McClintock, and Davis) (reflecting general Republican opposition to other parts of the bill but no Republican reference to the Power of the Purse reforms, while the only references to the Power of the Purse reforms were from Democrats in support).

303 *See supra* notes 86–88 and accompanying text.

Administration rejected as unnecessarily intruding on OMB's operations[304] in language that echoed President Trump's opposition to this proposal in previous appropriations bills.[305] The fact that a Democratic Congress ultimately included apportionment transparency requirements against the wishes of a President from its own party and applied those requirements to that President, too, further suggests that the reforms have an institutional rather than a partisan flavor, regardless of the initial packaging.[306]

In addition, the proposed reforms to GAO's authority[307] largely echo other recent legislation, initially proposed by Republicans and ultimately supported by bipartisan majorities, that expanded GAO's ability to obtain information from agencies.[308] In general, members

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304 Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 4502—Labor, Health and Human Services, Education, Agriculture, Rural Development, Energy and Water Development, Financial Services and General Government, Interior, Environment, Military Construction, Veterans Affairs, Transportation, and Housing and Urban Development Appropriations Act, 2022 10 (2021), https://www.whitehouse.gov/wp-content/uploads/2021/07/SAP-H.R.-4502.pdf [https://perma.cc/SB7P-ZGYL]; Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 8294—Transportation, Housing and Urban Development, Agriculture, Rural Development, Energy and Water Development, Financial Services and General Government, Interior, Environment, Military Construction, and Veterans Affairs Appropriations Act, 2023 6 (2022), https://www.whitehouse.gov/wp-content/uploads/2022/07/H.R.-8294-SAP.pdf [https://perma.cc/U47K-J9TJ].

305 *See* Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 7617—Defense, Commerce, Justice, Science, Energy and Water Development, Financial Services and General Government, Homeland Security, Labor, Health and Human Services, Education, Transportation, Housing, and Urban Development Appropriations Act, 2021 16–17 (2020), https://trumpwhitehouse.archives.gov/wp-content/uploads/2020/07/SAP-H.R.-7617-1.pdf [https://perma.cc/K98X-9YP2]; Off. of Mgmt. & Budget, Exec. Off. of the President, Statement of Administration Policy: H.R. 3351—Financial Services and General Government Appropriations Act, 2020 2 (2019), https://trumpwhitehouse.archives.gov/wp-content/uploads/2019/06/SAP_HR-3351.pdf [https://perma.cc/M8SA-U2YL].

306 Matthew B. Lawrence, *Apportionment Transparency in the 2022 CAA: The Return of Congressional Institutionalism?*, Yale J. on Regul. Notice & Comment Blog (2022), https://www.yalejreg.com/nc/apportionment-transparency-in-the-2022-caa-the-return-of-congressional-institutionalism-by-matthew-b-lawrence/ [https://perma.cc/Q4HJ-JF6W].

307 *See infra* notes 371–97 and accompanying text.

308 The GAO Access and Oversight Act of 2017, Pub. L. No. 115-3, 131 Stat. 7, expanded GAO's ability to obtain information and records from agencies and reiterated its ability to sue in court when agencies decline to provide what GAO requests. This Act stemmed from a conflict during the Obama Administration over GAO's access to a database held by HHS. *See* Press Release, Senator Susan Collins, Senators Demand Transparency After HHS Directs States Not to Comply with GAO Audit (Mar. 16, 2021), https://www.collins.senate.gov/newsroom/senators-demand-transparency-after-hhs-directs-states-not-comply-gao-audit [https://perma.cc/6JKG-55SP]; *see also* GAO Access to National Directory of New Hires, 35 Op. O.L.C. 106 (2011), https://www.justice.gov/d9/opinions/attachments/2021/02/18/2011-08-23-gao-ndnh.pdf [https://perma.cc/PC2Q-E6K6]. Passing the Act was one of the achievements touted by the Trump Administration within its first 100 days. *See* Tamara Keith, *White House Touts 'Historic' 28 Laws Signed By Trump, But What*

of both parties have historically favored GAO's work as an important mechanism of congressional oversight for both the majority party and the minority party at any given time.[309] The expansions to GAO's authority contemplated by the Power of the Purse Act thus sound, once more, in institutional rather than partisan tones.

This Part makes the case that Congress should adopt the reforms in the Congressional Power of the Purse Act in order to address the problems with the Antideficiency Act and the Impoundment Control Act law. They are sensible reforms that ought to secure broad endorsement from both parties in Congress. Until they pass, they ought to remain on the congressional agenda, regardless of which party is in power at either end of Pennsylvania Avenue.[310] This Part also argues that the reforms are underinclusive, as they failed to address the problem of programmatic delay and aggressive, but potentially legal, executive spending. Subsequent efforts to modernize the Antideficiency Act and Impoundment Control Act ought to incorporate responses to these problems as well.

Rather than walking through the Congressional Power of the Purse Act itself, however, this Part abstracts its sensible reforms into three categories of action under the Antideficiency Act and Impoundment Control Act: first, reforms that address transparency and informational deficits; second, reforms that enhance substantive limits on OMB and agencies; and third, reforms that enhance GAO's authorities. A fourth category of reforms addresses recommendations that are missing from the Congressional Power of the Purse Act: those better aligning the Impoundment Control Act's scope with its purpose considering current executive practices.

A. Transparency and Informational Reforms

Three separate transparency and informational reforms would be valuable: an improvement of the recent requirements for apportionment transparency, to make it easier to find directions that may conflict with or expand beyond congressional spending goals; disclosure of

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Are They?, NPR (Apr. 27, 2017, 6:00 AM), https://www.npr.org/2017/04/27/525753448/white-house-touts-historic-28-laws-signed-by-trump-but-what-are-they [https://perma.cc/K6SM-RC4Q]. It passed by voice vote in the House without controversy and 99–0 in the Senate. *See* H.R. 72, 115th Cong. (2017), https://www.congress.gov/bill/115th-congress/house-bill/72/actions [https://perma.cc/L8KL-LLED].

309 *See* Daniel A. Farber & Anne Joseph O'Connell, *The Lost World of Administrative Law*, 92 TEX. L. REV. 1137, 1180 (2014).

310 The Power of the Purse Act also contained a separate subtitle that would have amended the National Emergencies Act, *see* H.R. 5314, Tit. V, subtit. C, as well as some additional provisions not core to the Antideficiency Act and Impoundment Control Act reforms that are the focus of this Article, *see infra* note 325. While these other aspects of the Power of the Purse Act may have merit, they lie beyond the scope of my project here.

expenditures and obligations made during shutdowns, to prevent or assess potential Antideficiency Act violations; and disclosure of expired or canceled unobligated appropriations, to prevent or assess potential Impoundment Control Act violations.

1. Information About Apportionment

The first major category of transparency reform is over OMB's apportionments.[311] Happily, the Consolidated Appropriations Acts of 2022 and 2023 just made important interventions to ensure apportionment transparency. As discussed above, the Consolidated Appropriations Act of 2022 included a provision that required OMB to create a public-facing website on which to share each apportionment for that fiscal year, including a written explanation from the approving OMB official of any associated footnote.[312] Another provision required OMB to identify all delegations of apportionment authority in the Federal Register, to update the information in the Federal Register whenever the delegated authority changes, and to provide a written explanation to the "appropriate congressional committees" explaining why any such delegated authority was changed.[313] These changes were made permanent in the Consolidated Appropriations Act of 2023.[314]

In addition, the Consolidated Appropriations Acts of 2022, 2023, and 2024 each contained a provision requiring agencies to notify the committees on the budget, on appropriations, and "any other appropriate congressional committees" if OMB's apportionments were made late, were conditioned on agencies' further action, or would hinder their ability to prudently obligate the funds.[315] These provisions, however, have not yet been made permanent.

The permanent requirements, supported by the thus-far temporary reporting requirements, go a long way toward remedying the problem of apportionment secrecy. OMB's apportionments are final actions that have the force of law; agencies cannot ignore them without violating the Antideficiency Act.[316] Yet until these requirements went into place, Congress and the public had no way of knowing what OMB's instructions were or whether political officials had taken over the ministerial task

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311 *See supra* notes 82–88 and accompanying text.

312 Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. E, § 204(b)–(c), 136 Stat. 49, 256–57.

313 *Id.* div. E, § 204(d).

314 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 204, 136 Stat. 4459, 4467, 4718 (2022).

315 Consolidated Appropriations Act, 2022, div. E, § 749; Consolidated Appropriations Act, 2023, div. E, § 749; Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, § 749, H.R. 2882, 118th Cong. § 749.

316 *See supra* note 76 and accompanying text.

of senior civil servant apportionment; as a result, lines of accountability were blurred, and agencies' sources of authority were obfuscated.

At the same time, given the difficulty of making sense of apportionment disclosure,[317] more work should be done to improve transparency in this arena. Three sets of improvements would help.

First, Congress ought to require that OMB's website be made more user-friendly—for example, with titles that reflect program names, with identifications of where apportionment footnotes appear, with clearly identified changes between apportionments for the same program or activity over the course of the fiscal year, and with direct links to appropriation language and the President's own budget request and supporting materials for each program.[318] These moves would help Congress and the public put the disclosures in context, turning numbers into meaning. Such changes would be of a piece with other disclosure requirements and associated improvements to budget information that Congress has been directing over the past two decades.[319]

Second, the reporting requirements for delayed or conditioned apportionments ought to be made permanent. The reports also ought to be made available on a public-facing website, perhaps on the websites of the budget and appropriations committees, to assist with "fire-alarm oversight."[320] Civil society organizations with an interest in particular programs can play a role in urging Congress to act on questionable or troubling reports.

And third, Congress ought to expand its institutional capacity to read and understand agency and OMB budget data, both within committees and within GAO. The decline in congressional capacity is its own critical topic, both on its own and in the context of the rise of

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317 *See supra* notes 90–97 and accompanying text.

318 For example, OMB already provides lots of information about the President's Budget Request on its website, and it indicates changes between requests over time. *See President's Budget*, THE WHITE HOUSE: OMB, https://www.whitehouse.gov/omb/budget/ [https://perma.cc/7DUJ-QL2D]. The apportionment documents could be clearly situated among these documents with cross-references.

319 *See, e.g.*, *Background*, USASPENDING, https://www.usaspending.gov/about [https://perma.cc/MP6F-Z7WB] (describing three statutes passed by Congress between 2006 and 2014 focused on spending transparency); CARES Act, Pub. L. No. 116-136, § 15010(g), 134 Stat. 281, 539 (2020) (codified as 15 U.S.C. § 636) (requiring Pandemic Response Accountability Committee to create a public-facing website to provide "easy to understand" information on pandemic spending); Congressional Budget Justification Transparency Act, Pub. L. No. 117-40, 135 Stat. 337 (2021) (requiring public disclosure of agencies' budget justification submissions and appropriations requests on a website created and maintained by OMB). To the extent that placing technical specifications for government websites in permanent law risks enshrining what will become outdated before too long, report language or annual riders could require regular updating.

320 *See* Matthew D. McCubbins & Thomas Schwartz, *Congressional Oversight Overlooked: Police Patrols versus Fire Alarms*, 28 AM. J. POL. SCI. 165, 166 (1984).

presidentialism.[321] This recommendation calls out expertise in understanding budget execution as worthy of attention in this more general conversation.

2. *Information About Activities During a Shutdown*

Because Congress is currently without sufficient information to assess the legal and policy choices different agencies and administrations make during a shutdown,[322] Congress ought to require that agencies provide program-by-program information about any expenditure or obligation made during a lapse in appropriations.[323] The requirement should specify that agencies must include information about both "excepted activities" and "excepted personnel"—that is, the tasks that the executive branch kept functional as well as the people to run them.[324] Beyond a simple list, agencies should also be required to include an analysis of the legal authority for such spending, whether connected to OLC opinions or otherwise.[325] Where agencies make different choices than they have historically, they ought to explain the legal or policy rationale for these choices.

As GAO explained this reform in its own recommendation advocating it, this reform would have two benefits.[326] First, it would give Congress sufficient information to assess potential violations of the Antideficiency Act and to determine whether to modify the agency's authority.[327] Second, it would encourage agencies to hew more closely to the law.[328] While GAO did not mention it, there is also a third benefit: it would enhance accountability for the President, OLC, and OMB. OMB is ultimately making decisions about whether to approve or disapprove agencies' shutdown plans and is doing so against the backdrop of OLC interpretations.[329] To require articulation and justification of the

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321 *See generally* CONGRESS OVERWHELMED: THE DECLINE IN CONGRESSIONAL CAPACITY AND PROSPECTS FOR REFORM (Timothy M. LaPira et al. eds., 2020).

322 *See supra* notes 100–07 and accompanying text.

323 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 513 (2023); 31 U.S.C. § 1105(a)(42).

324 *See* CONG. RSCH. SERV., RL34680, SHUTDOWN OF THE FEDERAL GOVERNMENT: CAUSES, PROCESSES, AND EFFECTS 10 Box 3 (2018).

325 Another provision of the Power of the Purse Act would have generally required publication of all final OLC opinions on budget or appropriations law, with limited exceptions for classified material and other specifically described sensitive matters. Protecting Our Democracy Act, H.R. 5314, 117th Cong. § 524 (2021); *see also* DOJ OLC Transparency Act, S. 3858, 117th Cong. (2022) (requiring publication of all OLC opinions within forty-eight hours of their issuance). While this general transparency requirement has merit, further analysis lies beyond the scope of this Article focusing on remedying gaps in the Antideficiency Act and the Impoundment Control Act.

326 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 114.

327 *Id.* at 7.

328 *Id.*

329 Pasachoff, *supra* note 8, at 2233.

plans would require taking ownership and accepting the political consequences from the public and from Congress.

The Power of the Purse Act would require such disclosures to be made in the President's Budget each spring.[330] Depending on when a shutdown occurs, though, this regularized timing may not allow enough flexibility for Congress to respond in the next appropriations cycle. If a shutdown occurs in March, for example, but the President's Budget was submitted the previous month, the next fiscal year would be half over by the time the next President's Budget was submitted.[331] A better choice would be to require the submission of this information within a certain number of days after the lapse in appropriations ends—say, thirty or sixty days.

3. Information About Unobligated and Expired Appropriated Funds

To enhance its ability to assess potentially hidden impoundments,[332] Congress ought to require disclosure of sums that agencies did not use before they expired and became no longer available.

Most appropriated funding is available for agencies to obligate for the current fiscal year but expires at the end of that fiscal year.[333] Some appropriated funding is available for more than one year but expires within a particular time frame.[334] Once funding in either category is no longer available to obligate ("expired"), agencies have five years within which they can use the funding to satisfy obligations the agencies made when the sums were available to use.[335] After the five years are over, any remaining sums are "canceled."[336]

For the most part, small sums of unobligated appropriations do not necessarily indicate an improper impoundment. As GAO explains, "Under sound administrative funds control practices, agencies may obligate cautiously in order to cover unanticipated liabilities" and avoid "violating the Antideficiency Act."[337] Indeed, after a year-long review of

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330 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 513 (2023); 31 U.S.C. § 1105(a)(42).

331 *See* DREW C. AHERNE, CONG. RSCH. SERV., R47235, THE CONGRESSIONAL BUDGET PROCESS TIMELINE (2023); *see also* CONG. RSCH. SERV., R41759, PAST GOVERNMENT SHUTDOWNS: KEY RESOURCES (2021).

332 *See supra* note 233 and accompanying text.

333 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 2–9.

334 *Id.* A third kind of classification based on duration is "no-year appropriations," which are available for an indefinite period, typically "until expended." *Id.*; *see also supra* note 178 and accompanying text.

335 31 U.S.C. § 1553(a).

336 *Id.* § 1552(a).

337 U.S. GOV'T ACCOUNTABILITY OFF., B-331298, DEPARTMENT OF COMMERCE—APPLICATION OF THE IMPOUNDMENT CONTROL ACT TO APPROPRIATIONS ENACTED IN FISCAL YEARS 2018 AND 2019 5 (2020).

a subset of canceled appropriations over ten fiscal years, as required by the National Defense Authorization Act of 2020, GAO concluded that program-specific factors, such as unexpectedly lower needs or unpredictable year-to-year costs, explained most of the cancellations in the sample.[338] At the same time, "[l]arge unobligated balances . . . may indicate an improper impoundment."[339] And Congress has no ready regular method of spotting circumstances when such large unobligated balances remain.

The Power of the Purse Act would add to the annual reporting requirements for the President's Budget a requirement to report on unobligated expired balances and balances canceled because their period of availability had ended.[340] These provisions are sensible informational requirements of a piece with the numerous other reporting requirements that already exist for the President's Budget[341] and ought to be reintroduced. GAO's recent study of a subset of canceled sums provides a helpful baseline against which to evaluate future disclosures.[342]

B. Enhancing Substantive Limits on OMB and Agencies

Three substantive reforms to OMB's authority are in order: clarifying the limited scope of the apportionment power; requiring timely apportionment; and restricting the ability to propose rescissions or deferrals in the final ninety days of the fiscal year. In addition, Congress should impose three substantive reforms on agencies: making agencies report and explain their disagreements with GAO's findings of Antideficiency Act violations; adding the potential for civil penalties for violations of the Impoundment Control Act; and requiring identification and explanation of whether Antideficiency Act violations merited criminal investigation.

1. Limits on OMB

First, the Antideficiency Act ought to clarify that the power to apportion appropriated spending is not an independent source of policy authority.[343] This could be accomplished by inserting the word "only" before the statutory explanation of the goals of apportionment: for those sums appropriated for a definite time period, apportionment may

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338 U.S. Gov't Accountability Off., GAO-21-432, Federal Budget: A Few Agencies and Program-Specific Factors Explain Most Unused Funds 1 (2021).

339 U.S. Gov't Accountability Off., *supra* note 114, at 12 n.55.

340 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. §§ 511–512 (2023) (adding 31 U.S.C. § 1105(a)(40)–(41)).

341 *See* 31 U.S.C. § 1105(a)(1)–(39).

342 *See supra* note 338.

343 *See supra* notes 68–79 and accompanying text.

be conducted *only* "to prevent obligation or expenditure at a rate that would indicate a necessity for a deficiency or supplemental appropriation for the period," and for those sums appropriated for an indefinite time period, apportion may be conducted *only* "to achieve the most effective and economical use."[344] In addition, the provision that currently allows OMB officials conducting the apportionment to do so "as the official considers appropriate" should be modified to add the words "in keeping with" the previous provision defining the limited goals of apportionment.[345] These changes would cabin the ability of OMB to apportion funds in a way that furthers substantive presidential priorities disconnected from the purpose of the funding instead of to prevent agencies from running out of funds too quickly.

Second, the Antideficiency Act ought to require OMB to apportion all funds in time for agencies to be able to make sensible use of them before the funds expire. This could be accomplished by adding a time period for *reapportionment* to the time periods that already exist in the Act for *initial* apportionment.[346] The Congressional Power of the Purse Act would require all apportionments to "make available all amounts for obligation in sufficient time to be prudently obligated," not later than ninety days before the appropriation would expire.[347] This time period is a reasonable limit, not unduly requiring speedy obligation while still allowing for some end-of-fiscal-year flexibility.

The Consolidated Appropriations Acts of 2023 and 2024 included a modified version of this latter suggestion by focusing on agency disclosure of OMB's failure to do so rather than on limiting OMB from doing so in the first place. Agencies are now required to notify the Committees on the Budget and Appropriations and "any other appropriate congressional committees" if "an approved apportionment received by the department or agency may hinder the prudent obligation of such appropriation."[348] Providing Congress with this information is important, but clarifying substantive limits on OMB's actions would strengthen Congress's hand in responding to the misuse of apportionment power. The ninety-day limit initially contemplated by the Congressional Power of the Purse Act would also helpfully provide a specific deadline,

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344 31 U.S.C. § 1512(a).

345 *Id.* § 1512(b)(2).

346 *Id.* § 1512(a) (permitting reapportionment without limit); *id.* § 1513(b) (providing time limits for initial apportionment but remaining silent on any deadlines for reapportionment).

347 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 501(a) (2023).

348 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 749, 136 Stat. 4459, 4718 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, § 749, H.R. 2882, 118th Cong. § 749.

in keeping with the other time limits for apportionment in the Antideficiency Act.[349]

The Congressional Power of the Purse Act would have added this provision to the Impoundment Control Act as a means of limiting end-of-year impoundments,[350] but it would be better to include these basic instructions for how apportionment ought to operate in the law governing apportionments in the first instance.

What the Congressional Power of the Purse Act got right in this regard is a further limit on deferral or rescission within ninety days before the end of the fiscal year[351]—banning what Vought and Paoletta called a "pocket rescission."[352] Allowing the President to effectively unilaterally cancel a spending law not only runs counter to the intent of the Impoundment Control Act;[353] it also incentivizes last-minute presidential proposals at a time when Congress is already bogged down at the end of the fiscal year in negotiations over the next year's appropriations bills and cannot realistically respond. There are few circumstances in which a President would discover information at the end of the fiscal year that would require an immediate downward adjustment of resources. Congress thus ought to modify the Impoundment Control Act to explicitly limit the President from deferring or otherwise withholding from obligation any funding during the ninety-day period before its budget authority expires.

2. Requirements for Agencies

First, Congress ought to require agencies to report to Congress when GAO has determined they have violated the Antideficiency Act instead of letting agencies ignore these determinations when they disagree.[354] As explained above, letting agencies ignore GAO's findings—or requiring OMB approval to report GAO's findings where agencies may actually agree with GAO on the merits but are forced to comply with OMB—leaves Congress without meaningful insight into why the executive branch thinks GAO's determination is wrong.[355] Requiring agencies to *report* GAO's findings is not the same thing as requiring agencies to

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349 *See, e.g.*, 31 U.S.C. § 1513(b)(2)(B) (specifying that initial apportionments be made "not later than . . . 30 days after the date of enactment of the law by which the appropriation is made available").

350 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 501(a) (2023) (adding § 1018(b) to Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332).

351 *Id.* (adding § 1018(a) to Impoundment Control Act of 1974, Pub. L. No. 93-344, 88 Stat. 332).

352 *See supra* notes 209–10 and accompanying text.

353 *See supra* note 218 and accompanying text.

354 *See supra* notes 111–19 and accompanying text.

355 *See supra* note 118 and accompanying text.

agree with GAO's findings. To the contrary, in fact; as the Congressional Power of the Purse Act would sensibly add, where agencies disagree with GAO's determinations, they must simply explain to Congress why they disagree.[356]

This requirement of a reasoned response does not unduly impinge on executive authority. The Antideficiency Act already requires agencies to report violations and the actions they have taken in response;[357] this expansion would merely clarify that they should explain their views where they disagree with GAO's findings. Nor is it overly burdensome; to the contrary, it reflects the default position that OMB has historically taken, as well as OMB's current internal requirement.[358]

Second, Congress ought to expand upon the reporting requirement added in the 2023 and 2024 Consolidated Appropriations Acts for violations of the Impoundment Control Act.[359] This requirement parallels the currently existing reporting requirements for violations of the Antideficiency Act.[360] For the same reasons just explained, Congress ought to expand this new requirement to make agencies report and explain their views on GAO determinations of Impoundment Control Act violations even where agencies disagree with GAO's findings,[361] just as the Congressional Power of the Purse Act would add.[362] This change also ought to be made permanent.

Third, Congress ought to import the Antideficiency Act's administrative penalty structure into the Impoundment Control Act, as the Congressional Power of the Purse Act would do.[363] The goal would not be to catch out unwary well-meaning civil servants in innocent cautious behavior, but rather to provide an incentive for civil servants to refuse to comply with illegal directions without privileging decisions to spend over decisions not to spend.[364] Further clarifying the relationship between programmatic delay and illegal deferrals under the Impoundment Control Act, as proposed below, would help provide assurance

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356 Protecting Our Democracy Act, H.R. 5048, 118th Cong. § 522 (2023) (amending 31 U.S.C. §§ 1351, 1517).

357 31 U.S.C. §§ 1351, 1517(b).

358 *See supra* notes 115–17 and accompanying text.

359 Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. E, § 748, 136 Stat. 4459, 4718 (2022); Further Consolidated Appropriations Act, 2024, Pub. L. No. 118-47, div. B, § 748, H.R. 2882, 118th Cong. § 748.

360 *See* 31 U.S.C. §§ 1351, 1517(b).

361 *See supra* notes 354–57 and accompanying text.

362 Protecting Our Democracy Act, H.R. 5048, 118th Cong. § 505(a) (2023) (adding § 1020(b) to Pub. L. 93–344, Title X).

363 *Id.*

364 *See supra* notes 225–26 and accompanying text.

that agency employees would not be on the hook for potential violations when they are following well-established practices.[365]

The Congressional Power of the Purse Act would not import the Antideficiency Act's criminal penalty structure into the Impoundment Control Act,[366] and especially in light of the absence of such prosecutions, that seems like a reasonable choice; the potential for civil penalties would be a sufficient incentivizing addition. At the same time, the absence of information about the extent of investigation into Antideficiency Act violations that may have risen to the level of "knowing[] and willful[]" is a problem.[367] As long as the potential for criminal penalties for Antideficiency Act violations remains on the books, its power is weakened if it appears irrelevant.[368]

As the final requirement on agencies, therefore, Congress ought to require that the Department of Justice identify whether each reported Antideficiency Act violation merited a criminal investigation and explain to Congress its decisions. The Congressional Power of the Purse Act would do just this.[369] These responses need not be burdensome, as most of the time, the absence of the required mens rea will be readily apparent. Yet elevating attention to the Department of Justice's review of violations for potential criminal charges is especially important in light of GAO's recent determinations that it regarded certain operational decisions during a government shutdown to be categorically

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365 *See infra* notes 401–10 and accompanying text. In addition, as to both Antideficiency Act and Impoundment Control Act violations, Congress could consider adding a reliance defense along the lines developed by Zachary Price in the broader question of "whether executive-branch legal opinions approving" conduct later determined to be illegal "immunize[s] participants against future liability." Zachary S. Price, *Reliance on Executive Constitutional Interpretation*, 100 B.U. L. Rev. 197, 200 (2020). Price argues that "[r]eliance on a signed OLC or Attorney General opinion should provide a due process defense in any subsequent civil or criminal government enforcement action, but only insofar as the opinion's conclusions were objectively reasonable," while "[r]eliance on any other executive directive, including presidential signing statements and legal determinations reached through interagency dialogue, should support such a defense only insofar as the legal conclusions at issue either accorded closely with past OLC or Attorney General opinions or were objectively correct in the reviewing court's view." *Id.* at 202. Applied in the context of Antideficiency Act and Impoundment Control Act violations, such a reliance defense would place GAO in the role of the reviewing court as an initial interpretive matter, although GAO decisions would merely provide information to agencies, Congress, and perhaps ultimately courts about its perception of the reasonableness of such reliance, since it is agencies themselves, not GAO, that decide whether to apply any administrative penalties.

366 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 505(a) (2023) (adding § 1020(b) to Pub. L. 93–344, Title X).

367 *See supra* notes 120–23 and accompanying text.

368 *See supra* notes 122–24 and accompanying text.

369 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 523 (2023); 31 U.S.C. §§ 1350(b)(2), 1519(b)(2).

unlawful and that it would treat equivalent conduct in the future as willful violations.[370]

Information about the Department of Justice's investigation of violations as knowing and willful, including information about why violations were determined *not* to be knowing and willful, would serve three functions. It would allow Congress to better assess how and whether to respond to violations by modifying the agency's substantive statutes or including directions in appropriations acts. In addition, it would improve the deterrent effect of the threat of criminal sanctions if agency employees see that criminal sanctions are actually considered and that Congress will review the Department of Justice's assessments as background for its own institutional decisions. Finally, it would provide helpful information as to whether to retain the apparently never-used criminal penalty in the Antideficiency Act (or, from the other direction, perhaps even as to whether to import it into the Impoundment Control Act as well).

C. Enhancing GAO's Authorities

GAO's authority to conduct investigations and obtain information relating to potential Antideficiency Act and Impoundment Control Act violations ought to be strengthened in multiple ways. All of these recommendations would tweak existing authorities rather than propose major overhauls. Each would help Congress, both the majority and the minority,[371] obtain information to conduct oversight, regardless of which party holds the White House.

1. Antideficiency Act Investigations

To address the problem of agencies not complying with GAO requests for records as part of its investigation of potential Antideficiency Act violations,[372] Congress ought to clarify the scope of GAO's

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370 *See, e.g.*, U.S. Gov't Accountability Off., B-331132, *supra* note 108, at 10 (2020) (finding that OMB violated the Antideficiency Act when it reviewed regulatory materials during a government shutdown and that it would consider future such violations to be knowing and willful); U.S. Gov't Accountability Off., B-331093, U.S. Department of the Treasury—Tax Return Activities During the Fiscal Year 2019 Lapse in Appropriations 12 (2020) (finding that the Department of the Treasury violated the Antideficiency Act when it processed tax returns and issued tax refunds during a government shutdown and that it would consider future such violations to be knowing and willful); U.S. Gov't Accountability Off., B-331091, *supra* note 108, at 11 (2020) (finding that the National Archives and Records Administration did not have specific statutory authority to publish certain documents in the Federal Register during a government shutdown and that it would consider future such violations to be knowing and willful).

371 *Cf.* Farber & O'Connell, *supra* note 309, at 1180 (noting utility of GAO investigations both to majority and minority).

372 *See supra* notes 125–31 and accompanying text.

authority in its organic statute. The Congressional Power of the Purse Act would sensibly make each of the three following modifications.[373]

GAO should be provided with clear authority to request information and records related to budget and appropriations law, given its core responsibilities in this area.[374] This authority is arguably already contained in its ability to request information and records as required "to discharge the duties of the Comptroller General (including audit, evaluation, and investigative duties),"[375] but given agencies' occasional reluctance to provide material in support of Antideficiency Act violations, further clarification would help.[376]

Congress should also provide a timeframe within which an initial response from the agency is expected, such as the twenty days contemplated by the Congressional Power of the Purse Act,[377] in keeping with the twenty-day timeframe already required for an agency head to explain why a record is being withheld or to produce the record.[378] This timeframe is also of a piece with other timeframes GAO expects in its work with agencies as spelled out in its agency protocols—for example, fourteen days to schedule an initial entrance conference for a new investigation and seven to thirty days to comment on a draft product.[379]

And just as with its ability to bring a civil lawsuit to obtain such records under its existing authority for its "audit, evaluation, and investigative duties,"[380] Congress ought to include an equivalent authority for its budget and appropriations law work.[381] While GAO has only once brought a lawsuit under its investigative powers, the potential to do so lies behind its conversations with agencies reluctant to share information, and it therefore serves as a useful counterweight to agency resistance.[382]

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373 The House-passed version of the Financial Services and General Government appropriations bills for Fiscal Year 2023 also contained these three requirements, although they did not make it into the final appropriations law. Financial Services and General Government Appropriations Act, H.R. 8294, 117th Cong. Div. D, Title VII, § 749(a)–(b) (2023).

374 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 521 (2023) ("Requirement to respond to requests for information from the Comptroller General for budget and appropriations law decisions.").

375 31 U.S.C. § 716(a)(1).

376 *See supra* notes 132–36 and accompanying text.

377 Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 521 (2023); 31 U.S.C. § 722(a).

378 31 U.S.C. § 716(b)(1).

379 U.S. Gov't Accountability Off., *supra* note 237, at 3, 9, 13.

380 31 U.S.C. § 716(a)(1); *see also id.* § 716(c)–(d).

381 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 521 (2023); 31 U.S.C. § 722(b)(2).

382 *See, e.g.*, T.J. Halstead, The Law: Walker v. Cheney*: Legal Insulation of the Vice President from GAO Investigations*, 33 Presidential Stud. Q. 635, 636, 643 (2003) (describing how litigation authority provides "leverage in convincing executive entities to either provide requested information or to invoke" the statutory exceptions for providing such access based on a connection to "foreign intelligence or counterintelligence activities"); *see also* U.S. Gov't Accountability Off.,

2. *Impoundment Control Act Investigations*

To address the problems connected with GAO's authority to provide useful information to Congress about Impoundment Control Act violations,[383] Congress ought to make five changes, as the Congressional Power of the Purse Act sensibly seeks to do.[384]

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supra note 237, at 24 ("Although it is GAO's strong preference to resolve access issues at the lowest organizational levels at an agency, the Congress has authorized GAO (and recently reaffirmed this right in the GAO Access and Oversight Act of 2017) to enforce its access to agency records in court.").

To be sure, there is some question as to whether GAO has standing to bring such a suit. In *Walker v. Cheney*, for example, the district court held that the Comptroller General "does not have the personal, concrete, and particularized injury required under Article III standing doctrine, either himself or as the agent of Congress," to sue to obtain documents from the Vice President. *See* 230 F. Supp. 2d 51, 53 (D.D.C. 2002). However, while *Walker* did not purport to limit the analysis to the special case of suing a constitutional officer, the opinion was clearly centered around that particular context. *See id.* ("no court has ever before granted what the Comptroller General seeks—an order that the President (or Vice President) must produce information to Congress (or the Comptroller General."). GAO did not appeal, likely because of political pressure, *see* Halstead, *supra* note 382, at 645–46, and the D.C. Circuit has never adopted the *Walker* holding nor analysis. In addition, the doctrine of congressional standing to obtain information has grown considerably since then, and it is not at all clear that the case would come out the same way today. *See, e.g.*, Maloney v. Murphy, 984 F.3d 50, 54 (D.C. Cir. 2020) (holding that eight members of a congressional committee had standing to enforce their right to information under 5 U.S.C. § 2954 because "[a] rebuffed request for information to which the requester is statutorily entitled is a concrete, particularized, and individualized personal injury, within the meaning of Article III"), cert. granted sub nom. Carnahan v. Maloney, 22-425 (May 15, 2023) (June 26, 2023) (judgment vacated and case remanded after respondents entered a voluntary dismissal in the district court); Comm. on Judiciary, U.S. House of Representatives v. McGahn, 968 F.3d 755, 760–61 (D.C. Cir. 2020) (en banc) (holding that committee had standing to enforce subpoena seeking information from former White House counsel); Comm. on Oversight & Gov't Reform, U.S. House of Representatives v. Holder, 979 F. Supp. 2d 1, 9–16 (D.D.C. 2013) (holding that committee had standing to enforce subpoena seeking information from Attorney General); Comm. on Judiciary, U.S. House of Representatives v. Miers, 558 F. Supp. 2d 53, 55–56 (D.D.C. 2008) (holding that committee had standing to enforce subpoena seeking information from senior presidential advisors). Moreover, *Walker v. Cheney* included details that could conceivably make a difference in a subsequent case even under its restricted vision for institutional standing (such as whether committee chairs authorized the lawsuit on their committee stationery rather than on their personal stationery, 230 F. Supp. 2d at 57, 57 n.2, or whether committees themselves otherwise sought the documents, *id.* at 68). And Congress responded to the *Walker* court's observation that Congress had not "expressly authorized" the GAO to file a lawsuit in that case, *id.*, by adding to the records provision an instruction that "In reviewing a civil action under this section, the court shall recognize the continuing force and effect of the authorization in the preceding sentence [to seek records] until such time as the authorization is repealed pursuant to law." 31 U.S.C. § 716(a)(1) (added by Pub. L. No. 115-3, 131 Stat. 7 (2017)). In any event, this proposal merely tweaks the existing statutory regime rather than seeks to add a significant new authority for GAO. Unless and until the weight of authority suggests the absence of standing, GAO's ability to sue for information remains a viable path.

383 *See supra* notes 227–39 and accompanying text.

384 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 503 (2023) ("Updated Authorities for and Reporting by the Comptroller General"); *id.* § 504 ("Advance Congressional Notification and Litigation").

First, Congress ought to require GAO to report to Congress even those violations that have been remedied,[385] just as Congress has required for Antideficiency Act violations.[386] Such information would provide helpful oversight information both on a case-by-case basis and overall.

Second, Congress ought to change the effect of GAO's reporting of ongoing noncompliance when the President has failed to issue a "special message" to Congress under the Act.[387] Instead of letting GAO's report serve the same function as a presidential "special message," thereby providing temporary permission for the withholding, GAO's report ought to alert Congress to the fact that there is a problem under the Act without blessing the executive action.[388]

Third, Congress ought to ensure that GAO's authorities to investigate Impoundment Control Act violations include the same ability to obtain relevant information and records discussed above.[389] In principle, modifying GAO's organic statute to allow for this information would accomplish this goal.[390] In practice, because the Impoundment Control Act specifies particular authorities GAO has under that Act,[391] and the absence of references to such authorities would raise questions about whether GAO actually was empowered to do so, it would make sense for the Act itself to spell out this ability, or at the very least clarify that GAO's preexisting statutory authority applied here as well.[392]

Fourth, just as with the proposal to make the ability to obtain information and records related to budget and appropriations law inquiries enforceable in court, as discussed above,[393] in keeping with GAO's already existing authority to bring such lawsuits in support of its "audit, evaluation, and investigative duties,"[394] the litigation authority already contained in the Impoundment Control Act should be expanded to include the ability to bring a civil suit for such information and records.[395]

Finally, Congress ought to reduce the waiting period between GAO's notifying Congress that an agency is improperly withholding

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385 *Id.* § 503 (adding 2 U.S.C. § 686(c)(1)).

386 *See supra* note 60 and accompanying text.

387 *See supra* notes 230–31 and accompanying text.

388 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 503(a)(1) (2023) (deleting the last sentence of 2 U.S.C. § 686(a)).

389 *See supra* notes 374–76 and accompanying text.

390 *See supra* note 374 and accompanying text.

391 2 U.S.C. §§ 686–687.

392 *See* Congressional Power of the Purse Act, H.R. 5048, 118th Cong. § 503 (2023) (adding 2 U.S.C. § 686(c)(2)).

393 *See supra* notes 380–82 and accompanying text.

394 31 U.S.C. § 716(a)(1); *see also id.* § 716(c)–(d).

395 Protecting Our Democracy Act, H.R. 5048, Title V, Congressional Power of the Purse Act, 118th Cong. § 504 (2023) (amending 2 U.S.C. § 687); *see also supra* note 382 (discussing the issue of GAO's standing to pursue information to which it is statutorily authorized).

funds and bringing a lawsuit to compel the release of the funds. This recommendation is in keeping with the other proposals to ensure that improper impoundments do not lead to budget authority expiring at the end of the fiscal year without having been obligated.[396] The Congressional Power of the Purse Act would address this problem in a sensibly nuanced way, reducing the overall timeframe for congressional consideration before filing from twenty-five days to fifteen days, with the opportunity for an even shorter timeframe "if the Comptroller General finds (and incorporates the finding in the explanatory statement filed) that such delay would be contrary to the public interest."[397] The idea would be to incentivize either speedy release of the funds at the end of the fiscal year or sufficient time to allow a court to intervene before the budget authority expired.[398]

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396 *See supra* notes 346–53 and accompanying text.

397 Protecting Our Democracy Act, H.R. 5048, Title V, Congressional Power of the Purse Act, 118th Cong. § 504 (2023) (amending 2 U.S.C. § 687).

398 Whether GAO would have standing to bring such a lawsuit is an open question (distinct from the question of standing to pursue statutorily entitled information, *see supra* note 382). As noted earlier, *supra* note 159, the only time GAO sued in an effort to get the administration to release improperly impounded funds, the administration ultimately released the funds and the lawsuit was dismissed as moot. OGC-77-20, *supra* note 159, at 224. But before releasing the funds, the Ford administration filed a motion to dismiss challenging the constitutionality of the provision authorizing GAO to bring the lawsuit. *Id.* at 220. The arguments were that the Comptroller General, the head of GAO, was a legislative officer trying to bring an action to enforce the law, an executive action, and that with the government on both sides of the v., there was no actual case or controversy. *See id.* at 220–21. GAO responded that it was suing to compel the executive branch to execute the law by releasing the funds in question rather than performing an executive function; that the Comptroller General was not clearly a solely legislative officer; and that even if he was, all the lawsuit was doing was protecting legitimate legislative interests in ensuring that its decisions under the Impoundment Control Act were not ignored by executive officers. *Id.* at 221.

After Bowsher v. Synar, 478 U.S. 714 (1986), it can no longer be suggested that the Comptroller General is not a legislative officer. But as the law of congressional standing has developed, it is unclear whether GAO as a legislative entity would have standing to maintain a lawsuit to compel the release of funds. *See* Raines v. Byrd, 521 U.S. 811, 814, 821 (1997) (holding that six members of Congress did not have standing to challenge the Line Item Veto Act as unconstitutional in part because their claim was not based on "specially unfavorable treatment" of those members as compared to all members of Congress); U.S. House of Representatives v. Mnuchin, 976 F.3d 1, 13 (D.C. Cir. 2020), *vacated as moot*, Yellen v. U.S. House of Representatives, 142 S. Ct. 332 (2021) (holding that the entire House of Representatives did have standing to challenge a particular use of funds as going beyond the relevant appropriations act because it had a distinct institutional injury against its "unilateral authority to prevent expenditures"); *see also* Metzger, *supra* note 37, at 1167 (suggesting that "[p]articularly when a lack of congressional standing would allow the executive branch to violate an appropriations provision with legal impunity, the separation of powers may be better served by allowing Congress to sue, especially since doing so may give the executive branch more reason to negotiate with Congress in the first place"). As with the suggestions about lawsuits to enforce GAO's pursuit of information, *see supra* note 382, these suggestions merely tweak the already existing litigation regime, which remains viable until clearly established otherwise.

D. Aligning the Impoundment Control Act to Respond to Contemporary Executive Practices

The last set of reforms this Article proposes do not stem from the Congressional Power of the Purse Act at all. Rather, they reflect additional efforts to align the scope of the Impoundment Control Act with contemporary executive practices. The first recommendation calls for clarifying that special messages are required even in the context of the GAO-created category of programmatic delay.[399] The second recommendation calls for adding fast-track authority to allow Congress to respond to certain categories of executive spending.[400]

1. Incorporating Programmatic Delay into Deferral

The category of programmatic delay is in tension both with the language and purpose of the Impoundment Control Act. Congress would seem, therefore, to have two choices: it could explicitly incorporate programmatic delay as an exception to the category of deferral, or it could reject programmatic delay as an exception to the notice requirement.

Given the fact-intensive nature of programmatic delay inquiries,[401] however, it is difficult to imagine a statutory definition of programmatic delay that would not provide the opportunity for the executive branch to sidestep the Act completely. Rejecting programmatic delay as an exception to the notice requirement is thus the better option. Congress ought to provide that where agencies are now relying on programmatic delay to avoid notifying Congress about their delays in obligating or expending budget authority, they should no longer do so, and should instead alert Congress to all such delays under the special message process contemplated by the Impoundment Control Act.

This change would not need to overburden agencies. They already have to establish the relevant details required in a special message in order to get permission from OMB to engage in the requested programmatic delay.[402] Nor would this change have to overburden OMB; now that apportionments and footnotes have to be published as a matter of course, the relevant information is already in some sense being disclosed (although in a not-easily-understandable way).[403] Pulling it together with the details of the special message requirements would not be that much harder.

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399 *See supra* notes 243–67 and accompanying text.

400 *See supra* notes 271–90 and accompanying text.

401 U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 15, at 2-50.

402 *Compare* OFF. OF MGMT. & BUDGET, *supra* note 74, at § 120.48 (requiring agencies submit to OMB requests for reapportionment, including requests due to "[p]rogrammatic changes"), *with id.* § 112.8 (outlining the information to be included in requests for deferral).

403 *See supra* note 312 and accompanying text.

Nor would the receipt of additional special messages have to overburden Congress. Congress clearly envisioned when it first passed the Impoundment Control Act that it would receive deferral notices as a matter of course, without fearing that the workload would be impossible.[404] That is, the statute itself contemplates bulk special messages.[405] So did the legislative history. The House Report explained that if Congress had to affirmatively approve every time the executive branch delayed spending money, the "legislative process would be disrupted by the flood of approvals that would be required for the normal and orderly operation of the government."[406] The veto contemplated by the House would "permit Congress to focus on critical and important matters, and save it from submersion in a sea of trivial ones."[407] The "trivial" ones were nonetheless expected to be reported to Congress.

To help focus its attention on the "critical and important" ones, Congress should post the special messages on a public-facing website, perhaps on the websites of the budget and appropriations committees, where not only staff, but also civil society organizations with particular interests in specific programs can elevate potentially problematic delays for Congress's consideration.[408]

If at that point Congress wants further information about whether the deferrals are for a statutorily authorized reason or for an improper policy-based reason, Congress could ask GAO to assess the underlying action. But intent and motive should not be determinative as to whether Congress has the opportunity to consider an impoundment resolution.[409] Congress should be able to express its disapproval of a delay even if GAO determines that the delay is consistent with law or a result of contingencies, as with President Trump's delay of State Department funds to Ukraine or President Biden's delay in obligating funds for the wall.[410]

2. Spending Releases

To incorporate into the Impoundment Control Act a response to the contemporary problem of executive spending based on expansive interpretations of spending statutes, Congress ought to add a fast-track mechanism to review the administration's policy choices stemming

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404 *See* SCHICK, *supra* note 16, at 402–03.

405 2 U.S.C. § 684(a) ("A special message may include one or more proposed deferrals of budget authority.").

406 City of New Haven v. United States, 809 F.2d 900, 907 (D.C. Cir. 1987) (citing H.R. REP. No. 658, 93d Cong. 41 (1973)).

407 *Id.* (citing H.R. REP. No. 658, 93d Cong. 41 (1973)).

408 *See supra* note 320 and accompanying text.

409 *See supra* notes 260–69 and accompanying text.

410 *See supra* notes 250–59 and accompanying text.

from such interpretations. This mechanism should be based on the framework that is already in place in the Act to review special messages proposing rescission or deferral.[411] If the opposite of an "impoundment" is a "release,"[412] Congress's consideration might be called a "release resolution."

Fully fleshing out what such a system should look like is beyond the scope of this Article. Instead, the design of such a system ought to be subject to the kind of public debate that led to the proposals underlying the Congressional Power of the Purse Act. To help start the conversation, the paragraphs that follow first identify key questions to ask in designing the mechanism and then make the case for the value of such a mechanism.[413]

One design question is what executive actions around spending should constitute a "release" that would be subject to a "release resolution." Those that add to the deficit only? If so, by whose calculation? Those that involve only obligation or expenditure beyond a certain amount? If so, what amount?

A second design question is whether the President should be required to submit a special message to Congress describing such releases the way she is required to do for rescissions and deferrals[414] or the way the Congressional Review Act requires rules to be submitted to Congress before they can take effect.[415] Would special messages help focus legislative attention on the subject of the releases, or would they be unnecessary since presidential releases tend to be more public than impoundments? Whether there is a special message requirement or not, within what time frame would the release resolution have to be introduced? If there is no special message requirement, what would trigger the start of the clock for introducing the release resolution?

A third design question is what the ultimate legal outcome of the fast-track mechanism should be. Affirmative approval by Congress, as with a rescission bill, such that the policy choice cannot go into effect without Congress's approval?[416] An "express[ion] [of] disapproval," as with the "impoundment resolution" considering a deferral, such that the administration's action can go into effect but only against the backdrop

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411 2 U.S.C. § 688.

412 *Impound*, MERRIAM-WEBSTER.COM THESAURUS, https://www.merriam-webster.com/thesaurus/impound [https://perma.cc/6UYK-Y4PA].

413 For consideration of recent proposals to create other fast-track review mechanisms, see, for example, Christopher J. Walker, *A Congressional Review Act for the Major Questions Doctrine*, 45 HARV. J. L. & PUB. POL'Y 773 (2022); Aaron-Andrew P. Bruhl, *The Supreme Court Review Act: Fast-Tracking the Interbranch Dialogue and Destabilizing the Filibuster*, 25 U. PA. J. CONST. L. 1 (2023).

414 2 U.S.C. § 685(e)(1).

415 *See* 5 U.S.C. § 801(a)(1)(A); *see also* Bridget C.E. Dooling, *Into the Void: The GAO's Role in the Regulatory State*, 70 AM. U. L. REV. 387, 394–95 (2020).

416 *See* 2 U.S.C. § 681(3).

of congressional disapproval, a result for which the President would have to weigh the downstream political consequences?[417] A possibility to affirmatively reject the administration's action, as with the Congressional Review Act, such that the policy choice can go into effect unless Congress affirmatively rejects the rule subject to a potential veto and veto override?[418]

A robust public conversation, both inside and outside Congress, can help shed light on these important design questions, identifying and assessing the tradeoffs from different perspectives.

Moving from design questions to evaluation: Adding a fast-track mechanism would help assert legislative control over controversial executive spending choices, as befitting Congress's power of the purse. Having a ready-made path for privileged consideration of a spending choice would increase the likelihood of a congressional response because fast-track mechanisms provide a way around the hurdles of a number of vetogates.[419] Such a mechanism would not guarantee a congressional response, of course, nor would it guarantee that a congressional response would succeed.[420] But procedural paths open up possibilities,[421] and requiring the President to weigh the possibility of congressional response and grapple with the consequences of a rejection would likely affect presidential consideration of the action itself and its political costs.[422]

In addition, a fast-track mechanism would be institutionally valuable even if Congress does not always succeed in using it. Waiting to see whether the Supreme Court blesses the legality of a particular executive branch spending action and weighing in either as litigant or amicus curiae in the meantime puts Congress in the role of supplicant and secondary player rather than coequal branch in a tripartite government. More importantly, the Supreme Court only rules on the legality, not the wisdom, of policy. Congress ought to have a realistic path toward rejecting a particular spending decision even if it is legal but counter to congressional desires. If Congress's role is primary policymaker in

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417 2 U.S.C. § 682; *see also supra* notes 147–52 and accompanying text (explaining how Congress changed this provision after the Supreme Court struck down one-house vetoes in *Chadha*).

418 *See* 5 U.S.C. § 802.

419 *See* Garrett, *supra* note 289, at 754.

420 For example, although Congress voted to reject President Trump's emergency declaration, it did not have enough votes to override his veto. *See supra* note 282 and accompanying text.

421 *See* Garrett, *supra* note 289, at 720, 733 (noting that all decisions made under framework legislation could also have been made under ordinary procedural mechanisms).

422 In the case of the congressional rejection of President Trump's emergency declaration, for example, although he did not ultimately walk back from his action, the President had to issue the first veto of his presidency and grapple with intraparty opposition. *See* Michael Tackett, *Trump Issues First Veto After Congress Rejects Border Emergency*, N.Y. Times (Mar. 15, 2019), https://www.nytimes.com/2019/03/15/us/politics/trump-veto-national-emergency.html [https://perma.cc/7ZRX-BYCU].

general, and primary holder of the purse in particular, then finding a way through the barriers of ordinary lawmaking is a useful project even if Congress lets stand questionable assertions of executive spending power at times.

CONCLUSION

As Gillian Metzger has powerfully argued, public law must do a better job of "taking appropriations seriously."[423] This Article demonstrates that reforming doctrine, the subject of her article,[424] is not the only way to do that. The Power of the Purse statutes themselves should be modernized to account for the gaps that have become apparent in this era of presidential control. By doing so, Congress can give itself the tools to play a stronger institutional role in overseeing and pushing back at executive overreach.

423 *See generally* Metzger, *supra* note 37.

424 *Id.* at 1155–71.

The New Usury: The Ability-to-Repay Revolution in Consumer Finance

*Adam J. Levitin**

Abstract

American consumer credit regulation is in the midst of a doctrinal revolution. Usury laws, for centuries the mainstay of consumer credit regulation, have been repealed, preempted, or otherwise undermined. At the same time, changes in the structure of the consumer credit marketplace have weakened the traditional alignment of lender and borrower interests. As a result, lenders cannot be relied upon to avoid making excessively risky loans out of their own self-interest.

Two new doctrinal approaches have emerged piecemeal to fill the regulatory gap created by the erosion of usury laws and lenders' self-interested restraint: a revived unconscionability doctrine and ability-to-repay requirements. Some courts have held loan contracts unconscionable based on excessive price terms, even if the loan does not violate the applicable usury law. Separately, for many types of credit products, lenders are now required to evaluate the borrower's repayment capacity and to lend only within such capacity. The nature of these ability-to-repay requirements varies considerably, however, by product and jurisdiction. This Article terms these doctrinal developments collectively as the "New Usury."

The New Usury represents a shift from traditional usury law's bright-line rules to fuzzier standards like unconscionability and ability-to-repay. Although there are benefits to this approach, it has developed in a fragmented and haphazard manner. Drawing on the lessons from the New Usury, this Article calls for a more comprehensive and coherent approach to consumer credit price regulation through a federal ability-to-repay requirement for all consumer credit products coupled with product-specific regulatory safe harbors, a combination that offers the best balance of functional consumer protection and business certainty.

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INTRODUCTION

American consumer credit regulation is in the midst of a doctrinal revolution. Since time immemorial, price regulation has been the primary mode of consumer credit regulation, protecting borrowers, lenders, and society from the adverse effects of unaffordable credit. Historically, such regulation was in the form of usury laws that cap the permitted interest rate on loans. Since the late 1970s, however, usury laws in the United States have been repealed, preempted, or otherwise undermined, such that they apply to only a limited set of consumer financial products and institutions.

Traditionally, usury laws were buttressed by a market alignment of borrower and lender interests that constrained excessively risky extensions of credit. In the traditional lending world, a lender made a

loan directly to a borrower and held the loan on its books, hoping that the loan would be paid off according to its terms. In this arrangement, lenders succeeded only when borrowers succeeded, so their interests were substantially aligned: lenders would not saddle borrowers with unmanageable obligations because a default on the loan would harm them as well. Lender self-interest limited excessive price terms—and the accompanying risk of borrower default.

At the same time that usury laws were being eroded through deregulation, the structure of consumer credit markets also began to change. The advent of securitization as a technique for financing consumer loans separated the decision to lend from the subsequent exposure to the risk to the loan.[1] Principal-agent conflicts between lenders and their misincentivized employees or agents encouraged riskier lending.[2] And some lenders adopted a "sweatbox" lending model that treats the principal of a loan as a loss leader for the recovery of high fees and interest that more than offset any unrepaid principal.[3]

As a result of these developments, the assumption of an alignment of borrower and lender interests no longer holds true in many consumer credit markets. The self-interest of the party making the lending decision can no longer be relied upon to limit the risk assumed by the borrower.

The relaxation of usury laws and the reduction in alignment of borrower and lender interests began in the late 1970s. It occurred precisely at a time when many American families were coming under additional financial stress due to stagnating wages and rapidly rising costs of housing, transportation, education, and health care.[4] Many households turned to credit to bridge the gap.[5] These households faced credit markets unconstrained by regulation or lender self-interest. The result was a predictable growth in riskier and costlier lending and the inevitable negative consequences from increased levels of consumer default.

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1 *See* Adam J. Levitin, *Rent-a-Bank: Bank Partnerships and the Evasion of Usury Laws*, 71 Duke L. J. 329, 353–56 (2021).

2 *See* 78 Fed. Reg. 11280 (Feb. 15, 2013) (noting how mortgage industry "compensation was frequently structured to give loan originators strong incentives to steer consumers into more expensive loans").

3 *See* Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 Ill. L. Rev. 375, 385–87 (describing credit card lenders' profitability increasing upon borrower delinquency); Final Statement of Decision after Court Trial at 25–26, de la Torre v. CashCall, Inc., No. 19CIV01235 (Cal. Sup. Ct. Aug. 21, 2023) (describing how CashCall did not need a borrower to pay a loan to maturity for the loan to be profitable); Complaint ¶¶ 8, 43–45, CFPB v. Credit Acceptance Corp., No. 23 Civ 0038 (S.D.N.Y. Jan. 4, 2023) (alleging defendant is profitable even with only collections of sixty-six cents on the dollar because it purchases loans at such a steep discount).

4 *See generally* Elizabeth Warren & Amelia Warren Tyagi, The Two-Income Trap: Why Middle-Class Mothers and Fathers Are Going Broke (2003).

5 *See id.* at 5–7.

Law abhors a vacuum, and a set of doctrinal moves have emerged piecemeal over the last quarter century in the United States to fill the gap created by the erosion of usury laws and the traditional lender-borrower partnership. This Article refers to these doctrinal developments collectively as the "New Usury."[6]

This doctrinal shift has never previously been noted in the scholarly literature, in part because the New Usury coexists with what remains of the traditional old usury laws, but also because the New Usury is a set of reactive and uncoordinated doctrinal moves rather than a systemic, coherent vision of consumer credit regulation.[7] Nonetheless, as this Article explains, there is an undeniable logic undergirding the New Usury, a logic that when fleshed out can provide a comprehensive and cohesive regulatory approach.

The two primary doctrinal developments that make up the New Usury are: (1) a revived substantive unconscionability doctrine that holds high-cost loans substantively unconscionable, irrespective of compliance with usury laws, and (2) ability-to-repay requirements that require lenders to evaluate borrowers' payment capacity and only lend within it.

Unconscionability has historically played only a limited role in regulating the price terms of consumer credit, other than for retail installment sales.[8] Retail installment sales have long been exempt from general usury laws in most states,[9] which left courts with few tools for policing overreaching creditor behavior other than unconscionability.

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6 Other jurisdictions have also moved to adopt ability-to-repay requirements. *See, e.g.*, Directive 2008/48/EC, art. 8, 2008 O.J. (L 133) 76; Directive 2014/17/EU, art. 18(5)(a) & ¶ 55, 2014 O.J. (L 60) 43, 58; *National Consumer Credit Protection Act 2009* ch 3 pt 3-2 div 3 s 128 (Austl.) (obligation to assess unsuitability as part of responsible lending conduct); Credit Contracts and Consumer Finance Act 2003, s 9C(3)(a) (N.Z.) (Lender must "make reasonable inquiries, before entering into the agreement . . . so as to be satisfied that it is likely that . . . the borrower will make the payments under the agreement without suffering substantial hardship"); Consumer Credit Act of 1974, § 55B (later repealed by The Financial Services and Markets Act 2000 (Regulated Activities) (Amendment) (No.2) Order 2013, S.I. 2013/1881, arts. 1(2)(6), 20(22)) (UK); *see also* John Pottow, *Ability to Pay*, 8 BERKELEY BUS. L.J. 175, 189–93 (2011) (citing various foreign suitability and ability to pay requirements).

7 The one partial exception is Pottow, *supra* note 6, at 189–93, who recognized the wealth of foreign cognates to some type of ability-to-repay requirement.

8 The classic unconscionability cases of *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 447–49 (D.C. Cir. 1965), and *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264, 265–66 (Sup. Ct. 1969) both involved retail installment sales contracts.

9 Under the much-criticized time-price doctrine, endorsed as a matter of federal common law by the Supreme Court in *Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118–19 (1861), an installment sale is not considered a loan and therefore is not subject to usury laws. *See* William D. Warren, *Regulation of Finance Charges in Retail Instalment Sales*, 68 YALE L.J. 839, 840–41 (1959); Raoul Berger, *Usury in Instalment Sales*, 2 L. & CONTEMP. PROBS. 148, 148 (1935). The post-1938 status of federal common law decisions is unclear. Some states do have usury caps specific to retail installment sales. *See, e.g.*, FLA. STAT. § 520.34(6)(a) (2023).

Recently, however, some state courts—including two state supreme courts—have revitalized the doctrine in consumer credit transactions, holding that a high price term alone—even if not usurious—can still render a loan unconscionable.[10]

Meanwhile, ability-to-repay requirements have emerged in many consumer credit markets. The details of these requirements vary considerably, but they all require the lender to verify that the borrower has the capacity to repay the obligation or at least not ignore evidence of lack of such capacity. There are now federal ability-to-repay requirements for mortgage loans[11] and credit cards.[12] Some states have adopted their own ability-to-repay requirements for all mortgages,[13] some for auto loans,[14] and some for payday loans and other small dollar loans.[15] Others have ability-to-repay requirements, but only for high-cost mortgages.[16] There was also a now-repealed federal ability-to-repay requirement for payday and vehicle title loans.[17] Additionally, federal student loans have an income-driven repayment option that operates like a backend ability-to-pay provision.[18]

These ability-to-repay requirements have been developed haphazardly and without consistency in their substance or source. Ability-to-repay developed on a product-by-product basis and on a

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10 *See infra* Part III.

11 15 U.S.C. § 1639c(a)(1); 12 C.F.R. § 1026.43(d)(4).

12 15 U.S.C. § 1665e; 12 C.F.R. § 1026.51.

13 *See, e.g.*, Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548, 560 (Mass. 2008) (ability-to-repay requirement under state unfair trade practices act); MD. CODE ANN., COM. LAW § 12-127 (West 2009); MINN. STAT. § 58.13(a)(24) (2022); N.M. STAT. ANN. § 58-21A-4(C) (2023); OHIO REV. CODE ANN. § 1345.031(B)(2), (14) (West 2017); WASH. ADMIN. CODE § 208-620-506 (2022).

14 *See infra* Part III. Auto loan ability-to-repay requirements exist solely through state litigation settlements and complaints contending that failure to consider ability-to-repay violates the prohibition on unfair, deceptive, or abusive acts or practices. *See* 12 U.S.C. §§ 5531, 5536 (2018).

15 S*ee, e.g.*, NEV. REV. STAT. § 604A.5011 (2022); OHIO REV. CODE ANN. § 1345.03(B)(4) (West 2017) (prohibiting loans where lender knows that consumer does not have a reasonable probability of repayment, but not imposing a duty of investigation on the lender).

16 *See, e.g.*, CONN. GEN. STAT. § 36a-760b (2023); 815 ILL. COMP. STAT. 137/15 (2004); N.C. GEN. STAT. § 24-1.1E(c) (2022); N.Y. BANKING L. § 6-L(k) (2023); WIS. STAT. § 428.203(6) (2010).

17 Payday, Vehicle Title, and Certain High-Cost Installment Loans, 82 Fed. Reg. 54472, 54874 (Nov. 17, 2017) (promulgating an ability-to-repay requirement to be codified at 12 C.F.R. pt. 1041.5), *repealed by* 85 Fed. Reg. 44382, 44444 (July 22, 2020).

18 John R. Brooks & Adam J. Levitin, *Redesigning Education Finance: How Student Loans Outgrew the "Debt" Paradigm*, 109 GEO. L.J. 5, 11, 36, 73 (2020). Separately, a number of scholars have proposed back-end ability-to-repay requirements. *See* Vern Countryman, *Improvident Credit Extension: A New Legal Concept Aborning?*, 27 ME. L. REV. 1, 17–18 (1975) (proposing private civil liability for lending without reasonable determination of repayment capacity); John A.E. Pottow, *Private Liability for Reckless Consumer Lending*, 2007 ILL. L. REV. 405, 408 (extending theoretical arguments for Countryman's proposal); Abigail Faust, *Regulating Excessive Credit*, 2023 WISC. L. REV. 753, 758 (proposing using bankruptcy claims disallowance to operate as an ex-post check on lending without verification of ability to repay).

state-by-state or sometimes federal level. The requirements vary considerably and stem from statutes, regulations, consent orders, judicial opinions, and even from regulatory complaints that establish when regulators are likely to bring suit in the future. As a result, ability-to-repay exists as a fragmentary and nonstandardized doctrinal concept.

Nor are usury laws totally dead. While *state* usury laws have been substantially eroded, they still bind for some nonbank products.[19] Moreover, the federal government has enacted a usury statute for military members and their dependents,[20] and, in recent years, several states have tightened or expanded their usury laws.[21]

What we see, then, are three distinct approaches for addressing the problem of excessively risky consumer credit transactions: (1) usury, (2) unconscionability, and (3) ability-to-repay. These three approaches fall neatly on the rules-versus-standards spectrum, with usury laws being a classic bright-line rule (e.g., no loans above 36% annual percentage rate ("APR")), unconscionability being a classic fuzzy standard (e.g., "shocks the conscience"), and ability-to-repay requirements, which are often accompanied by safe harbors, occupying a middle ground with some features of both rules and standards.

This Article explores the trade-offs among these three regulatory approaches. At first glance, the trade-offs would appear to track the well-trodden path of the rules-versus-standards debate. Bright-line usury rules have the benefits of certainty, clarity, and administrability, while unconscionability standards benefit from flexibility and discretion.[22] Ability-to-repay is narrowly a standard—there is some subjectivity to the analysis—but statutory ability-to-repay requirements are often

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19 *See* Faust, *supra* note 18, at 763 (describing state regulation of consumer finance transactions).

20 Military Lending Act, Pub. L. No. 109-364, § 670, 120 Stat. 2083, 2266–69 (2006) (codified at 10 U.S.C. § 987).

21 *See, e.g.*, Assemb. B. 539, 2019 Gen. Assemb., Reg. Sess. (Cal. 2019) (codified at CAL. FIN. CODE §§ 22303, 22304.5) (cap of 36% over the Federal Funds Rate between $2,500 and $10,000); Proposition 111 (Colo. 2018) (codified at COLO. REV. STAT. § 5-3.1-105) (36% APR cap for payday loans); S.B. 1792, 101st Gen. Assemb., Reg. Sess. (Ill. 2020) (codified at 815 ILL. COMP. STAT. 123/15-5-5 (2021)) (36% APR cap on all nonbank loans, calculated with military APR); S.B. 2103, 66th Leg. Assemb., Reg. Sess. (N.D. 2020) (codified at N.D. CENT. CODE § 13-04.1-09.3) (36% APR cap on all nonbank loans); H.B. 132, 2022 Leg., Reg. Sess. (N.M. 2022) (codified at N.M. STAT. ANN. § 58-7-7) (36% APR cap on installment loans); Ohio Payday Lender Int. Rate Cap, Referendum 5 (2008) (28% rate cap on payday loans, but frequently evaded); H.B. 123, 132nd Gen. Assemb., Reg. Sess. (Ohio 2018) (codified at OHIO REV. CODE ANN. § 1321.40) (28% APR cap on payday loans, but with other fees permitted); S.B. 421/H.B. 789, 2020 Gen. Assemb., Reg. Sess. (Va. 2020) (codified at VA. CODE ANN. § 6.2-1520(a)) (36% APR cap for installment loans); VA. CODE ANN. § 6.2-1817 (36% APR cap for payday loans); VA. CODE ANN. §§ 6.2-2216, 6.2-2216.4 (36% APR cap for vehicle title loans and limiting total fees and charges on vehicle title loans to 50% or 60% of loan amount, depending on loan size).

22 *See infra* Section IV.A.

accompanied by bright-line prohibitions on certain loan features other than interest rates and by safe harbors for loans with certain other features.[23] Ability-to-repay thus offers a standards-plus-rules combination that offers ex ante certainty to risk-averse parties through rule-based safe harbors.[24] At the same time, it allows risk-preferring parties to venture beyond the safe harbors, even as bright-line prohibitions on loan features protect against certain types of definitively undesirable behavior.[25]

Yet the choice here is not simply between a rule or a standard. Instead, the scope and nature of the inquiry are fundamentally different for usury laws, unconscionability, and ability-to-repay. Usury laws look to the terms of the loan, irrespective of the borrower's situation, the availability of market alternatives, or the broader interactions between the borrower and the lender.[26] In contrast, unconscionability looks at the totality of the transaction.[27] Thus, a lender's market power, its communications with a borrower, or the borrower's financial situation are irrelevant for usury but potentially quite important for unconscionability.

Ability-to-repay involves an intermediate inquiry that looks at the borrower's financial condition and the terms of the loan but not at the borrower's broader situation, the bargaining power between lender and borrower, or the course of dealing between the parties.[28] The lender's market power and communications with the borrower are not relevant for ability-to-repay, but the borrower's financial situation is.

This narrower scope makes ability-to-repay an easier question to evaluate, both ex ante and ex post, than unconscionability because it eliminates the need to resolve factual questions about market power or communications. Instead, there is only the more limited factual question of whether the lender undertook the required ability-to-repay evaluation and heeded it. Relative to unconscionability, ability-to-repay's intermediary inquiry makes it more administrable for courts and businesses' compliance personnel while still addressing the true policy concern animating consumer credit cost regulation—that consumers will find themselves caught in unduly burdensome obligations.

Most importantly, the choice between a rule and a standard is not merely a question of trade-offs between efficiency, predictability, and flexibility, such as the rules-versus-standards literature has emphasized. Instead, this Article argues that, in the economic and procedural context

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23 *See infra* Section IV.B.

24 *See infra* Section IV.C.

25 *See infra* Section IV.C.

26 *See, e.g.*, sources cited *supra* note 21 (providing examples of state usury laws).

27 *See infra* Section II.A.

28 *See infra* Section III.A.

of consumer finance litigation, which is usually regulatory enforcement, *the choice between a rule and a standard is often outcome determinative*. To that end, the theoretical tradeoffs among efficiency, predictability, and flexibility are of secondary concern. Rather, concerns regarding the exercise of regulators' discretion become paramount.

Consumer finance disputes involve relatively small amounts in controversy.[29] As a result, consumer finance regulations are generally enforced through governmental action rather than through private litigation.[30] Because regulators are able to credibly threaten to impose substantial penalties and reputational costs on businesses, defendants in regulatory enforcement actions are incentivized to settle even when they might have meritorious disputes. This dynamic makes it important to ensure that there are adequate checks on the exercise of regulatory discretion.

A rules-based system constrains regulatory discretion, but it is too often gameable by well-counseled businesses, resulting in underenforcement.[31] Conversely, a standards-based system may give regulators too much unchecked discretion, raising the possibility of overzealous enforcement that will chill lawful and socially beneficial behavior.[32]

It is possible, however, to combine the strengths of a rule with those of a standard by coupling an ability-to-repay requirement with regulatory safe harbors.[33] Unlike usury laws, ability-to-repay is capable of considering a broader variety of factors than merely price term, yet when it is coupled by safe harbors, ability-to-repay can produce greater ex ante certainty for businesses than unconscionability. The bright-line safe harbors provide shelter against regulatory overreach while ensuring that regulators still have the flexibility to bring cases when appropriate against lenders that are more aggressive and venture outside of the safe harbors.

Thus, in place of the New Usury's disjointed doctrinal grab bag approach, this Article suggests a more deliberate, considered tack,

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29 Richard Cordray, *Prepared Remarks of CFPB Director Richard Cordray at the Arbitration Field Hearing*, CONSUMER FIN. PROT. BUREAU (Oct. 7, 2015), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-richard-cordray-at-the-arbitration-field-hearing-20151007/ [https://perma.cc/5Q7K-J5K2] ("Many violations of consumer financial law involve relatively small amounts of money for the individual victim.").

30 Jean Braucher, *Form and Substance in Consumer Financial Protection*, 7 BROOK. J. CORP. FIN. & COM. L. 107, 117 n.52 (2012) (citing William C. Whitford, *Structuring Consumer Protection Legislation to Maximize Effectiveness*, 1981 WIS. L. REV. 1018, 1022 (1981)) (discussing the "mostly symbolic effect of vague, admonitory legislation that depends on private rights of actions for enforcement").

31 *See infra* Part IV.

32 *See infra* Part IV.

33 *See infra* Part IV.

namely the adoption of a general federal ability-to-repay requirement coupled with product-specific regulatory safe harbors. An ability-to-repay requirement married with safe harbors would provide the optimal approach for consumer finance price regulation and should be the regulatory model going forward.

This Article contributes to the consumer finance regulation literature in three ways. First, it identifies a previously unremarked shift in regulatory approaches to consumer credit price regulation, namely the shift from usury rules to the New Usury. Second, this Article provides an analysis of the tradeoffs among the three approaches to price regulation that considers the interaction of the rules-standards debate with the realities of regulatory enforcement.[34] Third, it presents a coherent and comprehensive doctrinal vision for consumer credit pricing regulation through a general federal ability-to-repay requirement with product-specific regulatory safe harbors.

This Article proceeds as follows. Part I explains the "Old Usury"—traditional usury laws and the alignment of lender and borrower interests—and its unraveling through deregulation and changes in market structure. Part II turns to unconscionability, a venerable old contract law doctrine that has been reinvigorated by recent legal decisions holding that a high but non-usurious price term alone can render a contract unconscionable. Part III addresses ability-to-repay requirements, showing how they have developed from a law meant to address solely a specific type of predatory mortgage lending into a broader phenomenon. Part IV compares the approaches and argues that in the contemporary context of consumer credit, where excessive price terms are policed primarily by regulators rather than by private parties, an ability-to-repay approach is the preferable one. Accordingly, the Article concludes with a proposal for a national ability-to-repay standard.

I. The Old Usury: Usury Laws and the Lender-Borrower Partnership

A. A Brief History of Usury Laws

Usury prohibitions are the oldest form of commercial regulation, dating back at least to the Code of Hammurabi (circa 1750 B.C.E.),[35] and prohibitions against usury appear in virtually every religious

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34 To be sure, there is another approach to price regulation, namely not regulating prices at all. This Article takes the decision to engage in price regulation as a given as it is a long-established feature of consumer credit markets.

35 James M. Ackerman, *Interest Rates and Law: A History of Usury*, 1981 Ariz. St. L.J. 61, 66–67; *see also* Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 Pepp. L. Rev. 151, 151 (1988) ("Usury is society's oldest continuous form of commercial regulation.").

tradition.[36] The roots of contemporary American usury laws stem from the medieval Catholic prohibition on usury, but modern Anglo-American usury laws are fundamentally different from the historical religious usury laws.[37]

Usury was historically synonymous with charging interest, and usury laws prohibited lending at *any* rate of interest, at least to coreligionists.[38] The Catholic perspective was that usury was sinful.[39] Indeed, usury was once seen as so deplorable that Dante Alighieri relegated usurers to the seventh and worst circle of hell in the *Inferno*, along with murderers, suicides, blasphemers, and Sodomites.[40] Four centuries later, William Noy, the attorney general for James I of England, following a long Roman and Scholastic tradition, declared that "[u]surers are well ranked with murderers" because usury consumes the life of the borrower.[41]

Yet by the time of Noy's statement, English usury laws had already fundamentally departed from historical norms of absolute prohibitions.[42] In 1545, during the Great Debasement (of currency, not morals!), the elderly Henry VIII, freed from papal authority, legalized lending on interest of no more than 10%.[43] The inflationary pressure from the debasement of the currency necessitated legalizing interest to ensure

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36 *See, e.g.*, *Exodus* 22:25 ("ye shall not oppress him with usury"); *Leviticus* 25:36–37 ("Thou shalt take no usury of him"); *Deuteronomy* 23:19–21 ("Thou shalt not give to usury to thy brother"); *Ezekiel* 18:17; *Psalm* 15:5 ("He that giveth not his money unto usury, nor taketh reward against the innocent"); *Matthew* 25:27; *Luke* 19:22–23; *Al-Baqarah* 2:275–80; *Al-'Imran* 3:130; *Al-Nisa* 4:161; *Ar-Rum* 30:39. Other usury prescriptions are to be found in Vedic and Buddhist texts. *See generally*, R.S. Sharma, *Usury in Early Mediaeval India (A.D. 400–1200)*, 8 Compar. Stud. in Soc'y & Hist. 56 (1965) (describing early attitudes in India toward usury).

37 *See* Ackerman, *supra* note 35, at 62–63, 80 (describing the history of usury laws).

38 *Id.* at 82.

39 *See* Arthur Vermeersch, *Usury*, *in* Cath. Encyc. (1912), https://www.newadvent.org/cathen/15235c.htm [https://perma.cc/GA4N-8JKF].

40 Dante Alighieri, Divine Comedy - Inferno Canto XI, XVII (Josef Nygrin, ed., Henry Wadsworth Longfellow, trans., 2008).

41 Calvin Elliott, Usury: A Scriptural, Ethical and Economic View 263–64 (1902); *see also* Marcus Tullius Cicero, De Officiis Book II:89 (Walter Miller trans., Harvard University Press 1990) (relating a story in which Cato compared usury to murder: "'How about money-lending?' Cato replied: 'How about murder?'"); Norman Jones, *Usury*, EH.net, https://eh.net/encyclopedia/usury/ [https://perma.cc/ERE7-JAGL] ("St. Jerome declared usury to be the same as murder, echoing Cato and Seneca, since it consumed the life of the borrower.").

42 To be sure, although lending at interest was absolutely prohibited historically, what constituted "lending" was often a matter of some dispute and created ample opportunities for evasion of usury prohibitions. *See* Raymond de Roover, The Rise and Decline of the Medici Bank 10–14 (1966) ("In fact, there were innumerable ways of circumventing the usury prohibition . . . .").

43 37 Hen. 8 c. 9 (1545). A 1540 Hapsburg statute permitted interest on commercial loans of up to 12% in the Austrian Netherlands. *See* Recueil des Ordonnances des Pays-Bas 232–38 (J. Lameere & H. Simont, eds., 1907); *see also* John H. Munro, *The Coinages and Monetary Policies of Henry VIII (r. 1509–1547): Contrasts between Defensive and Aggressive Debasements* 7 (Univ. of Toronto Dep't of Econ., Working Paper No. 417, 2010), https://core.ac.uk/

credit availability.[44] Henry VIII's successors repealed the statute,[45] but it was reenacted by Elizabeth I,[46] with subsequent amendments merely changing the legal maximum rate.

Since Elizabeth I, Anglo-American usury laws have been a matter of price rather than principle. This is the situation in the United States today, where interest and fees are allowed, but are sometimes capped by statute at a specified percentage rate or a total dollar amount.[47]

B. Functions of Usury Laws

Usury laws aim to protect both borrowers and society from the effects of overindebtedness.[48] Risk is the backbone of capitalism, and all credit involves risk, but excessive risk, particularly in the case of individual borrowers, is something society discourages through usury laws.

If a borrower cannot repay a loan or has to reduce consumption to repay the loan, the borrower may incur serious hardship. The borrower protection function of usury laws is unabashedly paternalistic, but usury laws are not mere paternalism. Usury laws also protect society from the negative externalities of overindebtedness. A borrower may have dependents. The more assets the borrower is forced to divert to repaying a loan, the fewer are available for those dependents, who could even end up becoming public charges.[49] Moreover, an overindebted borrower may lose the incentive to engage in productive activities because the fruit of the borrower's labor—over and above whatever minimum level is protected by state law property exemptions and garnishment limitations—will go to his creditors. Overindebtedness can thus deprive society of productive workers.

Although usury laws are first and foremost borrower protections, they also have an element of lender protection in them in that higher-cost loans are, all else being equal, riskier. This is not only a matter of riskier and more credit-constrained borrowers being willing to take on higher-cost credit, but also reflects an endogeneity of risk—the higher the cost of credit, the harder it will be for any borrower to repay. Usury laws accordingly also protect lenders from incurring excessive risk.

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display/9307415?utm_source=pdf&utm_medium=banner&utm_campaign=pdf-decoration-v1 [https://perma.cc/3P44-DJ9D] (describing the historical context of the Great Debasement).

44 *See* Munro, *supra* note 43, at 10 (describing the effect of the Great Debasement, including reduced purchasing power).

45 5 & 6 Edw. 6 c. 20 (1551–1552).

46 13 Eliz. c. 8 (1571).

47 *See infra* Section I.D.

48 Ackerman, *supra* note 35, at 110.

49 *See* Eric A. Posner, *Contract Law in the Welfare State: A Defense of Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEG. STUD. 283, 292 (1995) (describing credit as a threat "to the state's ability to enforce the minimum welfare level").

Society has an interest in protecting lenders—or at least bank lenders—from incurring excessive risk. If lenders fail, then there can be a contraction of credit and thus of economic activity. If borrowers at time 1 fail to repay their lenders, it might be difficult for other borrowers to get credit at time 2. At the very least, excessive risk-taking will lead to a more volatile economy, which is harder for individuals with fewer resources to self-insure against. When lenders are depositories, the concern is greater because the failure of a depository can have a domino effect on depositors.

Usury laws protect against overindebtedness in two ways, one of which polices the procedure of bargaining, and the other of which polices the level of risk allowed in society because of concern regarding spillover effects. First, usury laws protect borrowers from the results of a grossly unequal bargaining process.[50] Usury laws create "an irrebuttable presumption that the conditions necessary for efficient Coasean bargaining could not have existed, if the interest rate in a contract is above the specified usury level."[51] Usury laws treat the high cost of credit as a proxy for an extreme imbalance of power between lender and borrower such that the bargain they struck cannot be described as falling within the universe of enforceable contracts. Instead, it indicates the existence of some flaw in the bargaining process.[52] Such an extreme imbalance of power between lender and borrower could stem from lack of borrower understanding about costs.[53] Alternatively, it could stem from lack of borrower choice, such as due to monopoly, high borrower search costs, the urgency of borrower's credit needs that preclude searching, or borrower unawareness of alternative credit options.[54]

Second, usury laws aim to protect borrowers and society from undue risk. The higher the cost of a loan, the more risk there is that a borrower becomes saddled with obligations that are so burdensome that if enforced they would not only harm the borrower's welfare, but would also harm his or her dependents, potentially rendering them public charges.[55] This same policy concern also animates restrictions on wage garnishment[56] and property exemption statutes.[57] Indeed, this is why business-to-business loans are rarely subject to usury laws:

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50 Levitin, *supra* note 1, at 347–48.

51 *Id.*

52 *Id.* at 348.

53 *Id.*

54 *Id.*

55 *See id.* (describing the spillover effects of usurious lending).

56 *See, e.g.*, 15 U.S.C. § 1673 (federal wage garnishment restriction).

57 *See* Richard M. Hynes, Anup Malani & Eric A. Posner, *The Political Economy of Property Exemption Laws*, 47 J.L. & ECON. 19, 40 (2004) ("Historical evidence suggests that exemptions were initially popular as a way to protect existing debtors against creditors . . . .").

although there are externalities from a business failure, they are not seen as severe as with an individual debtor.[58]

Modern scholars often view usury laws with skepticism. The usury laws are seen variously as fusty, hoary vestiges of past unenlightened epochs, unwarranted paternalistic interventions in freedom of contract that harmfully restrict credit to borrowers, or exercises in futility that the market will simply structure around.[59] Usury laws are generally bright-line prohibitions on lending at above a specified, fixed rate of interest or, in some more modern versions, above a specified, fixed APR, as that term is defined by the Truth in Lending Act,[60] which is a measure that accounts for both interest and certain fees and charges.[61]

This sort of regulation smacks of paternalism against which some scholars bridle: Are not individuals better judges than the legislature of how much risk they can handle, especially because they internalize the consequences of failure in the first instance? Moreover, usury's one-size-fits-all approach is obviously poorly tailored to the differences among borrowers, some of whom may have compensating circumstances, such as wealth, that enable them to better handle risk than others. And usury laws inherently risk limiting credit availability, particularly to riskier borrowers, which can have a compounding effect because credit helps build wealth and credit history, which in turn facilitates obtaining future credit and on better terms.[62] This effect can play out intergenerationally.[63] Thus, usury laws may compound the difference between the haves

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58 Whether this is a reasonable policy position is another matter given that most small business lending is underwritten based on the small business owner's personal credit and involves a personal guaranty of the business's debts by the owner. *See, e.g.*, Dock Treece, *Personal Guaranties and Business Loans*, Bus. Daily News (Feb. 21, 2023), https://www.businessnewsdaily.com/16467-personal-guarantee.html [https://perma.cc/7QSJ-G9VC].

59 *See, e.g.*, Robert Mayer, *When and Why Usury Should Be Prohibited*, 116 J. Bus. Ethics 513, 513 (2013) ("Usury is a relic . . . attacked for centuries by advocates of *laissez-faire* . . . ."); Rudolph C. Blitz & Millard F. Long, *The Economics of Usury Regulation*, 73 J. Pol. Econ. 608, 613 (1965) ("While the oft-stated purpose of usury legislation is to help that class of debtors which includes the landless peasants, poor urbanites, and very small businessmen, maximum rates are likely to affect them adversely by excluding them from the market."); Theodore Baron, *Usury as a Defense to Corporate Bonds Sold Below Par*, 25 Wash. U. L.Q. 592, 603 (1940) (citing scholarship and examples of states abolishing usury laws).

60 Pub. L. No. 90-321, tit. I, 82 Stat. 146, 146–59 (1968).

61 *See* sources cited *supra* note 21 (providing examples of state usury laws). The APR calculation varies for open-end and closed-end credit, with fees not included in the open-end credit calculation. 12 C.F.R. §§ 1026.14(b), 1026.22(a)(1).

62 Blitz & Long, *supra* note 59, at 613. *See generally* Adam Gordon, Note, *The Creation of Home Ownership: How New Deal Changes in Banking Regulation Simultaneously Made Homeownership Accessible to Whites and Out of Reach for Blacks*, 115 Yale L.J. 186 (2005) (describing the inequitable effects of federal laws providing mortgage insurance in transforming middle-class household wealth).

63 *See* Gordon, *supra* note 62, at 219 n.166 (describing the effects of intergenerational wealth from homeownership).

and have-nots in society by denying the have-nots the opportunity to establish credit and build wealth. Simply put, usury laws trade freedom of contract for those who believe themselves the most capable of bearing risk for protection for those least capable of bearing risk. This is a policy choice about which there is considerable disagreement.

C. Erosion of Usury Laws in the United States

Historically, state usury laws formed the bedrock of consumer credit regulation in the United States, although they began to be supplemented by federal law with the 1968 Consumer Credit Protection Act.[64] Today, usury laws in the United States are a combination of both state and federal law, intersecting in a moth-eaten patchwork.[65] Every state has some type of usury law, but there is tremendous variation among them both in terms of what types of lenders, borrowers, and products are covered, and in terms of the level of the prohibited charge.[66]

State usury laws governed virtually all consumer transactions—and sometimes business transactions—from colonial times until 1978,[67] when usury regulation was fundamentally transformed by the Supreme Court's decision in *Marquette National Bank of Minneapolis v. First of Omaha Service Corporation*.[68] *Marquette* held that the 1864 National Bank Act[69] entitled national banks to export the interest rate of their "home" state to any state in which they made loans.[70] Thus, in *Marquette* the Court held that a Nebraska-based national bank was subject to the Nebraska usury cap even when it made loans to Minnesota residents.[71]

Marquette created a federal choice-of-law rule regarding which state's usury law would apply to a national bank doing out-of-state business. Although *Marquette* is often referred to as a "preemption" decision,[72] *Marquette* did not void state usury laws so much as determine which one would apply to a national bank. In so doing, *Marquette*

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64 Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968). There were some limited earlier federal interventions in consumer credit markets. *See* Adam J. Levitin, *The Consumer Financial Protection Bureau: An Introduction*, 32 REV. BANKING & FIN. L. 321, 323–25 (2013).

65 *See* Ackerman, *supra* note 35, at 94.

66 *See* sources cited *supra* note 21 (providing examples of state usury laws).

67 *See* Ackerman, *supra* note 35, at 62.

68 439 U.S. 299 (1978).

69 National Bank Act of 1864, ch. 106, § 30, 13 Stat. 99, 108 (codified as amended at 12 U.S.C. § 85).

70 439 U.S. at 301. Technically, banks can export the greater of their home state's maximum allowed rate or 1% of the applicable Federal Reserve ninety-day commercial paper rate. 12 U.S.C. § 85.

71 439 U.S. at 313.

72 *E.g.*, Robert C. Eager & C.F. Muckenfuss, III, *Federal Preemption and the Challenge to Maintain Balance in the Dual Banking System*, 8 N.C. BANKING INST. 21, 36 (2004).

set off a deregulatory race-to-the-bottom that enabled banks—but not other entities—to largely avoid usury laws altogether.

Marquette affected only federally chartered "national" banks, but in the wake of *Marquette*, state "parity" laws were passed to ensure competitive equality for state-chartered banks.[73] In 1980, Congress also passed a federal parity statute that gave *Marquette* interest rate exportation rights to all state-chartered banks unless a state chose to opt out of the provision.[74]

The federal parity law does not permit state-chartered insured banks to charge out-of-state rates in their home state.[75] To wit, if Illinois had an 8% usury limit, an Illinois-chartered bank could charge 8% in Illinois or in Michigan, even if Michigan had a 6% usury rate. But a federally chartered national bank based in Indiana, which has a 12% usury limit, could charge 12% in either Illinois or Michigan, as well as in Indiana. Thus, the Illinois-chartered bank would remain at a competitive disadvantage to the Indiana-based national bank, which could still charge higher rates.

States responded to protect their state-chartered institutions' competitive equality with state parity laws that permitted state-chartered banks to charge the maximum rate permitted to a national bank doing business in the state.[76] Accordingly, in the above example, the Illinois-chartered bank would be able to charge 12% in Illinois because an Indiana-based national bank could export the 12% Indiana rate into Illinois. When combined with the federal parity statute, this would mean that the Illinois-chartered bank could also export the Indiana 12% rate into Michigan, instead of being limited to exporting the 8% Illinois rate.

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73 NAT'L CONSUMER L. CTR., CONSUMER CREDIT REGULATION § 3.7.1 (3d ed. 2020) (describing state parity laws).

74 Depository Institutions Deregulation and Monetary Control Act of 1980, Pub. L. No. 96-221, § 521, 94 Stat. 132, 164–65 (codified at 12 U.S.C. § 1831d) (federal parity law). 12 U.S.C. § 1831u(f) separately addresses usury caps in state constitutions. The Depository Institutions Deregulation and Monetary Control Act ("DIDMCA") parity provision allows state-chartered, Federal Deposit Insurance Corporation ("FDIC") insured banks to charge the greater of the maximum rate allowed in the state in which the bank is located or 1% above the Federal Reserve ninety-day commercial paper discount rate for the applicable Federal Reserve District. 12 U.S.C. § 1831d. The opt-out provision, § 525 of DIDMCA, is not currently codified; it was previously codified at 12 U.S.C. § 1730g note. Puerto Rico and Iowa have opted out of the federal parity statute. Catherine M. Brennan & Nora R. Udell, *What's Old Is New Again: The Future of Bank Partnership Programs from Small Dollar Installment Loans to Mortgages to Everything*, 72 CONF. ON CONSUMER FIN. L.Q. REP. 425, 430 (2018).

75 *See* 12 U.S.C. § 1831d(a) (allowing state insured banks to charge at the rate allowed by the state in which the bank is located).

76 John J. Schroeder, *"Duel" Banking System? State Bank Parity Laws: An Examination of Regulatory Practice, Constitutional Issues, and Philosophical Questions*, 36 IND. L. REV. 197, 202–03 (2003); *see also* NAT'L CONSUMER L. CTR., CONSUMER CREDIT REGULATION § 3.7.1 n.672 (3d ed. 2020) (listing parity statutes).

Notice that in this scenario, neither the Illinois usury law nor the Michigan usury law changes. They remain at 8% and 6% respectively, but the Illinois-chartered bank would now be able to charge 12% not just in Illinois, but also in Michigan because that is what *Indiana* allows. Parity statutes result in a bizarre situation in which one state's law enables a bank chartered by a second state to ignore a third state's usury rate. Bank usury law has therefore become a matter of conforming to the least constraining state's law.

Credit cards are among the highest-rate credit products offered by banks, so not surprisingly, national banks with major credit card lending operations began to relocate to states with no or liberal usury laws to take advantage of the *Marquette* decision.[77] These banks relocated (or created credit-card issuing national bank subsidiaries) in states with lax usury laws—notably Delaware,[78] Nevada,[79] South Dakota,[80] and Utah[81]—which permitted either whatever rate the parties agreed to by contract or had extremely high rate ceilings.[82] Indeed, "[b]y 1988, eighteen states had removed interest rate ceilings."[83]

Subsequent regulatory action expanded the scope of *Marquette*. The Office of Comptroller of the Currency ("OCC") defined "interest" under the National Bank Act as encompassing late fees,[84] an interpretation upheld by the Supreme Court.[85] This meant that most loan fees charged by national banks were not subject to state regulation.[86] State parity laws meant that states lost the ability to regulate not just interest rates, but also other fees charged by state-chartered banks.[87] The OCC also issued a set of opinion letters that interpreted the "location" of a national bank for the purposes of the interest rate provision of the National Bank Act as being the state of whatever branch of the bank had the closest nexus to the loan, rather than being the state where the

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77 *See* Robin Stein, *The Ascendancy of the Credit Card Industry*, PBS (Nov. 23, 2004), http://www.pbs.org/wgbh/pages/frontline/shows/credit/more/rise.html [https://perma.cc/Q6R7-HT4V] (describing Citibank's relocation decisions based upon differing state usury laws).

78 DEL. CODE ANN. tit. 5, §§ 943, 953, 963, 965, 973 (2022).

79 NEV. REV. STAT. § 99.050 (2022).

80 S.D. CODIFIED LAWS § 54-3-1.1 (2022).

81 UTAH CODE ANN. § 15-1-1 (LexisNexis 2022).

82 *See* Stein, *supra* note 77 (describing legislation in South Dakota and Delaware that lifted usury rates or other restrictions).

83 Randall S. Kroszner & Philip E. Strahan, *Regulation and Deregulation of the US Banking Industry: Causes, Consequences, and Implications for the Future*, *in* ECONOMIC REGULATION AND ITS REFORM: WHAT HAVE WE LEARNED? 503 (Nancy L. Rose ed., 2014).

84 61 Fed. Reg. 4849-03 (Feb. 9, 1996) (codified as amended at 12 C.F.R. § 7.4001).

85 *See* Smiley v. Citibank (S.D.), N.A., 517 U.S. 735, 744–45 (1996).

86 *See* 12 C.F.R. § 7.4001; *see also* Schroeder, *supra* note 76, at 207 ("In thirty-five states, if the parity law provisions are met, the federal law preempts even state laws that specifically prohibit particular powers or products.").

87 *See* sources cited *supra* note 86.

national bank is located on its charter certificate.[88] Thus, according to the OCC's opinion letters, a national bank no longer has to even change the location of its charter to export any particular state's usury rate. Instead, it needs only open a branch in that state and designate that branch as the one processing the loan.

D. Usury Laws Today

The *Marquette* decision set off a series of developments that undermined state control over bank pricing of consumer credit. But *Marquette*'s fallout was limited to banks. Nonbanks were unaffected by *Marquette*. In the 1980s, these nonbank lenders consisted primarily of finance companies, pawn shops, and retailers (including auto dealers) offering their own credit.[89]

Even for banks, the main impact of *Marquette* was in the credit card market.[90] Standard bank consumer loan products—mortgages, auto loans, and student loans—have lower interest rates and fees than credit cards, such that usury caps would rarely be an issue except in periods of extremely high market interest rates. In contrast, credit card interest rates frequently exceed many states' general usury caps, even when market rates are low.

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88 *See* Off. of the Comptroller of the Currency, Interpretive Letter No. 686 (Sept. 11, 1995), reprinted in [1995–1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-001 ("[W]hat is relevant in choosing the appropriate interest rate is the nexus between the loan and the office in the state whose interest rates are being imposed—whether that office is the main office or a branch office . . . ."); Off. of the Comptroller of the Currency, Interpretive Letter No. 707 (Jan. 31, 1996), reprinted in [1995–1996 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-022 ("[A] national bank is located for purposes of [s]ection 85 in each of the states where it has a main office and/or branches. We have also concluded that where a loan is originated and booked and loan funds are disbursed at a branch of a bank located in a state other than that bank's main office state, an appropriate nexus exists between that loan and the interstate branch office to justify imposition of interest rates permitted by the law of the state where the branch is located."); Off. of the Comptroller of the Currency, Interpretive Letter No. 782 (May 21, 1997), reprinted in [1997 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-209; Off. of the Comptroller of the Currency, Interpretive Letter No. 822 (Feb. 17, 1998), reprinted in [1997–1998 Transfer Binder] Fed. Banking L. Rep. (CCH) ¶ 81-265 ("[A]n interstate national bank may be 'located' for purposes of section 85 in both its home state and its host state or states."); Off. of the Comptroller of the Currency, Interpretive Letter No. 1171 (June 1, 2020).

89 *See* Arthur E. Wilmarth, Jr., *The Transformation of the U.S. Financial Services Industry, 1975–2000: Competition, Consolidation, and Increased Risks*, 2002 U. Ill. L. Rev. 215, 233–34 (providing that nonbank lenders such as finance companies had a large portion of the market up until the 1980s); Philip A. Klein, The Cyclical Timing Of Consumer Credit, 1920–67, at 4 (1971) (describing different types of nonbank lenders).

90 Lender Liability Law & Litigation § 10.03(3) (Matthew Bender ed., 2023) ("The *Marquette* decision applies to all types of consumer loans, but it had the greatest impact upon the credit card industry because credit card arrangements can be entered into entirely by mail with no need for the customer and lender to meet.").

The consumer credit product landscape changed in the mid-1990s, however, with the emergence of payday lending and auto title lending.[91] At the same time, the expansion of credit scoring and the development of automated underwriting technology started to facilitate a democratization of credit, meaning that institutional credit began to become available to more borrowers with weaker credit profiles.[92]

Usury laws have historically been a matter of state law; there has never been a general federal usury law.[93] There have, however, been federal usury laws for specific areas. Prior to 1980, there was a regulatory rate cap—generally 5%—on mortgages insured by the Federal Housing Administration ("FHA").[94] As interest rates rose in the 1970s, there was significant pressure to allow lending at higher rates; lenders would not lend at rates lower than their own cost of funds.[95] Thus, in 1983, following a period of extremely high market interest rates, the FHA's authority to restrict interest rates and eligibility criteria was repealed.[96]

Four specific federal usury laws are still extant. First, the National Bank Act's interest rate provision operates as a usury law. It permits national banks to charge the greater of the rate authorized by their home state or a 1% over the ninety-day commercial paper discount rate at the applicable Federal Reserve Bank for the bank's location.[97] Although this 1%+ provision rarely, if ever, applies, it is still in effect a federal usury law.[98]

Second, since 1980, the Federal Deposit Insurance Act[99] has had a parallel provision to the National Bank Act for Federal Deposit Insurance Corporation ("FDIC") insured state-chartered banks.[100] States are allowed to opt out of this provision,[101] but it otherwise operates like that of the National Bank Act, creating a federal usury limit for FDIC-insured state-chartered banks.

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91 *See, e.g.*, GARY RIVLIN, BROKE, USA: FROM PAWNSHOPS TO POVERTY, INC.—HOW THE WORKING POOR BECAME BIG BUSINESS 72–73 (2010) (describing rises in payday lending).

92 *See* ADAM J. LEVITIN & SUSAN M. WACHTER, THE GREAT AMERICAN HOUSING BUBBLE: WHAT WENT WRONG AND HOW WE CAN PROTECT OURSELVES IN THE FUTURE 85 (2020) (describing how these changes led to increases in homeownership).

93 *See supra* note 65 and accompanying text.

94 *See* LEVITIN & WACHTER, *supra* note 92, at 49, 79.

95 Cathy Lesser Mansfield, *The Road to Subprime "HEL" Was Paved with Good Congressional Intentions: Usury Deregulation and the Subprime Home Equity Market*, 51 S.C. L. REV. 473, 486 (2000).

96 *See id.* at 483–92.

97 12 U.S.C. § 85.

98 *See* Coreen S. Arnold & Ralph J. Rohner, *The "Most Favored Lender" Doctrine for Federally Insured Financial Institutions—What Are Its Boundaries?*, 31 CATH. UNIV. L. REV. 1, 7 (1981) (describing "little use" of this provision).

99 Federal Deposit Insurance Act of 1950, Pub. L. No. 81-797, 64 Stat. 873 (codified as amended at 12 U.S.C. §§ 1811–1835a).

100 12 U.S.C. § 1831d.

101 DIDMCA, Pub. L. No. 96-221, § 525, 94 Stat. 132, 167 (1980) (codified as amended at 12 U.S.C. § 1730g) (repealed 1989).

Third, a federal usury cap of 15% annually—with a variance permissible by regulation—has applied to federal credit unions since 1980.[102] Since 1987, the National Credit Union Administration ("NCUA") has permitted federal credit unions to charge an additional 3% in interest rates, for an 18% actual rate ceiling.[103] Furthermore, since 2010, the NCUA has allowed credit unions to offer payday alternative loans that meet other various requirements at 28% annual interest.[104]

Fourth, in 2006, Congress passed the Military Lending Act ("MLA"),[105] which prohibits most extensions of credit to active duty military members and their dependents if the annual percentage rate on the financing is over 36%.[106] The MLA does not apply to mortgage loans or to secured purchase money loans for cars or personal property.[107] The MLA covers approximately 4.7 million people or roughly 1.5% of the U.S. population.[108] Although the MLA only covers a limited part of the population, it is the most modern federal usury law.

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102 DIDMCA, Pub. L. No. 96-221, § 310, 94 Stat. 132, 149 (1980) (codified as amended at 12 U.S.C. § 1757(5)(A)(vi)(I)) (replacing original limitation of interest rates of no more than 1% per month, that is 12% annually without compounding, with a 15% rate); 12 C.F.R. § 701.21(c)(7)(i)–(ii) (2022).

103 *See* Nat'l Credit Union Admin., 23–FCU–02, Permissible Loan Interest Rate Ceiling Extended (2023); *Improving Credit Card Consumer Protection: Recent Industry and Regulatory Initiatives: Hearing Before the Subcomm. on Fin. Insts. and Consumer Credit of the H. Comm. on Fin. Servs.*, 110th Cong. 110–36 (2007) (statement of The Hon. JoAnn M. Johnson, Chairman, National Credit Union Administration); *see also* Nat'l Credit Union Admin., 11–FCU–04, Permissible Interest Rate Ceiling 1 (2011) (authorizing 18% cap for 2012); Nat'l Credit Union Admin., 21–FCU–04, Permissible Loan Interest Rate Ceiling Extended (2021) (extending 18% usury ceiling for federal credit unions until 2023). The 18% is interpreted by the NCUA as covering an effective rate rather than a stated rate. *See* Nat'l Credit Union Admin., 09–FCU–05, Payday Lending 1–2 (2009); Nat'l Credit Union Admin., Off. of Gen. Counsel, Opinion Letter 00–1217 (Jan. 2001) (explaining that FCUs cannot charge transaction fees if they cause effective rate to exceed interest rate limit). *But see* Nat'l Credit Union Admin., Off. of Gen. Counsel, Opinion Letter 91–0412, at 1 (Apr. 30, 1991) (stating NCUA's position that late payment charges do not impact the effective rate that the interest rate ceiling limits).

104 12 C.F.R. § 701.21(c)(7)(iii)–(iv) (authorizing federal credit union payday alternative loans with 28% interest rates).

105 Military Lending Act, Pub. L. No. 109-364, § 670, 120 Stat. 2266–69 (2006) (codified at 10 U.S.C. § 987).

106 10 U.S.C. § 987(b). The MLA's limit is in reference to an "Annual Percentage Rate," which is defined as the APR from the Truth in Lending Act ("TILA")—an annualization of the finance charge as a percentage of the loan amount in 10 U.S.C. § 987(i)(4), but it includes certain items in the finance charge numerator that are excluded from TILA's definition of "finance charge." *Id.*; *see also* 32 C.F.R. § 232.4(c) (2022) (including in the MAPR credit insurance premiums, debt cancellation or debt suspension fees, ancillary product fees for credit-related products, most application fees, and credit plan or arrangement fees).

107 10 U.S.C. § 987(i)(6).

108 U.S. Dep't. of Def., Off. of the Deputy Assistant Sec'y of Def. for Mil. Cmty. and Fam. Pol'y, 2020 Demographics: Profile of the Military Community vi (2020), https://download.militaryonesource.mil/12038/MOS/Reports/2020-demographics-report.pdf [https://perma.cc/

In addition to these four federal usury statutes of limited scope, various federal statutes also preempt state usury laws. To the extent that there is no federal usury law supplanting the preempted state usury laws, federal preemption operates like a usury law that permits whatever the contractual rate might be.[109] Besides the National Bank Act[110] and Federal Deposit Insurance Act,[111] the National Housing Act includes provisions that preempt state usury laws for both FHA-insured mortgages[112] and for all first-lien residential mortgages made by institutional lenders.[113]

Finally, federal law specifically prohibits the Consumer Financial Protection Bureau ("CFPB") from enacting a "usury limit."[114] The term "usury limit" is not defined in the statute. Although it seems beyond peradventure that a flat rate cap of "no lending above X% APR" is prohibited, exactly how far the prohibition reaches is unclear.[115]

SQ98-VPYR] (describing the MLA coverage of 2.1 million military personnel and 2.6 million military family members).

109 *See supra* notes 72–73 and accompanying text.

110 12 U.S.C. § 85.

111 12 U.S.C. § 1831d.

112 12 U.S.C. § 1735f-7. This provision was necessary to ensure a national market in FHA eligible mortgages. Gordon, *supra* note 62, at 188–89, 194–95, 224 tbl.1. The National Housing Act was not expressing congressional opposition to usury laws. Instead, it was concerned with uniformity of usury laws when the federal government was involved. Thus, Congress also provided that the Housing and Urban Development Secretary could set a maximum interest rate for FHA insurance-eligible loans. 12 U.S.C. § 1701l. In other words, the National Housing Act changed usury laws for a class of mortgages from state law to federal, with the usury limit set by regulation and the penalty for violation being ineligibility for FHA insurance, as opposed to a defense to enforcement of part or all of the loan.

113 *See* 12 U.S.C. § 1735f-7a. This provision, section 501 of the Depositary Institutions Deregulation and Monetary Control Act of 1980 ("DIDMCA"), preempts any state law, including state constitutional provisions, that limits mortgage interest, discount points, and finance or other charges. The DIDMCA preemption applies to any "federally related mortgage loan," a term that includes mortgages that are federally insured, made by a FDIC-insured institution, made by a federally regulated institution eligible for purchase by Fannie Mae and Freddie Mac (government-sponsored secondary-market entities), or made by an individual who regularly extends more than $1 million annually in residential real estate loans. 12 U.S.C. § 1735f-5(b). In other words, DIDMCA preemption covers virtually all mortgage loans not made by individuals who are small-time lenders. The DIDMCA provision permitted states to opt out of preemption in a limited time window. 12 U.S.C. § 1735f-7a(b)(2). Fifteen states opted out, so their usury laws are only preempted by DIDMCA in regard to FHA-insured mortgages, which are a relatively small part of the market. *See* Donna C. Vandenbrink, *Usury Ceilings and DIDMCA*, 9 Econ. Persp. 25, 28 tbl.3 (1985) (listing the fifteen states which opted out).

114 12 U.S.C. § 5517(o).

115 For example, does the prohibition cover only limitations on interest or also on fees? Does it only prohibit a fixed interest or fee cap, or does it also cover floating, indexed caps? Does it prohibit rules that establish bright-line safe harbors for loans under a certain rate (without creating liability for loans over that rate)? Does it prohibit additional regulatory burdens for loans over a certain rate? Would an *in duplum* rule that limits the fees and interest outstanding at any point to no more than twice principal be prohibited? *See* Michelle Kelly-Louw, *The Common-Law Versus*

Despite these federal forays, in most instances it is state usury laws—including through their incorporation in the National Bank Act and Federal Deposit Insurance Act—that are the major limitation on consumer credit pricing. The state laws almost never constrain banks, but they do constrain all manner of nonbank lenders—auto finance companies, payday lenders, vehicle title lenders, signature lenders, and pawn shops.[116]

The particulars of state usury laws vary considerably, however, with different rates allowed for different kinds of lenders and products. Rate caps are sometimes expressed as a fixed percentage rate, sometimes as a dollar amount relative to a maximum loan amount, and sometimes as a fixed percentage rate over an index rate. State law usury laws are also sometimes accompanied by other substantive term regulations, particularly for small-dollar loans, such as limiting loan amounts, regulating the maturity terms of loans, restricting refinancings, and prohibiting certain types of fees, or limiting fees to certain specified categories.[117] Remedies for usury law violations also vary considerably, ranging from a disallowance of usurious interest to a recovery of a multiple of the usurious interest to a voiding of the entire indebtedness to even criminal sanctions in some states.[118]

In all cases, however, the key feature of usury laws and the accompanying term limitations is that they are bright-line, rule-based prohibitions: above rate *X* is prohibited; at or below rate *X* is allowed. There is no subjectivity in this analysis once it is determined that the usury law applies and what it covers.[119]

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the Statutory In Duplum *Rule*, 14 JUTA'S BUS. L. 141, 142 (2006) (explaining the *in duplum* rule). What one might call a "usury" law is capable of being structured in numerous ways.

116 *See* Levitin, *supra* note 1, at 351–52. This Article does not address the use of rent-a-bank structures to evade state usury laws. For a detailed discussion, see generally *id.*

117 *See* ADAM J. LEVITIN, CONSUMER FINANCE: MARKETS AND REGULATION 611 (2d ed. 2022) (discussing state regulation of payday loans).

118 *See, e.g.*, COLO. REV. STAT. § 5-5-201 (creditor liable for up to three times the amount of usurious finance charge paid), COLO. REV. STAT. § 5-5-301 (criminal penalties), COLO. REV. STAT. § 18-15-104 (criminal penalties); DEL. CODE ANN. tit. 6, § 2304(b) (2023) (creditor liable for up to three times the amount of usurious interest paid); FLA. STAT. § 687.04 (creditor liable for up to two times the amount of usurious interest paid); FLA. STAT. § 687.146 (criminal liability); 815 ILL. COMP. STAT. 123/15-5-10 (2021) (voiding entire loan and disallowing collection of principal, interest, and fees); N.Y. GEN. OBLIG. LAW §§ 5-511, 5-513 (Consol. 2022) (borrower may recover up to twice the entire amount of the interest paid); N.Y. PENAL LAW § 190.45 (Consol. 2022) (criminal penalties for usury); OR. REV. STAT. § 82.010(4) (2021) (forfeiture of usurious interest).

119 At first glance, it would seem, then, that as bright-line rules usury laws provide clear ex ante certainty about which transactions are legal and which are not. The problem is that because usury laws are so clear, they create an incentive for businesses to come up with transactional workarounds. To the extent that usury laws can be circumvented with clever transactional structures, they provide but limited protection to consumers and push parties into inefficient workarounds. Accordingly, statutory usury provisions have long been backed by a strong, judicially created anti-evasion doctrine. *See, e.g.*, Mo., Kan. & Tex. Tr. Co. v. Krumseig, 172 U.S. 351, 356 (1899)

E. Erosion of the Lender-Borrower Partnership

At the same time that traditional usury laws began to unravel, consumer financial markets also started to change in ways that undermined the traditional borrower-lender partnership. Even without usury laws, lenders' self-interest in getting repaid can act as a meaningful check on unsustainable lending. Specifically, if the lender lends to borrowers who lack the capacity to repay, the lender will lose money. Self-interested lenders, therefore, will not lend to borrowers who lack repayment capacity. Thus, the lender's interest is actually aligned with the borrower's regarding repayment capacity.

The alignment of lender and borrower interests may no longer hold in all consumer credit markets for a number of reasons. First, if the making and management of a loan is divided from the economic

("[T]he question always is whether it was or was not a subterfuge to evade the laws against usury."); Sachs v. Ginsberg, 87 F.2d 28, 30 (D.C. Cir. 1936) ("It was the duty of the trial court to look beyond the form . . . and, if found to be a loan and usurious, to bring it within the terms of the statute, no matter how righteous the cloak of formality which was used to conceal its real character."); Barry v. Paranto, 106 N.W. 911, 912 (Minn. 1906) ("It is elementary that no device or scheme intended for the purpose of evading the laws against usury will prevent the courts from giving force to the statute and declaring contracts made in violation thereof null and void."); First Nat'l Bank of Ada v. Phares, 174 P. 519, 521 (Okla. 1918) ("In deciding whether any given transaction is usurious or not, the courts will disregard the form which it may take, and look only to the substance of the transaction in order to determine whether all the requisites of usury are present." (quoting 39 Cyclopedia of Law and Procedure 918 (William Mack ed., 1912))); Bank of Lumpkin v. Farmers' State Bank, 132 S.E. 221, 221 (Ga. 1926) ("The ingenuity of man has not devised a contrivance by which usury can be legalized . . . . [T]he name by which the transaction is denominated is altogether immaterial, if it appears that a loan of money was the foundation and basis of the agreement which is under consideration."); Fid. Sec. Corp. v. Brugman, 1 P.2d 131, 136 (Or. 1931) ("The courts do not permit any shift or subterfuge to evade the law against usury. The form into which parties place their transaction is unimportant. Disguises are brushed aside and the law peers behind the innocent appearing cloaks in quest for the truth."); Beacham v. Carr, 166 So. 456, 459 (Fla. 1936) ("[C]ourts have been compelled to look beyond the form of a transaction to its substance, and they have laid it down as an inflexible rule that the mere form is immaterial, but that it is the substance which must be considered."); Milana v. Credit Disc. Co., 163 P.2d 869, 871 (Cal. 1945) ("The courts have been alert to pierce the veil of any plan designed to evade the usury law and in doing so to disregard the form and consider the substance."); Austin v. Ala. Check Cashers Ass'n, 936 So. 2d 1014, 1031–32 (Ala. 2005) ("[I]f . . . [the transaction] is in substance a receiving or contracting for the receiving of usurious interest for a loan or forbearance of money the parties are subject to the statutory consequences, no matter what device they may have employed to conceal the true character of their dealings." (quoting Hamilton v. York, 987 F. Supp. 953, 955–56 (E.D. Ky. 1997))). Some states also have statutory anti-evasion provisions in their usury laws. *See, e.g.*, 815 Ill. Comp. Stat. 123/15-5-15 (West 2021); Ga. Code Ann. § 16-17-2(b)(4) (West 2020) ("if the entire circumstances of the transaction show that the purported agent holds, acquires, or maintains a predominant economic interest in the revenues generated by the loan" the "purported agent" is to be considered a "de facto agent"), *upheld by* BankWest, Inc. v. Baker, 411 F.3d 1289, 1293 (11th Cir. 2005), *vacated and appeal dismissed as moot*, 446 F.3d 1358 (11th Cir. 2006) (*per curiam*). The antievasion doctrine adds a highly fact-specific ex post standard-based analysis to usury's universal bright-line ex ante rule.

interest in the loan, such as through securitization, the interests of the party making or managing the loan may not align with the borrower's, even if the interests of the party with the economic interest still do.[120]

Second, there may be agency problems that interfere with the lender-borrower relationship.[121] Lenders are corporate entities that act through their employees, and those employees' incentives may not align with the lender's. If loan officers are compensated based on lending volume, they may be more interested in increasing lending volume—making larger loans to more consumers—than in ensuring that the loans that are made are sustainable, as the losses will be the lender's, not the loan officers'.

Third, if there are other financial product relationships between a borrower and a lender, the lender might be willing to take a loss on one product if it will be more than offset by revenue from another product.[122] A product like "free" checking may in fact be a loss leader for other products like overdraft credit or for the ability to readily cross-sell credit cards, car loans, mortgage loans, and annuities and other investment products to the consumer.

Fourth, for some financial products, default may be more profitable than performance for the lender.[123] Defaults can generate additional revenue opportunities—penalty interest, late fees, and for collateralized loans, property inspection and preservation fees.[124] If default becomes a profit center for a lender, it encourages the lender to make riskier, nonsustainable loans with an eye toward maximizing the number of defaults and thus default-related revenue.

And fifth, a borrower who pays interest and fees for a long enough period might still be a profitable borrower, even if the borrower ultimately defaults. This situation is known as "sweatbox" lending.[125] In

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120 Levitin, *supra* note 1, at 355; *see also* Adam J. Levitin & Tara Twomey, *Mortgage Servicing*, 28 YALE J. ON REG. 1, 69 (2011) (discussing how mortgage servicers' incentives diverge from those of mortgage-backed securities investors).

121 *See* Loan Originator Compensation Requirements Under the Truth in Lending Act (Regulation Z), 78 Fed. Reg. 11280 (Feb. 15, 2013) (noting how the mortgage industry "compensation was frequently structured to give loan originators strong incentives to steer consumers into more expensive loans").

122 *See* Adam J. Levitin, *The Financial Inclusion Trilemma*, 41 YALE J. ON REG. 109, 132–34 (2023).

123 Levitin & Twomey, *supra* note 120, at 50–51 (discussing how default can be a profit center for mortgage servicers).

124 *Id.*

125 The concept of "sweatbox" lending originated in a political economy theory posited by Professor Ronald Mann that attempted to explain the support of credit card issuers for a bankruptcy law reform that made it harder to file for bankruptcy. Ronald J. Mann, *Bankruptcy Reform and the "Sweat Box" of Credit Card Debt*, 2007 U. ILL. L. REV. 375, 384–92. Mann's insight was that delaying a bankruptcy filing could result in a borrower making a few more payments to a lender: the timing of the bankruptcy matters. *Id.* This Article uses "sweatbox" lending to describe

"sweatbox" lending, the lender's profitability does not depend on whether loans are paid to maturity. If a loan has sufficiently high fees and interest rates, the lender will recoup a sum equal to its principal and a profit, even if the borrower defaults before the loan is paid off.[126] Sweatbox lending aptly describes some credit card issuers' business models, but it also can apply to other types of credit with relatively high fees or interest rates.[127]

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a broader phenomenon in which a lender's profitability does not depend upon loans being paid to maturity.

126 To illustrate, suppose a lender makes a $2,000 loan with a sixty-month term at 90% annual interest, compounded monthly with a constant maturity amortization. Monthly payments on the loan would be $151.98. By the end of month fourteen, the consumer would have repaid a total of $2,217.72, or $217.72 more than the principal hazarded by the lender. If the consumer pays through twenty months—a third of the way to maturity—the consumer would have paid $3,039.60 on the $2,000 originally borrowed and would still have a balance of $1,914.13 because almost all of the payments would have been designated as interest under a constant maturity amortization.

Although the distinction between principal and interest payments matters for determining a loan's balance and its amortization, that is primarily an accounting matter about the future of the loan. From an economic perspective, a lender does not care whether a payment is designated as interest or principal—it is just money and is all fungible. From this perspective, even though most of the loan principal remains outstanding, the lender has received payments that exceed the original principal by month fourteen and are more than a time and a half the principal by month twenty. Thus, if the consumer were to default at month twenty, the lender would surely have already recovered enough to cover its lost principal, its cost of funds and other expenses, and also make a handsome profit. The fact that most of the principal remains outstanding due to the amortization schedule is just gravy for the lender, as it increases the size and hence value of the lender's claim if the consumer defaults. Even if the borrower only makes it a third of the way through the loan prior to default, the loan would still be profitable because of the high interest rate. *See* de la Torre v. Cashcall, Inc., No. 19-civ-01235, slip op. at 25–26, 30 (Cal. Super. Ct. Aug. 22, 2023).

The lender will, of course, make more money the longer any individual borrower performs prior to default. But the aggregate picture might be different. Underwriting borrowers based on ability to pay off the loan in full will result in fewer eligible borrowers than underwriting the borrowers to make only, say, the first third of payments. Lower underwriting standards will increase potential lending volume. Thus, in aggregate, the lender might prefer to have more borrowers who default sooner to fewer borrowers who default later.

To illustrate, if a borrower pays off the above loan in full, the lender will receive payments over sixty months totaling $9,119.80 on a loan of $2,000 principal. But that would require stricter underwriting standards than for ensuring that a borrower can make it just to month twenty. While the lender would need three borrowers who default at month twenty to generate the same revenue as one who pays in full, there is no trade-off required: if the lender lowers its underwriting standards, it can make both the loan to the consumer who will pay in full *and* the loans to the consumers who will default at month twenty. Although dollar profit per loan is reduced with lower underwriting standards, the lender's total revenue stream is increased, and it is the total revenue stream that actually matters. Lowering underwriting standards expands the lender's volume and total revenue.

The key to making the sweatbox work is having large upfront payments that will quickly offset the amount of principal hazarded. Higher interest rates, high up-front fees, and unfavorable amortization methods all increase the effectiveness of sweatbox lending. Thus, sweatbox lending is a model that appears primarily in extremely high-cost lending.

127 *See, e.g.*, Mann, *supra* note 3, at 391 (describing the application of sweatbox lending in the credit card context); Levitin & Twomey, *supra* note 120, at 50–51 (discussing the application of

All in all, then, there is good reason to question the assumption that lenders—even lenders that hold loans on their own balance sheets—are consistently incentivized to lend prudently based on borrowers' repayment capacity. This suggests the need for regulatory safety belts.

F. The Emergence of the New Usury

Traditional usury laws are one such regulatory safety belt. The erosion of traditional usury laws created a regulatory vacuum. A pair of doctrinal responses have arisen to fill the gap. These are a revived unconscionability doctrine and ability-to-repay requirements. This Article terms these doctrines collectively the "New Usury," but they are not a cohesive or even entirely coherent approach.[128] Instead, the New Usury is a set of jury-rigged doctrinal responses to the erosion of usury laws.

The New Usury has emerged from numerous sources—court decisions in private litigation, regulatory enforcement actions, statutes, and regulations—and its reach has also varied considerably by state and by product, even as it has continued to expand over the past quarter century. The New Usury did not arise as the result of a deliberate, considered consumer credit policy. Instead, it developed in an organic and sometimes haphazard manner, responding to particularly outrageous cases or product-specific crises. Despite emerging from various sources for different products in different jurisdictions, there has been a large degree of doctrinal convergence in the New Usury.

By identifying the New Usury as a collection of doctrinal responses to the attrition of traditional usury laws, this Article aims to provide focus on the tradeoffs among the doctrinal tools that are being used to address the problem of unmanageable consumer credit obligations. The following Parts of the Article review each of the New Usury's main doctrinal moves—unconscionability and ability-to-repay—in turn.

II. The New Usury: Unconscionability Revived

A. Elements of Unconscionability

Whereas usury laws are a classic example of an objective, bright-line rule, unconscionability doctrine is a prime example of a fuzzy, subjective standard, based on what shocks the conscience of a particular court. Courts vary in their precise formulation of unconscionability, but most require a finding of both "procedural" unconscionability and "substantive" unconscionability, frequently with a sliding scale such

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sweatbox lending in the mortgage context).

128 *See* Ackerman, *supra* note 35, at 94 (discussing the lack of cohesion in usury laws); Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. Davis L. Rev. 965, 968 (2019) (discussing the lack of cohesion in unconscionability doctrine).

that a greater quantum of one type of unconscionability can substitute for a lesser quantum of the other.[129]

Procedural unconscionability, as one court has explained, refers to an analysis of whether there was

> a real and voluntary meeting of the minds. The relevant factors include the parties' age, education, intelligence, business acumen and experience, their relative bargaining power, who drafted the contract, whether the terms were explained to the weaker party, whether alterations in the printed terms would have been permitted by the drafting party, and whether there were alternative providers of the subject matter of the contract.[130]

The procedural unconscionability inquiry reflects a similar policy concern to that of usury statutes regarding whether there was such an imbalance of power between the parties such that the bargaining process could not be expected to protect the weaker party's interest.[131] Yet whereas usury laws take a price term that exceeds a specified level as an irrefutable proxy for an unacceptable imbalance of bargaining power, unconscionability analysis instead looks to a totality of the circumstances.[132]

Substantive unconscionability, in contrast, looks at whether the actual terms of the transaction are outside the reasonable expectations or unduly oppressive of the party with weaker bargaining power.[133] In other words, substantive unconscionability looks at whether the party with superior bargaining power has abused its market position and taken unreasonable advantage of its counterparty.

To be sure, counterparties in all transactions are always trying to take advantage of each other or at least drive hard bargains.[134] But the

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129 *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 690 (Cal. 2000) (describing the "prevailing view" that "[procedural" and "substantive unconscionability] must both be present" (quoting Stirlen v. Supercuts, Inc., 51 Cal. App. 4th 1519, 1533 (Cal. Ct. App. 1997))).

130 Drogorub v. Payday Loan Store of WI, Inc., No. 2012AP151, 2012 Wis. App. LEXIS 1002, at *7 (Wis. Ct. App. Dec. 18, 2012).

131 *See supra* notes 52–53 and accompanying text.

132 *Compare* discussion *supra* notes 52–53 (usury), *with Drogorub*, 2012 Wisc. App. LEXIS 1002, at *7 (unconscionability).

133 *See, e.g.*, Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 689 (Cal. 2000) ("Generally speaking, there are two judicially imposed limitations on the enforcement of adhesion contracts or provisions thereof. The first is that such a contract or provision which does not fall within the reasonable expectations of the weaker or adhering party will not be enforced against him . . . . The second—a principle of equity applicable to all contracts generally—is that a contract or provision, even if consistent with the reasonable expectations of the parties, will be denied enforcement if, considered in its context, it is unduly oppressive or unconscionable." (quoting Graham v. Scissor-Tail, Inc., 623 P.2d 165, 172–73 (Cal. 1981))).

134 *See, e.g.*, Baltazar v. Forever 21, Inc., 62 Cal. 4th 1237, 1244 (Cal. 2016) ("the unconscionability doctrine is concerned not with a simple old-fashioned bad bargain" (quoting Schnuerle v. Insight Commc'ns Co., 376 S.W.3d 561, 575 (Ky. 2012))).

principle here is effectively "pigs get fat, hogs get slaughtered": driving a hard bargain is acceptable, but not an excessively hard bargain. Because substantive unconscionability is keyed to whether contract terms are "*unreasonably favorable* to the more powerful party,"[135] the substantive unconscionability analysis depends on the particular balance of power between the parties—itself part of the procedural unconscionability analysis—with a lesser power imbalance allowing for more favorable terms for the more powerful party.[136]

As a standard, unconscionability differs from usury laws in two key dimensions. First, as a standard, it involves an analysis that occurs ex post for any transaction, so it naturally imputes less certainty ex ante than a bright line rule.

Second, unconscionability is a totality of the circumstances analysis. The procedural element of the unconscionability analysis looks beyond the contract terms to consider the larger transactional setting—the identity and nature of the parties and the process by which they interacted.[137] Usury laws pay no attention to such details other than to the extent that different usury laws apply to different lenders or different loan products or that the transaction has been structured to evade the usury laws.[138] As the California Supreme Court has observed:

> [F]inding unconscionable a contract setting an interest rate is categorically different from imposing an unvarying cap on the interest rate. To declare an interest rate unconscionable means only that—*under the circumstances of the case*, taking into account the bargaining process and prevailing market conditions—a particular rate was "overly harsh," "unduly oppressive," or "so one-sided as to shock the conscience."... An unconscionability determination does not generally depend on a single factor, and tends to be "*highly dependent on context*." . . . This is a far cry from how a rate cap operates. If an interest rate exceeds a cap, then it will always exceed the cap, as will all rates above it, regardless of the circumstances under which those rates came about. A rate cap is uniform and rigid; unconscionability, on the other hand, is context-specific and malleable.[139]

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135 *Id.* (emphasis added) (quoting 8 WILLISTON ON CONTRACTS § 18:10 (4th ed. 2010)).

136 *See, e.g.*, Davis v. Kozak, 267 Cal. Rptr. 3d 927, 935–36 (Cal. Ct. App. 2020) (analyzing the balance of power between the two parties).

137 *See id.* (analyzing the totality of the transaction).

138 *See supra* note 119 and accompanying text.

139 de la Torre v. CashCall, Inc., 422 P.3d 1004, 1015 (Cal. 2018) (emphasis added) (citations omitted).

> Similarly, the Connecticut Supreme Court has explained that:
>
> Whether interest rates are unconscionable is a question that should not be decided simply by judicial surmise about prevailing prime interest rates. The financial circumstances of the borrower, the increased risk associated with a second mortgage, and the income-producing capacity of the mortgaged property are some of the questions of fact that might appropriately be explored to shed light on whether a designated interest rate is or is not unconscionable.[140]

The broader totality-of-the-circumstances analysis in unconscionability is not simply a matter of the procedural element. The procedural element is concerned with the contracting process, but the substantive element considers characteristics of the parties and the entirety of the transaction terms, not merely the monetary price term that is the focus of usury laws.[141] This means that even a loan with a low monetary price term could, in theory, be unconscionable based on other provisions.

B. Unconscionability's Limitations as a Regulatory Mode

Unconscionability is an old legal doctrine, but historically it was not deployed to address excessive monetary price terms. Instead, monetary price terms were policed by usury in most cases, such that unconscionability only made an appearance in the contexts where usury law was inapplicable, such as retail installment sales contracts.[142] Indeed the classic unconscionability cases—*Williams v. Walker-Thomas Furniture Co.*[143] and *Jones v. Star Credit Corp.*[144]—were both retail installment sale contract cases where usury laws did not apply.[145]

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140 Hamm v. Taylor, 429 A.2d 946, 948–49 (Conn. 1980).

141 *See de La Torre*, 422 P.3d at 1014 ("In assessing the presence of substantive unconscionability, a court may also need to consider context. . . . When a price term is alleged to be substantively unconscionable . . . it is not sufficient for a court to consider only whether the price exceeds cost or fair value.") (citations omitted).

142 *See* Warren, *supra* note 9, at 841 ("Most jurisdictions have exempted credit sales from usury statutes by invoking the doctrine that a seller may offer an article at two different prices, one a cash price and the other at a time or credit price.").

143 350 F.2d 445 (D.C. Cir. 1965).

144 298 N.Y.S.2d 264 (Sup. Ct. 1969).

145 *See* Joseph P. Jordan & James H. Yagla, *Retail Installment Sales: History and Development of Regulation*, 45 MARQ. L. REV. 555, 560 (1962) ("The majority position in the United States is that the general usury statutes do not apply to installment sales."). In contrast to usury, which is generally both a free-standing cause of action and a defense, most jurisdictions limit unconscionability to being an affirmative defense to enforcement of a contract. *See generally* Brady Williams, *Unconscionability As a Sword: The Case for an Affirmative Cause of Action*, 107 CALIF. L. REV. 2015 (2019).

In recent years, however, a number of courts have held that a high—although not necessarily usurious—interest rate alone can be the basis for finding a loan substantively unconscionable.[146] Although courts are far from unanimous in this approach,[147] these decisions point to unconscionability as another doctrinal path for regulating consumer credit price terms.

Unconscionability, however, is problematic as a mode of regulation because it is so fact and circumstance specific that it provides little meaningful guidance about what behavior is lawful and what is not.[148] A regulatory system built on unconscionability creates little certainty for parties and frustrates reasonable business planning.

Part of the problem is that even today unconscionability doctrine remains unsettled regarding whether it is to be applied with an objective standard referencing a typical, ordinary, median, or "reasonable"

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146 *See, e.g.*, *de La Torre*, 422 P.3d at 1008–10 (holding that the high interest rates were in fact unconscionable even though the lender was careful to avoid the usury rates); James v. Nat'l Fin., LLC, 132 A.3d 799, 816–17, 826–37 (Del. Ch. 2016) (finding payday loan unconscionable based in part on its cost); State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 662–63 (N.M. 2014) (finding a 1,147.14% APR twelve-month signature loan unconscionable despite not violating state usury law); Drogorub v. Payday Loan Store of Wisc., Inc, No. 2012AP151, 2012 Wis. App. LEXIS 1002, at *11 (Wis. Ct. App. Dec. 18, 2012) ("[W]hile a 294% interest rate is not per se unconscionable, it is unconscionable under the facts of this case."); Danjanovich v. Robbins, No. 2:024-CV-623, 2005 WL 2457090, at *5 (D. Utah Oct. 5, 2005) (finding a monthly interest rate of 100% substantively unconscionable). Some isolated older cases have similar holdings. *See, e.g.*, Carboni v. Arrospide, 2 Cal. Rptr. 2d 845, 847 n.5 (Cal. Ct. App. 1991) ("We can see no reason why interest rate provisions should be exempt from the general rules of unconscionability . . . ."); Hamm v. Taylor, 429 A.2d 946, 947–49 (Conn. 1980) (interest rate can be unconscionable, even if nonusurious, but totality of circumstances must be considered); Jones v. Star Credit Corp., 298 N.Y.S.2d 264, 266 (Sup. Ct. Nassau City 1969) (holding in a case about high credit charges for a home freezer that unconscionability "is intended to encompass the price term of an agreement"); Spiotta v. William H. Wilson, Inc., 179 A.2d 49, 52–53 (N.J. Super. Ct. App. Div. 1962) (finding rate unconscionable); Feller v. Architects Display Bldgs., Inc., 148 A.2d 634, 639 (N.J. Super. Ct. App. Div. 1959) (finding the interest amount, when considered with the associated penalty, unconscionable); Levin v. Johnson (*In re* Chicago Reed & Furniture Co.), 7 F.2d 885, 885 (7th Cir. 1925) (applying general equitable principles).

147 Some courts refuse to find loans that comply with usury laws to be unconscionable on the basis of a high-interest rate. *See, e.g.*, Sims v. Opportunity Fin., LLC, No. 20-cv-04730, 2021 U.S. Dist. LEXIS 71360, at *26–27 (N.D. Cal. Apr. 13, 2021) (applying Utah law); Wright v. Oasis Legal Fin., No. 4:19 CV 926 RWS, 2020 U.S. Dist. LEXIS 50648, at *6–8, *10 (E.D. Mo. Mar. 24, 2020) (applying Missouri law); Peoples Fin. & Thrift Co. v. Mike-Ron Corp., 46 Cal. Rptr. 497, 501–02 (Cal. Dist. Ct. App. 1965); Barnes v. Helfenbein, 548 P.2d 1014, 1021 (Okla. 1976) (applying Oklahoma law); Williams v. Alphonse Mtge. Co., 144 So. 2d 600, 602 (La. Ct. App. 1962) (applying Louisiana law); *see also* Nathalie E. Martin, *Public Opinion and the Limits of State Law: The Case for a Federal Usury Cap*, 34 N. Ill. U. L. Rev. 259, 288 (2014) ("[C]ases in which unconscionability has been applied to consumer loans are few and far between.").

148 Additionally, Professor Steven Bender has suggested that unconscionability could also potentially fail to protect borrowers from themselves because it could theoretically validate a high but nonetheless "fair" rate. Steven W. Bender, *Rate Regulation at the Crossroads of Usury and Unconscionability: The Case for Regulating Abusive Commercial and Consumer Interest Rates Under the Unconscionability Standard*, 31 Hous. L. Rev. 721, 740 (1994).

consumer of some stripe or whether it is to be applied as a subjective standard tailored to the circumstances of a particular borrower.[149] A more particularized inquiry will, of course, be harder to generalize into prospective legal guidance. Yet even if the doctrine were applied regarding an objective "reasonable" consumer of some sort, it would still leave unresolved substantial questions about exactly what behavior is proscribed because unconscionability is not simply a matter of the borrower's circumstances.

In recent work, Professor Jacob Hale Russell has argued for tailoring unconscionability to the particular circumstances of consumers, rather than applying an objective standard.[150] He argues that such a particularized approach tracks modern consumer markets "where merchants engage in micro-marketing, hyper-segmentation, and individualized pricing."[151] Russell revels in the fact that unconscionability is not "one-size-fits-all,"[152] but this is both a feature and a bug. The bespoke nature of unconscionability is its advantage as an interstitial doctrinal safety net but is also a serious limitation on its usefulness as a mode of regulation.[153]

To see the limitations of unconscionability as a workable mode of regulation, consider the lodestar of unconscionability law, *Williams v. Walker-Thomas Furniture Co*.[154] In that celebrated decision, the D.C. Circuit addressed whether enforcement of installment purchase contracts for household goods with payment pro ration provisions could be denied on the grounds of unconscionability.[155] Although one of the lower courts expressed sharp condemnation of the defendant's sales practices, it did not believe that it had the power to declare these acts and practices unconscionable.[156] The D.C. Circuit disagreed.[157]

Yet, what is often forgotten about the decision is that the D.C. Circuit did not ever rule on whether the defendant's practices were in fact unconscionable, much less why. Instead, the D.C. Circuit remanded

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149 Russell, *supra* note 128, at 968.

150 *See id.* at 969.

151 *Id.* (citations omitted). The degree of individualization in the pricing of credit varies substantially by product, as not all products are underwritten for risk. The pricing of payday loans, for example, is not individualized; all borrowers are charged the same fee.

152 *Id.* at 970.

153 *See id.*

154 350 F.2d 445 (D.C. Cir. 1965).

155 *See id.*

156 *See* Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 916 (D.C. 1964) ("We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings."). The appellate decision was a consolidated opinion on the appeal of two separate cases.

157 *See* 350 F.2d at 448–49.

because the lower courts had not made any findings about whether the contracts at issue were unconscionable.[158] On remand, the cases settled.[159]

It is easy enough to read between the lines in *Walker-Thomas Furniture Co.* and recognize that the defendant was likely to lose on remand. Yet the question remains exactly why the defendant would lose.[160]

What precisely was unconscionable with Walker-Thomas Furniture Co.'s practices? Was it having installment purchase contracts where title did not pass until payment in full?[161] Was it having multiple contracts with payment proration provisions?[162] Was it the combination of the payment proration with the retained title?[163] Was it the cost of the contracts? Was it that Walker-Thomas Furniture Co. did aggressive door-to-door sales?[164] Was it the particular methods used by its salesmen, such as physically covering up language in the contract, so that only the signature line was visible?[165] Was it complex and difficult to read contract language?[166] The extremely small print?[167] Was it dealing with consumers with low levels of education?[168] Dealing with consumers with low incomes or on public assistance?[169] Dealing with consumers who might be living beyond their means?[170] Or was it some combination of these multiple factors? Or something else, such as the race of the parties, unstated in the opinion, but obvious to everyone involved in

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158 *Id.* at 450.

159 Anne Fleming, *The Rise and Fall of Unconscionability as the "Law of the Poor,"* 102 Geo. L.J. 1383, 1432 (2014).

160 *See id.* (noting that the case created a degree of uncertainty that would likely lead to additional settlements).

161 *See Walker-Thomas Furniture*, 198 A.2d at 915 (noting that title to the first purchase would not pass to Williams until the fourteenth purchase was fully paid).

162 *See Walker-Thomas Furniture Co.*, 350 F.2d at 447.

163 *Id.*

164 *See* Fleming, *supra* note 159, at 1392.

165 *Id.* at 1395.

166 *Walker-Thomas Furniture Co.*, 350 F.2d at 449 (Did each party "considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices?").

167 *Walker-Thomas Furniture Co.*, 198 A.2d at 915 (noting the contracts at issue "were approximately six inches in length and each contained a long paragraph in extremely fine print").

168 *Id.*; *see also* Fleming, *supra* note 159, at 1409, 1414 (noting Thorne's third grade education and Williams' eighth grade education).

169 *Walker-Thomas Furniture Co.*, 198 A.2d at 915 (noting that Williams was supporting herself and seven children with public assistance).

170 *See Walker-Thomas Furniture Co.*, 350 F.2d at 448 ("Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set." (quoting Williams v. Walker-Thomas Furniture Co., 198 A.2d 914, 916 (D.C. 1964))).

the case given the demographics of 1960s Washington, D.C.? We do not know.

Imagine, however, that on remand the trial court had said that the contract was unconscionable due to one factor or another or some combination. What guidance would this have given to other businesses that sought to act lawfully? If the unconscionability was merely the matter of having a payment proration clause or retaining title until payment in full, that would be a bright-line of unacceptable conduct, but if the unconscionability was about the combination of the contract terms with the particular situation of the consumers, then it would provide only the most limited guidance. For example, would the same contract with the same consumer be acceptable without the payment proration? Or would the same contract, including the payment proration provision, have been acceptable with a better educated consumer or one with greater financial means?

Part of the problem with *Walker-Thomas Furniture Co.* is that the court does not distinguish between elements of the dealings that would be substantively unconscionable and those that are procedurally unconscionable.[171] It remains unclear if the case was primarily about the forfeiture-like impact of the payment proration (the substantive unconscionability) or the disparity in bargaining power (the procedural unconscionability).

The problems with unconscionability can be seen in how *Walker-Thomas Furniture Co.* is often taught and in its interpretation by the Federal Trade Commission ("FTC"). The practice Walker-Thomas Furniture Co. engaged in is often described (although not by the decision) as "cross-collateralization,"[172] a term that suggests that Walker-Thomas Furniture took a security interest in collateral owned by the debtors.

Yet, there was no actual security interest to speak of in *Walker-Thomas Furniture Co.*, and thus there was no collateral. Instead, the transaction involved an installment purchase contract with the title retained by the seller until payment in full.[173] That meant that at least formally the goods were not the property of the buyers, and thus collateral for loans. Instead, they were at all times purported to be the property of the Walker-Thomas Furniture Co., even when in the possession and use of the consumers.[174] Accordingly, there was no cross-collateralization, at least formally. Instead, Walker-Thomas Furniture Co. had come up with a transactional design that created an effect very similar—but not

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171 *See* 350 F.2d at 447–50 (remanding because the lower court had not made a finding on unconscionability).

172 *E.g.*, Russell, *supra* note 128, at 971.

173 *See Walker-Thomas Furniture Co.*, 350 F.2d at 447.

174 *Id.*

identical—to cross-collateralization through payment proration among multiple contracts and retained title to the goods.[175]

This distinction is important because the FTC's Credit Practices Rule forbids nonpurchase money security interests in household goods.[176] The Credit Practices Rule does not seem to prohibit the actual practice in *Walker-Thomas Furniture Co.*[177] To be sure, a court might well deem Walker-Thomas Furniture Co.'s arrangement to be a disguised security interest, but that is not a matter of unconscionability. The point is that lawyers can readily design transaction structures that are formally distinct but that have similar economic effects.

For example, imagine a lender that makes numerous loans to a borrower. Each loan is secured by a purchase money security interest, and each contract has a cross-default clause, making a default on one loan a default on another. Although payments would not be prorated, a default on any outstanding loan would result in the ability of the lender to repossess the collateral from all the loans, an outcome not so different from that in *Walker-Thomas Furniture Co*. Whether a cross-default clause would be interpreted by a court as equivalent to cross-collateralization is unclear. And that's the point: a ruling holding one structure unconscionable does not provide clear guidance on the use of another.

C. Summarizing Unconscionability Revived

Some courts—including the California and New Mexico Supreme Courts—have been willing to extend unconscionability doctrine to reach high-cost loans, even if the loans do not violate usury statutes.[178] These courts have been responding to egregious factual situations: unsecured loans with a 96% or 135% interest rate in California[179] and

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175 Among the distinctions, a nonpayment breach of one contract would not have entitled Walker-Thomas Furniture Co. to replevy its goods on the other contracts. 350 F.2d at 447.

176 16 C.F.R. § 444.2(a)(4) (2018). *But see* UNIF. CONSUMER CREDIT CODE § 3-303 (UNIF. L. COMM'N 1974) (stating that payments made on debts secured by a security interest will apply to the first sales made).

177 Indeed, the original proposed version of the Credit Practices Rule had a provision prohibiting the "encumber[ing] [of] goods purchased on different dates from a retail installment seller on a deferred payment basis, unless the contract provides that payments made by the consumer will be credited in full to the earliest purchase to release the goods from encumberance [sic] in the order acquired." 40 Fed. Reg. 16437 (Apr. 11, 1975). That provision was dropped in the final rule, however. *See* Jean Braucher, *Delayed Disclosure in Consumer e-Commerce As an Unfair and Deceptive Practice*, 46 WAYNE L. REV. 1805, 1814 n.32 (2000) (noting that the Credit Practices Rule does not prohibit payment pro ration, although some state laws do).

178 *See, e.g.*, de la Torre v. CashCall, Inc., 422 P.3d 1004, 1022 (Cal. 2018); State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 676 (N.M. 2014).

179 *Id.* at 1008.

a jaw-dropping 1,147.14% APR unsecured loan in New Mexico.[180] The courts appear to be making the most of the limited doctrinal toolkit available to them. These cases do not present any guidance, however, for what would be a conscionable interest rate. Would a rate 1% lower have produced a different outcome? 10% lower? No one knows. Thus, the judicially administered unconscionability doctrine still presents a problematic framework for regulating consumer credit pricing.

The same can be said for codified versions of unconscionability doctrine in the form of state or federal unfair and deceptive act or practices ("UDAP") or unfair and deceptive and abusive acts or practices ("UDAAP") laws.[181] This sort of codification of unconscionability sometimes has more a constraining definition than courts' requirements for unconscionability, but it is generally a broad, open-ended inquiry that considers more than just one contract term or even the four corners of a contract. Thus, even in its codified statutory forms, unconscionability still leaves considerable uncertainty for businesses about what conduct is permitted, particularly given that the line could vary with political control of regulatory agencies.

This critique of unconscionability does not mean that unconscionability lacks a role in the legal system. Unconscionability has much to commend as a gap-filling, interstitial doctrine that provides a catchall for practices that in their sum total and context are problematic, but which may not be so when their components are considered individually or outside of the context of the particular borrower and lender and their interaction. In other words, unconscionability polices behavior that would be broadly condemned, but which might be so unique or particularized as to escape the attention or imagination of the legislature.

Unconscionability doctrine carries on the spirit of medieval courts of equity, where a petitioner could come to the Chancellor seeking justice when there was no remedy at law. But such Chancery decisions

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180 State *ex rel.* King v. B & B Inv. Grp., Inc., 329 P.3d 658, 663 (N.M. 2014).

181 *See, e.g.*, 12 U.S.C. §§ 5531, 5536, 5552 (UDAAP); 15 U.S.C. § 45(a)(1) (UDAP); CAL. CIV. CODE § 1.200 (unfair competition law); OHIO REV. CODE § 1345.03 (prohibiting any "unconscionable act or practice in connection with a consumer transaction"); FTC v. Sperry-Hutchinson Co., 405 U.S. 233, 244 n.5 (1972) (upholding the FTC's interpretation of "unfair" as including "'(1) whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other businessmen)'" (quoting Statement of Basis and Purpose of Trade Regulation Rule 408, Unfair or Deceptive Advertising and Labeling of Cigarettes in Relation to the Health Hazards of Smoking, 29 Fed. Reg. 8355 (1964))). Unconscionability is only a private right of action or affirmative defense, which is in contrast to usury violations, which are enforceable not just by private parties, but by regulatory agencies. *See generally* Williams, *supra* note 145, at 2015 (arguing "that the doctrine of unconscionability must be recrafted into an offensive sword that provides affirmative relief to victims of unconscionable contracts").

were always limited to their facts and not binding precedent.[182] They were simply a way of dealing with the most egregious mismatches between the law and the world.[183] In other words, unconscionability is best reserved for dealing with outlier cases that are not meant to establish precedents for regulating an industry as a whole, but for dealing with unusual, oppressive, ugly situations.

III. The New Usury: Ability-to-Repay Requirements

Ability-to-repay requirements reflect a third mode of regulating price terms in consumer credit contracts. Ability-to-repay is a much more recent concept than usury or unconscionability, making its first appearance—as far as research indicates—just a bit over a quarter century ago, in the Home Owners Equity Protection Act of 1994 ("HOEPA").[184] Ability-to-repay has subsequently expanded to many other product markets, but the expansion has been piecemeal and haphazard, sometimes led by regulators through rulemaking or enforcement actions, sometimes by legislatures, and sometimes by courts.[185]

A. Asset-Based Lending Prohibitions

HOEPA is an antipredatory mortgage lending statute.[186] Its provisions target specific practices of subprime mortgage lenders in the 1990s. Among these practices was "asset-based lending," meaning lending to borrowers based solely on the value of the collateral property without regard to the borrower's ability to repay the loan from income or other assets.[187] Such asset-based lenders would often seek to lend to borrowers who specifically lacked an ability to repay.[188] The goal was for

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182 *See* Joseph Hendel, *Equity in the American Courts and in the World Court: Does the End Justify the Means?*, 6 Ind. Int'l & Compar. L. Rev. 637, 641 (1996) (discussing how courts of equity were not originally subject to guiding precent but eventually "began to adhere to precedent rather than only 'natural justice'").

183 *Id.*

184 Home Owners Equity Protection Act of 1994, Pub. L. No. 103-325, §§ 151–157, 108 Stat. 2160, 2190–98 (Sept. 23, 1994) (codified in scattered sections of 15 U.S.C.).

185 *See infra* Section III.G (summarizing this development and the resulting doctrine).

186 Home Owners Equity Protection Act of 1994, Pub. L. No. 103-325, §§ 151–157, 108 Stat. 2160, 2190–98 (Sept. 23, 1994) (codified in scattered sections of 15 U.S.C.).

187 *See, e.g.*, OCC, Advisory Letter 2003-2 on Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices, at 3 (Feb. 21, 2003), https://tinyurl.com/yckpjs9n [https://perma.cc/R7YS-VSSW] ("A national bank that makes a loan to a consumer based predominantly on the liquidation value of the borrower's collateral, rather than on a determination of the borrower's repayment ability, including current and expected income, current obligations, employment status, and other relevant financial resources, is engaging in a fundamentally unsafe and unsound banking practice that is inconsistent with established lending standards.").

188 *Id.*; *see also* Press Release, Fed. Trade Comm'n, *Home Equity Lenders Settle Charges that They Engaged in Abusive Lending Practices* (Jul. 29, 1999) ("These subprime lenders appear to

the borrower to default on and then lose the property in a foreclosure sale at which the lender would credit bid and capture the borrower's home equity.[189]

In response to this practice, HOEPA prohibits lenders from engaging in a pattern or practice of making covered loans "based on the consumers' collateral without regard to the consumers' repayment ability, including the consumers' current and expected income, current obligations, and employment."[190] HOEPA's focus on the borrower's ability to repay is not really about ensuring that the loan is affordable for the borrower so much as prohibiting lenders from lending solely based on collateral values. The HOEPA ability-to-repay provision is meant to be a prohibition on asset-based consumer mortgage lending, not a broader regulatory move. Were it otherwise, HOEPA's numerous other requirements and restrictions—additional disclosures and prohibitions on negative amortization, balloon payment structures, prepayment penalties, and default interest rates[191]—would not be necessary.

HOEPA coverage is triggered either by the APR on a mortgage loan exceeding a spread over a maturity-matched Treasury security or by total up-front points and fees exceeding a certain percentage of the total transaction amount.[192] In other words, HOEPA coverage is triggered by the pricing of a loan, whether in the form of a floating rate limit or a particular percentage of initial costs.

HOEPA has both elements of a usury law and an ability-to-repay law. HOEPA resembles a usury law in that its coverage is triggered by the price point of a loan.[193] Yet HOEPA does not prohibit loans at particular interest rates. Instead, it merely adds regulatory burdens and prohibits certain features on such loans.[194]

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care little about a borrower's ability to pay, so long as he/she has enough home equity to secure the new loan. The lenders are able to prey on homeowners because mortgage transactions are often very complicated and difficult to understand.").

189 HOEPA's original scope of coverage is indicative of the initial goal of the legislation. Originally, HOEPA did not cover all residential mortgages. It only covered refinancings of closed-ended loans, excluding both purchase money loans and home equity lines of credit from its coverage. Home Ownership and Equity Protection Act of 1994, Pub. L. No. 103-325, § 152, 108 Stat. 2160, 2190 (codified at 15 U.S.C. § 1602(aa)(1) (2006)). This indicates that HOEPA was concerned about predatory, equity-stripping refinancings and nonpurchase loans, such as for home improvement.

190 15 U.S.C. § 1639(h).

191 *See* 15 U.S.C. § 1639(a), (c)–(f) (imposing additional disclosure requirements and prohibitions).

192 15 U.S.C. § 1602(bb).

193 *Compare id.* (establishing HOEPA's rate trigger), *with* sources cited *supra* note 21 (providing examples of state usury laws).

194 *See* 15 U.S.C. § 1639(a), (c)–(f) (imposing additional disclosure requirements and prohibitions).

At the same time, HOEPA has a prohibition on making loans without regard for borrowers' ability to repay.[195] This provision differs from other, later ability-to-repay requirements in that it does not require an ability-to-repay analysis for making any particular loan; instead, it prohibits having a general pattern or practice of doing so.[196]

Still, given that most mortgage lenders lend to multiple borrowers and have common practices and procedures, HOEPA is effectively requiring an ability-to-repay analysis of some sort for every loan, but it is not clear if an individual borrower can invoke this provision regarding his own loan. More importantly, HOEPA never defined what was required in the ability-to-repay analysis. The Federal Reserve Board, which was initially entrusted with implementing HOEPA regulations, did not detail ability-to-repay requirements until 2008—but in so doing removed the "pattern or practice" requirement in the regulation.[197] Nonetheless, HOEPA can be viewed as the origin of the ability-to-repay move in consumer credit regulation.

Beginning in 1999 and continuing for the next decade, states began to adopt their own mini-HOEPA, antipredatory mortgage lending statutes.[198] These mini-HOEPAs often had lower trigger thresholds than HOEPA for coverage and covered certain types of transactions originally excluded by HOEPA.[199] Nevertheless, they all followed the same basic pattern of a price-based trigger, a set of prohibited terms for covered loans, and a prohibition on lending without regard for ability to repay.[200] Some of these mini-HOEPA statutes included a presumption of ability-to-repay if the borrower's back-end debt-to-income ratio—the ratio of the debtor's total monthly obligations, including those on the loans to the borrower's monthly gross income—did not exceed a specified threshold, such as 50%.[201] These mini-HOEPAs were still focused on ability-to-repay as a way of limiting asset-based lending, however, rather than seeing it as a broader regulatory requirement to ensure sustainable loans.[202]

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195 15 U.S.C. § 1639(h).

196 *Id.*

197 *See* 12 C.F.R. § 226.34(a)(4) (2008); 12 C.F.R. § 1026.34(a)(4) (2020) (amending the 2008 regulation and focusing on individual loans rather than the "pattern or practice" language of 15 U.S.C. § 1639(h)).

198 Baher Azmy, *Squaring the Predatory Lending Circle*, 57 FLA. L. REV. 295, 361–65 (2005) (reviewing mini-HOEPA statutes).

199 *Id.* at 364–65.

200 *Id.*

201 *See, e.g.*, N.C. GEN. STAT. ANN. § 24-1.1E(c)(2) (West 2023).

202 *See* Azmy, *supra* note 198, at 361–65 (reviewing mini-HOEPA statutes).

B. Expansion Through Federal Bank Regulators' Guidance

The next developments in the ability-to-repay space were from guidance and rules promulgated by federal bank regulators. In 1995, federal bank regulators issued the Interagency Guidelines Establishing Standards for Safety and Soundness ("1995 Interagency Guidelines").[203] These are guidelines for bank supervision, setting forth regulators' expectations for banks; no private right of action exists under them.[204] The 1995 Interagency Guidelines provide that banks "should establish and maintain loan documentation practices that: . . . [i]dentify the purpose of a loan and the source of repayment, and assess the ability of the borrower to repay the indebtedness in a timely manner."[205]

The 1995 Interagency Guidelines also provide that banks:

> should establish and maintain prudent credit underwriting practices that: . . . Provide for consideration, prior to credit commitment, of the borrower's overall financial condition and resources, the financial responsibility of any guarantor, the nature and value of any underlying collateral, and the borrower's character and willingness to repay as agreed.[206]

The 1995 Interagency Guidelines apply only to banks, and they have never been interpreted as an ability-to-repay requirement. They merely require banks to engage in underwriting of loans but do not mandate any particular metrics or documentation for evaluating borrower capacity.[207]

In 2003, however, the OCC, the primary regulator of national banks, issued a nonbinding Advisory Letter regarding predatory and abusive lending practices focused on consumer lending based on the liquidation value of collateral rather than ability-to-repay.[208] The 2003 Advisory Letter states that lending based on collateral value rather than ability to repay is an "unsafe and unsound banking practice" and advised national banks to "adopt policies and procedures to ensure that an appropriate determination has been made that the borrower has the capacity to make scheduled payments to service and repay the loan, including principal, interest, insurance, and taxes," in order to "mitigate the risk of lending without regard to ability to repay."[209] Although the 2003 Advisory Letter is not formally restricted to mortgage lending, it is

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203 60 Fed. Reg. 35674, 35679 (July 10, 1995) (codified at 12 C.F.R. pt. 30, app. A).

204 *Id.*

205 12 C.F.R. pt. 30, app. A. § II.C.2. (2022).

206 *Id.* § II.D.3.

207 *Id.*

208 Guidelines for National Banks to Guard Against Predatory and Abusive Lending Practices. Off. Comptroller Currency, Advisory Letter 2003-2, at 2 (Feb. 21, 2003).

209 *Id.* at 7–8.

clearly tied to concerns about predatory mortgage lending rather than to other types of lending.[210]

In 2004, the OCC went further and issued a formal regulation ("OCC Mortgage Rule") regarding national bank mortgage lending.[211] The OCC Rule applies to all mortgage lending by national banks, not just the high-cost loans covered by HOEPA.[212] The OCC Mortgage Rule prohibits national banks from making residential mortgage loans "based predominantly on the bank's realization of the foreclosure or liquidation value of the borrower's collateral, without regard to the borrower's ability to repay the loan according to its terms."[213] The OCC Mortgage Rule provides:

> A bank may use any reasonable method to determine a borrower's ability to repay, including, for example, the borrower's current and expected income, current and expected cash flows, net worth, other relevant financial resources, current financial obligations, employment status, credit history, or other relevant factors.[214]

Thus, the OCC Mortgage Rule prohibits lending solely on residential mortgage value; it did not specify what "ability to repay" meant or how it should be determined.[215]

Although the OCC Mortgage Rule is broader in product reach than HOEPA, it only covers a limited group of lenders—national banks—and left "ability to repay" entirely up to the national banks, imposing only a "reasonable method" requirement.[216] Moreover, no private right of action attaches to the OCC Mortgage Rule; it is enforceable solely by the OCC, which has never brought an enforcement action under the rule.[217] The OCC Mortgage Rule, like HOEPA and mini-HOEPAs, still focused on preventing asset-based lending.[218]

In 2006, two years after the OCC Mortgage Rule, a consortium of federal banking regulators issued non-binding guidance regarding

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210 *See id.* at 3 (discussing actions taken to reduce abusive loans in the secondary market for mortgages).

211 Bank Activities and Operations; Real Estate Lending and Appraisals, 69 Fed. Reg. 1904, 1916–17 (Jan. 13, 2004) (codified at 12 C.F.R. § 7.4008).

212 *Id.* at 1917.

213 *Id.*

214 *Id.*

215 *Id.* at 1904.

216 *Id.* at 1904, 1912.

217 *See Enforcement Actions Search*, OCC, https://apps.occ.gov/EASearch/Search/Table?Search=ability%20to%20repay&Category= [https://perma.cc/L3SM-VD2Q] (finding no enforcement actions that mention "ability to repay").

218 *See* 69 Fed. Reg. 1,904, codified at 12 C.F.R. § 7.4008 (Jan. 13, 2004) (explaining the purpose of the rule).

"nontraditional" mortgages ("2006 Interagency Guidance").[219] In it, the regulators advised that for these loans "analysis of borrowers' repayment capacity should include an evaluation of their ability to repay the debt by final maturity at the fully indexed rate, assuming a fully amortizing repayment schedule."[220]

The 2006 Interagency Guidance, while still limited to HOEPA or HOEPA-like mortgages, started to move ability-to-repay to mean something more than simply a prohibition on asset-based lending.[221] Its reference to repaying the debt "by final maturity at the fully indexed rate" began to push ability-to-repay into an analysis of whether the consumer could be reasonably expected to perform the contract according to its terms.[222]

C. Fremont Investment and Loan

Applying the 2006 Interagency Guidance and the 1995 Interagency Guidelines, the FDIC entered into a consent order in 2007 with a subprime mortgage lender, Fremont Investment and Loan.[223] The consent order directed Fremont to cease and desist from unsafe and unsound practices, including "making mortgage loans without adequately considering the borrower's ability to repay the mortgage according to its terms."[224] This included: qualifying borrowers solely on ability to pay a teaser rate instead of the fully indexed rate; underwriting loans that would "likely to require frequent refinancing to maintain an affordable monthly payment and/or to avoid foreclosure"; containing prepayment penalties that lock borrowers into the mortgage beyond the teaser rate; "approving borrowers for loans with inadequate debt-to-income analyses that do not properly consider the borrowers' ability to meet their overall level of indebtedness and common housing expenses"; and making loans at loan-to-value ratios approaching or exceeding 100%.[225]

Notice how far the Fremont consent order is from HOEPA. An asset-based loan of the type with which HOEPA is concerned would have been at well less than 100% loan-to-value ratio ("LTV") because

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219 Interagency Guidance on Nontraditional Mortgage Product Risks, 71 Fed. Reg. 58,609 (Oct. 4, 2006).

220 *Id.* at 58,610–11.

221 *Id.*

222 *Id.*

223 Order to Cease and Desist, at 4, *In re* Fremont Inv. & Loan, Brea, California, FDIC-07-035b (Mar. 7, 2007), https://www.fdic.gov/bank/individual/enforcement/2007-03-00.pdf [https://perma.cc/7SY8-9JWT]. The consent order does not specifically reference either the Guidance or the Guidelines.

224 *Id.*

225 *Id.* at 3–4. FDIC also brought another enforcement action under the guidance. *See* Order to Cease and Desist, *In re* Citizens Bank, New Tazewell, Tennessee, No. FDIC-07-147b, 2007 FDIC Enf. Dec. LEXIS 168 (Oct. 10, 2017).

the whole point of predatory asset-based lending is to capture the borrower's equity stake, which only exists if the LTV is less than 100%. The Fremont loans, however, were at 100% LTV or more, the very antithesis of asset-based lending.[226]

Instead, the problem with the Fremont loans was that they were all but doomed to foreclosure. Fremont was not looking to capture the borrowers' equity; it merely wanted to qualify more borrowers for mortgages than otherwise because that would increase the number of loans it would have to sell into securitizations. Because Fremont was transferring the credit risk on the loans through securitization, it had little reason to care about the sustainability of the loans as long as they were sellable.[227]

Fremont's problems were not limited to federal bank regulators. The Massachusetts Attorney General also sued Fremont for violating the state's unfair trade practices law regarding non-HOEPA loans.[228] In *Commonwealth v. Fremont Inv. and Loan*,[229] the Massachusetts Supreme Judicial Court found that "the origination of a home mortgage loan that the lender should recognize at the outset the borrower is not likely to be able to repay" was an unfair trade practice.[230] The Massachusetts *Fremont* decision did not focus on the particular pricing of the loans, but instead on a combination of features: (1) the loans in question were made to low-income borrowers, (2) the loans had adjustable rates with an initial two-to-three year teaser period well below the fully indexed rate, (3) the loans were underwritten solely to the teaser rate, with the expectation that they would be refinanced, and (4) the loans either had prepayment penalties that extended beyond the teaser period or had such high LTVs that they could only be refinanced if property values increased.[231]

The Massachusetts Supreme Judicial Court's decision was in the context of mortgage lending by a bank, but nothing in the ruling was limited to mortgages or to banks. The state's unfair trade practices law is equally applicable to nonbanks and nonmortgage lending. As explained

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226 Order to Cease and Desist, *supra* note 224, at 4.

227 *Compare* Ryan Bubb & Alex Kaufman, *Securitization and Moral Hazard: Evidence from Credit Score Cutoff Rules*, 63 J. MONETARY ECON. 1 (2014) (analyzing the relationship between credit score cutoff rules and securitization), *with* Benjamin J. Keys, Tanmoy Mukherjee, Amit Seru & Vikrant Vig, *Financial Regulation and Securitization: Evidence from Subprime Loans*, 56 J. MONETARY ECON. 700 (2009) (analyzing subprime loans), *and* Benjamin J. Keys, Tanmoy Mukherjee, Amit Seru & Vikrant Vig, *Did Securitization Lead to Lax Screening? Evidence from Subprime Loans*, 125 Q. J. ECON. 307 (2010) (discussing lender screening and subprime loans), *and* Benjamin J. Keys, Amit Seru & Vikrant Vig, *Lender Screening and the Role of Securitization: Evidence from Prime and Subprime Mortgage Markets*, 25 REV. FIN. STUD. 2071 (2012) (same).

228 Commonwealth v. Fremont Inv. and Loan, 897 N.E.2d 548, 550–51 (Mass. 2008).

229 897 N.E.2d 548, 550–51 (Mass. 2008).

230 *Id.* at 560 (applying MASS. GEN. LAWS. ch. 93A (2023)).

231 *Id.* at 552–58.

in the following Section, the Massachusetts Attorney General has subsequently used the *Fremont* precedent to push an ability-to-repay requirement in auto lending.

D. Expansion Beyond Mortgages

By 2008 ability-to-repay was well-established as a requirement for at least high-cost mortgage loans, and the OCC rule plus the *Fremont* case pointed to the expansion of the requirement to all mortgage loans at the very least. Additionally, in the wake of the 2008 global financial crisis, some states adopted statutory ability-to-repay requirements for all mortgages, not just high-cost loans.[232]

In 2009, ability-to-repay was also extended to credit cards as part of the Credit Card Accountability, Responsibility, and Disclosure Act ("CARD Act"),[233] the first federal consumer finance legislation to follow the financial crisis. The CARD Act prohibits a card issuer from issuing a card "unless the card issuer considers the ability of the consumer to make the required payments under the terms of such account."[234]

The CARD Act does not spell out in detail what this means, however, and its regulatory implementation by the Federal Reserve Board—and since carried on by the CFPB—is exceedingly weak. The regulatory implementation defines the requirement as merely ensuring the ability to make the minimum monthly payment on the card[235] rather than to pay off the balance in any particular period of time, such as the thirty-six-month period required to be disclosed under the CARD Act.[236] A typical monthly payment is around 2% of the balance,[237] so

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232 *E.g.*, S. 270, 2008 Gen. Assemb., 425th Sess. (Md. 2008) (amending MD. COM. LAW §§ 12-127, 12-311, 12-409.1, 12-925, 12-1029); New Mexico Mortgage Loan Originator Licensing Act, S. 342, 49th Leg., 1st Reg. Sess. (N.M. 2009) (enacting N.M. STAT. § 58-21A-4(C)); H.R. 1840, 91st Leg., 91st Sess. (Minn. 2019) (codified at MINN. STAT. § 58.13(a)(24)).

233 Credit Card Accountability, Responsibility, and Disclosure Act of 2009, Pub. L. No. 111-24, 123 Stat. 1734.

234 15 U.S.C. § 1665e.

235 *See* 12 C.F.R. § 1026.51(a)(1)(i) (card issuer shall not issue a card "unless the card issuer considers the consumer's ability to *make the required minimum periodic payments* under the terms of the account based on the consumer's income or assets and the consumer's current obligations" (emphasis added)).

236 15 U.S.C. § 1637(b)(11)(B)(iii). There is no general requirement of a particular minimum payment amount or amortization period. A specific requirement exists for closed accounts. *See* 15 U.S.C. § 1666i-1(c).

237 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, OCC BULL. 2003-1, CREDIT CARD LENDING: ACCOUNT MANAGEMENT AND LOSS ALLOWANCE GUIDANCE, at 3 (2003) (indicating that national banks should set minimum payment requirements to ensure that accounts amortizing positively over a reasonable period of time). "Informally, . . . the OCC has indicated that it believes that a minimum monthly payment that covers 1% of the initial monthly balance plus new interest charges and fees is sufficient." Declaration of Adam J. Levitin in Support of Plaintiffs' Motion for Class Certification, at ¶ 12, *In re* Chase Bank USA, N.A. "Check Loan" Cont. Litig., No. 3:09-md-02032

the regulatory implementation of the CARD Act's ability to repayment requirement is not particularly demanding, requiring a fairly low level of financial capacity. The official commentary to the regulatory implementation also allows the requirement to be satisfied by reference to the income and assets of the cardholder's spouse and others who are not co-liable on the card,[238] and lets the card issuer satisfy the requirement through models[239] rather than requiring the use of actual verified income and assets and obligations.

In 2010, a year after the enactment of the CARD Act, Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank").[240] Title XIV of Dodd-Frank contains a more muscular ability-to-repay requirement than the CARD Act, applicable to all close-end mortgage loans.[241] Title XIV prohibits the making

(N.D. Cal. Oct. 15, 2010), ECF No. 102. Actual requirements vary by card issuer but are generally in the range of 2% of the balance. *See id.* ¶¶ 18–21 (empirical review of cardholder agreement minimum payments).

238 *See* 12 C.F.R. § 1026.51, cmt. 51(a)(1)(i)-4.iii ("Consideration of the income or assets of authorized users, household members, or other persons who are not liable for debts incurred on the account does not satisfy the requirement to consider the consumer's current or reasonably expected income or assets, unless . . . the consumer has a reasonable expectation of access to such income or assets even though the consumer does not have a current or expected ownership interest in the income or assets."); *see also* 12 C.F.R. § 1026.51, cmt. 51(a)(1)(i)-6.iii ("The non-applicant's salary or other income is deposited into an account to which the applicant does not have access. However, the non-applicant regularly uses a portion of that income to pay for the applicant's expenses. A card issuer is permitted to consider the amount of the non-applicant's income that is used regularly to pay for the applicant's expenses to be the applicant's current or reasonably expected income for purposes of § 1026.51(a) because the applicant has a reasonable expectation of access to that income.").

239 12 C.F.R. § 1026.51, cmt. 51(a)(1)(i)-5.iv ("[A] card issuer may consider the consumer's current or reasonably expected income and assets based on . . . Information obtained through any empirically derived, demonstrably and statistically sound model that reasonably estimates a consumer's income or assets, including any income or assets to which the consumer has a reasonable expectation of access."). Some card issuers claim that the Office of the Comptroller of the Currency has expressed supervisory concerns regarding reliance on models, such that they do not use them. Joint Comment Letter from Fin. Servs. Roundtable & Consumer Bankers Ass'n to CFPB re: Request for Information Regarding Credit Card Market (May 18, 2015), https://www.consumerbankers.com/cba-issues/comment-letters/joint-comment-letter-cfpb-re-request-information-regarding-credit-card [https://perma.cc/GRP9-MBNK] ("Regulation Z commentary clarifies that issuers may use an empirically derived, demonstrably and statistically sound model of consumers' income or assets to assess their ability to pay in connection with the issuance of a credit card. However, several of our members are not using these models due to confidentially expressed supervisory safety and soundness concerns from [OCC], often despite very high levels of statistical accuracy. Since income and asset models are explicitly permitted by Regulation Z, we encourage the Bureau to coordinate with the OCC on this issue, so that consumers who can repay their credit lines consistent with the requirements of 12 C.F.R. 1026.51 can obtain access to credit.").

240 Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

241 *See* 15 U.S.C. § 1639c(a)(1) (imposing an ability to repay requirement on the making of a "residential mortgage loan"). Home equity lines of credit are not covered by the Dodd-Frank Act's

of residential mortgage loans "unless the creditor makes a reasonable and good faith determination based on verified and documented information that, at the time the loan is consummated, the consumer has a reasonable ability to repay the loan, according to its terms, and all applicable taxes, insurance (including mortgage guarantee insurance), and assessments."[242] The CFPB's Qualified Mortgage ("QM") Regulation provides a safe harbor for compliance that requires the loan to have certain characteristics, including, originally, a debt-to-income ratio, and currently, a price cap.[243] Dodd-Frank also amended HOEPA, extending its coverage to purchase money and open-ended mortgages.[244]

In the decade since Dodd-Frank, ability-to-repay requirements of various sorts have been extended to other types of consumer credit products. On the federal level, the CFPB promulgated—and subsequently repealed—an ability-to-repay requirement for payday, vehicle title, and certain high-cost signature loans ("Payday Rule"),[245] which provided that it was "an unfair and abusive practice for a lender to make covered short-term loans or covered longer-term balloon-payment loans without reasonably determining that the [borrowers] will have the ability to repay the loans according to their terms."[246] The CFPB's Payday Rule also set forth in detail how ability-to-repay could be determined.[247]

On the state level, Nevada adopted in 2017 requirements that lenders of title, payday, or high-interest loans must verify borrowers' ability to repay based on enumerated factors.[248] Likewise, California in 2018 adopted an ability-to-repay requirement for its statutory pilot program for affordable small-dollar loans.[249] Nevada and California's choice of an ability-to-repay approach in these contexts contrasts with that of

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ability to repay requirement. *See* 15 U.S.C. § 1602(dd)(5) (defining "residential mortgage loan" as excluding open-end credit plans).

242 15 U.S.C. § 1639c(a)(1).

243 12 C.F.R. § 1026.43(e) (2022).

244 *See* 15 U.S.C. § 1602(bb)(1).

245 82 Fed. Reg. 54472 (Nov. 17, 2017), *codified at* 12 C.F.R. pt. 1041 (2018), *repealed in part by* 85 Fed. Reg. 44,382, 44,444 (July 22, 2020).

246 12 C.F.R. § 1041.4 (2018), *repealed by* 85 Fed. Reg. 44,382, 44,444 (July 22, 2020).

247 *See* 12 C.F.R. § 1041.5(b)(2) (2018), *repealed by* 85 Fed. Reg. 44,382, 44,444 (July 22, 2020).

248 *See* 2017 Nev. Stat. 1438 (codified at NEV. REV. STAT. §§ 604A.5065, 5011, 5038 (2017)) (specifying verification requirements of title loans, deferred deposit loans, and high-interest loans respectively); NEV. REV. STAT. §§ 604A.5037, 0703 (2017) (defining "high-interest loan" to mean short-term loans with an annual percentage rate of over 40%). Since 2005, Nevada has required title lenders to obtain an affidavit from borrowers stating that the borrower has the ability to repay the loan. *See* 2015 Nev. Stat. 1692 (codified at NEV. REV. STAT. § 604A.5076 (2015)). High-interest loans also have limitations on loan amounts keyed to borrower income. *See* NEV. REV. STAT. § 604A.5045(1) (2019) (prohibiting high-interest loans which require monthly payment "that exceeds 25 percent of the gross monthly income of the customer").

249 H. 237, 2017 Cal. Assemb., Reg. Sess. (Ca. 2018) (codified at CAL. FIN. CODE § 22370(i)(4)(A)). Ohio had previously adopted in 2007 a prohibition on making small dollar loans if the lender knew the consumer did not have a reasonable probability of repayment, but the Ohio law did not

several states—including California in 2019—that have tightened their usury limits generally for small dollar credit.[250]

Other states have advanced ability-to-repay requirements through litigation settlements. For example, ability-to-repay has been extended to the auto finance sector through consent orders with state attorneys general. Thus, Delaware and Massachusetts have both entered into consent orders with Santander Consumer Holdings USA, Inc., that require Santander to consider borrower ability-to-repay when making loans.[251]

Santander subsequently entered into separate consent orders with another thirty-four state attorneys general.[252] These subsequent consent orders also included the requirements that "[i]n its evaluation of an application for a Loan, Santander shall account for a Consumer's ability to pay the Loan on its specific terms," and that "Santander shall set a reasonable Debt to Income threshold to ensure that Santander is reasonably evaluating a Consumer's ability to pay."[253] Moreover, Santander is required to reevaluate the debt-to-income threshold annually.[254]

Although such consent orders do not formally bind any parties other than the defendants who consented to them, they set a marker for the rest of the industry regarding the expectations of state attorneys general and, therefore, what sort of acts and practices might trigger a lawsuit.[255] Thus, within a few years, Massachusetts had entered into

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put any duty of inquiry on the lender. S. 185, 126th Gen. Assemb., Reg. Sess. (Ohio 2007) (codified at OHIO REV. CODE ANN. § 1345.03(B)(4) (2007)).

250 *See supra* note 21 (providing examples of state usury laws).

251 *See* Cease and Desist by Agreement at ¶¶ 36, 56, *In re* Santander Consumer USA Holdings Inc., CPU Case No. 17-17-17001637 (Del. Consumer Prot. Dir., Mar. 28, 2017) (noting that "[i]n some instances, borrowers were not likely to be able to repay the loans that [Santander Consumer ("SC")] purchased, in part because the income data provided by the dealers was overstated. SC was thus reckless with respect to unfairness under [the Delaware UDAP statute]" and therefore requiring Santander to "establish screens adequate to prevent the sale to third parties of Delaware Loans that SC identifies as being out of compliance with Delaware law, for reasons including but not limited to unfair or deceptive dealer conduct and the associated risk that the borrower will be unable to repay the loan according to its terms."); *see also* Assurance of Discontinuance at ¶ 57, *In re* Santander Consumer USA Holdings Inc., 17-CV-0946E (Suffolk Cnty. Super. Ct. Mass., Mar. 29, 2017) (requiring SC to "develop procedures such that, when . . . there appears to be income inflation or power booking . . . SC will not waive such screens or documentation requirements related to proof of income").

252 *See* Press Release, Santander Consumer USA, Coalition of 34 State Attorneys General Announces over $550 Million Settlement with Nation's Largest Subprime Auto Financing Company (May 19, 2020), https://santandermultistateagsettlement.com/Press-Release [https://perma.cc/Y67E-WWEV].

253 *E.g.*, Final Consent Order and Judgment at § 18.d, e, New York v. Santander Consumer, USA, Inc., No. 451265/2000 (N.Y. Sup. Ct. June 18, 2020); Final Consent Judgment at § 18.d, e, Commonwealth v. Santander Consumer USA, Inc., No. GD-20-005905 (Penn. Ct. of Common Pleas, Allegheny Cnty., May 19, 2020).

254 *See* orders cited *supra* note 253.

255 *See* Comm. on Fed. Regul. of Sec., *Report of the Task Force on SEC Settlements*, 47 BUS. LAW. 1083, 1171–72 (1992) (discussing the impact of consent orders on the public, industry, and courts).

a consent order with three other subprime auto lenders for making loans without regard to borrowers' ability to repay.[256] Massachusetts also sued a fifth subprime auto lender, Credit Acceptance Corporation ("CAC"), alleging among other things, that CAC was violating the state's prohibition on unfair and deceptive acts and practices in trade or commerce by making loans without regard for borrowers' ability to repay.[257]

E. CFPB v. Credit Acceptance Corp.*: A General Ability-to-Repay Requirement?*

In January 2023, the CFPB, together with the New York Attorney General, took a major step toward announcing a general ability-to-repay requirement. The CFPB and New York Attorney General brought suit against CAC, alleging, *inter alia*, that CAC violated the prohibition on UDAAP by a person that offers or provides a consumer financial product or service.[258] Specifically, they alleged that:

> In using a lending model that is indifferent to whether consumers are unable to repay their loans in full and end up in default, CAC took unreasonable advantage of consumers' lack of understanding of the risk of default, and the magnitude of harm in the event of default, as well as consumers' inability to protect their interests in selecting or using CAC's loans . . . .[259]

The complaint against CAC can be read in one of two ways. It can be read as claiming that lending without regard to ability to repay is a UDAAP violation. Alternatively, it can be read as claiming that lending without regard to *known inability to repay* is a UDAAP violation. The former, broad reading would imply an affirmative duty to determine ability to repay, while the latter, narrow reading would merely prohibit ignoring known *in*ability to repay.

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256 *See, e.g.*, Assurance of Discontinuation at § 4, Commonwealth v. Exeter Finance LLC, No. 1984-CV-01079E (Suffolk Cnty. Super. Ct., Mass. Apr. 5, 2019) (alleging violation of M.G.L. ch. 93A and referencing Comm. v. Fremont Inv. & Loan, 452 Mass. 733, 750 (2008)).

257 Complaint at ¶ 171, Commonwealth v. Credit Acceptance Corp., No. 2084-CV-01954 (Suffolk Cnty. Super. Ct., Mass. Aug. 28, 2020) (alleging violation of Mass. Gen. Laws ch. 93A, § (2)). After defeating a motion to dismiss, Opinion, Commonwealth v. Credit Acceptance Corp, No. 2084-CV-01954 (Suffolk Cnty. Super. Ct., Mass. Mar. 15, 2021), Massachusetts settled the litigation for $27 million, but no injunctive relief relating to ability to repay. Assurance of Discontinuation, In the Matter of Credit Acceptance Corp., Civil Action 21-1996A (Suffolk Cnty. Super. Ct. Mass. Sept. 1, 2021). At the time of the settlement, the Massachusetts Attorney General was running for governor.

258 *See* Complaint at ¶¶ 179–187, CFPB v. Credit Acceptance Corp., No. 23-CIV-0038 (S.D.N.Y. Jan. 4, 2023) (alleging violations of 12 U.S.C. §§ 5531 and 5536).

259 *Id.* ¶ 186.

The complaint against CAC is, of course, merely an allegation at this stage; it is not law. Unlike a consent order, it does not even bind CAC. Nevertheless, the complaint provides a strong indication of how the CFPB or the office of a state attorney general view the matter. Regulators' views, expressed in litigation positions, provide guidance to other companies of the type of behavior that will likely result in litigation. Regardless of ultimate legality, a risk-averse company will shy away from such behavior because it does not wish to get entangled with an enforcement action. Moreover, in view of the ambiguity about the scope of the complaint—whether the CFPB and New York Attorney General view UDAAP as having a broad or narrow ability to repay requirement—risk-averse companies are likely to adopt the broad reading. Thus, irrespective of the actual position of the CFPB and New York Attorney General, the message that the consumer finance industry—and bar—takes from the CAC complaint is that UDAAP may include a general ability-to-repay requirement, so risk-averse companies should behave accordingly.

F. Income-Driven Repayment as Back-End Ability-to-Repay

Federal student loans include a type of ability-to-repay provision, but it is a back-end ability-to-repay option rather than a requirement.[260] Federal student loans do not feature any front-end, pre-lending underwriting.[261] By their very nature, federal student loans are made "without any consideration of [borrowers'] ability to repay."[262] This is because the nature of student borrowers is that they are generally young and therefore have few assets and limited income and little, if any, credit history; they are borrowing to finance an education that will hopefully increase their earnings potential.[263] Moreover, the public purposes of federal student loans mean that they incorporate a cross-subsidy so that they are available on the same terms to all qualifying borrowers; were it otherwise, the availability of federal student loans would be greatest for the borrowers who need them the least.[264]

While there is no front-end ability-to-repay analysis for federal student loans, various income-based repayment options have been available since 1993,[265] with options expanding in 2007[266] and then further

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260 Brooks & Levitin, *supra* note 18, at 11.

261 *Id.* at 10.

262 *Id.* at 11.

263 *Id.* at 18, 35–36.

264 *Id.* at 35.

265 Student Loan Reform Act of 1993, Pub L. No. 103-66, 107 Stat. 341 § 4021 (adding new Higher Education Act § 455(e)) (codified as amended at 20 U.S.C. § 1001 et seq.).

266 College Cost Reduction and Access Act, Pub. L. No. 110-84, §§ 203, 401, 121 Stat. 784 (codified as amended at 20 U.S.C. § 1001 et seq.).

expanding in 2010,[267] 2012,[268] 2015,[269] and 2023.[270] These various income-based repayment options base repayment amounts on the borrower's income and provide substantial debt forgiveness. This sort of back-end underwriting is not automatic, however, and instead requires the borrower to opt in and annually recertify eligibility for the programs.[271] As a result, these programs are underutilized, with many borrowers making larger loan payments—and having higher default rates—than should occur, but they are still an ability-to-repay move.[272]

G. Summarizing Ability-to-Repay Doctrine

What we see, then, is that over the past quarter century, there has been a movement toward adopting ability-to-repay requirements for many types of consumer financial products: mortgage loans, credit cards, payday, title, and high-cost signature loans, auto loans, and, in a very different form, federal student loans.

A few things are notable about this trend in regulation. First, there is enormous variation in terms of what ability-to-repay regulations require in terms of what sort of repayment is involved: the full repayment of the loan according to its terms or simply the minimum required payments on a revolving line of credit. For example, the statutory ability-to-repay requirement for mortgages requires an evaluation of the ability to pay off the entire loan at its fully indexed rate,[273] whereas for credit cards, the only requirement is the ability to make the required monthly payment,[274] which is just a fraction of the total loan balance.[275]

Second, there is variation regarding how the inquiry is to be undertaken: whether specific types of information must be considered and documented or whether the nature of the inquiry is left to the lender. For example, the 1995 Interagency Guidelines give no direction about what sort of information is to be considered for mortgage lending,[276] while the CFPB's QM Regulation details acceptable types of

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267 Health Care and Education Reconciliation Act of 2010, § 2001 et seq., Pub. L. No. 111-152, 124 Stat. 1029, 1071 § 2213 (codified at 26 U.S.C. § 1098e(e)).

268 *See* 34 C.F.R. § 685.209(a) (2019) (Pay As You Earn repayment plan).

269 80 Fed. Reg. 67,204 (Oct. 30, 2015).

270 88 Fed. Reg. 43820 (July 10, 2023).

271 34 C.F.R. §§ 685.209, 685.221 (2019).

272 Brooks & Levitin, *supra* note 18, at 10.

273 12 C.F.R. § 1026.43(c)(5) (2022).

274 12 C.F.R. § 1026.51(a)(1)(i) (2022).

275 *See* OFF. OF THE COMPTROLLER OF THE CURRENCY, *supra* note 237, at 3 (describing low required monthly payments).

276 60 Fed. Reg. 35674, 35679 (July 10, 1995) (codified at 12 C.F.R. Part. 30, App. A, §§ II.C.1, II.C.2. (2022)).

documentation for qualifying for the safe harbor from the Dodd-Frank Act's title XIV ability-to-repay requirement for mortgage loans.[277]

Third, some ability-to-repay requirements are coupled with bright-line prohibitions on particular product terms. For example, the ability-to-repay requirements in HOEPA, the CARD Act, and Dodd-Frank title XIV all contain prohibitions on particular product terms, as did the CFPB's now defunct Payday Rule.[278] In contrast, no such product term prohibitions are to be found in the ability-to-repay requirements created by judicial decision (*Fremont*)[279] or litigation settlement (*Santander*).[280]

Lastly, the statutory ability-to-repay requirements are sometimes coupled with a safe harbor of some type. For HOEPA, it is the triggers themselves that function as safe harbors—HOEPA's ability-to-repay requirement can be avoided by ensuring that the cost of the loan is beneath the HOEPA trigger.[281] For Dodd-Frank title XIV, the CFPB's QM Regulation operates as a safe harbor,[282] and Congress subsequently added in a statutory safe harbor for certain loans held on balance sheet by depositories.[283] The now-defunct CFPB Payday Rule also contained a safe harbor.[284] These safe harbors are all bright-line rules that temper the standards-based nature of the ability-to-repay requirement.

IV. Evaluating the New Usury

At this point we have seen three different approaches to regulating consumer credit that all aim to prevent consumers from ending up in contracts that are unduly burdensome. Which of these paths is the optimal approach for consumer credit regulation?

As an initial matter, a choice may not be strictly necessary. It is possible for usury laws, unconscionability doctrine, and ability-to-repay requirements to coexist for the same product, and there might be good reason to prefer a belt-and-suspenders-and-elastic-waistband approach to any single approach. Given that unconscionability stems from a different source—equity—than usury laws and ability-to-repay requirements—primarily state and federal laws, respectively—there is

277 12 C.F.R. § 1026.43(c)(4) (2022).

278 *See* 15 U.S.C. § 1639h (HOEPA); 15 U.S.C. § 1665e (CARD Act); 15 U.S.C. § 1639c(b)(2)(F) (Dodd-Frank title XIV); 12 C.F.R. § 1041.2(d) (CFPB's now defunct Payday Rule).

279 *See supra* Section III.C.

280 *See* cases cited *supra* notes 251–54 and accompanying text.

281 15 U.S.C. § 1602(bb)(1).

282 12 C.F.R. § 1026.43(e).

283 Pub L. No. 115-174, § 101, 132 Stat. 1297 (May 24, 2018) (adding 15 U.S.C. § 1639c(b)(2)(F)).

284 12 C.F.R. § 1041.6 (2020), *repealed by* 85 Fed. Reg. 44,382, 44,444 (July 22, 2020).

limited ability to coordinate the deployment of the three approaches.[285] Nevertheless, a rationalization of consumer credit regulation suggests that there should be consideration of the trade-offs among the approaches.

A. The Rules-versus-Standards Debate

A comparison of the three approaches is, in the first instance, illuminated by the rules-versus-standards debate. The rules-versus-standards debate is a familiar old chestnut from legal scholarship.[286] In the frequently used example, a speed limit of sixty-five miles per hour would be a "rule," whereas a standard would be a requirement of "maintaining a reasonable speed" under the circumstances.[287]

Usury laws are examples of bright-line rules—e.g., no lending over 36% annual interest.[288] In contrast, unconscionability is a standard *par excellence*, irrespective of whether it is applied on an objective reasonable person basis or tailored to the specific consumer(s) at issue.[289]

Ability-to-repay is harder to characterize neatly. The core ability-to-repay requirement is a standard that would seem to be tailored to the specific consumer. There is a subjective and speculative nature to the inquiry about whether a consumer's current income and assets will be sufficient to pay off a debt in the future. Yet statutory ability-to-repay

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285 *Compare* discussion *supra* note 182 (describing unconscionability's equitable origin), *with* sources cited *supra* note 21 (providing examples of state usury laws), *and supra* Section III.G (summarizing statutory sources of ability-to-repay).

286 *See, e.g.*, Cass R. Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 971–78 (1995) (examining three arguments against rules); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 42–61 (1990) (summarizing the debate); Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557, 621 (1992) (arguing that, from an economic perspective, "[t]he central factor influencing the desirability of rules and standards is the frequency with which a law will govern conduct"); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178–81 (1989) (arguing "[t]he common-law, discretion-conferring approach is ill suited, moreover, to a legal system in which the supreme court can review only an insignificant proportion of the decided cases" and that rules would provide the advantage of predictability); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 600 (1988) ("[C]rystalline rules seem less the king of the efficiency mountain than we may normally assume."); Pierre Schlag, *Rules and Standards*, 33 UCLA L. REV. 379, 379 (1985) ("Every student of law has at some point encountered the 'bright line rule' and the 'flexible standard.'"); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687–1713 (1976) ("The jurisprudence of rules . . . is premised on the notion that the choice between standards and rules of different degrees of generality is significant, and can be analyzed in isolation from the substantive issues that the rules or standards respond to."). *But see* Russell B. Korobkin, *Behavioral Analysis and Legal Form: Rules vs. Standards Revisited*, 79 OR. L. REV. 23, 25–30 (2000) (arguing that rules and standards lie along a spectrum rather than in a clear dichotomy); H.L.A. HART, THE CONCEPT OF LAW 124 (1961) (noting that rules "will, at some point where their application is in question, prove indeterminate").

287 *See, e.g.*, Korobkin, *supra* note 286, at 23 (summarizing the speed limit example).

288 *See* discussion *supra* note 119.

289 *See* discussion *supra* notes 139–41.

requirements are often accompanied by safe harbors that operate as bright-line rules.[290] For example, there might be a safe harbor presumption that ability-to-repay has been met if a loan has a debt-to-income ratio below a certain level.

The core takeaway from the rules-versus-standards literature is that there are arguments in favor of and against both rules and standards.[291] Bright-line rules create ex ante certainty for parties about legality, which enables them to efficiently adjust their behavior and engage in resource allocation decisions.[292] Moreover, rules help parties avoid the need for litigation, and, when litigation arises, rules reduce the role for judicial discretion and the possibility of misadjudication.[293] Additionally, rules enable issues to be resolved on a wholesale basis without inquiry into individual situations.[294] This reduces litigation expense.[295] Rules thus have efficiency benefits over standards in terms of their administrability and predictability.

On the other hand, rules can be over- or underinclusive, undermining their overall efficiency. In particular, rules can fail to account for unusual circumstances.[296] Moreover, bright-line rules encourage the proverbial "bad man" to walk right up to the line of what is legal.[297] In the credit cost context, this would mean that creditors would charge the maximum rate permitted by law. To the extent that a legislature

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290 *See supra* Section III.G (summarizing safe harbors).

291 *See, e.g.*, Schlag, *supra* note 286, at 400 (describing the traditional "virtues" and "vices" of rules and standards).

292 *See* Richard Posner, Economic Analysis of Law, 554–66 (4th ed. 1992) (analyzing through an economic lens how rules affect a litigant's decision to settle a case before trial); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 Yale L.J. 950, 951 (1979) (analyzing "how the rules and procedures used in court for adjudicating disputes affect the bargaining process that occurs between divorcing couples *outside* the courtroom"); Schlag, *supra* note 286, at 383–90 (summarizing the relative pros and cons of rules and standards); Kennedy, *supra* note 286, at 1687–1701 (summarizing how rules affect both the form and substance of law).

293 *See* sources cited *supra* note 292.

294 *See* Kaplow, *supra* note 286, at 563 ("If there will be many enforcement actions, the added cost from having resolved the issue on a wholesale basis at the promulgation stage will be outweighed by the benefit of having avoided additional costs repeatedly incurred in giving content to a standard on a retail basis.").

295 *See* Adams v. Plaza Finance Co., Inc., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) ("It is more expensive to apply and litigate about standards than to apply rules.").

296 *See, e.g.*, Kaplow, *supra* note 286, at 561–62 (describing the relationship between the decision of a rule or standard and human behavior); Sunstein, *supra* note 286, at 957–58 ("Often general rules will be poorly suited to new circumstances that will be turned up by unanticipated developments . . . ."); Schlag, *supra* note 286, at 384–89 (summarizing the relative pros and cons of rules and standards).

297 Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 459 (1897) (developing the concept of the "bad man"); *see also* Schlag, *supra* note 286, at 385 ("By predesignating and quantifying the magnitude of the penalty to be applied, rules allow Holmes' proverbial bad man to treat the deterrent as a fixed cost of doing business.").

is unsure exactly where within a range of rates the usury limit should be, the concern about the "bad man" who goes to the very edge of the legal precipice counsels for setting a lower usury limit but that lower limit might actually be suboptimal, at least for some borrowers, because it might prevent mutually beneficial lending relationships that do not generate undue risk.

Worse still, the "bad man" can sometimes cleverly structure his dealings around a bright-line rule, because the clarity of the rule lets him know exactly what he must do to avoid its application. A loan might be characterized as a sale, for example.[298] This has always been a major challenge for usury laws,[299] and the bright-line rules of usury laws have long been accompanied by a standards-based, anti-evasion doctrine.[300]

Standards, in contrast, have the advantages of greater flexibility, less arbitrariness in line drawing—why limit speed to sixty-five miles per hour and not sixty-four miles per hour or sixty-six miles per hour?—and potentially greater accuracy of outcomes.[301] Standards are more adaptable, fair, and practical.[302] Whereas rules are likely to be both over- and underinclusive, a standard is capable of sorting between technical and flagrant violations and meting out justice accordingly.[303]

Standards, however, are often vague and unpredictable.[304] To the extent that standards reduce certainty about where the limes of legality lies, they may chill permissible or even desirable conduct.[305] Yet that chilling effect may be precisely the point; muddy standards discourage a risk-averse "bad man" from walking up to the edge because a "bad man"

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298 *See, e.g.*, Lateral Recovery LLC v. Capital Merchant Services, LLC, 2022 U.S. Dist. LEXIS 181044 (S.D.N.Y. Sept. 30, 2022) (finding purported sale of future receivables to be a disguised loan); Fleetwood Services v. Ram Capital Funding LLC, 2022 U.S. Dist. LEXIS 100837 (S.D.N.Y. June 6, 2022), *aff'd*, Fleetwood Servs., LLC v. Richmond Capital Grp. LLC, 2023 U.S. App. LEXIS 14241 (2d Cir. 2023) (same); CapCall, LLC v. Foster (In re Shoot The Moon, LLC), 635 B.R. 797, 816 (Bankr. D. Mont. 2021) (same); Davis v. Richmond Capital Group LLC, 194 A.D.3d 516 (N.Y. App. Div. 1st Dep't 2021) (same).

299 *See* Bender, *supra* note 148, at 739 ("Because usury regulation typically recognizes a violation only when certain discrete elements are present, lenders can skirt usury by structuring transactions so as to avoid one or more of these elements." (footnote omitted)).

300 *See supra* note 119 (discussing in greater detail how bright-line usury rules are accompanied by more normative standards to prevent evasion).

301 *See* Schlag, *supra* note 286, at 383–90 (summarizing the benefits and drawbacks of rules and standards); Kennedy, *supra* note 286, at 1687–1701 (summarizing the benefits of standards).

302 *See* sources cited *supra* note 301.

303 *See* sources cited *supra* note 301.

304 *See* Kaplow, *supra* note 286, at 561–62; (describing how standards, relative to rules, can be imprecise and fail to capture other criteria "relevant in adjudicating" a particular issue); Sunstein, *supra* note 286, at 957–58 (arguing that specific, particularized rules may be better than standards because standards are so general that relevant information about an individual's action is left out).

305 Schlag, *supra* note 286, at 385 (describing how because of generalized standards, "some risk-averse people will be chilled from engaging in desirable or permissible activities").

does not exactly know what is permitted to him.[306] On the other hand, if the "bad man" is risk preferring, then a standard will liberate him to engage in more aggressive antisocial behavior.[307] And because standards depend on ex post application by courts, they are less efficient in this regard than rules, which allow parties more ex ante certainty and facilitate transaction planning.[308]

Finally, rules and standards differ in terms of their allocation of decision-making authority.[309] A rule retains almost all decision-making authority in the hands of the body that promulgated it.[310] Thus, if a state legislature promulgates a speed limit of sixty-five miles per hour, there is little discretion for regulators or judges to decide that the cap does not apply in certain situations. At most, there is discretion in prosecution. In contrast, if a legislature were to promulgate a "reasonable speed" standard, discretion would be vested in the judiciary—and not just the current judiciary, but future iterations thereof, which may have a different political composition—to apply the standard.[311] There is thus less certainty about how a standard will be applied or whether it will be applied consistently over time.[312]

B. Rules-versus-Standards in Consumer Credit Regulation

Applying these insights to the choice among usury laws, unconscionability, and ability-to-repay, the tradeoff between usury laws and unconscionability neatly tracks the rules-versus-standards divide. Usury laws have the benefits and drawbacks of rules, even if they rely on a standards-based, anti-evasion doctrine to be effective, while unconscionability has the benefits and drawbacks of standards. Ability-to-repay requirements are also standards, but they operate somewhat differently than unconscionability—addressed anon—and are often paired with rule-based safe harbors.

Just characterizing these three modes of regulation as rules or standards does not tell the full story, however, for they all involve different types of inquiries. Usury laws look only to the level of an interest rate or fees, which can generally be determined within the four corners of the

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306 *Id.*

307 *Id.*

308 *See* Robin A. Morris, *Consumer Debt and Usury: A New Rationale for Usury*, 15 PEPP. L. REV. 151, 173–74 (1988) (noting that unconscionability standards have high transaction costs because of the need for judicial involvement).

309 *See* Schlag, *supra* note 286, at 386 (describing the relative benefits of rules and standards as they relate to the concept of delegation).

310 *Id.*

311 *See, e.g.*, Korobkin, *supra* note 286, at 23 (summarizing the speed limit example).

312 *See* Schlag, *supra* note 286, at 400 (describing certainty as a "virtue" of rules relative to standards).

loan contract. In contrast, unconscionability is a standard that involves a holistic inquiry that considers both the terms of the contract and the process of dealings between the borrower and lender. Whether it considers individual borrower attributes or uses a reasonable borrower standard of some sort depends on the court.[313]

Ability-to-repay is different still. Like unconscionability it is a standard that involves a holistic inquiry, but the ability-to-repay inquiry is always a borrower-specific inquiry of the borrower's income, assets, and obligations.[314] Ability-to-repay also looks at loan terms more broadly than usury; ability-to-repay considers not just the interest rates and fees but also other potentially problematic lending practices relating the loan amortization, rate resets, fees, extended refinancings, and costs not paid to the lender, such as taxes, insurance, and homeowners' association dues.[315] Ability-to-repay thus addresses the potential misalignment of lender and borrower interests in situations where the misalignment might not be reflected in the interest rate.

The ability-to-repay inquiry does not, however, extend to the nature of the bargaining process in the way procedural unconscionability does;[316] ability-to-repay is not concerned with imbalances in power between lender and borrower or the details of their communications. Ability-to-repay reflects an implicit assumption that there will always be a power imbalance between lender and borrower such that verification of borrower repayment capacity is a necessary safeguard.[317] Thus, ability-to-repay is focused on the very practical question of whether consumers are likely to find themselves caught in unduly burdensome obligations, not on the bargaining process by which consumers found themselves facing such obligations.[318] Put another way, ability-to-repay is concerned with a narrow type of process—verification of ability to repay—and then only because of its concern about outcomes.

Unlike judicially created ability-to-repay requirements, such as in the *Fremont* case,[319] statutory ability-to-repay requirements are often coupled with safe harbors.[320] These safe harbors have the effect of making ability-to-repay more rule-like. The safe harbors provide ex ante certainty for risk-averse lenders yet still allow freedom of contract for risk-preferring lenders, who are still required to verify borrowers' ability to repay. This allows for risk-preferring lenders to specialize in dealing with higher-risk borrowers and possibly develop economies of

313 *See supra* Section II.C.

314 *See supra* Section II.A.

315 *See supra* Part III.

316 *See supra* note 130 and accompanying text.

317 *See supra* Section III.G.

318 *See supra* Part III.

319 *See* Commonwealth v. Fremont Inv. & Loan, 897 N.E.2d 548, 560 (Mass. 2008).

320 *See supra* Section III.G (summarizing safe harbors).

scale for verifying their ability to repay. It also ensures that the safe harbor rules do not prevent mutually beneficial lending relationships that do not generate undue risk.

Each of these approaches has merits and drawbacks as a method of consumer credit regulation. As a method for regulating a consumer credit system, the lack of ex ante certainty engendered by unconscionability standards renders them unsuitable as the primary regulatory mode. Given the enormous number of consumer credit transactions and the tremendous variation in how any particular lender interacts with borrowers, much less on what terms, relying on unconscionability to be the primary policing mechanism rather than a tool for targeting extraordinary cases would inject too much transaction-chilling uncertainty into the consumer credit system.

Usury laws, for all of their arbitrariness, provide substantial certainty benefits for credit transactions. In this regard, usury laws are to be preferred over unconscionability as the primary mode of regulation, but with unconscionability providing a backstop for egregious cases where the problem stems from either nonmonetary price terms or contracting process (market power and communications) or the interaction of these terms or process with other features of the loan, even if the interest rate complies with the usury statute.

Yet, although usury laws might be preferable as a primary regulatory mode relative to unconscionability, ability-to-repay requirements have much to commend them relative to usury laws. Because the ability-to-repay inquiry is broader than the monetary price terms, it captures the totality of the loan terms, such as amortization schedules and rate resets.[321] This means that the ability-to-repay is more likely to capture situations like sweatbox lending, where the interests of the lender and borrower are not substantially aligned.[322]

Unlike unconscionability, however, ability-to-repay does not account for the bargaining process that led up to the contract.[323] It thus does not capture the situation where the borrower can repay the loan, but the loan would not have been advisable, and the borrower lacked the wherewithal to decline the offer. Nor does it address the situation where a borrower failed to fully understand the offer, such that the borrower would not have entered into the loan had he fully understood. Thus, ability-to-repay is also well served with an unconscionability doctrine backstop.

Ultimately, the combination of ability-to-repay plus safe harbors gains virtually all the benefits of a usury law while maintaining

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321 *See supra* Section III.G.

322 *See supra* Section I.E.

323 *Compare supra* Section II.C (summarizing unconscionability), *with supra* Section III.G (summarizing ability-to-repay).

flexibility. If backstopped by unconscionability, ability-to-repay would seem to provide the best approach to consumer protection.

C. Rules-versus-Standards is Outcome Determinative

The rules-versus-standards debate has strangely operated as if the choice is merely a procedural matter of efficiency and administrability with no effect on actual outcomes.[324] Yet, the rules-versus-standards choice is always potentially outcome determinative to the extent that the outcomes with a standard do not align with those of a rule. For example, if a usury rule prohibits interest at more than 36% APR, and an unconscionability standard holds that a 30% APR loan is unconscionable, then the rule-versus-standard choice is outcome determinative. So, too, if the unconscionability standard were to hold that a loan at 40% APR were not unconscionable.

In other words, depending on the baseline (rule or standard), both approaches can produce type 1 errors (false positives) and type 2 errors (false negatives). To be sure, one cannot say in the abstract whether the choice of a rule or a standard will result in any particular result, but the idea that they are outcome equivalent is dubious, as is underscored by the literature's emphasis on the unpredictability of standards.[325]

In the context of consumer credit regulation, however, there is an additional aspect to the outcome-determinative nature of rules-versus-standards, namely how the choice of a rule versus a standard interface with the economics and procedural posture of regulation.

From the perspective of a consumer, the choice between rules and standards is messy. A consumer will bear the burden of proof either if the consumer is the plaintiff or if the consumer raises an affirmative defense, like unconscionability or ability-to-repay. This means that the consumer has a hurdle to surmount under either a rule or a standard.

On the one hand, a consumer might prefer a rule to a standard because it is much cheaper to enforce rules than standards.[326] Proving a usury violation is much more straightforward than proving that a practice is unconscionable. A usury violation can generally be shown from the four corners of the loan contract. And because compliance is much easier for a rule, a consumer might never need to take action to enforce a rule; the lender will simply comply.

On the other hand, because rules are easier to evade than standards, a consumer might more often be confronted with problematic

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324 *See* sources cited *supra* note 286 (summarizing the rule-versus-standards debate).

325 *See, e.g.*, Korobkin, *supra* note 286, at 25–26 ("Standards, in contrast, require adjudicators (usually judges, juries, or administrators) to incorporate into the legal pronouncement a range of facts that are too broad, too variable, or too unpredictable to be cobbled into a rule.").

326 *See* Adams v. Plaza Finance Company, Inc., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) ("It is more expensive to apply and litigate about standards than to apply rules.").

business practices under a rule-based regime. Moreover, if a consumer finds herself in litigation, a standard might be preferable because it is harder for a business defendant to dismiss a standards-based claim on a pre-discovery motion to dismiss.

At the same time, however, to the extent the consumer is proceeding as part of a class, a standards-based approach presents an obstacle if the standard looks to the characteristics of individual consumers within a class, as it might prevent class certification. Given the economics of consumer finance litigation, which usually involves relatively small amounts in controversy, litigation by consumers is often not economically feasible, unless it can be brought as a class action.[327] All told, the rules-versus-standards choice is not obvious from the perspective of an individual consumer.

Yet this perspective is not the most important in consumer credit regulation. The reality of consumer credit contracts is that they are rarely litigated by individual consumers precisely because the dollars at stake are too small to justify litigation in most cases.[328] Consumers with credit problems can rarely pay for counsel except on contingency fee, and the potential recoveries are often too low to merit representation given the odds of success, even with statutory attorneys' fees and fee shifting statutes.[329]

Because of the small amounts in controversy, the economics of consumer credit litigation often preclude consumers from bringing affirmative litigation except in the context of class actions.[330] But class actions are all but impossible because of the prevalence of binding mandatory arbitration clauses in most types of consumer credit contracts—excluding mortgages, federal student loans, and loans covered by the MLA.[331] Thus, affirmative private litigation about consumer credit is quite rare.[332] Likewise, most suits against consumers seeking to collect on consumer credit result in default judgments, such that private litigation plays a limited role in the law of consumer credit.[333]

Instead, the key perspective in consumer credit regulation is that of public regulators—the CFPB, the FTC, the federal banking regulators, and state attorneys general and banking supervisors. The choice of a rule versus a standard looks quite different from a public regulatory agency's perspective: a standard gives the agency immensely more

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327 *See* LEVITIN, *supra* note 117, at 46–47 (discussing the economics of consumer finance litigation).

328 *Id.*

329 *Id.*

330 *Id.*

331 *See id.* at 59–65 (discussing arbitration).

332 *Id.* at 47.

333 *Id.*

discretion and hence power than a rule. Moreover, a standard-based regime virtually dictates the outcome if the agency takes action.

If a financial regulator were to bring litigation in court, the burden of proof would be on the regulatory agency, which would likely prefer a rule in such a situation. But financial regulatory enforcement is rarely decided in court. Instead, it is usually decided in the context of regulatory agency investigations, supervisory actions, or enforcement actions that are never actually litigated but result in consent decrees that are summarily approved by courts.[334]

In situations that fall short of full-blown litigation, the regulatory agency has the whip hand. It faces no barrier of arbitration clauses or class certification and can often recover far greater damages than a private litigant—restitution plus civil monetary penalties. Additionally, liability may have collateral regulatory consequences—loss of licenses, or further regulatory scrutiny—and there are serious reputational consequences for a regulated entity.[335] All this means that the mere threat of enforcement creates a powerful incentive for a regulated entity to settle rather than litigate even if it may have meritorious defenses.

In such situations, private litigation's dynamic regarding the burden of proof is flipped. A standard gives the regulator tremendous discretion regarding whether to claim a legal violation. Even if the lender has some reasonable defenses, it may not matter given the heavy enforcement hammer wielded by the regulator. Indeed, this raises the danger of overzealous enforcement because a regulator empowered to enforce a standard that faces little meaningful judicial review can become a law unto itself.

In contrast, a bright-line rule provides a lender with substantial certainty regarding the likelihood of regulatory enforcement—either the lender has violated the usury law, or it has not. The choice of rules versus standards may well be outcome determinative in a regulatory enforcement context because if there is a standard, the lender will generally lose or, more precisely, be forced to settle, while if there is a rule, the lender will only face an action if there is a clear violation. Thus, the political economy of rules-versus-standards flips depending on whether usury laws are enforced primarily through public rather than private action.[336]

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334 *See generally* Kelly Thompson Cochran, *The CFPB at Five Years: Beyond the Numbers*, 21 N.C. Banking Inst. 55 (2017) (describing CFPB enforcement through both court filings and agency investigations).

335 *See* Levitin, *supra* note 64 at 357–58 (describing CFPB enforcement authority).

336 Judge Easterbrook's insight regarding the cost of standards does not address who bears the costs of litigating about standards. *See* Adams v. Plaza Finance Company, Inc., 168 F.3d 932, 939 (7th Cir. 1999) (Easterbrook, J., dissenting) (acknowledging that standards are often costlier without analyzing who bears such costs). In the context of private litigation, added costs inure to well-heeled defendants. But in the context of public litigation, added costs inure to the benefit of the government.

The ability-to-repay approach with safe harbors helps address this dynamic. Safe harbors help protect against an overzealous regulator while giving the regulator a freer hand to act against egregious violations and encouraging parties that do not rely on safe harbors to seek preclearance of their practices through no-action letters and the like. And because of the UDAAP prohibition in the Consumer Financial Protection Act, the CFPB and state attorneys general are still able to use an unconscionability-like standard to address problems in the contracting process or contract enforcement outside of the credit terms of a loan.[337]

In contrast, the choice of rule or standard is largely irrelevant for the concern about underenforcement. This is because a regulator that does not wish to bring enforcement actions because of its political worldview will not bring them irrespective of whether it administers a rule or a standard, although it will find it easier to hide behind a standard.

Ability-to-repay requirements with safe harbors help harness the best of both rules and standards, particularly given the dynamics of consumer credit regulation, where safe harbors offer risk-adverse parties certainty while maintaining flexibility to allow risk-preferring lenders to serve consumers so long as they ensure compliance with the standard.

D. Toward a National Ability-to-Repay Requirement

In light of this Article's insights about the preferability of an ability-to-repay standard with safe harbors, this Article argues that Congress should enact a national ability-to-repay requirement for all consumer credit, excluding student loans, which are a product premised on future rather than present, earning power.[338] The CFPB should then be empowered to implement the requirement with product-specific safe harbors that ensure statistically low (but not zero) default rates.[339] A national ability-to-repay requirement would transform the doctrinal grab bag of the New Usury into a coherent and comprehensive approach to consumer credit regulation. A national ability-to-repay requirement would have the effect of creating a uniform playing field for national

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337 *See generally* Adam J. Levitin, *"Abusive" Acts and Practices: Toward a Definition?* 10–11 (June 19, 2019), https://ssrn.com/abstract=3404349 [https://perma.cc/Q932-S8LP] (explaining the relationship between "abusive" and unconscionability).

338 Excluding federal Direct Loans from ability-to-repay does not raise a policy concern, however, because federal Direct Loans already have the most consumer-friendly terms of any financial product on the market, have an interest rate set by federal law, and have a back-end ability-to-repay feature through income-driven repayment options. Private student loans are a more problematic situation; addressing them is beyond the scope of this Article.

339 To be sure, the existing prohibition on unfair, deceptive, or abusive acts or practices already arguably encompasses an ability-to-repay requirement for which the CFPB could promulgate safe harbors. *See supra* Part III.E. But it remains unclear exactly how far the UDAAP power reaches. Express legislation would resolve the uncertainty.

consumer credit markets, enabling broader and more efficient markets than fragmented local regulations.

A national ability-to-repay requirement would punt the hard work of detailed requirements and safe harbors to the regulators, particularly the CFPB. The devil is very much in the details of regulatory implementation of defining what is necessary to evaluate ability-to-repay and creating safe harbors, but this is something the CFPB has already implemented for mortgages and credit cards,[340] two of the largest consumer financial product markets, so expanding it to other markets such as auto loans or retail installment sales should be readily feasible.

Conclusion

The erosion of traditional usury laws through preemption and deregulation created a doctrinal vacuum regarding the treatment of high-cost credit. At the same time, changes in the structure of the consumer finance market undermined lenders' incentive to ensure the affordability of loans. Courts, legislatures, and regulatory agencies have all acted in their own ways to fill that gap with the set of doctrinal innovations this Article terms the "New Usury"—an expansion of traditional unconscionability doctrine to hold nonusurious loans unconscionable based on high cost, and various ability-to-repay requirements.

Because of its multiple sources, the New Usury has developed in a piecemeal and haphazard manner, often in response to particular market problems. As a result, the New Usury applies differently by product and jurisdiction. Moreover, some of the New Usury is not even formally binding law but rather merely akin to indications of when a regulatory agency might bring an enforcement action.

The different doctrinal approaches represented in the New Usury tee up the question of what is the optimal approach among traditional usury laws' bright-line rules, unconscionability's broad standards-based regime, and the narrower standards-based inquiry of ability-to-repay. Although many of the considerations track the well-established rules-versus-standards debate, the added twist is that in the consumer finance context the choice of a rule or a standard is often outcome determinative and must be evaluated with consideration of the dynamics of regulatory enforcement.

Based on this analysis, this Article calls for formalizing the New Usury in a national ability-to-repay requirement coupled with product-specific regulatory safe harbors. Combining an ability-to-repay standard with rules-based safe harbors would guarantee certainty for businesses while still ensuring that consumers are protected from unduly aggressive extensions of credit.

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340 *See supra* Part III.D.

NOTE

Religious Protection or Religious Privilege? The Threat Religious Claimants Pose to Protecting Health in the HIV Epidemic

*Sydney Fay**

ABSTRACT

As tensions rise between the right to religious freedom and the rights of LGBTQ persons, a recent challenge to a preventive health service threatens the people's ability to protect their health. The United States District Court for the Northern District of Texas recently held the mandated insurance coverage of preexposure prophylaxis ("PrEP") violated the Religious Freedom Restoration Act ("RFRA") after plaintiffs claimed providing coverage for PrEP facilitated homosexual and other purported morally objectionable behaviors that violated their religious beliefs. In reality, PrEP is a drug that prevents the contraction of human immunodeficiency virus ("HIV")—a potentially deadly disease that can infect anyone. As the United States continues to fight the ongoing HIV epidemic, PrEP is essential in stopping the spread of HIV,

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and it should be treated with such importance by courts. However, with the difficulties adjudicating what exactly is a "substantial burden" on a plaintiff bringing a RFRA complicity claim, courts are ill-prepared to appropriately measure the government interest in mandating coverage for PrEP against the burden on religious objectors. This Note proposes a new framework for courts to apply when addressing RFRA challenges to preventive health services. In applying the framework, this Note additionally argues why the facts of the PrEP challenge do not show a sufficient substantial burden on the plaintiffs' religious exercise and why the PrEP mandate is necessary in the government's efforts to stop the spread of HIV. When the Supreme Court reviews the issue of whether the PrEP mandate violates RFRA, the claim should fail because of the factually tenuous link between the plaintiff's complicity claim and the alleged objectionable behavior along with the government's interest in stopping the spread of a deadly disease.

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Introduction

In the United States, 1.2 million people live with human immunodeficiency virus ("HIV"), and 36,136 of those individuals were diagnosed in 2021.[1] One of the best defenses to the ongoing spread of HIV is pre-exposure prophylaxis ("PrEP"), a drug taken by HIV-negative persons at risk of contracting HIV.[2] PrEP is ninety-nine percent effective at preventing HIV infection from sexual activity and seventy-four percent effective at preventing HIV infection among people who inject drugs.[3] PrEP coverage, meaning the percentage of individuals at risk for HIV and taking PrEP, is tracked as part of the Centers for Disease Control and Prevention's ("CDC") "Ending the HIV Epidemic in the U.S." initiative.[4] The CDC hopes to increase PrEP coverage so that by 2025 at least fifty percent of the population that needs the drug is prescribed PrEP.[5]

The preventive services requirement in the Affordable Care Act ("ACA")[6] mandates insurance coverage of PrEP.[7] In 2010, when the ACA was enacted, it amended the Public Health Services Act[8] and added section 2713, which requires coverage without cost sharing of certain preventive health services recommended by a group of administrative agencies.[9] Codified as 42 U.S.C. § 300gg-13, the preventive services requirement ensures group and individual insurance plans cover essential preventative care like vaccines, cancer screenings, PrEP, and more without any cost-sharing requirements.[10] The preventive services

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1 *U.S. Statistics*, HIV.gov (Dec. 7, 2023), https://www.hiv.gov/hiv-basics/overview/data-and-trends/statistics [https://perma.cc/BM8Z-MKKF].

2 *See PrEP (Pre-Exposure Prophylaxis)*, Ctrs. for Disease Control & Prevention (June 3, 2022), https://www.cdc.gov/hiv/basics/prep.html [https://perma.cc/B93W-PT9W].

3 *PrEP Effectiveness*, Ctrs. for Disease Control & Prevention (June 6, 2022), https://www.cdc.gov/hiv/basics/prep/prep-effectiveness.html [https://perma.cc/4Z97-UA6D].

4 *PrEP Coverage*, Ctrs. for Disease Control & Prevention (June 21, 2023), https://www.cdc.gov/hiv/statistics/overview/in-us/prep-coverage.html [https://perma.cc/4J2A-MHTK].

5 *Id.*

6 The Patient Protection and Affordable Care Act of 2010, Pub. L. No. 111-148, 124 Stat. 119 (codified as amended in scattered sections of 25 U.S.C., 26 U.S.C., 29 U.S.C., and 42 U.S.C.).

7 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015).

8 42 U.S.C. §§ 201–300mm-64.

9 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318.

10 42 U.S.C. § 300gg-13(a); *see also Preventive Care*, U.S. Dep't Health & Hum. Servs. (Mar. 17, 2022), https://www.hhs.gov/healthcare/about-the-aca/preventive-care/index.html [https://perma.cc/UJM4-JATR]; *Preventive Care Benefits for Adults*, HealthCare.Gov (Sept. 23, 2023), https://www.healthcare.gov/preventive-care-adults/ [https://perma.cc/2JTM-49ES]; *Prevention of Acquisition of HIV: Preexposure Prophylaxis*, U.S. Preventative Servs. Task Force (Aug. 22, 2023), https://uspreventiveservicestaskforce.org/uspstf/recommendation/prevention-of-human-immunodeficiency-virus-hiv-infection-pre-exposure-prophylaxis [https://perma.cc/8A75-FVNZ].

requirement is no stranger to the Religious Freedom Restoration Act of 1993 ("RFRA")[11] as it also created the contraceptive mandate, a decision challenged on the basis of RFRA several times in the past decade.[12]

Insurance coverage is a strong indicator of whether an individual at risk uses PrEP, underscoring the need for mandating coverage in the fight to stop the spread of HIV.[13] Those at risk are much less likely to use PrEP when they are uninsured or PrEP is not covered by their plan.[14] In a 2017 study, insured individuals were four times as likely to use PrEP when compared with uninsured individuals.[15] This is understandable because PrEP is a very expensive drug, costing anywhere from $8,000 to $24,000 a year for someone without insurance.[16] Thus, lack of insurance coverage can be a significant barrier to a person at risk for HIV who wants to take PrEP, and the potential harm to an individual denied insurance coverage for PrEP is significant.[17]

A recent challenge to PrEP insurance coverage threatens to undermine the government's efforts in stopping the spread of HIV. The United States District Court for the Northern District of Texas recently held the preventive services requirement mandating insurance coverage for PrEP violated an employer's rights under RFRA.[18] The plaintiffs in *Braidwood Management Inc. v. Becerra*[19] are a group of individuals and businesses who seek to purchase health insurance that excludes the

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11 42 U.S.C. §§ 2000bb to 2000bb-4.

12 The three Supreme Court cases addressing RFRA challenges to the contraceptive mandate gradually expanded who may be allowed a religious exemption to the mandate. *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657, 662–63 (2020); Zubik v. Burwell, 578 U.S. 403, 403 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014). The term "contraceptive mandate" stems from language in the federal statute mandating coverage of preventive health services, specifically "such additional preventive care and screenings" for women recommended by the Health Resources and Services Administration ("HRSA"). 42 U.S.C. § 300gg-13(a)(4).

13 *See* Emma Sophia Kay & Rogério M. Pinto, *Is Insurance a Barrier to HIV Preexposure Prophylaxis? Clarifying the Issue*, 110 Am. J. Pub. Health 61, 61–63 (2020); Rupa R. Patel, Leandro Mena, Amy Nunn, Timothy McBride, Laura C. Harrison, Catherine E. Oldenburg, Jingxia Liu, Kennenth H. Mayer & Philip A. Chan, *Impact of Insurance Coverage on Utilization of Pre-exposure Prophylaxis for HIV Prevention*, PLOS One, May 2017, at 1, 3.

14 *See* Kay & Pinto, *supra* note 13, at 63.

15 Patel et al., *supra* note 13, at 3.

16 Kay & Pinto, *supra* note 13, at 61; *see also* Sarah Varney, *HIV Preventive Care Is Supposed to Be Free in the US. So, Why are Some Patients Still Paying?*, KFF Health News (Mar. 3, 2022), https://khn.org/news/article/prep-hiv-prevention-costs-covered-problems-insurance/ [https://perma.cc/CH7A-K9KR].

17 Kay & Pinto, *supra* note 13, at 61.

18 *See* Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 655 (N.D. Tex. 2022). The district court also ruled the agency recommending PrEP was unconstitutional because the agency's members were unconstitutionally appointed in violation of the Appointments Clause. *Id.* at 646. In the interest of fully addressing the implications of the RFRA challenge to PrEP, this Note will not address the plaintiff's Appointments Clause challenge.

19 627 F. Supp. 3d 624, 655 (N.D. Tex. 2022).

coverage of PrEP because of their religious beliefs.[20] They claim PrEP "facilitates and encourages homosexual behavior, intravenous drug use, and sexual activity outside of marriage between one man and one woman" and that providing coverage for the drug would make them complicit in those behaviors.[21] When making a RFRA claim, the plaintiff must show the government "substantially burden[ed]" the exercise of their religion.[22] To overcome this substantial burden, the government in response must show a "compelling governmental interest," and that this interest is being achieved by the "least restrictive means."[23] In *Braidwood*, the court found the mandate requiring PrEP insurance coverage violated RFRA because the government did not show a compelling enough governmental interest to overcome the substantial burden on the plaintiff's religious beliefs.[24]

The challenge to PrEP in *Braidwood* is not entirely unexpected; more than eight years ago, LGBTQ advocates were raising concerns for the future of PrEP following growing exceptions to the contraceptive mandate.[25] In fact, the court in *Braidwood* compares PrEP to contraceptives to justify why the PrEP mandate violates RFRA.[26] Other courts are likely to continue relying on this analogy as contraceptives are the only other preventive service to be challenged by religious objectors. Because anyone can be infected with HIV, it is important that all Americans have the power to protect themselves from such a deadly disease without the interference of an employer and their religious or moral objections. Further, federal courts cannot rely on the contraceptive cases as precedent because of the large differences between PrEP and contraceptives as preventive health services.[27]

Part I of this Note discusses the history and function of the preventive services requirement and the PrEP mandate. Part II lays out the

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20 *Id.* at 633.

21 *Id.* at 652.

22 42 U.S.C. § 2000bb-1(a).

23 *Id.* § 2000bb-1(b).

24 *Braidwood*, 627 F. Supp. 3d at 653–54.

25 *See, e.g.*, Travis Gasper, Comment, *A Religious Right to Discriminate*: Hobby Lobby *and Religious Freedom as a Threat to the LGBT Community*, 3 TEX. A&M L. REV. 395, 411–13 (2015); Kellan Baker, *LGBT Protections in Affordable Care Act Section 1557*, HEALTH AFFS. (June 6, 2016), https://www.healthaffairs.org/do/10.1377/forefront.20160606.055155/full/ [https://perma.cc/45QN-X2HD]. In the first Supreme Court case addressing RFRA challenges to the contraceptive mandate, Justice Ginsburg expressed concern for future complicity-based RFRA challenges and exemptions coming into conflict with LGBTQ rights. *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 770 (2014) (Ginsburg, J., dissenting) (questioning how the Court in the future will "divine which religious beliefs are worthy of accommodation, and which are not" following the decision to exempt corporations from the contraceptive mandate and noting specific concerns for any person "'antagonistic to the Bible', including 'fornicators and homosexuals'" (citations omitted)).

26 *Braidwood*, 627 F. Supp. 3d at 653–54.

27 *See infra* Section IV.A.

legislative and judicial history of RFRA and explains the RFRA balancing test. Part III analyzes the RFRA challenges to the contraceptive mandate and discusses the difficulties courts have in determining "substantial burdens" under RFRA, especially when it comes to complicity claims like the objection to PrEP in *Braidwood*.[28] Lastly, Part IV proposes a new framework for courts to apply when addressing complicity claims against the preventive services mandate. Part IV also argues that PrEP is factually distinct from contraceptives, making the connection between the PrEP mandate and the alleged objectionable behavior in *Braidwood* insufficient to meet the substantial burden requirement; and that even if there were a substantial burden, the government's interest in protecting the public from contracting HIV overcomes that burden, such that the PrEP mandate survives.

I. Protecting Low-Cost Preventive Health Care

The PrEP mandate is a product of the preventive services requirement and requires insurance companies to provide PrEP to consumers with no cost sharing.[29] Insurance coverage for PrEP is a vital tool in stopping the spread of HIV because of the power of preventive medicine and the effectiveness of PrEP in preventing HIV infections.[30] The following Sections discuss the function of the preventive services requirement and the importance of PrEP when facing the severity of HIV and acquired immunodeficiency syndrome ("AIDS").

A. Explaining the ACA's Preventive Services Requirement

Under the Obama Administration, on March 23, 2010, Congress enacted the ACA, amending a section of the Public Health Service Act relating to group and individual insurance plans and markets.[31] The ACA's purpose was, and still is, "to increase the number of Americans covered by health insurance and decrease the cost of health care."[32] Congress hoped to achieve this goal by (1) increasing access to affordable health care for individuals close to the federal poverty line, (2) expanding Medicaid coverage, and (3) supporting medical care delivery methods that decreased the cost of care.[33] To increase access to affordable health care for Americans and improve health outcomes at

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28 *Braidwood*, 627 F. Supp. 3d at 652–53.

29 *See* 42 U.S.C. § 300gg-13(a).

30 *See infra* Section I.B.

31 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,318 (July 14, 2015).

32 Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 538 (2012).

33 *See About the Affordable Care Act*, U.S. Dep't Health & Hum. Servs. (Mar. 17, 2022), https://www.hhs.gov/healthcare/about-the-aca/ [https://perma.cc/AN8Q-LVKD].

the lowest cost, the ACA specifically focuses on public health and preventive care initiatives.[34]

Preventive health care mainly consists of services utilized before the onset of illness, like immunizations and screenings for health problems such as cancer and sexually transmitted infections ("STIs").[35] The purpose of preventive care is to catch health problems early on when treatment is easiest and to reduce the risk of comorbidities and death.[36] With the enactment of the ACA, Congress recognized the historical underutilization of preventive health services in the American health care system and understood that increased insurance coverage and decreased cost of preventive services would increase consumer use.[37] Because it is cheaper to prevent the onset of disease rather than to treat it,[38] focusing on increasing coverage of preventive health services is also a cost-effective plan in protecting public health.

The preventive services requirement lowers the cost of preventive health care by mandating group and individual insurance plans cover preventive health services without any cost sharing requirements.[39] Enacted as section 2713 of the Public Health Service Act, the preventive services requirement did not list which services should have mandated coverage but delegated that decision to three different agencies.[40] These agencies make recommendations for which services require coverage, and these recommendations are reviewed by private insurance companies to ensure compliance with section 2713.[41] The Health Resources

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34 *See, e.g.*, Laura Anderko, Jason S. Roffenbender, Ron. Z. Goetzel, Francois Millard, Kevin Wildenhaus, Charles DeSantis & William Novelli, *Promoting Prevention Through the Affordable Care Act: Workplace Wellness*, 9 PREVENTING CHRONIC DISEASE 1 (2012); Nadia Chait & Sherry Glied, *Promoting Prevention Under the Affordable Care Act*, 39 ANN. REV. PUB. HEALTH 507, 513–14 (2018).

35 *See, e.g.*, Kate Sahnow, *Preventive Care 101: What, Why and How Much*, HEALTHPARTNERS, https://www.healthpartners.com/blog/preventive-care-101-what-why-and-how-much/ [https://perma.cc/EEM4-YXRU].

36 *See id.*

37 *See* 42 U.S.C. § 300gg-13(a); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. 41,318, 41,332 (July 14, 2015); Chait & Glied, *supra* note 34, at 514.

38 *See, e.g.*, Kimberly Amadeo, *How Preventive Care Lowers Health Care Costs*, THE BALANCE (Oct. 28, 2022), https://www.thebalancemoney.com/preventive-care-how-it-lowers-aca-costs-3306074 [https://perma.cc/AH6X-Y38Q].

39 *See* 42 U.S.C. § 300gg-13(a); Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318.

40 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 80 Fed. Reg. at 41,318.

41 *See Procedure Manual Appendix I. Congressional Mandate Establishing the U.S. Preventive Services Task Force*, U.S. PREVENTIVE SERVS. TASK FORCE (April 2019), https://uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/procedure-manual/procedure-manual-appendix-i [https://perma.cc/7QPN-S2SH]. Some experts critique the preventive services requirement's fragmented and vague recommendation system. The lack of clarity in how insurance companies are meant to implement the agency's recommendations is a specific

and Services Administration ("HRSA") is responsible for preventive care and screening recommendations for women and children, including contraceptives.[42] The Advisory Committee on Immunization Practices is responsible for recommending immunization for routine use in children, adolescents, and adults.[43] Lastly, the United States Preventive Services Task Force ("USPSTF") is responsible for most of the clinical preventive services covered under the statute, including screenings for cancer, heart disease, and other illnesses.[44] The USPSTF is also responsible for recommending HIV preventive screenings and the drug PrEP.[45]

The USPSTF makes its recommendations depending upon scientific research and benefit-risk analyses and, using a grading system, decides which health services should be given mandatory coverage.[46] The USPSTF is made up of sixteen nominated members who are all "nationally recognized experts in prevention, evidence-based medicine, and primary care."[47] The board of members use scientific and unbiased methodology to recommend preventive health services and assign them a letter grade—i.e., A, B, C, D, or I—depending on the net benefit and potential harms in providing the service.[48] Then, as explicitly stated by Congress in section 2713, insurance companies are required to provide services recommended with a grade of "A" or "B" by the USPSTF at

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concern because differences in implementing the recommendations cause disparate access to services across insurance plans. For more information, see, for example, Neil Rosacker, Richard Hughes IV & Reed Maxim, *Lack of Clarity on Preventive Services Recommendations May Create Access Barriers*, AVALERE (Dec. 20, 2018), https://avalere.com/insights/lack-of-clarity-on-preventive-services-recommendations-may-create-access-barriers [https://perma.cc/6J8M-VPYP].

42 *See* 42 U.S.C. § 300gg-13(a)(3)–(4); *see also Preventive Services Coverage*, CTRS FOR DISEASE CONTROL AND PREVENTION (May 5, 2020), https://www.cdc.gov/nchhstp/highqualitycare/preventiveservices/index.html [https://perma.cc/HRQ9-GKFL].

43 *See* 42 U.S.C. § 300gg-13(a)(3)–(4); *Preventive Services Coverage*, *supra* note 42.

44 *See* 42 U.S.C. § 300gg-13(a)(3)–(4); *Preventive Services Coverage*, *supra* note 42; Michael Ollove, *Lawsuit Could End Free Preventive Health Checkups*, STATELINE (Aug. 9, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/08/09/lawsuit-could-end-free-preventive-health-checkups [https://perma.cc/K4QK-J3SX].

45 *See* U.S. Preventive Services Task Force, *Screening for HIV Infection*, J. AM. MED. ASS'N, June 11, 2019, at E1, E2 (explaining why USPTF made their recommendation for HIV screening); U.S. Preventive Services Task Force, *Preexposure Prophylaxis for the Prevention of HIV Infection*, 321 J. AM. MED. ASS'N 2203, 2203–06 (2019) [hereinafter PrEP Recommendation Statement] (explaining why USPTF made their recommendation for PrEP).

46 *See Methods and Processes*, U.S. PREVENTIVE SERVS. TASK FORCE (July 2023), https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes [https://perma.cc/9CXJ-TZUY]; *Grade Definitions*, U.S. PREVENTIVE SERVS. TASK FORCE (June 2018), https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/methods-and-processes/grade-definitions [https://perma.cc/LR8J-AAL7].

47 *See Our Members*, U.S. PREVENTIVE SERVS. TASK FORCE, https://www.uspreventiveservicestaskforce.org/uspstf/about-uspstf/current-members [https://perma.cc/VJ3Q-PT4R].

48 *See id.*; *Grade Definitions*, *supra* note 46.

no cost to the consumer.[49] A grade of less than "A" or "B" means the agency either discourages the service or suggests it only be used in particular patient circumstances because of the relatively small net benefit compared with the potential harms.[50]

B. The Importance of Mandatory Insurance Coverage for PrEP

In the effort to stop the spread of HIV, PrEP is an effective tool at preventing an individual from passing HIV to another person. Individuals can take PrEP as a daily pill by mouth, a bimonthly shot, or "on-demand" for moments when a person is most at risk of contracting HIV.[51] In a study of 74,541 participants, the HIV infection rate dropped seventy-four percent over a period of less than four years after PrEP was offered compared with before PrEP was offered.[52] In USPSTF's most recent recommendation statement for PrEP, the agency "found convincing evidence that PrEP is of substantial benefit in decreasing the risk of HIV infection in persons at high risk of HIV acquisition."[53] The agency recommended PrEP with a Grade A rating, meaning the agency is of "high certainty" that the net benefit of PrEP is substantial, thereby requiring that insurance companies cover PrEP.[54]

The population of patients on PrEP is diverse and not exclusively LGBTQ persons. This may come as a surprise to some because PrEP is mainly advertised to LGBTQ persons and a common perception that HIV is a disease that only affects LGBTQ people.[55] In reality, HIV is a disease that can affect anyone, and PrEP is used by people of all sexual orientations. In fact, heterosexual contact accounts for almost a quarter of all HIV diagnoses in the United States.[56] Individuals taking PrEP include people who are sexually active but want to stay HIV negative, people who have a sexual partner with HIV, and people who have had vaginal or anal sex in the last six months but are not consistently using condoms or were diagnosed with a sexually transmitted infection during

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49 *See* 42 U.S.C. § 300gg-13(a)(1); *id.* § 1395l(a)–(b).

50 *See Grade Definitions*, *supra* note 46.

51 *See What Is PrEP?*, Planned Parenthood, https://www.plannedparenthood.org/learn/stds-hiv-safer-sex/hiv-aids/prep [https://perma.cc/4S2Y-6R68].

52 Gus Cairns, *PrEP Prevents an Estimated Three-Quarters of HIV Infections in People at Risk in Large African Study*, NAM aidsmap (July 4, 2020), https://www.aidsmap.com/news/jul-2020/prep-prevents-estimated-three-quarters-hiv-infections-people-risk-large-african-study [https://perma.cc/CZ4P-N5DY].

53 PrEP Recommendation Statement, *supra* note 45, at 2210.

54 *See id.* at 2203–04.

55 *See* Brian Mastroianni, *HIV Prevention: Why Aren't More Heterosexual People Using PrEP?*, Healthline (Jan. 3, 2023), https://www.healthline.com/health-news/hiv-prevention-why-arent-more-heterosexual-people-using-prep [https://perma.cc/4R8L-6VXL].

56 *See Basic Statistics*, Ctrs. for Disease Control & Prevention (May 22, 2023), https://www.cdc.gov/hiv/basics/statistics.html [https://perma.cc/UP6R-EPCB].

those six months.[57] Anyone is able to begin taking PrEP after first testing negative for HIV and then obtaining a prescription from a doctor.[58]

When left untreated, an individual with HIV has an estimated eight to ten years to live.[59] The first few weeks of HIV infection manifests as flu-like symptoms which eventually progress to the final stage of HIV, AIDS.[60] The symptoms of AIDS are much more severe: rapid weight loss, body sores, memory loss, extreme tiredness, and more.[61] These symptoms start after the HIV virus kills enough white blood cells responsible for fighting off infection, eventually destroying the body's immune system.[62] Thankfully, there are effective treatments that increase the life expectancy of a person with HIV by preventing the onset of AIDS.[63]

Nonetheless, even with proper treatment, people with HIV have lower life expectancies and less years in good physical health than people who do not contract HIV.[64] In a recent study, HIV-positive people lived on average nine years less than their HIV-negative counterparts.[65] The study also found HIV-positive people live about sixteen fewer healthy years free from cancer, chronic lung disease, cardiovascular disease, chronic liver disease, or renal diseases when compared with uninfected adults.[66]

While the difference in overall life expectancy has decreased over the years, the difference in number of healthy years has stayed consistent since 2000.[67] The current improvements in HIV treatment have, therefore, not improved quality of life or reduced the risk of developing other serious illnesses for HIV-positive people. The CDC acknowledges the significant harm caused by a positive-HIV diagnosis

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57 *See Deciding to Take PrEP*, Ctrs. for Disease Control & Prevention (July 6, 2022), https://www.cdc.gov/hiv/basics/prep/prep-decision.html [https://perma.cc/U9S4-4BJU].

58 *See Starting and Stopping PrEP*, Ctrs. for Disease Control & Prevention (June 6, 2022), https://www.cdc.gov/hiv/basics/prep/starting-stopping-prep.html [https://perma.cc/VL2Z-3BBX].

59 Caroline A. Sabin, *Do People with HIV Infection Have a Normal Life Expectancy in the Era of Combination Antiretroviral Therapy?*, BMC Med., Nov. 27, 2013, at 1.

60 *See Symptoms of HIV*, HIV.gov (June 15, 2022), https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/symptoms-of-hiv [https://perma.cc/GD9S-MS3X].

61 *See id.*

62 *See HIV and AIDS and Mental Health*, Nat'l Inst. of Mental Health (Nov. 2022), https://www.nimh.nih.gov/health/topics/hiv-aids [https://perma.cc/ME79-7E4M].

63 *See Symptoms of HIV*, HIV.gov (June 15, 2022), https://www.hiv.gov/hiv-basics/overview/about-hiv-and-aids/symptoms-of-hiv [https://perma.cc/624K-XBPN].

64 *See* Julia L. Marcus, Wendy A. Leyden, Stacey E. Alexeeff, Alexandra N. Anderson, Rulin C. Hechter, Haihong Hu, Jennifer O. Lam, William J. Towner, Qing Yuan, Michael A. Horberg & Michael J. Silverberg, *Comparison of Overall and Comorbidity-Free Life Expectancy Between Insured Adults With and Without HIV Infection, 2000–2016*, J. Am. Med. Ass'n Network Open, June 15, 2020, at 1, 8.

65 *Id.*

66 *Id.* at 5.

67 *See id.* at 4–5.

and so has focused its efforts on preventing the contraction of HIV in the first place.[68] Because PrEP prevents an HIV infection, the medicine has the effect of not only preventing serious illness and death but also ensuring as many healthy years as possible for people at risk of HIV.[69]

PrEP is important to the health care industry not only because it protects individuals at risk of contracting HIV, but the drug helps keep healthcare costs low. PrEP is significantly cost-effective because it prevents the even higher costs of treating HIV and the comorbidities that follow.[70] The government's federal budget for HIV totaled $34.8 billion in 2019 with $21.5 billion dedicated only to care and treatment programs under Medicare, Medicaid, and other government programs.[71] In a 2015 study, the estimated lifetime healthcare costs for an HIV-positive person are $326,500 compared with only $96,700 for HIV-negative individuals at high risk of infection.[72] For each HIV infection that is prevented, an estimated $229,800 to $338,400 is saved in medical costs.[73] By preventing HIV infections, the federal government saves hundreds of thousands of dollars that could be utilized elsewhere—instead of treating a preventable disease.

These cost savings are only realized, however, if PrEP is covered by insurance because individuals at risk are much less likely to use PrEP when they are uninsured or PrEP is not covered by their plan.[74] When compared with the uninsured, insured individuals were four times more likely to use PrEP in a 2017 study.[75] This is likely because PrEP costs $8,000 to $24,000 a year for someone without insurance.[76] Lack of insurance coverage is therefore a significant barrier to a person at risk of HIV and needing PrEP, and decreasing insurance coverage of PrEP

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68 *See HIV-Related Death Rate in U.S. Fell by Half from 2010 to 2017*, CTRS. FOR DISEASE CONTROL & PREVENTION (Nov. 19, 2020), https://www.cdc.gov/nchhstp/newsroom/2020/hiv-related-death-rate-press-release.html [https://perma.cc/HQ8F-SYV5].

69 *See supra* notes 64–66 and accompanying text.

70 *See generally HIV Cost-effectiveness*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/hiv/programresources/guidance/costeffectiveness/index.html [https://perma.cc/3GC5-A7VP] (illustrating the significant cost-effective benefits in preventing HIV infections rather than treating HIV).

71 *U.S. Federal Funding for HIV/AIDS: Trends over Time*, KAISER FAM. FOUND. (Mar. 5, 2019), https://www.kff.org/hivaids/fact-sheet/u-s-federal-funding-for-hivaids-trends-over-time [https://perma.cc/AMD9-UQZB].

72 Bruce R. Schackman, John A. Fleishman, Amanda E. Su, Bethany K. Berkowitz, Richard D. Moore, Rochelle P. Walensky, Jessica E. Becker, Cindy Voss, David Paltiel, Milton C. Weinstein, Kenneth A. Freedberg, Kelly A. Gebo & Elena Losina, *The Lifetime Medical Cost Savings from Preventing HIV in the United States*, 53 MED. CARE 293, 297 (2015).

73 *Id.* at 297–98.

74 *See* Kay & Pinto, *supra* note 13, at 63; Patel et al., *supra* note 13, at 3.

75 Patel et al., *supra* note 13, at 3.

76 *See* Kay & Pinto, *supra* note 13, at 61; Sarah Varney, *HIV Preventive Care Is Supposed to Be Free in the US. So, Why Are Some Patients Still Paying?*, KHN (Mar. 3, 2022), https://khn.org/news/article/prep-hiv-prevention-costs-covered-problems-insurance/ [https://perma.cc/XCK3-N6BF].

means increased medical costs as more individuals are forced to treat an HIV-positive diagnosis because they could not afford to prevent it.

The plaintiffs in *Braidwood* alleged the PrEP mandate violates RFRA by requiring they buy or provide insurance which covers PrEP—a drug that in their eyes facilitates morally objectionable behavior.[77] The next Part outlines the creation and purpose of RFRA and explains how a court addresses a RFRA challenge.

II. The Creation of RFRA and Understanding its Statutory Balancing Test

The road to enacting RFRA began with the 1990 Supreme Court case, *Employment Division v. Smith*.[78] In the case, a private drug rehabilitation organization fired the respondents because, during a religious ceremony for the Native American Church, they ingested peyote—an illegal drug under Oregon law—as a sacrament.[79] Respondents then applied to the Employment Division for unemployment compensation but were denied as ineligible because respondents were fired for "work-related 'misconduct.'"[80] Respondents sued the Employment Division for denying their benefits and argued for a religious exemption from the criminal law against ingesting peyote.[81] But the Court upheld the Employment Division's denial of the respondents' benefits because the respondents violated Oregon's law prohibiting the use of peyote, and the Constitution does not require religious exemptions for "neutral, generally applicable" laws.[82]

The Court also held that the government is not required to show a "compelling governmental interest" in instances involving generally applicable laws.[83] Before *Smith*, in cases where a plaintiff argued a government action unduly burdened the exercise of their religion, the Court balanced the burden on the religious person against the government's compelling interest behind their action.[84] This balancing test is called the *Sherbert* test, named after the case that developed it, *Sherbert v. Verner*.[85] According to the Court, if the government's compelling interest were to be considered in *Smith* and a religious exception granted,

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77 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 633 (N.D. Tex. 2022).

78 494 U.S. 872 (1990); *see* 42 U.S.C. § 2000bb-1(a).

79 *Smith*, 494 U.S. at 874.

80 *Id.*

81 *See id.* at 874–75.

82 *Id.* at 880, 884–85, 890.

83 *Id.* at 883, 885–86.

84 *Id.* at 883.

85 374 U.S. 398 (1963); *see* Gregory D. Wellons, Employment Division, Department of Human Resources v. Smith*: The Melting of* Sherbert *Means a Chilling Effect on Religion*, 26 U.S.F. L. Rev. 149, 150 (1991).

the result would be a "constitutional anomaly" as the respondents would be carving out "a private right to ignore generally applicable laws."[86]

The Supreme Court's decision to minimize the use of the compelling governmental interest test in religious freedom cases caused distress in Congress.[87] Three years later, Congress enacted RFRA by a unanimous vote from the House and a nearly unanimous vote in the Senate.[88] With RFRA, Congress restored the *Sherbert* test used in religious objection claims pre-*Smith* and required the Supreme Court balance the government's compelling interest against the burden on the religious plaintiff.[89] RFRA provides an opportunity for religious persons to seek relief when a law or government action "substantially burden[s]" the practice of their religion.[90] The statute states that the "[g]overnment shall not substantially burden a person's exercise of religion" except in instances where the government shows that the specific burden on that person is (1) "in furtherance of a compelling governmental interest" and (2) "is the least restrictive means of furthering that compelling governmental interest."[91]

The RFRA balancing test first requires the plaintiff to show the government action at issue substantially burdens their free exercise of religion.[92] The court must determine if there is an actual burden on the plaintiff claiming relief.[93] For instance, in *Sherbert*, the Court held that South Carolina's Unemployment Compensation Act[94] posed a substantial burden on the plaintiff because the government forced the plaintiff to choose between observing the Sabbath, a day of rest for her faith, and forfeiting unemployment benefits or, alternatively, "abandoning one of the precepts of her religion in order to accept work."[95] Similarly, in *Wisconsin v. Yoder*,[96] the Court found Amish respondents were sufficiently burdened by the compulsory school attendance laws for children up to age sixteen because the state law would force the

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86 *Smith*, 494 U.S. at 886.

87 *See Religious Freedom Restoration Act of 1991: Hearing on H.R. 2797 Before the Subcomm. on Civ. & Const. Rts. of the H. Comm. on the Judiciary*, 102d Cong. 121 (1992) (statement of Rep. Stephen J. Solarz).

88 *H.R.1308 - Religious Freedom Restoration Act of 1993*, CONG., https://www.congress.gov/bill/103rd-congress/house-bill/1308/actions [https://perma.cc/KT8N-QU7N]. Only three senators—two democrats and one republican—voted nay on RFRA. *Roll Call Vote 103rd Congress - 1st Session*, SENATE, https://www.senate.gov/legislative/LIS/roll_call_votes/vote1031/vote_103_1_00331.htm [https://perma.cc/CEE4-4LPX].

89 *See* 42 U.S.C. § 2000bb-1(a)–(b).

90 *Id.* § 2000bb-1(a).

91 *Id.* § 2000bb-1(b).

92 *See, e.g.*, Sherbert v. Verner, 374 U.S. 398, 406–09 (1963).

93 *See id.* at 399 n.1, 403.

94 S.C. CODE ANN. §§ 68-1 to 68-404 (1952).

95 *Sherbert*, 374 at 404.

96 406 U.S. 205 (1972).

respondents to "perform acts undeniably at odds with fundamental tenets of their religious beliefs" and would undermine "the Amish community and religious practice."[97] If the court finds there is a substantial burden on the plaintiff, the government then must show (1) that there is a compelling governmental interest that justifies the burden on the plaintiff, and (2) that the governmental interest cannot be achieved by any other less restrictive means.[98] According to *Sherbert*, the government cannot rely on hypotheticals in showing a compelling interest but must rely on a real and present danger to that interest.[99]

III. Expanding Exceptions and the Issues with Adjudicating Substantial Burden

To understand the court's analysis of the RFRA challenge to PrEP in *Braidwood*, it is necessary to discuss the first challenge to the preventive services requirement: the contraceptive mandate.[100] The contraceptive mandate challenge uniquely illustrates the difficulties in adjudicating a substantial burden for a complicity claim that implicates the health care choices of others. The following Sections discuss the contraceptive mandate cases, the challenges of adjudicating the substantial burden prong under RFRA, and the current case with the challenge to PrEP.

A. The First Strike Against Section 2713: Religious Exceptions to the Contraceptive Mandate

The "contraceptive mandate" is the provision of the preventive services requirement mandating insurance companies to provide coverage for "additional preventive care and screenings" specific to women.[101] Contraceptives are included in the "additional preventive care and screenings" category because they are recommended by HRSA, the agency that specializes in women's health and gender-specific issues.[102] HRSA's reasoning for mandating coverage for the "full range of contraceptives" is to "prevent unintended pregnancies and improve birth outcomes."[103]

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97 *Id.* at 218.

98 *See Sherbert*, 374 U.S. at 406–07.

99 *See id.* at 406; *see also* Thomas v. Collins, 323 U.S. 516, 530 (1945).

100 *See* 42 U.S.C. § 300gg-13.

101 *Id.* § 300gg-13(a)(4).

102 *Id.*; *Women's Preventive Services Guidelines*, Health Res. & Services Admin. (Dec. 2022), https://www.hrsa.gov/womens-guidelines [https://perma.cc/NP6U-HTQJ]; *see also About the Office of Women's Health*, Health Res. & Services Admin. (June 2022), https://www.hrsa.gov/office-womens-health/about-us [https://perma.cc/4BDK-3MMT].

103 *Women's Preventive Services Guidelines*, *supra* note 102.

Following the enactment of the preventive services requirement, the Departments of Health and Human Services, Labor, and the Treasury ("Departments") published interim final rules implementing section 2713.[104] In response to the rules, several commenters raised concerns regarding the lack of a religious exemption for individuals and employers whose religious beliefs would be violated by the contraceptive mandate.[105] Several commentators claimed that the mandate violated the religious freedom of employers by requiring that they cover services adverse to the "tenets" of their religion.[106]

In response, the Departments amended the interim final rules to allow a religious exemption for the contraceptive mandate, but only for certain religious employers.[107] The Departments' exemption only applied to houses of worship and nonprofit organizations that primarily employ and serve people who "share its religious tenets."[108] This exemption was later clarified and simplified by requiring eligible religious employers to self-certify as an organization needing an exemption from the contraceptive mandate.[109] The self-certification form notified the insurance company that the employer would not be paying for contraceptive coverage for their employees.[110] After receiving the notice, the insurance company would automatically enroll the employees in a separate plan that covers contraceptives with no cost-sharing.[111] In the Departments' words, the self-certification requirement furthered "government interests in safeguarding public health and ensuring that women have equal access to health care" by providing women access to contraceptives without harming religious organizations and their religious beliefs.[112]

The three Supreme Court cases addressing the challenges to the contraceptive mandate focused on (1) the limitations on who was eligible for a religious exemption, and (2) the self-certification accommodation for religious employers.[113] In 2014, *Burwell v. Hobby Lobby*[114]

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104 *See* Interim Final Rules for Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 75 Fed. Reg. 41,726 (July 19, 2010).

105 *See* Group Health Plans and Health Insurance Issuers Relating to Coverage of Preventive Services Under the Patient Protection and Affordable Care Act, 76 Fed. Reg. 46,621, 46,623 (Aug. 3, 2011).

106 *Id.*

107 *Id.*

108 *Id.*

109 *See* Coverage of Certain Preventive Services Under the Affordable Care Act, 78 Fed. Reg. 39,870, 39,875 (July 2, 2013).

110 *See id.*

111 *See id.*

112 *Id.* at 39,872.

113 *See* Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania, 591 U.S. 657 (2020); Zubik v. Burwell, 578 U.S. 403 (2016); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682 (2014).

114 573 U.S. 682 (2014).

was the first RFRA challenge to the contraceptive mandate and asked whether closely held corporations could seek a religious exemption from the contraceptive mandate.[115] Plaintiffs in the case, three closely held corporations, sought a religious exemption from the contraceptive mandate because of the business owners' religious objections to abortion and their belief that several forms of contraceptives were abortifacients.[116] The majority held that because the mandate imposes an enormous sum in fees for noncompliance and the plaintiffs sincerely believe that providing these contraceptives violates their religious beliefs, the mandate imposes a substantial burden on those beliefs, and it is not for the Court to "say that their religious beliefs are mistaken or insubstantial."[117]

For the sake of the argument, the Court conceded that the government has a compelling governmental interest in ensuring that all women have access to contraceptives without cost-sharing.[118] The Court then turned to whether the contraceptive mandate was the least restrictive means of furthering that interest. The majority held that the mandate failed the least restrictive means test because the government already provides accommodation for nonprofit organizations with religious objections, and the self-certification accommodation can simply be expanded to include closely held corporations.[119] The Court stated that such an approach would not "impinge on the plaintiffs' religious belief[s]" and serve the government's interests "equally well."[120]

The cases that followed *Hobby Lobby*, *Zubik v. Burwell*[121] and *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*,[122] addressed religious objections to the Departments' self-certification requirement. In *Zubik*, the Supreme Court consolidated several cases and considered whether the required self-certification notice informing an insurance plan of an employer's religious objection to providing

115 *See Burwell*, 573 U.S. at 688–91.

116 *See id.* at 691, 700–04. The plaintiffs in the case were the founders of the three closely held corporations: Conestoga Wood Specialties, Hobby Lobby, and Mardel. *See id.*

117 *Id.* at 725–26.

118 *See id.* at 728.

119 *See id.* at 728–31.

120 *Id.* at 731. The majority also proposed the idea of the government "assum[ing] the cost of providing" the contraceptives religious objectors have issue with to the women employed by an exempt employer. *Id.* at 728. But this suggestion minimizes the potential administrative and financial costs of such a new program and how those costs may be imposed on the women attempting to access contraceptives. *See id.* at 728–30. In her dissent, Justice Ginsburg discussed exactly this problem, noting how female employees may be subject to tax credits or other burdens if employers refuse to pay for contraceptives. *Id.* at 767–68 (Ginsburg, J., dissenting).

121 578 U.S. 403 (2016).

122 591 U.S. 657 (2020).

contraceptives substantially burdens the exercise of a person's religion.[123] Without expressing any views on the merits, the Court remanded the cases so that the respective courts could hear further arguments by the parties and decide on an approach that respects the petitioners' religious rights while ensuring that the women impacted by petitioners' beliefs "receive full and equal health coverage, including contraceptive coverage."[124]

Then, *Little Sisters* picked up where *Zubik* left off after the Departments could find no alternative to the self-certification accommodation.[125] Because the Departments could not see any other less restrictive means to facilitate exemptions besides the self-certification requirement, they decided to expand exemptions to not only religious objectors but moral objectors to appease the plaintiffs in *Zubik*.[126] Following the Departments' decision to expand exemptions, the Commonwealth of Pennsylvania sued the Departments arguing the new rules were "procedurally and substantively invalid" under the Administrative Procedure Act.[127] The Court upheld the Departments' decision as procedurally valid and stated that the Departments had the authority to make such a decision.[128]

The holdings of *Zubik* and *Little Sisters* show where the law is today on religious exemptions to a preventive health service, and if these cases are used by courts to justify an exemption to the PrEP mandate, the result would likely mirror the expanding exemptions to contraceptives. Additionally, since the Court's adjudication of the complicity claim in *Hobby Lobby*, the adjudication of substantial burden under the RFRA statutory test has become unpredictable. The next Section discusses the difficulties courts have when addressing whether a person's religious practice is actually "substantially burdened."

B. Flaws in Adjudicating Substantial Burden with Complicity Claims

Plaintiffs bringing complicity claims emphasize the issues courts have adjudicating substantial burden under RFRA. Complicity claims are unique in that they condemn the conduct of a third party and depend

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123 *See Zubik*, 578 U.S. at 405–07.

124 *Id.* at 408–09 (citation omitted).

125 *See Little Sisters*, 591 U.S. at 670–72; Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,603 (Nov. 15, 2018).

126 *See* Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. 57,592, 57,603 (Nov. 15, 2018).

127 Pub. L. No. 79-404, 60 Stat. 237 (1946) (codified in scattered sections of 5 U.S.C.); *Little Sisters*, 140 S. Ct. at 2378.

128 *See Little Sisters*, 591 U.S. at 682–86.

on the claimant's relationship to that third-party actor.[129] Professors Douglas Nejaime and Reva Siegel describe these claims as "faith claims about how to live in community with others who do not share the claimant's beliefs, and whose lawful conduct the person of faith believes to be sinful."[130] For instance, the case in *Hobby Lobby* centered on a complicity claim that by providing coverage for certain contraceptives, the plaintiffs would be complicit in abortions allegedly caused by the contraceptives.[131] But because of the nature of complicity claims, the actual burden on the plaintiffs rests on whether the third party ever does the perceived-immoral act the plaintiff objects to.[132] These complicity claims are thus controversial for courts in determining if a substantial burden exists for the purposes of RFRA.

Judges, in their adjudication of "substantial burden," typically consider two factors: (1) the *sincerity* of a person's religious belief and (2) the secular costs (i.e., monetary fines) on the religious objector.[133] Because sincerity is virtually never questioned by the court absent real evidence the claim is fraudulent, claimants are taken for their word that their beliefs are sincere.[134] Secular costs, however, apply to all citizens, regardless of whether a person chooses to not comply because of a religious or a secular reason. For example, the fine for not complying with the contraceptive mandate would still apply to an employer who chooses not to cover contraceptives because she believes contraceptives are dangerous to a woman's health and wants to protect her employees from them. The secular cost therefore burdens all individuals who choose not to comply with a law and is not limited to religious persons, so the fine tells the courts arguably nothing about the substantial *religious* burden on the claimant.[135] In the words of Professor Frederick Mark Gedicks, "If judicial review is confined to claimant sincerity and secular costs, the substantiality of a claimed religious burden under RFRA is effectively established by the claimant's mere say-so."[136] With complicity claims, courts continue to look at sincerity and secular costs in adjudicating substantial burden, but they do not deeply analyze how

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129 Douglas Nejaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2519 (2015).

130 *Id.*

131 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014); *see also* Amy J. Sepinwall, *Conscience and Complicity: Assessing Pleas for Religious Exemptions in* Hobby Lobby*'s Wake*, 82 U. CHI. L. REV. 1897, 1911–13 (2015).

132 *See* Nejaime & Siegel, *supra* note 129, at 2519.

133 *See* Frederick Mark Gedicks, *"Substantial" Burdens: How Courts May (and Why They Must) Judge Burdens on Religion Under RFRA*, 85 GEO. WASH. L. REV. 94, 96–97 (2017).

134 *See id.* at 110 (noting that "[s]ince the development of religious liberty jurisprudence in the early 1960s, the government has conceded claimant sincerity in virtually every religious exemption case to reach the Supreme Court").

135 *See id.* at 105, 114.

136 *Id.* at 98.

claimants are complicit in the religiously objectionable behavior. The substantial burden instead relies on the secular consequences of the plaintiff not complying with the law rather than the religious burdens on the plaintiff for complying with the law.[137]

The focus on secular costs in evaluating a religious claim ignores what makes a religious claim unique and worthy of protection: its religiosity. A religious claim is protected by the courts while a challenge to a law for secular beliefs is not because religious exercise is protected by the Constitution.[138] Thus, more is needed than just an evaluation of the secular costs to show why these religious claims require a higher bar of protection, and because complicity claims hinge on third parties participating in religiously objectionable behavior, courts need to analyze the nature of the religious plaintiff's complicity to determine if there is a substantial burden.

Unfortunately, for reasons unnamed by the courts but likely attributed to the religious question doctrine, courts irresponsibly shy away from analyzing whether there is a rational connection between the complicit behavior and the third-party action. The religious question doctrine—a doctrine that precludes courts from deciding religious questions—and the Establishment Clause are the biggest reasons for courts' reluctance in evaluating religious burdens.[139] Together these legal constraints restrain courts from adjudicating issues of religious doctrine or questioning the reasonableness of a person's religious belief.[140] Because judges cannot be experts in every person's religion, the religious question doctrine and the Establishment Clause keep judges from inadvertently favoring a certain belief or religion over another and inadvertently discriminating against religions.[141] Therefore, judges tend to lean on secular costs in measuring a substantial burden out of fear of drawing a conclusion on the person's religion.

The consideration of only secular costs and failure to analyze religious costs also stems from a misinterpretation of dicta. In *Hobby Lobby*, the majority cited to *Thomas v. Review Board of Indiana Employment Division*[142] in holding that the Court's "narrow function" in analyzing the substantial burden on the claimant is to determine whether the plaintiff's claimed restriction of their religious exercise

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137 *See* Sepinwall, *supra* note 131, at 1914.

138 U.S. CONST. amend. I.

139 *See* 42 U.S.C. § 2000bb-4; Gedicks, *supra* note 133, at 97; Gabrielle M. Girgis, *What Is a "Substantial Burden" on Religion under RFRA and the First Amendment*, 97 WASH. U. L. REV. 1755, 1775–76 (2020).

140 *See* 42 U.S.C. § 2000bb-4; Gedicks, *supra* note 133, at 97; Girgis, *supra* note 139, at 1775–76.

141 *See* Girgis, *supra* note 139, at 1776.

142 450 U.S. 707 (1981).

reflects an "honest conviction."[143] But claiming that the Court has a "narrow function" misinterprets the *Thomas* Court and leads the Court to accept complicity claims as fulfilling the "substantially burden" prong of RFRA without partaking in thorough analysis of the religious burdens on the plaintiff.[144]

In *Thomas*, the Court merely meant that judges cannot interrogate or dissect a plaintiff who was struggling with their religious beliefs.[145] Instead, the Court must take the plaintiff's religious beliefs as they are given, as it is an "honest conviction" by the plaintiff.[146] Although courts are not allowed to dissect religious doctrine nor a person's struggles with their religion, they are allowed to evaluate what religious burdens and costs are put on a plaintiff in having to adhere to the government's laws and actions. And in the case of complicity claims where the religious objection lives inside the internal conscience of the plaintiff, it is more difficult but even more important, considering the burden these religious exemptions have on third parties, to evaluate the actual burdens on the plaintiff.[147]

Hobby Lobby held that the secular penalty of not complying with the contraceptive mandate amounts to a substantial burden on a religious person, but the Court did not address what burdens are *not* sufficient to succeed under an RFRA claim. Not all complicity claims are created equal and not all complicity claims amount to a substantial burden in the Court's eyes.[148] In fact, RFRA challenges often dismissed by courts are religious objections to paying taxes or paying for social welfare programs like Social Security.[149] In *United States v. Lee*,[150] an Amish employer refused to pay social security taxes because the Amish religion "prohibits the acceptance of social security benefits" and "bars

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143 Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 686, 725 (2014) (quoting *Thomas*, 450 U.S. at 716); *see also* Ira C. Lupu & Robert W. Tuttle, Response, Little Sisters of the Poor v. Pennsylvania*: The Misuse of Complicity*, GEO. WASH. L. REV. ON THE DOCKET (July 19, 2020), https://www.gwlr.org/little-sisters-of-the-poor-v-pennsylvania-the-misuse-of-complicity/ [https://perma.cc/YP5G-9R25].

144 *See* Lupu & Tuttle, *supra* note 143.

145 *Thomas*, 450 U.S. at 715*; see also* William P. Marshall, *Bad Statutes Make Bad Law:* Burwell v. Hobby Lobby, 2014 SUP. CT. REV. 71, 114–15 (2015).

146 *See Thomas*, 450 U.S. at 716.

147 *See* Ira C. Lupu & Robert W. Tuttle, *The Radical Uncertainty of Free Exercise Principles: A Comment on* Fulton v. City of Philadelphia, 5 AM. CONST. SOC'Y SUP. CT. REV. 221, 244–45 (2021); *see also* Lupu & Tuttle, *supra* note 143.

148 *See* United States v. Lee, 455 U.S. 252, 257 (1982).

149 *See The Truth About Frivolous Tax Arguments—Section I (D to E)*, INTERNAL REVENUE SERV. (Mar. 2022), https://www.irs.gov/privacy-disclosure/the-truth-about-frivolous-tax-arguments-section-i-d-to-e [https://perma.cc/A4WZ-JRT9]; *see also* Frederick Mark Gedicks & Rebecca G. Van Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 359 (2014).

150 United States v. Lee, 455 U.S. 252 (1982).

all contributions by Amish to the social security system."[151] The Supreme Court held that while it is necessary for courts to be sensitive to the constitutional liberties afforded by the First Amendment,

> [E]very person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity.[152]

The Court is therefore willing to draw lines regarding what complicity claims can succeed, but it is still up for debate what exactly pushes a complicity claim into viable territory. Complicity claims exist on a spectrum, and the Court recognizes this by upholding some claims while dismissing others. When addressing complicity claims against the preventive services mandate, courts should recognize the "commercial" sphere employers voluntarily enter and the burdens third parties must bear when employers deny them access to life-protecting medical services. Such a threat facing third parties requires a clear bar that complicity-based claimants must meet to show they are substantially burdened under RFRA. The final Part of this Note presents a new framework for the Court to apply when determining whether a complicity claim against preventive health services meets the bar of a substantial burden under RFRA.

C. Braidwood Management Inc. v. Becerra*: The Case Against the Mandate for PrEP*

In the case of *Braidwood Management Inc. v. Becerra*, the plaintiffs are six individuals and two businesses seeking to obtain or provide health insurance that does not cover PrEP.[153] The plaintiffs argued the PrEP mandate violates RFRA because PrEP facilitates "homosexual behavior, intravenous drug use," and sex outside of heterosexual marriage, and that by providing coverage for PrEP, they would be complicit in those behaviors.[154] The court initially decided on the RFRA claim for only Braidwood Management Inc. ("Braidwood"), a Christian for-profit corporation that self-insures its seventy employees, because the

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151 *Id.* at 255.

152 *Id.* at 261; *see also* Tayla Seidman, *The Strictest Scrutiny: How the* Hobby Lobby *Court's Interpretation of the "Least Restrictive Means" Puts Federal Laws in Jeopardy*, 14 Cardozo Pub. L. Pol'y & Ethics J. 133, 145–46 (2015).

153 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 655 (N.D. Tex. 2022).

154 *Id.* at 633–34, 652.

business presented the "easiest case for standing" and found the PrEP mandate did violate RFRA.[155]

First, the court held that Braidwood was substantially burdened by the PrEP mandate because of the sincerity of its belief and the substantial penalty Braidwood would face by not complying with the law.[156] Second, the court held that the government did not show that the PrEP mandate furthers a compelling governmental interest.[157] The court rejected the government's argument that reducing the spread of HIV is a compelling governmental interest because, in the court's view, the government framed the interest too broadly.[158] Third, the court held that even if a compelling governmental interest had been shown, the PrEP mandate is not the least restrictive means of achieving that interest.[159] The court stated the government did not bring sufficient evidence that the PrEP mandate is the least restrictive means of reducing the spread of HIV because the government did not prove why a religious exemption to the PrEP mandate or other similar alternative is not feasible.[160]

The importance of this case cannot be understated as its reach goes beyond PrEP insurance coverage, which alone is incredibly important to those at risk of HIV. If on later appeal the Supreme Court agrees with the district court and decides to expand the contraceptive mandate exceptions to include PrEP, this would be an incredible setback in the effort to stop the spread of HIV.[161] Such a decision will also show the public that employers will likely receive an exemption when attacking other preventative services on a religious basis.

IV. A Fresh Analysis of the RFRA Challenge to PrEP

This Part proposes a new framework for courts to apply when determining whether a plaintiff bringing a complicity claim against the preventive services requirement is sufficiently burdened under RFRA. This Part also argues that providing insurance coverage for PrEP is not a substantial enough burden on the *Braidwood* plaintiffs because of the realities of PrEP and HIV, but even if the Supreme Court does find a

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155 *Id.* at 634, 636, 655. The court later determined the standing of the other plaintiffs after further briefing from both parties and held the other parties did have standing and were entitled to relief. *See* Braidwood Mgmt. Inc. v. Becerra, 666 F. Supp. 3d 613, 621–25 (N.D. Tex. 2023). For the purpose of simplicity, this Note will only focus on the analysis of Braidwood's claim.

156 *Braidwood*, 627 F. Supp. 3d at 652–53.

157 *Id.* at 653.

158 *Id.*

159 *Id.* at 654.

160 *Id.* at 654–55.

161 *See, e.g.*, Richard Hughes IV, Nija Chappel & William Walters, *Will the US Supreme Court Strike Down the ACA's Preventive Services Coverage Requirement?*, Health Affs. (Sept. 23, 2022), https://www.healthaffairs.org/content/forefront/us-supreme-court-strike-down-aca-s-preventive-services-coverage-requirement [https://perma.cc/K8VU-H4R4].

substantial burden, the government's interest in not allowing a religious exemption to the PrEP mandate is compelling and achieved through the least restrictive means.

A. Substantial Burden: A New Framework for RFRA Challenges to Preventive Health Services

As the Court is willing to draw lines for what complicity claims meet the bar for substantial burden, a clear line needs to be drawn for what complicity claims against the preventive services requirement amount to a substantial burden on the plaintiff. The proposed framework evaluates the facts of the health service related to the complicity claim and the nature of the intervening act by the third-party participating in the alleged objectionable behavior.

Because complicity claims affect the rights of a third party, courts need to consider whether the plaintiffs' complicity claims are objectively inaccurate and thus cannot warrant interference with a person's freedom to make personal healthcare decisions. Courts cannot and should not contest the feelings and beliefs of a plaintiff, but courts have the power to call plaintiffs out when their claim of complicity does not factually line up. Courts should determine whether the health service challenged *actually causes or facilitates* the outcome or behavior that plaintiffs religiously object to. The framework requires factual analysis from the courts—not a questioning of the plaintiffs' religious beliefs.[162] Such analysis would be one factor in determining if a complicity claim meets the bar of "substantial burden."

Courts should also consider whether the third-party action triggering the plaintiff's complicity is too attenuated to the plaintiff's legally required action to make them *legally* complicit. Although a plaintiff may sincerely believe themselves complicit in an objectionable act, this may not mean they are legally complicit and entitled to a religious exemption.[163] If the third party's choice or act breaks complicity for the employer's actions, then the plaintiff is not legally complicit and cannot demand a religious exemption.

In applying the third-party intervening act analysis to contraceptives, plaintiffs could argue they are legally complicit in providing abortions because of the automatic function of contraceptives, so the complicity begins with providing the service for their employees to use. The complicity is meaningfully tied to the employer providing that service because the contraceptives could theoretically perform the objectionable act without any choice being made by the third party. In contrast, if an employer provides PrEP, an employee may use this service

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162 Gedicks, *supra* note 133, at 131–35.

163 *Id.*

for any reason, including a reason the plaintiff does not find religiously objectionable. The complicity thus depends on why the employee is taking PrEP and whether that reason is religiously objected to by the plaintiffs. Therefore, complicity does not depend on the plaintiff's action or even the functioning of PrEP itself but the third party's reasoning for taking PrEP which breaks legal complicity and would not warrant an exception to the PrEP mandate.

When looking at whether PrEP factually facilitates homosexual and other alleged morally objectionable behavior, Braidwood fails to show sufficient evidence of legal complicity. This is because the behavior that the plaintiff has moral and religious objections to is not related to the goal or purpose of a drug like PrEP; PrEP is a drug that protects people's lives by preventing HIV infection. This is unlike opposing the use of contraceptives, whose primary purpose is a form of birth control and to prevent pregnancy.[164] There is significant controversy surrounding whether the four contraceptives at issue in *Hobby Lobby* actually facilitate or cause abortions because of disagreement over whether these contraceptives prevent pregnancy before or after an egg is fertilized.[165] This controversy is, however, absent from the use and function of PrEP. PrEP does not inherently achieve the activities that the plaintiffs in *Braidwood* have religious issue with because PrEP is used by all kinds of people for the single reason of preventing an HIV infection. Even though Braidwood does face a "substantial monetary penalty" by not following the PrEP mandate and claims the PrEP mandate violates their religious beliefs,[166] this alone should not make Braidwood legally complicit because PrEP factually does not facilitate the purported morally objectionable behavior.

Because there are several reasons why people use PrEP that are not objected to by Braidwood, the third-party's reason for using PrEP is

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164 *See* Rachel K. Jones, Guttmacher Inst., Beyond Birth Control: The Overlooked Benefits of Oral Contraceptive Pills 3 (2011) (finding eighty-six percent of current contraceptive users do so with the purpose of preventing pregnancy).

165 *See* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 691 (2014). The issue of whether these contraceptives work as abortifacients as the plaintiffs in *Hobby Lobby* believe hinges on two issues: (1) whether pregnancy begins at fertilization or implantation, and (2) whether these contraceptives function to prevent fertilization or implantation. *See* June Ng, *Why There's Confusion over Whether Plan B, Ella, and IUDs Cause Abortions*, Slate (Aug. 1, 2022, 4:28 PM), https://slate.com/technology/2022/08/iuds-plan-b-ella-fertilization-not-abortifacients.html [https://perma.cc/Y6RD-EJRW]. Doctors disagree over whether certain contraceptives could cause an abortion, and misconceptions about contraceptives and differing ideas about the stages of pregnancy further plague this issue. *See* Laura E.T. Swan, Abigail S. Cutler, Madison Lands, Nicholas B. Schmuhl & Jenny A. Higgins, *Physician Beliefs About Contraceptive Methods as Abortifacients*, 228 Am. J. Obstetrics & Gynecology 237, 237 (2023). I will not attempt to solve this controversy in this Note, but I recommend readers do their own research and think critically about how recent medical research squares with the Court's reasoning in *Hobby Lobby*.

166 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 652 (N.D. Tex. 2022).

an intervening act that negates Braidwood's legal complicity. Although people who are LGBTQ, or use intravenous drugs, or have sex outside of marriage can and may take PrEP, PrEP is also a lifesaving medicine for people outside of these groups. Furthermore, PrEP does not facilitate the participation in these behaviors, but simply protects people from contracting HIV in risky situations. Someone who identifies as LGBTQ, for instance, may choose not to take PrEP because they openly communicate with all of their sexual partners and test regularly for HIV. In a different hypothetical, if a woman identifies as heterosexual and is married to a man whose HIV-positive status predates their relationship, she may choose to use PrEP to prevent contracting HIV while having sexual contact with her husband. This behavior does not fall into the category of behaviors that the plaintiffs in *Braidwood* object to, but PrEP is necessary to protect this couple nonetheless. Situations like this are not rare or unique as heterosexual sexual contact accounts for twenty-two percent of all HIV diagnoses.[167]

The court in *Braidwood* follows the framework of *Hobby Lobby*'s analysis in holding the plaintiff is substantially burdened by the PrEP mandate.[168] The analysis starts and ends with the facts that the ACA requires Braidwood to provide coverage for PrEP or face substantial financial penalty and Braidwood sincerely believes that providing coverage for PrEP violates its religious beliefs.[169] The court relied almost entirely on *Hobby Lobby* and *Little Sisters* in its analysis and inappropriately analogized PrEP to contraceptives.[170] This substantial burden analysis is not adequate in determining whether Braidwood is actually substantially burdened under RFRA, and it inappropriately equates PrEP and contraceptives when the two are vastly different. With the alternative framework, the determination of a sufficient substantial burden on Braidwood turns on a legal analysis of Braidwood's complicity and demonstrates the lack of evidence that Braidwood's exercise of religion is sufficiently burdened by the PrEP mandate.

B. The Government's Defense: Protecting the Public from HIV

If the Court disagrees with this Note's analysis of the insufficient burden on Braidwood, the government then bears the responsibility of showing a compelling interest achieved through the least restrictive means to justify restricting a person's constitutional liberties.[171] With the challenge to PrEP, the government has a compelling interest in not

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167 *Basic Statistics*, *supra* note 56.

168 627 F. Supp. 3d at 637.

169 *See id.*

170 *See id.* at 654.

171 42 U.S.C. § 2000bb-1(b).

allowing a religious exemption for the PrEP mandate and so providing access to PrEP for all people.

1. Compelling Interest

The government's interest in providing access to PrEP is not limited to only certain communities but ensures the ability of *all* persons to protect their life and health even if this infringes on an employer's religious beliefs. Everyone should have the power to protect themselves from a potentially deadly disease without the interference of an employer and their religious or moral objections. Thus, the government's interest in not allowing a religious exemption to the PrEP mandate is compelling because anyone can be infected with HIV. This is true even though prejudice and stigma label HIV as a disease affecting only certain communities, like LGBTQ persons. Additionally, significant benefits are attached to insurance coverage of PrEP. These benefits stem from the severity of HIV, the effectiveness of PrEP at preventing HIV, and the higher utilization rates of PrEP when insurance covers the drug.[172]

When someone is diagnosed with HIV and is not treated, the person has eight to ten years to live, at which point AIDS eats away at the body and fatally destroys the immune system.[173] There are now drugs to treat HIV and prevent the onset of AIDS, increasing the life expectancy of someone with HIV, but this does not change the fact that HIV-positive individuals are sicker than their HIV-negative counterparts.[174] Even with the proper treatment preventing death, a person with HIV will have nearly sixteen fewer years of good health because of comorbidities like cancer and chronic lung and liver diseases.[175]

HIV infections, however, can be prevented, and PrEP is highly effective at preventing infection by reducing the risk of contracting HIV by ninety-nine percent.[176] Further, the best method to controlling an infectious, highly deadly disease is preventing more infections.[177] In the effort to stop the spread of HIV, increasing access to PrEP is one of the four key strategies the CDC is employing in its "Ending the HIV Epidemic in the U.S." program.[178] The other three key strategies focus on controlling the spread of HIV after there already *is* an infection: responding quickly to HIV outbreaks, diagnosing individuals as early

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172 *See supra* Section I.B.

173 Sabin, *supra* note 59, at 1.

174 *See* Marcus et al., *supra* note 64, at 5.

175 *Id.*

176 *PrEP Effectiveness*, *supra* note 3.

177 *See supra* Section I.B.

178 *See Ending the HIV Epidemic in the U.S.*, Ctrs. for Disease Control & Prevention (June 13, 2022), https://www.cdc.gov/endhiv/prevent.html [https://perma.cc/8AW4-2G85].

as possible, and starting treatment immediately after a positive diagnosis.[179] Ensuring access to PrEP is the only strategy that protects the public before infection occurs, and it is the only strategy that stops the spread of HIV before it starts.

PrEP is an incredibly expensive drug, and without mandatory insurance coverage, PrEP's price tag creates serious barriers to individuals who cannot afford PrEP otherwise.[180] Depending on the specific brand of PrEP used, the drug can cost up to tens of thousands of dollars, and if an uninsured person forgoes PrEP because of the high cost, they will likely be forced to pay for the more expensive treatment for HIV.[181] And with lifetime healthcare costs for an HIV-positive person being hundreds of thousands of dollars more than an HIV-negative person, there is a large incentive for the government to encourage the use of PrEP and prevent HIV infections.[182]

In *Braidwood*, the court rejects the government's compelling interest in stopping the spread of HIV as framed too broadly and that mandating coverage for PrEP is not narrowly tailored in achieving such an interest.[183] The court states that requiring everyone to provide insurance coverage for PrEP does not further the government's compelling interest absent evidence that religious exemptions to the PrEP mandate would harm the government's interest in stopping the spread of HIV.[184] In making this decision, however, the court fails to acknowledge the reality of exempting religious and morally objecting companies from providing insurance coverage for PrEP and the effect this would have on the spread of HIV. The government does have an interest in not allowing a religious exemption to the PrEP mandate because of the possibility of expanding exemptions, like with the contraceptive mandate, and the necessity of stopping the spread of an infectious, deadly disease.

The court seems to imply that religious communities play no part in the spread of HIV because of their beliefs and have no interest in stopping its spread.[185] The court points to the preexisting exemptions for grandfathered plans and plans that cover less than fifty people to justify more exemptions for religious and moral objectors.[186] But by allowing

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179 *See id.*

180 *See* Kay & Pinto, *supra* note 13, at 61.

181 *See supra* Section I.B.

182 *See supra* Section I.B.

183 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 653–54 (N.D. Tex. 2022).

184 *See id.* at 654.

185 *See id.* (finding "[d]efendants provide no evidence of the scope of religious exemptions, the effect such exemptions would have on the insurance market or PrEP coverage, the prevalence of HIV in those communities, or any other evidence relevant 'to the marginal interest' in enforcing the PrEP mandate in these cases").

186 *See id.*

exemptions for religious and morally objecting employers, a significant size of the population is left unprotected from contracting HIV. In the Unites States, over 1.6 million people are employed by religious organizations.[187] After *Little Sisters*, exemptions for contraceptives were expanded to include companies with moral objections,[188] and there is no way to know how many companies might claim moral objections to providing PrEP, a drug that is incredibly expensive to cover. Expanding exceptions to the insurance mandate pose a serious threat to the effectiveness of preventive tools like PrEP and undermines the effort in stopping the spread of HIV because of increasing infection rates when people are left vulnerable and unprotected.[189]

Additionally, an HIV-negative person whose employer does not cover PrEP is more likely to contract HIV, but this is even more evident with employees of religious employers.[190] Because of the longstanding stigma and prejudice attached to having a positive-HIV diagnosis, disclosing HIV status can be incredibly difficult.[191] And with the stigma being greater in religious communities, talking about HIV status is more difficult.[192] Employees of religious organizations and businesses likely know less about preventing HIV because it is discussed less in their community, and they are less able to advocate for their need for PrEP because of fear of retribution from their peers.[193] Employees then would be pressured into not speaking up about their personal risks of contracting HIV,[194] and if their company were permitted an exemption

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187 *Religious Organizations in the US—Employment Statistics 2004–2029*, IBISWorld (Dec. 28, 2023), https://www.ibisworld.com/industry-statistics/employment/religious-organizations-united-states/ [https://perma.cc/B7K8-UXHJ].

188 *See* Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania, 591 U.S. 657, 670–72 (2020); Moral Exemptions and Accommodations for Coverage of Certain Preventive Services Under the Affordable Care Act, 83 Fed. Reg. at 57,603 (Nov. 15, 2018).

189 *See supra* notes 51–54 and accompanying text.

190 *See* Patel et al., *supra* note 13, at 3–4; *Braidwood*, 627 F. Supp. 3d at 633.

191 *HIV Stigma and Discrimination*, Ctrs. for Disease Control & Prevention (June 1, 2021), https://www.cdc.gov/hiv/basics/hiv-stigma/index.html [https://perma.cc/A2G4-VVXS].

192 While more studies are needed evaluating the impact religious communities have on their members using PrEP, several researchers have focused on black religious communities as black individuals are at a greater risk for HIV than any other racial group. *See* Yusuf Ransome, Laura M. Bogart, Amy S. Nunn, Kenneth H. Mayer, Keron R. Sadler & Bisola O. Ojikutu, *Faith Leaders' Messaging Is Essential to Enhance HIV Prevention Among Black Americans: Results from the 2016 National Survey on HIV in the Black Community*, BMC Pub. Health, Dec. 2018, at 1, 6–8 (finding black men more likely to use PrEP when hearing positive messages about HIV and HIV prevention from religious leaders); Trisha Arnold, Lauren Brinkley-Rubinstein, Philip A. Chan, Amaya Perez-Brumer, Estefany S. Bologna, Laura Beauchamps, Kendra Johnson, Leandro Mena & Amy Nunn, *Social, Structural, Behavioral and Clinical Factors Influencing Retention in Pre-Exposure Prophylaxis (PrEP) Care in Mississippi*, PLOS ONE, Feb. 2017, at 1, 5 (finding fear of church members learning that they take PrEP as a reason individuals stop using PrEP).

193 *See* Arnold et al., *supra* note 192, at 5.

194 *See id.*

from the PrEP mandate, they would be powerless in preventing an HIV infection unless they had thousands of dollars to pay for the drug out-of-pocket.[195] Instead, these vulnerable employees will likely engage in risky behaviors that could expose them to an HIV infection and eventually infect others.

The government's interest in not allowing a religious exemption to PrEP is compelling in its efforts to stop the spread of HIV. Increasing access and use of PrEP is a cost-effective method to preventing HIV infections. PrEP protects people from suffering from serious illnesses that come with a positive HIV diagnosis. Lastly, PrEP protects everyone, not only the stigmatized communities that religious objectors claim PrEP protects.

2. Least Restrictive Means

Of the four key strategies the CDC employs in its "Ending the HIV Epidemic in the U.S." program ensuring access to PrEP is the only strategy that proactively stops the spread of HIV.[196] Thus, the PrEP mandate is essential in stopping the spread of HIV because it is the main tool the government has to quickly prevent infections. By not allowing a religious exemption to the PrEP mandate, the government is empowering all individuals to protect themselves from an HIV infection and participate in the effort to stop the spread of HIV.

After determining the government had no compelling interest, the *Braidwood* court held that the PrEP mandate was not the least restrictive means in achieving its interest.[197] The court based its decision on an idea raised by the majority in *Hobby Lobby*—that the government can assume the costs of contraceptives for women who work for an exempted employer.[198] Similarly, here, the court claimed the government showed no evidence that they are incapable of assuming the costs of PrEP for individuals who work for an exempted employer.[199]

The least restrictive means here does not compel the government to pay for a substitute plan providing exempted health services to employees. First, the court does not consider the significant administrative difficulties in developing a system which attempts to cover exempted plans that already exist in a patchwork, disaggregated health system.[200] Even if the government made the effort to implement such

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195 Kay & Pinto, *supra* note 13, at 61.

196 *See Ending the HIV Epidemic in the U.S.*, *supra* note 178.

197 Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 654 (N.D. Tex. 2022).

198 *See id.*; *see also* Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 728 (2014).

199 *Braidwood*, 627 F. Supp. 3d at 654.

200 *See* Harris Meyer, *How a Texas Court Decision Threatens Affordable Care Act Protections*, NAT'L PUB. RADIO (Sept. 14, 2022, 5:00 AM), https://www.npr.org/sections/health-shots/2022/09/14/1122789505/aca-preventive-health-screenings [https://perma.cc/54J8-FBSQ].

a complex system, this would likely take several years—years where people in need of PrEP may lose access.[201] The public should not have to spend years living in fear of losing access to a potentially lifesaving drug, or worse, actually losing access and having to risk HIV infection because they cannot afford PrEP out-of-pocket.[202] In the meantime, it is likely more people would become infected with HIV and then require increased medical costs as a result.[203] Implementing such a system to allow exemptions for employers with religious or moral objections to PrEP is not realistic in the face of so many risks to the public and the incredible costs it would impose on the government.

Second, with other preventive health services waiting to be challenged in the future, the government needs to draw a line regarding what services allow for exemptions and could be covered by the government. The expense on the government to build such a system has limits, and although currently the only services which would need coverage are hypothetically contraceptives and PrEP, it may not stay limited to those two health services for long.[204] Plaintiffs in *Braidwood* also raised religious objections to other preventive health services—the human papillomavirus ("HPV") vaccine and screenings and behavioral counseling for STIs and drug use—but these challenges were dropped after a mistake with an amended complaint.[205] Given the deference courts give to plaintiffs bringing complicity-based RFRA claims, there would be little to stop claimants from continuing to object to health services that conflict with their beliefs and require the government to foot the bill instead.

Congress gave the USPSTF, an agency made up of experts in preventative and evidence-based medicine, the authority to decide what health services are so essential to be given mandated insurance coverage.[206] The USPSTF, in analyzing the effectiveness of PrEP and the severity of HIV, decided that the public should be afforded the benefit of access to PrEP without cost-sharing.[207] Although the rights of religious persons to be protected are held in high esteem, this should not overcome the ability of employees to protect themselves and the

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201 *See* Michael Ollove, *Lawsuit Could End Free Preventive Health Checkups*, STATELINE (Aug. 9, 2022, 12:00 AM), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/08/09/lawsuit-could-end-free-preventive-health-checkups [https://perma.cc/KN3F-TGZX].

202 *See id.*

203 *See U.S. District Court Ruling Jeopardizes Access to Proven, Life-Saving Cancer Screenings*, AM. CANCER SOC'Y CANCER ACTION NETWORK (Sept. 7, 2022), https://www.fightcancer.org/releases/us-district-court-ruling-jeopardizes-access-proven-life-saving-cancer-screenings [https://perma.cc/RLN7-GG7S].

204 *See* Meyer, *supra* note 200.

205 *See* Braidwood Mgmt. Inc. v. Becerra, 627 F. Supp. 3d 624, 633, 637 n.3 (N.D. Tex. 2022).

206 *See* 42 U.S.C. § 300gg-13(a)(1).

207 *See* PrEP Recommendation Statement, *supra* note 45, at 2205.

federal government to protect the public from deadly disease. Ultimately, the substantial burden on the plaintiff is too far removed from the PrEP mandate for the plaintiff to succeed on that prong of RFRA, but if courts were to decide otherwise, the government has a compelling interest achieved through the lease restrictive means by not allowing a religious exemption to the mandate. The PrEP mandate survives this RFRA challenge and limits the ability of religious plaintiffs to bring attenuated challenges to the preventive services requirement.

Conclusion

The recent challenge to PrEP raises several issues about the power of religious rights to overcome all else. Religious persons should not be privileged in denying their employees potentially lifesaving drugs. Further, it is not sensible to deny all Americans access to a drug because some people are unwilling to extend access to a certain segment of society. Religious protection has an important place in the history of the United States, and people's religious practices and beliefs need to be protected. However, these protections need to be balanced against the interests of the whole public, and especially against the interest people have in protecting their health. If exemptions to preventive health services continue to expand, the HPV vaccine and behavioral counseling for STIs and drug use are likely to be the next ones threatened and certainly would not be the last. Already, organizations like the American Medical Association and the American Cancer Society have expressed concerns for the deteriorating insurance coverage of preventative health services.[208] And with increasing religious exemptions, there will be little to prevent more preventive health services from being challenged, leaving the majority to watch as the minority strips the power from the preventive services requirement—unless the Supreme Court judges this complicity challenge appropriately.

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208 *See* Michael Ollove, *Lawsuit Could End Free Preventive Health Checkups*, Stateline (Aug. 9, 2022, 12:00 AM), https://stateline.org/2022/08/09/lawsuit-could-end-free-preventive-health-checkups/ [https://perma.cc/G8PD-P66E]; Press Release, Am. Cancer Soc'y, U.S. Dist. Ct. Ruling Jeopardizes Access to Proven, Life-Saving Cancer Screenings (Sept. 7, 2022), https://www.fightcancer.org/releases/us-district-court-ruling-jeopardizes-access-proven-life-saving-cancer-screenings [https://perma.cc/76LG-QC7G]; Meyer, *supra* note 200.

NOTE

Protecting Teleworkers: Unilateral Conflicts and Statutory Interpretation

*Rachel L. Blau**

ABSTRACT

The COVID-19 pandemic taught us that homes can double as offices. But when a teleworker opens her laptop across state lines from her employer, may she claim the statutory worker protections provided in the employer's state? Too often, courts misunderstand this recurring problem and refuse to extend an employer's state protections to an out-of-state teleworker, granting a defendant's motion to dismiss. Because each statute is analyzed in isolation, a teleworker may be relegated to lawless nowhere land, unable to recover under any state statutory scheme.

This Note argues that, in the absence of legislative direction, a court should always find that the scope of an employer's state statute is broad enough to extend to an out-of-state remote teleworker. Telework is performed using entirely virtual technology and has no physical connection to the place in which it is

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performed. In contrast, the employer is tethered to earth and therefore should permissibly regulate the employer-teleworker relationship. This Note advocates for a judicial solution by examining existing judicial considerations. It argues that, because of the quasi-territorial nature of remote work, a teleworker should always fall within the legislative jurisdiction of an employer's state.

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Introduction

In January of 2020, Kathryn Shiber started a job at Centerview Partners, LLC, a New York City-based investment bank.[1] Because of the COVID-19 pandemic, she "worked remotely from her home in New Jersey."[2] At this new job, Centerview required Kathryn to be available twenty-four hours per day, at one point working from 8:00 AM to 1:00 AM for multiple days in a row.[3] Kathryn had been diagnosed with unspecified anxiety disorder and unspecified mood disorder and found these hours took a substantial toll on her mental and physical health.[4] After speaking with her supervisors about these challenges, it was agreed that Kathryn could log off by midnight and log on at 9:00 AM.[5] But once this plan was implemented, Kathryn was quickly fired via video call.[6] The expectation, Kathryn was told, was that she work for 120 hours per week and that fewer hours was insufficient.[7]

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1 Shiber v. Centerview Partners LLC, No. 21 Civ. 3649, 2022 WL 1173433, at *1 (S.D.N.Y. Apr. 20, 2022).

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.* at *1–2.

6 *Id.* at *2.

7 *Id.*

Kathryn brought claims under the New York City Human Rights Law and the New York State Human Rights Law,[8] which ordinarily may have allowed recovery on these facts.[9] But the court found that the plaintiff, because she had never once "stepped foot inside Centerview's New York City office" and "worked exclusively from her home in New Jersey," did not state a claim on which relief could be granted.[10] The court therefore dismissed the teleworker's claim, granting the defendant's 12(b)(6) motion to dismiss.[11]

A court, absent an express statement from the legislature, should not dismiss a teleworker's claim brought under an employer's state statute under the rationale that the teleworker falls outside of the statute's geographic reach. Teleworker plaintiffs will often seek the protection of their employer's state worker protection statutes because employer's state protections are often more favorable than the teleworker's state's protections. Courts should permit this more favorable treatment. But moreover, limiting recovery under the employer's state statute may also give rise to impunity for employers who mistreat their workers and render teleworkers "stateless," without any state-based cause of action. This is because a court, at the defendant's urging, is likely to conduct a unilateral analysis when analyzing worker protection claims, asking only whether one state's statute may permissibly apply to the out-of-state worker. It likely does not take a multilateral approach, asking whether there is *another state's law* that may *instead* apply. Where a court agrees with the defendant that the statute does not apply, the action is dismissed for failure to state a claim. Thus, each state can separately refuse its protections to the worker, and the employer may face zero liability exposure under state law. Indeed, while some employer's state statutes have been interpreted to exclude out-of-state teleworkers, some "teleworker's state" statutes have also been interpreted to exclude teleworker recovery.[12]

This Note argues that, when presented with a teleworker's complaint under an employer's state worker protection statute, a court should always conclude that an employer's state statute is prima facie broad enough to include the remote teleworker in its legislative reach. This is not to suggest that another state's statute may not *also* be broad

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8 *Id.*

9 *See* N.Y.C. ADMIN. CODE § 8-101 (2020) (declaring discrimination based on disability unlawful); *see also* N.Y. EXEC. LAW § 296 (McKinney 2022) (same).

10 *Shiber*, 2022 WL 1173433, at *2, *4.

11 *Id.* at *6.

12 *Compare* Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d, 187, 200 (D.N.J. 2021) (declining to extend New Jersey protections to an out-of-state teleworker), *with* Steinke v. P5 Sols., Inc., No. 2018 CA 004445 B, 2019 WL 9606798, at *3 (D.C. Super. Ct. July 3, 2019) (refusing to rope an out-of-state employer into the legislative jurisdiction of D.C. where the teleworker resided and dismissing the teleworker's claim on those grounds).

enough to include the teleworker in its reach, nor is it to say that the employer's state law should always be *applied*. Instead, this Note argues that a teleworking employee should always have the *option* of adjudicating her disputes under the protections in the employer's state because the employer's state statute is broad enough to include the teleworker in its reach.

This categorical conclusion follows logically because the teleworker fact pattern presents a "quasi-territorial" scenario: while a teleworker is based primarily in cyberspace, an employer has defined, physical contacts on the ground. This grounded location—whether in its principal place of business, place of incorporation, or place of a branch or satellite office—is appropriate to govern disputes that may arise when teleworkers work from indeterminate locations all over the globe. An employer's brick-and-mortar locations serve as a tether for the otherwise placeless teleworker. These physical locations provide a teleworker with a definite, predictable, and defined legal jurisdiction under which she may negotiate her employment disputes. Without this tether, a teleworker may fall outside the scope of *any* state-based claim for relief.

The battleground for teleworker protection is in the state and federal courts.[13] Because a worker protection statute under which a teleworker seeks protection is almost always silent as to its precise geographical scope, a court has near unfettered discretion to decide whether a statute will protect an "out-of-state" teleworker.[14] Courts, in turn, have not developed a one-size fits all statutory interpretation test to decide a statute's scope.[15] This uncertainty—and possibility of unfair and inefficient outcomes—is significant. Although society will usually respect the outcome of a statutory interpretation decision so long as the court applied some reasonable approach, courts should pay specific attention to worker protection statutes in light of the new telework phenomenon. Courts looking at teleworker cases are faced with a matter suddenly impacting millions of people, involving "highly significant

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13 A state court is entitled to determine the scope of its own state statutes. *See* Erie R.R. v. Tompkins, 304 U.S. 64, 71 (1938); Klaxon Co. v. Stentor Electric Mfg. Co., 313 U.S. 487, 497 (1941).

14 *See infra* notes 74–78.

15 Erin A. O'Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1170 (2000) ("Since legislators rarely contemplate this issue, courts must resort to an exploration of constructive intent: What would the legislature have preferred if it had thought about the problem? Unfortunately, however, constructive intent proves no more fruitful than actual intent because it is not clear what principles should guide the construction."); RESTATEMENT (SECOND) CONFLICT OF LS. § 5 (AM. L. INST. 1971) ("The rules of Conflict of Laws, and especially the rules of choice of law, are largely decisional and, to the extent that this is so, are as open to reexamination as any other common law rules.").

policy considerations"[16] with almost no guidance from the state legislature. A court's decision in these cases has far-reaching impacts beyond the immediate claim dismissal: it may render the teleworker "stateless," without state-based recovery at all. This Note provides guidance to both advocates and judges addressing the novel "teleworker problem."

This Note identifies five major considerations that a court will often examine when conducting this prima facie statutory interpretation analysis. To derive statutory intent, a court is likely to consider (1) the statutory text, (2) precedent interpreting the statute, (3) a teleworkers' "contacts" with the employer's state, (4) the employer's state's "interests" in regulating the substance of the dispute, and possibly, (5) a presumption against extraterritoriality. These often-used considerations arise from a mix of traditional choice of law considerations and statutory interpretation tools and canons. They are not an exhaustive list, for example, notably excluding legislative history, but they are some of the most often used rationales used when deciding a statute's geographical scope.

Each of these considerations guide in favor of protecting a teleworker under an employer's state statute. First, a teleworker may be properly said to "work within the state" of the employer in accordance with the statutory text since this terminology takes on new meaning as applied to teleworking. Second, prepandemic precedent does not provide meaningful guidance because a teleworker presents a quasi-territorial fact pattern, where one party is in "cyberspace." In contrast, historical cases are entirely territorial. Third, because a teleworkers' job is not meaningfully connected to the state where it was performed, process of elimination dictates that a teleworker has the most meaningful contacts with the employer's state. Fourth, an employer's state clearly has an interest in regulating the *in-state conduct* of the employer, such as preventing in-state employers from discriminating

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[16] Trevejo v. Legal Cost Control Inc., No. A–1377–16T4, 2018 WL 1569640, at *4 (N.J. Super. Ct. App. Div. Apr. 2 2018) ("Based upon current computer technology and the forward thinking concept of 'telecommuting,' we are satisfied that determining who may be entitled to protection under the NJLAD is a novel question of law that involves highly significant policy considerations."); Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *5 (D. Md. Feb. 4, 2022) (recognizing "particularly in light of the recent advent of remote telework, that there may be examples of work by individuals physically located outside of Maryland that could arguably be considered to be work within the state," but declining to address such cases); Malloy v. Superior Ct. of L.A. Cnty., 83 Cal. App. 5th 543, 546 (Cal. Ct. App. 2022) ("Today, more than four decades after the original passage of [the Fair Employment and Housing Act ('FEHA')], as a result of advances in technology and the impact of the COVID-19 pandemic, working remotely is no longer an infrequently conferred perquisite, but an increasingly common and necessary adaptation to the demands of modern life."); Sexton v. Spirit Airlines Inc., No. 21-cv-00898, 2023 WL 1823487, at *4 (E.D. Cal. Feb. 7, 2023) ("Remote work has added an additional complexity to the analysis outlined above as some employers have been more flexible with authorizing their employees to work at home as a result of the COVID-19 pandemic.").

based on race or gender. Lastly, the conclusion that a presumption against extraterritorial application prevents the application of a state statute to an out-of-state teleworker is inappropriate because an employer's state statute as applied to teleworkers does not govern conduct that occurs wholly outside the state.

I. Background

A. The Teleworker Phenomenon

Since the World Health Organization declared COVID-19 a pandemic on March 11, 2020,[17] and state and local governments began issuing work-from-home orders,[18] the number of Americans working from home over tripled, from 5.7% of Americans (nine million people) to 17.9% of Americans (27.6 million people) between 2019 and 2021.[19] As of July 2023, researchers estimate that over forty percent of U.S. employees now work remotely for part of the workweek.[20] This pandemic-era lifestyle change tested the bounds of what could be done without ever entering the office.[21] As a result of work from home, workers relocated in huge numbers.[22] Notably, teleworkers[23] are most frequently relocating from states with better worker protections—California, New York, Washington, D.C., Washington State, and Illinois—to a state with the

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17 *WHO Director-General's Opening Remarks at the Media Briefing on COVID-19—11 March 2020*, World Health Org. (March 11, 2020), https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020 [https://perma.cc/57GC-P8VA].

18 *See* Sarah Mervosh, Denise Lu & Vanessa Swales, *See Which States and Cities Have Told Residents to Stay at Home*, N.Y. Times (Apr. 20, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-stay-at-home-order.html [https://perma.cc/GB7V-NBWF].

19 Press Release, U.S. Census Bureau, The Number of People Primarily Working from Home Tripled Between 2019 and 2021 (Sept. 15, 2022), https://www.census.gov/newsroom/press-releases/2022/people-working-from-home.html [https://perma.cc/36XS-8G5G]; *see also* Matthew Dey, Harley Frazis, Mark A. Loewenstein & Hugette Sun, *Ability to Work from Home: Evidence from Two Surveys and Implications for the Labor Market in the COVID-19 Pandemic*, Monthly Lab. Rev., June 2020, https://www.bls.gov/opub/mlr/2020/article/ability-to-work-from-home.htm [https://perma.cc/6NPC-3B2G].

20 Jose Maria Barrero, Nicholas Bloom & Steven J. Davis, *The Evolution of Work from Home*, 37 J. Econ. Persps. 23, 28 tbl.1 (2023).

21 Tim Bajarin, *Work from Home Is the New Normal for Workers Around the World*, Forbes (Apr. 29, 2021), https://www.forbes.com/sites/timbajarin/2021/04/29/work-from-home-is-the-new-normal-for-workers-around-the-world/ [https://perma.cc/2HY2-49NQ].

22 Stephan D. Whitaker, *Did the COVID-19 Pandemic Cause an Urban Exodus?*, Clev. Fed Dist. Data Brief, Feb. 5, 2021, at 2, https://doi.org/10.26509/frbc-ddb-20210205 [https://perma.cc/G83L-RN39]; *see also* Laurel Wamsley, *Workers Are Moving First, Asking Questions Later*, NPR (Mar. 9, 2021, 8:28 AM), https://www.npr.org/2021/03/09/974862254/workers-are-moving-first-asking-questions-later-what-happens-when-offices-reopen [https://perma.cc/B9DT-CCAZ].

23 This Note uses the terms "telework," "remote work," and "work from home" interchangeably.

worst protections—Texas.[24] Others have given up the traditional notion of "home" altogether to become digital nomads.[25] Now, some workers are starting their employment remotely from the outset, and will never once step foot in the office.[26] There is no sign of slowing the remote worker trend.[27]

The nature of telework deserves special attention. Telework is "a work flexibility arrangement under which an employee performs the duties and responsibilities of such employee's position, and other authorized activities, from an approved worksite other than the location from which the employee would otherwise work."[28] Flexibility is a key element of this work style: a worker may work remotely a few days per week or full-time.[29] A work-from-home solution may, from the outset, be temporary or permanent, but may evolve.[30] Remote workers perform the same work that they would perform in an office; the nature and essence of the work does not meaningfully change based

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24 *Compare* Emily Badger, Robert Gebeloff & Josh Katz, *The Places Most Affected by Remote Workers' Moves Around the Country*, N.Y. Times (June 17, 2023), https://www.nytimes.com/interactive/2023/06/17/upshot/17migration-patterns-movers.html [https://perma.cc/8BZQ-W395] (finding that New York City saw the highest number of remote workers relocate at 116,000; followed by Los Angeles at 53,000; San Francisco at 32,000; Chicago at 29,000; San Jose at 27,000; Washington, D.C. at 11,000; and Seattle at 3,000, but in contrast, Austin, Texas gained the highest number of teleworkers of any metro area: 28,000), *with Best and Worst States to Work in America 2022*, OxFam, https://www.oxfamamerica.org/explore/countries/united-states/poverty-in-the-us/best-states-to-work-2022/ [https://perma.cc/E8KR-Q4RB] (ranking, in terms of worker protection policies, California as number two, Washington State as number three, the District of Columbia as number four, New York as number five, Illinois as number ten, and Texas as forty-eight).

25 MBO Partners, COVID-19 and the Rise of the Digital Nomad 3 (2020) ("In 2020, the number of traditional workers working as digital nomads grew 96 percent, from 3.2 million to 6.3 million.").

26 Kathryn Vasel, *These Recent Grads Landed Office Jobs, But They've Barely Set Foot in the Office*, CNN (Jan. 21, 2022, 2:29 PM), https://www.cnn.com/2022/01/21/success/young-employees-remote-work/index.html [https://perma.cc/C2LD-7UHB].

27 *See* Lydia Saad & Ben Wigert, *Remote Work Persisting and Trending Permanent*, Gallup (Oct. 13, 2021), https://news.gallup.com/poll/355907/remote-work-persisting-trending-permanent.aspx [https://perma.cc/FRY2-HZ6E] (finding, as of 2021, "[n]ine in 10 remote workers want to maintain remote work to some degree"); Molly Bolan, *The Places Where Remote Work Became Most Common*, Route Fifty (Sept. 30, 2022), https://www.route-fifty.com/tech-data/2022/09/places-where-remote-work-became-most-common/377927/ [https://perma.cc/J35V-GYW4] (stating that even as people return to in person work, the impact of remote work is still likely to be felt in the years to come).

28 5 U.S.C. § 6501 (listing one definition).

29 *See* Int'l Lab. Org., An Employers' Guide on Working From Home in Response to the Outbreak of COVID-19 5 (2020), https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---act_emp/documents/publication/wcms_745024.pdf [https://perma.cc/N9CL-KQUE] ("[Work from home] is a working arrangement in which a worker fulfils the essential responsibilities of his/her job while remaining at home, using information and communications technology (ICT).").

30 *See id.* at 5, 8.

on where it is conducted.[31] The work is accomplished via the internet,[32] and remote workers frequently correspond with their supervisors through electronic communications, such as Zoom, Webex, e-mail, or phone call.[33] The location of the work is dependent only upon all but ubiquitous Wi-Fi—which means it can be done from almost anywhere.[34] Crucially, remote workers are *not* based in a branch or a satellite office established by the employer.[35] Unlike other out-of-state workers who travel *because of* an in-person assignment, teleworkers travel because of the *absence of* an in-person assignment.[36]

In sum, telework is work that is (1) conducted entirely through virtual means which (2) has no physical relationship to the place in which it is performed. To illustrate, a teleworker may work remotely in Connecticut for the Boston branch of a large law firm that is incorporated in Delaware and has its principal place of business in New York. He may participate in daily Zoom calls with his three supervisors based in San Francisco, Georgia, and Denver, respectively. He may use Westlaw, headquartered in Minnesota, to conduct research for a memo he writes on Microsoft Word, based in Washington. He may work for a client incorporated in Delaware with its principal place of business in Phoenix but communicate with the client representatives who are based in New York. He may be fired via Zoom call while visiting family in New Jersey.

Not one of these locations matters to a teleworker, who conducts his work through cyberspace.[37] Each one of these geographic locations

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31 *See id.* at 5.

32 *See* Zoltán Bankó, *The Situation of Telework Regulation in Hungary*, 2020 Reg'l L. Rev. 115, 117.

33 *See* Wait v. Travelers Indem. Co. of Ill., 240 S.W.3d 220, 225 (Tenn. 2007) ("An employee telecommutes when he or she takes advantage of electronic mail, internet, facsimile machines and other technological advancements to work from home or a place other than the traditional work site."); *see also Report on the Implementation of the European Social Partners' Framework Agreement on Telework*, at 6, COM (2008) 2178 final (Feb. 7, 2008).

34 *But see* Int'l Lab. Org., Teleworking During the COVID-19 Pandemic and Beyond 8 (2020) ("[O]nly a quarter of the population in Sub-Saharan Africa has access to the internet and only half in the Maghreb, compared to four-fifths in Europe. In the countries where regular power cuts and weak internet service makes even sending an e-mail a challenge, teleworking is practically impossible." (citation omitted)).

35 *See, e.g.*, Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021).

36 *See, e.g.*, Hannah Towey, *4 Remote Workers Who've Secretly Worked from Abroad Without Their Employers Knowing Describe How They Keep Up the Charade*, Insider (Oct. 16, 2022, 6:52 AM), https://www.businessinsider.com/meet-remote-workers-secretly-working-abroad-without-boss-knowing-2022-10 [https://perma.cc/JNX4-6SLY].

37 *See* Joel R. Reidenberg, *Technology and Internet Jurisdiction*, 153 U. Pa. L. Rev. 1951, 1951 (2005) ("The current Internet technology creates ambiguity for sovereign territory because network boundaries intersect and transcend national borders.").

is purely incidental.[38] Were they to change, the nature and substance of a teleworker's work would remain the same.[39] Cyberspace *is* a teleworker's office.[40] Work conducted through internet communications is not performed in any singular "place."[41] This work has its effects all over the country and is enabled only through the placeless internet channels of communication.[42] The employer allows the work to be performed from any remote location, because they know that the work product will look the same regardless of where it is conducted.[43] The work a teleworker performs from home, therefore, has no necessary local impact—even though such impact may be incidental.

In contrast, the location of an employer is finite and determinable—it can be understood as any place where an employer has its place of incorporation, principal place of business, or any branch office.[44] These terms are well-defined in American jurisprudence. In *Hertz Corp. v. Friend*,[45] for example, the Supreme Court defined a company's principal place of business for diversity jurisdiction purposes as its "nerve

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38 *See* Huw Halstead, *Cyberplace: From Fantasies of Placelessness to Connective Emplacement*, 14 MEMORY STUD. 561, 561 (2021) (noting that "cyberplace" is "malleable, shifting, often disorienting; but also textured, uneven, and located").

39 *See supra* note 36.

40 *See* David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 84 STAN. L. REV. 1367, 1370 (1996) (identifying cyberspace as a separate "place" for jurisdictional purposes). *But see* Mark A. Lemley, *Place and Cyberplace*, 91 CALIF. L. REV. 521, 529 (2003) (arguing in part that this metaphor has misled courts into inappropriately expanding "real world" doctrines, such as tort). The web has substantially advanced to accommodate this shift. Zoom added new features, including webinars, virtual events, telemedicine, and resources for remote workers. *See, e.g., Support During the COVID-19 Pandemic*, ZOOM, https://explore.zoom.us/en/covid19/ [https://perma.cc/ZB3R-KH69]; *Telemedicine*, OPENMD, https://openmd.com/directory/telemedicine [https://perma.cc/TZK3-CZ3G] (telemedicine apps for virtual medicine and therapy); META, https://about.meta.com/metaverse/ [https://perma.cc/PEN2-BBSC] (the "metaverse" promises to make virtual activities feel in person, allowing greater flexibility).

41 *See* Ashwin Jacob Mathew, Where in the World is the Internet? Locating Political Power in Internet Infrastructure 1 (2014) (Ph.D. dissertation, University of California, Berkeley) (on file with author) ("It is these interconnections—in the shape of the inter-domain routing system—which allow the Internet to appear to be a single entity, and provide the means through which the apparent placelessness of virtual space is produced.").

42 *Id.*

43 *See* Michelle Cheng, *Employers Are Giving Workers the Work from Home Days They Want*, WORLD ECON. F. (June 26, 2022), https://www.weforum.org/agenda/2022/07/work-from-home-employers-workers-work-life/ [https://perma.cc/YG8Q-4955] ("Employers that have increased the number of remote days they offer have done so out of concern for worker productivity and retention, an economist says.").

44 *See* 28 U.S.C. § 1332(c) (defining a corporation's domicile for diversity purposes as its place of incorporation or principal place of business). Similarly, section 188 of the Restatement Second on Conflict of Laws recommends considering, in the choice of law selection process for contract claims, "the domicile, residence, nationality, place of incorporation and place of business of the parties." RESTATEMENT (SECOND) OF CONFLICT OF LS. § 188(e) (AM. L. INST. 1971).

45 559 U.S. 77 (2010).

center," or "the place where a corporation's officers direct, control, and coordinate the corporation's activities."[46] It would be reasonable to import these definitions to the statutory protection context.[47] A corporation answering for its wrongs under the law of its domicile, place of business, or place of incorporation should hardly come as a surprise to an employer.[48]

B. Statutory Interpretation, Extraterritoriality, and Conflicts of Law

The conflicts of laws field has long wrestled with the question of which state law should apply to a dispute. In a conflicts analysis, a court asks the question: of the possible states that may have an interest in this conflict, which state law should apply to the dispute at hand? The First Restatement offered a strictly territorial approach that defined which state's law should apply based on the "place of the wrong."[49] The Second Restatement then gave rise to increased flexibility and allowed courts to weigh a list of possible locations that could control, in light of a list of six possible considerations that include states' interests, among other factors.[50] Professor Currie's interest analysis allowed a court to compare the underlying interests of two potentially interested states, and then ask which state's interests were best furthered on the facts of the case.[51] And Professor Leflar progressively offered five "choice-influencing considerations," also known as the "better law" approach.[52]

But in the statutory worker protection context, the conflicts analysis is often a unilateral question that asks only whether the statute is broad enough to apply to an out-of-state plaintiff. This approach finds

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46 *Id.* at 78.

47 *See* Jack L. Goldsmith, *Against Cyberanarchy*, 65 U. Chi. L. Rev. 1199, 1236 (1998) ("For example, the skeptics are wrong to the extent that they believe that cyberspace transactions must be resolved on the basis of geographical choice-of-law criteria that are sometimes difficult to apply to cyberspace, such as where events occur or where people are located at the time of the transaction. But these are not the only choice-of-law criteria, and certainly not the best in contexts where the geographical locus of events is so unclear. Domicile (and its cognates, such as citizenship, principal place of business, habitual residence, and so on) are also valid choice-of-law criteria that have particular relevance to problems, like those in cyberspace, that involve the regulation of intangibles or of multinational transactions.").

48 *See infra* notes 209–10 (discussing the constitutional Due Process standard, which protects against "unfair surprise").

49 *See* Restatement (First) of Conflict of Ls. § 384 (Am. L. Inst. 1934).

50 Restatement (Second) of Conflict of Ls. §§ 6, 146, 188 (Am. L. Inst. 1971).

51 Brainerd Currie, *Notes on Methods and Objectives in the Conflict of Laws*, 1959 Duke L.J. 171, 176.

52 Robert A. Leflar, *Choice-Influencing Considerations in Conflicts Law*, 41 N.Y.U. L. Rev. 267, 275, 282 (1966) (suggesting that courts consider five main factors when deciding a choice of law question: (1) predictability of results, (2) maintenance of interstate order, (3) simplification of the judicial task, (4) advancing forums governmental interest, and (5) applying the "Better Law," or the law that restricts the plaintiff the least).

support in the conflicts field because "[c]hoice of law can be thought of as a two-step process."[53] First, a court must "determin[e] the scope of the potentially applicable laws to see if more than one law applies."[54] Second a court "determin[es] which law should be given priority if more than one law applies," turning to one of the theories outlined above.[55] The Draft of the Third Restatement favors this two-step approach, which first requires a court to evaluate the internal scope of the statute.[56] This is known as the "extraterritoriality approach" and arises at a motion to dismiss stage.[57] As Professor Kramer notes, "the familiar problem of determining whether the plaintiff states a claim is, in fact, a choice of law problem."[58] This approach is unilateral rather than multilateral, in the sense that it "focus[es] simply on whether the forum's law applies to the activity in question, without worrying that another forum might also apply its law."[59] This is a statutory interpretation question that asks whether the plain text of the statute, the statutory intent, the legislative purpose, and applicable canons conspire to permit it to apply to an out-of-state teleworker. State courts have a range of understandings about how to reconcile a statutory interpretation question with a conflicts of laws question, with some courts expressly using a two-step process, others supplanting the conflicts analysis with a statutory interpretation analysis, and still others replacing a statutory interpretation analysis with a conflicts analysis.[60]

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53 William S. Dodge, *Presumptions Against Extraterritoriality in State Law,* 3 U.C. DAVIS L. REV. 1389, 1423 (2020).

54 *Id.*

55 *Id.*; *see also* Larry Kramer, *Rethinking Choice of Law*, 90 COLUM. L. REV. 277, 280 (1990) ("When the parties disagree about what law governs their dispute, the court chooses the applicable law through a two-step process of interpretation—first determining the apparent scope of the laws in question in order to ascertain whether there is a conflict of laws, and then resolving any conflicts it finds. The second step is usually accomplished through the use of rules or canons of construction.").

56 *See* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022) ("Resolving a choice-of-law question requires two analytically distinct steps. First, it must be decided which states' laws are relevant, meaning that they might be used to govern a particular issue. This is typically a matter of discerning the scope of the various states' internal laws, i.e., deciding to which people, in which places, and under which circumstances, they extend rights or obligations. Second, if states' internal laws overlap and conflict, it must be decided which law shall be given priority.").

57 *See generally* William Dodge, *Extraterritoriality and Conflicts-of-Laws Theory: An Argument for Judicial Unilateralism*, 39 HARV. INT'L. L.J. 101, 104, 135 (1998).

58 Kramer, *supra* note 55, at 280.

59 Dodge, *supra* note 57, at 104.

60 Dodge, *supra* note 53, at 1429 ("[S]ome courts see choice of law as a two-step process and apply a presumption against extraterritoriality in determining the scope of a statute before considering which state's law should be given priority under a conflicts analysis. Some courts bizarrely reverse the order of these steps, applying a presumption against extraterritoriality after the conflicts analysis. Some courts view conflicts rules as a substitute for the presumption against

In some respects, this question may be comparable to the statutory construction work performed on the international level.[61] In *Kiobel v. Royal Dutch Petroleum*,[62] for example, the Supreme Court analyzed the scope of the federal Alien Tort Statute ("ATS")[63] to find that it was not intended to apply to conduct that occurs outside of the United States.[64] The Court did not ask *which* state was better positioned to address the matter, taking on a comparative analysis as between two competing laws; instead, it questioned whether a plaintiff's claim under the ATS "may reach conduct occurring in the territory of a foreign sovereign."[65] The Court looked to the "text, history, and purposes" of the statute, and applied the canon of the presumption against extraterritoriality to conclude that the ATS did not apply to out-of-state conduct.[66] The Court used traditional statutory interpretation tools—not a specific conflicts canon—to reach its conclusion.

Courts dealing with the applicability of a statutory worker protection to a remote teleworker most often enter this conversation at step one and ask whether the *substantive statute by its own terms* may permissibly apply to the dispute at hand.[67] In a unilateral analysis,

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extraterritoriality and other principles that might determine questions of scope. And some courts view the presumption against extraterritoriality as a substitute for conflicts rules, making it unnecessary to consider whether another state's law should be applied.").

61 *But see* Lea Brilmayer & Charles Norchi, *Federal Extraterritoriality and Fifth Amendment Due Process*, 105 HARV. L. REV. 1217, 1232 (1992) (arguing that federal extraterritoriality and interstate choice of law conflicts are treated differently, in part because state choice of law takes a multistate approach whereas federal extraterritoriality is unilateral). Where a plaintiff attempts to state a claim under a state worker protection statute, however, this Note demonstrates that such an analysis is often unilateral in nature and in that sense may be comparable to a federal international conflicts analysis. *See supra* notes 56–60 and accompanying text.

62 569 U.S. 108 (2013).

63 28 U.S.C. § 1350.

64 *Kiobel*, 569 U.S. at 108.

65 *Id.* at 115.

66 *Id.* at 117.

67 *See, e.g.*, Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 199–200 (D.N.J. 2021) ("Defendants maintain that there is no 'conflict' of laws as such; rather, *substantive New Jersey law provides* that out-of-state employees are not protected by the [New Jersey Wage Theft Act] or [New Jersey wage and hour laws]. In other words, even assuming that New Jersey law governs, that law itself provides that New Jersey's wage and hour laws do not apply extraterritorially. . . . Defendants have the better argument here." (citations omitted)); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014) (holding that California wage and hour laws asserted in plaintiff's complaint do not create a cause of action for people who perform work entirely in another state); Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *4 (D.D.C. July 8, 2016) (defining the issue as "whether the plaintiff qualifies as a covered employee" under the D.C. Wage Payment and Collections Law); Sexton v. Spirit Airlines, Inc., No. 21-CV-00898, 2023 WL 1823487, at *3 (E.D. Cal. Feb. 8, 2023) ("Defendant argues 'Plaintiff's employment and the actions forming the basis of Plaintiff's disability accommodation and retaliation claim under [ ] FEHA and [ ] [the California Family Rights Act] occurred in Florida' and 'Plaintiff has no legal grounds to apply these [California] laws extraterritorially or bring such claims against Defendant

where a court finds that its own statute does not permit it to reach an out-of-state teleworker, a court will not apply the law of another interested state, as in a multistate analysis, but will instead dismiss the case altogether for failure to state a claim. Thus, each potentially interested state may separately decline to extend its protections to the worker, leaving the worker with only federal protections.[68] The statutory interpretation exercise conducted where a teleworker brings a claim under an employer's state statute is therefore exceptionally important. The below analysis focuses on this statutory interpretation step, arguing that a court should not dismiss a teleworker's claim brought under an employer's state law.

II. Securing a Teleworker Cause of Action

The "teleworker question" asks whether a teleworker-plaintiff suing their employer may claim the protections of their employer's state worker protection statute. Courts of the internet age are repeatedly asked to fit nonterritorial ideas into a distinctly territorial system,[69] and remote workers are the next iteration in a long line of factual scenarios that test the logical integrity of our federalist scheme.[70] Internet-place

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in California.' The question, then, is whether Plaintiff has pleaded sufficient facts to sustain these California causes of action." (omissions in original)); Sullivan v. Oracle Corp., 254 P.3d 237, 240 (Cal. 2011) ("The question whether California's overtime law applies to work performed here by nonresidents entails two distinct inquiries: first, whether the relevant provisions of the Labor Code apply as a matter of statutory construction, and second, whether conflict-of-laws principles direct us to apply California law in the event another state also purports to regulate work performed here."). For an incomplete list of multijurisdictional employment cases analyzed to reach this conclusion, not including teleworker cases, see Deborah F. Bruckman, Annotation, *Extraterritorial Application of State Wage and Hour Laws*, 29th A.L.R.7th Art. 7 (2017); Robert Fitzpatrick, *Which State Law Applies? Multijurisdictional Conduct and State Employment Law Statutes*, Fitzpatrick on Emp. L. (May 28, 2010), http://robertfitzpatrick.blogspot.com/2010/05/which-state-law-applies.html [https://perma.cc/64TS-HX85].

68 Certainly, any worker in the United States can turn to the Fair Labor Standards Act, which guarantees a federal minimum wage at $7.25, and overtime pay at a rate of 1.5 times the rate of regular pay. 29 U.S.C. § 203. They may also turn to federal antidiscrimination laws. *See, e.g.*, 29 U.S.C. § 206(a), 207(a)(1); 42 U.S.C. §§ 2000e to 2000e-17. But state statutes almost always create more plaintiff rights than a federal cause of action.

69 *See, e.g.*, Johnson & Post, *supra* note 40, at 1370; Michael A. Geist, *Is There a There There? Toward Greater Certainty for Internet Jurisdiction*, 16 Berkeley Tech. L.J. 1345, 1352 (2001); Lemley, *supra* note 40, at 529; Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 804–06 (2001); Matthew R. Burnstein, *Conflicts on the Net: Choice of Law in Transnational Cyberspace*, 29 Vand. J. Transnat'l L. 75, 92–95 (1996); Erin Ann O'Hara, *Choice of Law for Internet Transactions: The Uneasy Case for Online Consumer Protection*, 153 U. Pa. L. Rev. 1883, 1885 (2005); Jenny Bagger, Note, *Dropping the Other Shoe: Personal Jurisdiction and Remote Technology in the Post-Pandemic World*, 73 Hastings L.J. 861, 861 (2022).

70 *See, e.g.*, Young Ran (Christine) Kim, *Taxing Teleworkers*, 55 U.C. Davis L. Rev. 1149, 1195–214 (2021); Joan T. A. Gabel & Nancy Mansfield, *On the Increasing Presence of Remote Employees: An Analysis of the Internet's Impact on Employment Law as it Relates to Teleworkers*, 2001 U. Ill.

theory arises in the personal jurisdiction, conflict of laws, and internet regulation fields, and several approaches have emerged.[71] Yet this question is easier than internet jurisdiction questions of the past, such as the issue of internet regulation. Telework is not *non*territorial, like internet regulation,[72] but *quasi-territorial*. At least one party—the employer—is clearly tethered to the ground. A court should therefore consistently find that a remote teleworker states a claim under at least an employer's state worker protection statute. And although another state statute may also provide a cause of action for an aggrieved plaintiff, at a minimum the employer's state statute should offer up its protections because of its consistent and grounded physical location.

To make this argument, this Note surfaces some existing methods for making a statutory scope determination that courts have used in examining teleworker cases. Those are (1) statutory text, (2) precedent, (3) state contacts, (4) governmental interests, and (5) presumptions against extraterritoriality. These factors draw from both traditional choice of law principles and traditional statutory interpretation tools and canons, as courts tend to borrow from both context when determining the scope of its statutes. This Note argues that under each consideration, a teleworker should fall within the legislative reach of an employer's state statute.

A. Statutory Text

A court confronting the teleworker question might find itself analyzing statutory text that indicates that the statute applies to workers "in the state." Although a court might look into this language to find legislative intent, there is widespread agreement that statutes are usually silent as to their geographical scope.[73] In general, legislatures do not

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J.L. Tech. & Pol'y 233, 264–66 (examining whether a teleworker working from home creates sufficient minimum contacts to establish personal jurisdiction over an employer-defendant).

71 In the personal jurisdiction sphere, see Zippo Manufacturing Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997) (developing a "sliding scale" test that conferred jurisdiction on defendants with interactive websites wherever the site was viewed, but not for defendants with passive sites); Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, May 22, 2000, No. 00/05308 (Fr.) (conferring jurisdiction over Yahoo! in France and ordering the company to remove Nazi paraphernalia being sold to people in France); Yahoo! Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme, 433 F.3d 1199, 1207 (9th Cir. 2006) (using the "effects test" to assess the interim orders from the French court); Geist, *supra* note 69, at 1352 (arguing that the effects-based test promotes overregulation and instead courts should adopt a "targeting test" that considers "contract, technology, and knowledge" as the standard for assessing Internet jurisdiction cases).

72 *See* Johnson & Post, *supra* note 40, at 1370 (arguing that cyberspace creates a separate "place" for jurisdictional purposes).

73 Restatement (Second) Conflict of Ls. § 6, cmt. b. (Am. L. Inst. 1971) ("A court will rarely find that a question of choice of law is explicitly covered by statute. That is to say, a court will

directly address the scope of a statute's reach.[74] This is no less true of worker protection statutes.[75] The absence of legislative direction opens the door to tremendous judicial discretion.[76] Indeed, in the conflicts field, statutory interpretation is most often a task for the courts.[77]

Courts have expressed willingness to interpret the popular statutory language, allowing coverage for employers and employees "in the state," to include teleworkers. In one nonteleworker case where a Maryland statute defined an employer as "any person who employs an individual in the State," the District of Maryland in *Poudel v. Mid Atlantic Professionals, Inc.*[78] noted, "particularly in light of the recent advent of remote telework, . . . there may be examples of work by individuals physically located outside of Maryland that could arguably be considered to be work within the state."[79] In *Kuklenski v. Medtronic*,[80] the District of Minnesota looked at the statutory language of the Minnesota Human Rights Act,[81] which extended to workers who "work[] in this state."[82] The Court concluded that, as applied to the teleworker plaintiff, "[p]retty clearly, the [statute's] 'works in this state' requirement is ambiguous."[83] A court's interpretation of this language may depend

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rarely be directed by statute to apply the local law of one state, rather than the local law of another state, in the decision of a particular issue.").

74 Kramer, *supra* note 55, at 294 ("Since the legislature's failure to specify the statute's extraterritorial reach is an oversight, the court must infer what limits-if any-there ought to be on the extraterritorial reach of the law."); O'Hara & Ribstein, *supra* note 15, at 1170 ("Since legislators rarely contemplate this issue, courts must resort to an exploration of constructive intent: What would the legislature have preferred if it had thought about the problem? Unfortunately, however, constructive intent proves no more fruitful than actual intent because it is not clear what principles should guide the construction.").

75 *See, e.g.*, Pestell v. CytoDyn, No. 19-cv-1563, 2020 WL 6392820, at *3 (D. Del., Nov. 2, 2020) ("The statute, however, does not define 'employee' for the purposes of geographical inclusion under the act."); Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 200 (D.N.J 2021) ("[N]either party really stresses the plain language of the statutes, which are silent as to extraterritorial application."); Wexelberg v. Project Brokers LLC, No. 13 Civ. 7904, 2014 WL 2624761, at *10 (S.D.N.Y. 2014) ("[N]either [the New York City Human Rights Law nor the New York State Human Rights Law] directly defines the geographic scope of its coverage."). *But see* Border v. Nat'l Real Est. Advisors, LLC, 453 F. Supp. 3d 249, 252 (D.D.C. 2020) (interpreting title 4, section 1603.1 of the D.C. Municipal Regulations, which defined what it means to "work[] within the District").

76 *See* Leflar, *supra* note 52, at 951 (1977) ("The bulk of American conflicts law in the choice-of-law area is and always has been judge-made law."); *see also* Lindsay Traylor Braunig, Note, *Statutory Interpretation in a Choice of Law Context*, 80 N.Y.U. L. Rev. 1050, 1050 (2005).

77 Willis L.M. Reese, *Statutes in Choice of Law*, 35 Am. J. Compar. L. 395, 395 (1987) ("Most statutes do not contain any legislative directive with respect to their extraterritorial application and leave the entire problem to the judgment of the courts.").

78 No. 21-1124, 2022 WL 345515 (D. Md. Feb. 4, 2022).

79 *Id.* at *4–5.

80 635 F. Supp. 3d 726 (D. Minn. 2022).

81 Minn. Stat. § 363A.03.

82 *Kuklenski*, 635 F. Supp. 3d at 734 (quoting Minn. Stat. § 363A.03).

83 *Id.*

on dictionary definitions or on definitions found in other areas of the state's code. But often, a court leans on tools outside of the language itself to find statutory meaning, such as the factors below.

B. Examining Precedent

In the absence of a clear expression of a statute's geographic scope, a court is likely to turn to precedent to determine the scope of a statute's reach.[84] Multistate employment cases have historically occurred in two main settings. First, where the worker is *inherently mobile*, by virtue of the type of work that they do. These include truck drivers,[85] rideshare drivers,[86] flight attendants,[87] or salespeople.[88] The second batch are those where an employee is *sent out* to a *single location* to conduct work on behalf of the in-state company.[89]

Relying on precedent that denies a cause of action for a teleworker under an employer's state statute is misplaced—telework presents a novel factual framework heretofore insufficiently addressed by American courts.[90] One example of a court relying on inapplicable precedent

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84 Sometimes precedent interprets the statutory text at issue—usually language that reads that an employee must "work in the state" to state a claim under the statute. Other times, a court will find that the precedent establishes the scope of the statute without assistance from the text of the statute itself. *Compare Kuklenski*, 635 F. Supp. 3d at 734 (interpreting the text itself in light of precedent), *with* Loza v. Intel Ams. Inc., No. C 20-06705, 2020 WL 7625480, at *4 (N.D. Cal. 2020) (concluding that the California Fair Employment Practices Act does not apply to an out-of-state teleworker and citing to case law discussing the general scope of all California statutes for the proposition that the relevant inquiry is "whether 'the conduct which gives rise to liability . . . occurs in California'" (quoting Leibman v. Prupes, No. 14–CV–09003,2015 WL 3823954, at *7 (C.D. Cal. June 18, 2015))).

85 *See, e.g.*, Portillo v. Nat'l Freight Inc., 323 F. Supp. 3d. 646, 663 (D.N.J. 2018) (finding that the transitory nature of truckers made it such that the workers had no significant relationship with any other state, and that therefore New Jersey law should apply to the dispute); Woods v. Mitchell Bros. Truck Line, Inc., 143 Wash. App. 1016, 1017 (2008) (Washington state law applies to wage dispute brought by an interstate truck driver working for a Washington-based company).

86 *See, e.g.*, Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059, 1061 (N.D. Cal. 2014) (Lyft drivers failed to state a claim for misclassification against California-based company under California law).

87 *See, e.g.*, Oman v. Delta Air Lines, Inc., 230 F. Supp. 3d 986, 989 (N.D. Cal. 2017); Ward v. United Airlines, Inc., 466 P.3d 309, 311 (Cal. 2020); Bernstein v. Virgin Am. Airlines, Inc., 3 F.4th 1127, 1133 (9th Cir. 2021).

88 *See, e.g.*, Dow v. Casale, 989 N.E.2d 909, 914–15 (Mass. App. Ct. 2013); Rao v. St. Jude Med. S.C., Inc., No. 19-923, 2020 WL 4060670, at *2 (D. Minn. 2020) (sales representative worked for a Minnesota company in Florida); Sullivan v. Oracle, 254 P.3d 237 (Cal. 2011) (Oracle instructors were required to travel to destinations within the United States away from their city of domicile for the purpose of performing work for Oracle).

89 *See, e.g.*, Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 151 (1932) (electrical work performed in New Hampshire for a Vermont based company); Alaska Packers Ass'n v. Indus. Acct. Comm'n, 294 U.S. 532 (1935) (salmon farming in Alaska for California-based company).

90 *See* Fitzpatrick, *supra* note 67 (organizing a collection of multistate employment cases and stating that, on the issue of whether to apply "state human rights and other employment law statutes" to an out-of-state plaintiff, "authority on point is split").

to determine the scope of a worker protection statute is *Munenzon v. Peters Advisors, LLC*.[91] In that case, a teleworker in Connecticut sought protection under New Jersey wage laws.[92] The employee worked remotely for a New Jersey company from the outset of his employment, and was not required to travel to New Jersey on any occasion.[93] The District Court of New Jersey held that New Jersey law does not extend to out-of-state workers, relying on three cases to support this conclusion.[94] The first case was an action brought against a New Jersey corporation by cross-country delivery truck drivers.[95] The second and third were cases brought against a New Jersey corporation by a salesperson operating in their respective sales districts outside of New Jersey.[96]

The defining feature of this precedent, however, is that the location of the work was so essential to the job that the employee *had* to physically be present in the place to perform it. Selling products in-person in Virginia can only be done while in Virginia, and driving across country to deliver goods can only be done by physically crossing state lines to reach the destination. Telework presents the exact opposite scenario: the location of where the work is conducted is so *nonessential* that it can be conducted from *anywhere*.[97] Additionally, because of the significance of an employee's physical contacts in other states in the nonteleworker context, a court in those states may be more likely to apply *their* law to a dispute.[98] But because a teleworker is not tethered to any other state, it is possible that a teleworker's *only* mode of recovery is under an

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91 553 F. Supp. 3d 187, 200 (D.N.J. 2021).

92 *Id.* at 191–92.

93 *Id.*

94 *Id.* at 200–01.

95 *Id.* at 200 (citing Lupian v. Joseph Cory Holdings, LLC, 240 F. Supp. 3d 309, 313–14 (D.N.J. 2017)) (finding that multistate delivery workers could not state a claim under the New Jersey Wage Payment Law and the New Jersey Wage and Hour Law).

96 *Id.* at 200–01 (citing Ortiz v. Goya Foods, No. 19-19003, 2020 WL 1650577, at *4 (D.N.J. Apr. 3, 2020)) (declining to extend New Jersey Wage Payment Law or New Jersey Wage and Hour Law to sales representatives based all over the country but working for a New Jersey corporation); *see also id.* at 201 (citing Overton v. Sanofi-Aventis U.S., LLC, No. 13-5535, 2014 WL 5410653, at *6 (D.N.J. Oct. 23, 2014)) (declining to extend New Jersey wage payment law to sales representatives based in the Virginia, Wisconsin, and Louisiana sales territories for the New Jersey corporation).

97 *Cf.* Banko, *supra* note 32, at 116 (2020) ("In the case of mobile telework, there is no permanent, fixed workplace, it is a means of work made possible by portable IT and telecommunications devices."); *see also* Burnstein, *supra* note 69, at 92–95 (discussing why conventional choice of law regimes are insufficient in the cyberspace context).

98 *See, e.g.*, Runyon v. Kubota Tractor Corp., 653 N.W.2d 582, 586 (Iowa 2002) (holding there was no error in applying Iowa Law in a dispute between an employee who resided in Missouri because the employee "transacted substantial business and routinely performed services on behalf of [the corporation] within Iowa's borders").

employer's state statute.[99] Analogies to these historical cases, therefore, are inappropriate.

It is natural for a court to cleave to the (facially) familiar when presented with a novel fact pattern.[100] But where a court analogizes a teleworker to other types of out-of-state work, it misunderstands the novel facets of this type of employment arrangement—therefore possibly depriving a plaintiff from recovery in any state.[101] Remote work as conducted over the internet may be performed anywhere and have effects anywhere.[102] A court can therefore distinguish a teleworker fact pattern from historical multistate employment cases which may hold that an out-of-state worker cannot recover under an in-state statute.[103]

C. State Contacts

In deciding the scope of an employer's state statute, courts that have addressed the teleworker question have considered the relationship between a plaintiff and the state.[104] As the District of Minnesota observed in a teleworker case, a "contacts-based approach to the issue may fairly be criticized because it 'treat[s] the question almost as one of personal jurisdiction rather than as one of statutory interpretation.'"[105]

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99 *See* Steinke v. P5 Sols., Inc., No. 2018 CA 004445 B, 2019 WL 9606798, at *3 (D.C. Super. Ct. July 3, 2019) (declining to apply a teleworker-state's law to an employment dispute with an out-of-state corporation).

100 *Cf.* Lawrence M. Solan, *Precedent in Statutory Interpretation*, 94 N.C. L. Rev. 1165, 1185–88 (2016) (discussing circumstances in which referencing precedent to interpret statutes may be inappropriate).

101 *See* Banko, *supra* note 32, at 124 ("[E]very manifestation of telework will also necessarily require thinking beyond the employment relationship framework for labour law legislation."); *see also, e.g.*, *Steinke*, 2019 WL 9606798, at *3 (declining to apply a teleworker's state's law to an out-of-state corporation).

102 *See* Johnson & Post, *supra* note 40, at 1370. To be sure, the remote worker phenomenon predated the ubiquitous adaptation of the internet. *See* Kelli L. Dutrow, *Working at Home at Your Own Risk: Employer Liability for Teleworkers Under the Occupational Safety and Health Act of 1970*, 18 Ga. St. U. L. Rev. 955, 977–79 (2002) (discussing the rise in teleworking in the aftermath of 9/11).

103 *See supra* notes 84–89 and accompanying text.

104 *See, e.g.*, Loza v. Intel Ams., Inc., No. C 20-06705, 2020 WL 7625480, at *2–4 (N.D. Cal. Dec. 22, 2020) (examining the facts to determine whether the tortious act took place in California); Hearn v. Edgy Bees, Inc., No. 21-2259, 2022 U.S. Dist. LEXIS 94745, at *4 (D. Md. May 26, 2022) (examining the facts to determine whether defendant employed plaintiff in Maryland or if the facts surrounding plaintiff's employment "sufficiently connect [his] work to Maryland such that the presumption against extraterritoriality does not apply" (quoting Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *3 (D. Md. Feb. 4, 2022))); Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021) (using the most significant relationship test to track the contacts between the Connecticut remote worker and the New Jersey employer).

105 Kuklenski v. Medtronic USA, Inc., 635 F. Supp. 3d 726, 734 (D. Minn. 2022) (quoting Walton v. Medtronic USA, Inc., No. 22-CV-0050, 2022 WL 3108026, at *2 (D. Minn. Aug. 4, 2022)).

Nonetheless, the extent of a plaintiff's contacts with the state is often a factor in a court's statutory interpretation analysis.[106]

Contacts—a highly physical and territorial phenomenon[107]—are a poor conceptual fit for telework, which is, at best, quasi-territorial, and at worst, completely nonterritorial.[108] To allow recovery under the employer's state statute, a court may attempt to determine the extent of the out-of-state plaintiff's contacts with the employer's state.[109] Courts embarking on this intellectual exercise are prone to performing nonsensical backflips to try to fit this cyberspace-based idea into the physical world.[110] The frequency of a plaintiff's physical presence in the state is an often-used metric.[111] For example, in *Desiderio v. Hudson Technologies, Inc.*,[112] the Southern District of New York did not dismiss Staryl Desiderio's gender-based discrimination claim under the New York Human Rights Law, but only because the gender-based discrimination occurred at an isolated in-person meeting during the pandemic.[113] Regarding her disability-based discrimination claim, however, the court dismissed because the impact of the disability-based discrimination was felt while the plaintiff was working remotely from her home in Florida.[114] And in *McPherson v. EF Intercultural Foundation Inc.*,[115] when a teleworker

106 *See infra* notes 109–31 and accompanying text.

107 *But see* Paul Schiff Berman, *The Globalization of Jurisdiction*, 151 U. PA. L. REV. 311, 322 (2002) (offering a "cosmopolitan pluralist conception of jurisdiction" which "allows us to think of community not as a geographically determined territory circumscribed by fixed boundaries, but as 'articulated moments in networks of social relations and understandings'" (quoting DOREEN MASSEY, SPACE, PLACE, AND GENDER 154 (1994))).

108 *See supra* notes 28–43.

109 *See, e.g.*, Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *11 (D.D.C. July 8, 2016) (citing McGoldrick v. TruePosition, Inc., 623 F. Supp. 2d 619, 631 (E.D. Pa. 2009)) (considering "(1) the location of the employer's headquarters; (2) the employee's physical presence working in the state; (3) the extent of employee's contact with the in-state employer (i.e., reporting, direction, supervision, hiring, assignment, termination); (4) the location of the employee's residence; and (5) the employee's ability to bring a claim in another forum").

110 *Cf.* YOCHAI BENKLER, RULES OF THE ROAD FOR THE INFORMATION SUPERHIGHWAY: ELECTRONIC COMMUNICATIONS AND THE LAW § 30.3, at 625 (1996) ("Courts applying traditional doctrines . . . will find themselves entangled in a variety of questions for which their physical-space-based conceptual framework will leave them unprepared.").

111 *See, e.g.*, Hearn v. Edgy Bees, Inc., No. 21-2259, 2022 U.S. Dist. LEXIS 94745, at *10 (S.D. Md., May 26, 2022) ("[T]he Complaint contains no allegations that Plaintiff actually traveled to or worked in Maryland—even on one occasion."); Shiber v. Centerview Partners LLC, No. 21 Civ. 3649, 2022 WL 1173433, at *6 (S.D.N.Y. Apr. 20, 2022) (finding the plaintiff "never stepped foot inside Centerview's New York City office and instead worked exclusively from her home in New Jersey"); McPherson v. EF Intercultural Found., Inc., 260 Cal. Rptr. 3d 640, 662–64 (Ct. App. 2020) (considering a plaintiff's annual trips into California for her job's summer program to decide whether California law applies to the dispute).

112 No. 22 Civ. 541, 2023 WL 185497 (S.D.N.Y. Jan 13, 2023).

113 *Id.* at *6.

114 *Id.* at *7.

115 260 Cal. Rptr. 3d 640 (Ct. App. 2020).

attempted to state a claim under California's labor code, the court considered the fact that she had only performed 25 percent of her work in-person in California, and the rest remotely from her home in Virginia.[116] Yet, this physical-contacts analysis does not appreciate the real "location" of telework—jurisdictionless cyberspace.[117] Especially given the rise of digital nomads, a teleworker's geographic location has little, if any, connection to the substance of the work.

To accommodate for the apparent nonphysical nature of telework, a handful of courts have expanded the definition of "contacts" to include "electronic" or "virtual" contacts. In *Trevejo v. Legal Cost Control Inc.*,[118] a Massachusetts-based teleworker brought an age-based discrimination action against his New Jersey-based employer under the New Jersey Law Against Discrimination.[119] The Superior Court of New Jersey Appellate Division reversed the order, granting summary judgment in favor of the defendant and requested additional discovery on the type of software used by the remote employees, the location of the server that connected the teleworkers to the employer's state, and the location of the internet provider.[120] Similarly, in *Hull v. ConvergeOne*,[121] a remote worker based in Utah working in sales for a Minnesota-based company brought a claim under the Minnesota Payment of Wages Act.[122] The District of Minnesota denied the defendant's motion to dismiss, citing to plaintiff's virtual interactions through WebEx, daily Zoom meetings, and quarterly corporate conference calls with people based in the employer's state.[123] Finally, in *Pestell v. CytoDyn Inc.*,[124] despite holding for the defendant, the District of Delaware considered plaintiff's argument that he had "thrice-weekly meetings with laboratory staff via

116 *See id.* at 661 ("Most of Heimann's work may have been to support programs in California, but as a Virginia resident she did not perform most of her work in California. Based on the record, at most Heimann worked in California for about 12 to 13 weeks per year—about two months or so in the summer and additional days, or perhaps a week at a time, in January or February and in April or September. She thus spent at least 75 percent of her time performing work in Virginia from June 2005 to October 2014." (emphasis omitted)).

117 *See supra* notes 28–43.

118 No. A-1377-16T4, 2018 WL 1569640 (N.J. Super. Ct. App. Div. 2018).

119 N.J. STAT. ANN. § 10:5 (West); *Trevejo*, 2018 WL 1569640, at *1.

120 *Trevejo*, 2018 WL 1569640, at *4.

121 570 F. Supp. 3d 681 (D. Minn. 2021).

122 MINN. STAT. § 181.01–181.27; *Hull*, 570 F. Supp. 3d at 686.

123 *See Hull*, 570 F. Supp. 3d at 687. The court distinguished on the facts from previous cases that held that the MPWA does not apply extraterritorially, where plaintiff never once entered the state, because here, the plaintiff also attended trainings in person in Minnesota and carried Minnesota health insurance. This indicates that perhaps the case might have gone the other way were electronic contacts the only contact considered. *Id.* at 692.

124 No. 19-cv-1563, 2020 WL 6392820 (D. Del. Nov. 2, 2020).

videoconference or teleconference, maintaining near-daily contact with laboratory staff."[125]

While the "electronic contacts" concept is useful as a first step that better grasps the realities of telework, this analytical microleap does not address the central problem. Because workers and employers alike are now based anywhere and everywhere, the "electronic contacts" will float between two meaningless locations, unconnected to the central location of the employer-employee relationship.[126] A system that considers only the physical locations of each of the participants in a dispute is bad for workers and bad for business.[127] The District of Minnesota in *Kuklenski* recognized this incongruity, rejecting a territorial approach altogether:

> What if that Wisconsin resident worked only remotely for a Minnesota-based corporation performing job duties that—prior to the proliferation of remote work—were performed by an employee located at the company's Minnesota offices? In other words, might purely electronic contacts with Minnesota-based co-workers be enough in some cases to show that an employee works in Minnesota? Does the location of the person or persons responsible for the alleged discrimination matter? Must the impact of the alleged discrimination occur in Minnesota? Pretty clearly, the [Minnesota Human Rights Act]'s "works in this state" requirement is ambiguous.[128]

As the court in *Kuklenski* correctly understood, telework is a quasi-territorial form of work that is not meaningfully tied to *any* specific jurisdiction.[129]

But to the extent telework can be said to be tied anywhere, it must at the very least be tied to the employer's state.[130] The employer's state centralizes all the relevant parties into one tangible location.[131] Any teleworker—wherever she may happen to rest her head at night—should be able to state a claim in the employer's state. A court should always find that there is a sufficient nexus between a teleworker and the employer's state such that a teleworker falls within the state's legislative jurisdiction. The court in *Munenzon*—despite holding to the contrary—grasped the connection between a teleworker and her employer's state:

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125 *Id.* at *1.

126 *But cf. id.* at *5 (granting defendant's motion to dismiss where plaintiff brought a claim, under a third state's statute, different from the company's principal place of business or place of incorporation, since both employer and employee were working remotely).

127 *See, e.g.*, Burnstein, *supra* note 69, at 92–95.

128 Kuklenski v. Medtronic USA, Inc., 635 F. Supp. 3d 726, 734 (D. Minn. 2022).

129 *See id.*

130 *See* Goldsmith, *supra* note 47, at 1129.

131 *See id.*

> Working remotely for a New Jersey company is concededly different from working for, say, a branch office of a New Jersey company. Such a stay-at-home employee is directly linked to the New Jersey employer, and is not "anchored" in the same manner to a local brick-and-mortar office of the employer.[132]

In other words, a teleworker remains tethered to the employer's primary or original location, while a worker at a branch office—perhaps like mobile workers sent out to a single location[133]—is likely to come within another controlling jurisdiction.

To find a nexus to the employer's state, courts have looked to criteria such as the location from which a teleworker receives official correspondence such as pay stubs, where a teleworker was originally hired, where the teleworker is taxed, where a teleworker reports, where the teleworker may have periodic in-person meetings, where the employer treated as the teleworker's "base," and whether the employer had a physical presence in the teleworker's state.[134] Although these contacts may support many teleworkers in stating a claim under an employer's state statute, a court should find that the employer's state laws may permissibly govern an employment dispute *as a categorical rule*. The alternative may create a lawless circumstance for the teleworker, who may be untethered to any other specific geographical location, since each state's statute is analyzed in isolation. And even if a teleworker-state allows for recovery, it's likely that those state's protections are not as strong as the employer's state protections.[135]

A teleworker's nexus to an employer's state is also prevalent in the tax arena, where the employer's state routinely subjects out-of-state

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132 Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021).

133 *See supra* note 89 and accompanying text.

134 *See, e.g.*, Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *11 (D.D.C. July 8, 2016) (finding teleworker based in Virginia could state a claim under the District of Columbia Wage Payment and Collection Law in part because she "(1) was hired in the District of Columbia; (2) was supervised and received directions from her employer in the District of Columbia, which maintains no facility in the state in which the plaintiff performed her work duties; (3) was issued pay statements from a District of Columbia address to an address in the District; (4) received correspondence from her employer expressly recognizing the plaintiff's eligibility for relief under District of Columbia worker protection laws; and (5) since the initiation of the present action, has worked periodically at her employer's office in the District of Columbia" (citations omitted)); Wexelberg v. Project Brokers LLC, No. 13 CIV. 7904, 2014 WL 2624761, at *10 (S.D.N.Y. 2014) (finding where plaintiff worked remotely from his home in New Jersey for the last five weeks of employment, he was able to state a claim under the New York Human Rights Law against his employer in part because "defendants consistently treated him as an employee in their New York office, as they withheld a portion of his pay to account for New York State income taxes").

135 *See supra* note 24.

teleworkers to the employer's state tax code.[136] Numerous states have developed a "convenience of the employer" rule which treats teleworking labor as in-state employment, therefore subjecting a teleworker's income to employer's state taxation.[137] Although the standard for imposing tax liability is somewhat different from the standard involved in stating a claim under an employer's state statute, both consider a "nexus" to the employer's state.[138] In the absence of express legislative directive from a worker protection statute, it is nonsensical that a state may extend its tax laws to out-of-state teleworkers, and yet refuse the same generosity for its worker protections.[139]

D. Government Interests Analysis

When a court considers the scope of only a single statute—as in teleworker cases—it may inquire into the purpose of the act and ask whether it is compatible with an extraterritorial application. This inquiry into legislative purpose involves a Currie-like exploration into the interests of the forum. Professor Brainerd Currie—father of modern interest analysis—suggests that when conducting a multistate interest analysis, the court "determine[s] the governmental policy expressed in the law of the forum" and then "inquire[s] whether the relation of the forum to the case is such as to provide a legitimate basis for the assertion of an interest in the application of that policy."[140] Currie suggests that the process of multistate interest analysis "is essentially the familiar one of construction or interpretation."[141] The difference is that in a multistate interest analysis, a court assesses the interests underlying two

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136 *See, e.g.*, Brief in Opposition to Motion for Leave to File Complaint at 36, New Hampshire v. Massachusetts, 141 S. Ct. 2848 (2021) (No. 22-154) (noting that Massachusetts Law subjected out-of-state teleworkers to Massachusetts's tax where employer was based in Massachusetts). *See generally* Edward Zelinsky, *Taxing Interstate Remote Workers after* New Hampshire v. Massachusetts*: The Current Status of the Debate*, 25 Fla. Tax Rev. 767 (2022).

137 Mark Klein, Joseph Endres & Katherine Piazza, *Tax Implications of COVID-19 Telecommunication and Beyond*, CPA J. (July 2020) ("Under the 'convenience of the employer' rule, if the employer or the employee's principal office is located in one of those states, then the employee's compensation earned while telecommuting will be treated as if earned in the employer's location, and not in the state from which the employee is telecommuting, if the employee is working remotely for their own convenience and not the employer's necessity.").

138 *See* Kim, *supra* note 70, at 1195–214 (discussing the nexus between teleworkers and employer's states for tax purposes).

139 *See, e.g.*, Buckeye Inst. v. Kilgore, No. 20CV004301, 2021 Ohio Misc. LEXIS 37, at *13 (Ct. Com. Pl. 2021) (finding that a remote teleworker could be considered working in the employer's state for tax purposes). Some, however, have argued that these tax schemes are unconstitutional. *See, e.g.*, Kim, *supra* note 70, at 1170; Nathan Sauers, Comment, *Remote Control: State Taxation of Remote Employees*, 60 Hous. L. Rev. 175, 185–94 (2022).

140 Currie, *supra* note 51, at 178.

141 *Id.* ("[The process of interest analysis] is essentially the familiar one of construction or interpretation. Just as we determine by that process how a statute applies in time, and how it

comparative state's statutes, and then applies the law of the state with the greater interest.[142] In a unilateral interest analysis, in step one of the conflicts analysis, a court will look only to a single state's statute to determine whether the legislative purpose would *permit* the statute to extend to a party outside of the state. The court dismisses the case altogether in the absence of such extraterritorial legislative intent.

A court inquiring into the legislative purpose to determine the scope of a statute should always conclude that the employer state has a strong interest in regulating the employer-teleworker relationship. First, the employer's state has interest in regulating *in-state conduct.* Worker protection statutes are, by their nature, designed to regulate conduct by *employers*, not *employees*.[143] An antidiscrimination statute, for example, is designed to prevent an *employer's* discriminatory actions.[144] An anti-wage theft statute might require an *employer* to pay their workers a certain rate on a regular basis.[145] Some courts addressing the teleworker problem have recognized that regulating in-state employer conduct is an essential purpose of a worker-protection statute. In *Lincoln-Odumu v. Medical Faculty Associates, Inc.*,[146] a plaintiff-teleworker based out of her home in Virginia and working for a Washington, D.C., company claimed that she was instructed to underreport the hours she worked and was not fully compensated for the overtime wages she was owed.[147] The plaintiff brought a claim under the D.C. Wage Payment and Collection Law ("WPCL").[148] Contrary to the defendant's assertion that "the District '[c]ertainly . . . has no interest in whether or not individuals working . . . outside the District are paid their wages,'" the D.C. District Court found that the District has an interest in preventing wage theft initiated by employers within their borders, "regardless of the physical location of their employees"[149] because, as the plaintiff contended, "the 'focus of the []WPCL is on the actions of an employer,' and not the location of the employee."[150] Similarly, in *Trevejo v. Legal Cost Control*

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applies to marginal domestic situations, so we may determine how it should be applied to cases involving foreign elements in order to effectuate the legislative purpose.").

142 *Id.* (describing the steps involved in the conflicts analysis).

143 *See, e.g.*, Bradford Elec. Light Co. v. Clapper, 286 U.S. 145, 159 ("[T]he purpose of that Act, as of the workmen's compensation laws of most other States, is to provide, in respect to persons residing and businesses located in the State, not only for employees a remedy which is both expeditious and independent of proof of fault, but also for employers a liability which is limited and determinate.").

144 *See, e.g.*, N.Y. Exec. § 296 (2021).

145 *See, e.g.*, Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *4 (D.D.C. July 8, 2016).

146 No. CV 15-1306, 2016 WL 6427645 (D.D.C. July 8, 2016).

147 D.C. Code § 32-1308.

148 *Lincoln-Odumu*, 2016 WL 6427645, at *2.

149 *Id.* at *10 (alterations and omissions in original).

150 *Id.* at *6 (alteration in original).

Inc., the New Jersey Superior Court, Appellate Division found that the purpose of the New York statute "'is nothing less than the eradication of the cancer of discrimination in the workplace,'"[151] and that the statute has been "broadly construed to protect not only 'aggrieved employees but also to protect the public's strong interest in a discrimination-free workplace.'"[152] Additional discovery was required to decide whether the plaintiff could state a claim for relief.[153] And in *Poudel v. Mid Atlantic Professionals, Inc.*, despite ultimately holding for the defendant, the District Court of Maryland noted that "the 'purpose' of the [Maryland wage payment law] . . . is to provide 'an incentive for *employers* to pay . . . back wages.'"[154]

States also have an interest in preventing in-state employers from manipulating their employees. If courts do not extend teleworkers' employer's state statutory protections, employers may quickly realize that they may hire out-of-state workers to avoid abiding by in-state legislation. For example, in *Wexelberg v. Project Brokers, LLC*,[155] the plaintiff who started out working in-person in New York and then later began working remotely from his home in New Jersey alleged he was fired due to his severe physical disability that required special accommodations.[156] He brought a claim under the New York Human Rights Act.[157] The Southern District of New York stated,

> By the simple stratagem of directing a targeted employee to do his work at home rather than at the New York office where he normally works, and then terminating him a few days or weeks later, the employer would immunize itself from liability under both State and City statutes. It can scarcely be the case that the State Legislature intended to allow this form of victimization of the very employees whom the Court of Appeals deemed "those who are meant to be protected."[158]

Thus, courts and employers have recognized this legal loophole in the teleworker arena, and a state has an interest in guarding against it.

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151 2018 WL 1569640, at *3 (quoting Garnes v. Passaic County, 100 A.3d 557, 564 (N.J. App. Div. 2014)).

152 *Id.* at *3 (quoting Hoag v. Brown, 397 N.J. Super. 34, 47 (App. Div. 2007)).

153 *Id.* at *4.

154 Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *4 (D. Md. Feb. 4, 2022) (second omission in original) (emphasis added) (quoting Battaglia v. Clinical Perfusionists, Inc., 658 A.2d 680, 686 (Md. 1995)).

155 No. 13 CIV. 7904, 2014 WL 2624761, at *1 (S.D.N.Y. 2014).

156 *Id.* at *1.

157 N.Y. Exec. L. § 290 (McKinney); *Wexelberg*, 2014 WL 2624761, at *1.

158 *Wexelberg*, 2014 WL 2624761, at *35 (quoting Hoffman v. Parade Publ'ns, 933 N.E.2d 744, 747 (N.Y. 2010)).

Similarly, in *Rinksy v. Cushman and Wakefield Inc.*,[159] an employee had previously commuted into New York for twenty-seven years from his home in Massachusetts.[160] Rinsky's employer allowed him to begin working from his home in Massachusetts, only to fire him three months later.[161] In effect, the defendant "allowed [Rinsky] to believe that he would be able to transfer to Massachusetts, but never officially authorized or intended to authorize the transfer, thus creating a pretext to fire him after he moved."[162] The employer then filed a motion to dismiss when plaintiff attempted to file suit under the New York City Human Rights Law,[163] arguing that the statute did not apply extraterritorially to a remote worker in Massachusetts.[164] But the First Circuit held for the plaintiff, citing *Wexelberg*, and recognizing that "[i]t would create a significant loophole in the statutory protection" were the court to allow the defendants' ill-intentioned actions to prevent the plaintiff from filing suit under the New York law.[165]

Finally, granting a defendant's motion to dismiss a teleworker claim brought under an employer's state statute enables an employer to override the legitimate expectations of their workers.[166] Professor Robert Leflar's article *Choice-Influencing Considerations* emphasizes the "predictability of results" as one of the most frequently addressed metrics that a court will use to determine a choice of law problem.[167] During the pandemic, millions were required to work from home across state lines with the expectation of one day returning to in-person work.[168] Where an employer enabled the reasonable expectation—such as by promising a return to in-person work and continuing to deduct the employer's state taxes from a teleworkers' paycheck—an employer's in-state conduct is at issue. This was the case in *Shiber*, where plaintiff "understood her remote work to be temporary and expected to work in person from Centerview's New York City offices once those offices reopened," in

159 918 F.3d 8 (1st Cir. 2019).

160 *Id.* at 12.

161 *Id.* at 13.

162 *Id.* at 20 (alteration in original) (citation omitted).

163 N.Y.C. Admin. Code §§ 8-101 to 8-134.

164 *Rinksy*, 918 F.3d at 14.

165 *Id.*

166 Reidenberg, *supra* note 37, at 1953 ("[T]he initial wave of cases seeking to deny jurisdiction, choice of law, and enforcement to states where users and victims are located constitutes a type of 'denial-of-service' attack against the legal system.").

167 Leflar, *supra* note 52, at 282; *accord* Robert A. Leflar, *Choice of Law Statutes*, 44 Tenn. L. Rev. 951, 967 (1977); Robert A. Leflar, *Conflicts Law: More on Choice-Influencing Considerations*, 54 Calif. L. Rev. 1584, 1586 (1966); Robert A. Leflar, American Conflicts of Law 240 (3d ed. 1977).

168 *The Number of People Primarily Working from Home Tripled Between 2019 and 2021*, U.S. Census Bureau (Sept. 15, 2022), https://www.census.gov/newsroom/press-releases/2022/people-working-from-home.html [https://perma.cc/YBV5-KE9M].

part because Centerview indicated that it would "continue to provide updates as [the company] got 'closer to . . . office re-openings'" and because Centerview continued to deduct New York State taxes from Shiber's paycheck.[169] Centerview's actions should therefore be subject to in-state regulation under the statute.

Problematically, some courts have found that an employer's state does not have an interest in regulating teleworker relationship.[170] Those courts suggest that "[t]he states where the[] plaintiffs lived and worked would have the greatest interest in their treatment as employees."[171] This view presents several challenges. First, this view overstates the significance of the place in which a teleworker may incidentally open her laptop. Because remote work is inherently nonlocational and not meaningfully connected to any state other than that of the employer,[172] the state where the teleworker resides has a limited interest in applying its law to a dispute between the worker and the employer.[173] Indeed, the state might not even be aware that a remote worker is within its borders, conducting business for an out-of-state company.[174] Relatedly, this view presupposes that the state where a teleworker physically lives and works is *willing* to rope an employer into its legislative jurisdiction. Courts have been unwilling to construe the teleworker's state's statute in that way. In *Steinke v. P5 Solutions*,[175] the D.C. Superior Court found that a teleworker working in D.C. could not state a claim under the D.C. WPCL against their Virginia-based employer.[176] The court reasoned that "[o]ne employee's decision to work from home should not qualify the entire company as operating in the District of Columbia nor as 'employing' any person in the District of Columbia" under the WPCL.[177] This case demonstrates that the teleworker-state may not provide an adequate forum for enforcing antidiscrimination statutes or wage and hour statutes. The onus must therefore fall to the employer's state to enforce its own law against its own in-state companies.

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169 Shiber v. Centerview Partners LLC, No. 21 Civ. 3649, 2022 WL 1173433, at *1 (S.D.N.Y. Apr. 20, 2022).

170 Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 201 (D.N.J. 2021).

171 *Id.* (alteration in original) (citation omitted).

172 *See supra* notes 29–35.

173 *See, e.g.*, Steinke v. P5 Sols., Inc., No. 2018 CA 004445 B, 2019 WL 9606798, at *3–5 (D.C. Super. Ct. July 3, 2019).

174 This Author has not found any state that requires a teleworker to "register" his presence in the state as a teleworker or otherwise inform the state that he is working from home in the state.

175 No. 2018 CA 004445 B, 2019 WL 9606798 (D.C. Super. Ct. July 3, 2019).

176 *See id.* at *5 (D.C. Super. Ct. July 3, 2019). To be clear, this holding is consistent with *Lincoln-Odumu*, in which the court found that an out-of-state teleworker employed by a D.C. corporation could recover under the D.C. WPCL. Therefore, D.C.'s approach is harmonious. *See* Lincoln-Odumu v. Med. Fac. Assocs., Inc., No. CV 15-1306, 2016 WL 6427645, at *13 (D.D.C. July 8, 2016).

177 *Steinke*, 2019 WL 9606798, at *3.

E. Presumptions Against Extraterritoriality

Courts routinely deny out-of-state teleworkers protection pursuant to a canon of statutory construction known as the "presumption against extraterritoriality"[178]—that is, the assumption that the legislature only intended for the statute to apply within the state.[179] This presumption is designed to protect against dormant Commerce Clause violations.[180] In turn, the strand of the dormant Commerce Clause that addresses the extraterritoriality principle "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State."[181] With the exception of one case,[182] the Supreme Court has only struck down statutes under the extraterritoriality principle where the Court "faced (1) a price control or price affirmation regulation, (2) linking in-state prices to those charged elsewhere, with (3) the effect of raising costs for out-of-state consumers or rival businesses."[183]

Broadly speaking, presumptions against extraterritoriality as an interpretive canon are waning in popularity. Scholars have argued that these presumptions are not genuine concerns of constitutional violations.[184] Professor Larry Kramer notes that the presumption is not based

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178 *See, e.g.*, Pestell v. CytoDyn, No. 19-cv-1563, 2020 WL 6392820, at *3 (D. Del. Nov. 2, 2020) ("[P]rotections contained in [Pennsylvania Wage Payment and Protection Law] extend only to those employees based in Pennsylvania." (quoting Killian v. McCulloch, 873 F. Supp. 938, 942 (E.D. Pa. 1995)); Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021) ("[Case law] is fairly uniform in suggesting or holding that New Jersey's wage and hour law does not apply to out-of-state workers."); Loza v. Intel Ams., Inc., No. C 20-06705, 2020 WL 7625480, at *4 (N.D. Cal. Dec. 22, 2020) (plaintiff-teleworkers' claim under California state law "must be dismissed pursuant to the presumption against extraterritoriality"); See, e.g., Hearn v. Edgy Bees, Inc., No. 21-2259, 2022 U.S. Dist. LEXIS 94745, at *4 (S.D. Md., May 26, 2022) (finding that the facts of the case—that the employee did not work even one day in Maryland despite the firm being headquartered in Maryland—were not sufficient to overcome the presumption against extraterritoriality).

179 *See* Dodge, *supra* note 53, at 1408, 1420, 1433 (finding that twenty states apply presumptions against extraterritoriality in their choice of law rules to prevent dormant Commerce Clause violations).

180 *See* U.S. Const. art. I, § 8; *see also* Dodge, *supra* note 53, at 1433.

181 Healy v. Beer Inst., 491 U.S. 324, 336 (1989) (quoting Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion)).

182 *Edgar*, 457 U.S. at 626–27 (plurality opinion) (striking down a statute that required "any takeover offer for the shares of a target company [to] be registered with the Secretary of State").

183 Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1173 (10th Cir. 2015) (extrapolating principles from *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573 (1986), and *Healy*, 491 U.S. 324).

184 *See* Dodge, *supra* note 53, at 1392 ("[A]s a practical matter, the most significant constraints on the extraterritorial application of state law are [not constitutional constraints, but] state conflict-of-laws rules."); Goldsmith & Sykes, *supra* note 69, at 804–06; Brannan P. Denning, *Extraterritoriality and the Dormant Commerce Clause: A Doctrinal Post-Mortem*, 73 La. L. Rev. 979, 979 (2013) ("At this point, the extraterritoriality principle looks to be quite moribund.").

on evidence of actual legislative intent.[185] Courts have also characterized the extraterritoriality principle as "the most dormant" of dormant Commerce Clause jurisprudence.[186] The draft of the Third Restatement of Conflict of Laws recommends that states should not have presumptions against extraterritoriality.[187] Even if the dormant Commerce Clause was genuinely implicated, Professors Goldsmith and Sykes argue that, in relation to internet regulations, some out-of-state impacts from state regulations "are commonplace and often desirable from the efficiency perspective that informs the meaning and scope of the dormant Commerce Clause."[188] To the extent that a presumption against extraterritoriality is designed to protect against dormant Commerce Clause violations, it is far from clear that *some* extrastate regulation in a teleworker case would give rise to such a violation.[189]

Nonetheless, when a presumption against extraterritorially is applied to a teleworker's claim, a court is likely to hold that a teleworker cannot recover under an employer's state statute.[190] This presumption is a poor match for the teleworker context. First, worker protection statutes are unlike price-regulating statutes that the Court previously struck down under the extraterritoriality principal.[191] These statutes do not directly or indirectly regulate prices on goods sold out of state.[192] Second, the dormant Commerce Clause is not implicated on these facts because the statute does not—neither de jure nor de facto—regulate conduct that occurs "*wholly*" outside the state.[193] In cases where the teleworker problem arises, at least one very key participant in the transaction—the employer—*is* located within the state. And even

185 Kramer, *supra* note 55, at 295.

186 Ass'n for Accessible Meds. v. Frosh, 887 F.3d 664, 680–81 (4th Cir. 2018) (Wynn, J., dissenting) (quoting *Energy & Env't Legal Inst.*, 793 F.3d at 1172).

187 *See* RESTATEMENT (THIRD) OF CONFLICT OF LS. § 5.01 cmt. c (AM. L. INST., Tentative Draft No. 3, 2022) ("This Restatement does not adopt a presumption against extraterritoriality with respect to the laws of States of the United States, although some States have done so.").

188 Goldsmith & Sykes, *supra* note 69, at 827.

189 *Cf.* Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103, 1134 (1990) (arguing for a "public values" approach to statutory construction in the international context and suggesting that this approach applies especially well to "those canons that preserve scope for multiple sources of law"). *But see* Susan Lorde Martin, *The Extraterritoriality Doctrine of the Dormant Commerce Clause Is Not Dead*, 100 MARQ. L. REV. 497, 526 (2016).

190 *See supra* note 178.

191 *See, e.g.*, Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 519 (1935) (statute regulating milk prices sold by out-of-state producers to out-of-state dealers); Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth., 476 U.S. 573, 575 (1986) (statute requiring manufacturers not to sell product in other states for less than the New York price); Healy v. Beer Inst., 491 U.S. 324, 326 (1989) (statute requiring beer producers to affirm that their in-state prices were "no higher than the prices at which those products are sold in the bordering states").

192 *See Baldwin*, 294 U.S. at 511.

193 *See Healy*, 491 U.S. at 326.

where the supervisor who may have caused the harm is also teleworking from outside the employer's state, basic principles of agency law apply: the corporation itself is based in one location, even as its agents may be located elsewhere.[194] A more expansive reading, moreover, might consider that a teleworker *is* working "within the state" within the meaning of a statute, and a court applying the presumption to exclude a teleworker necessarily assumes that the teleworker is not working within the state.[195] At the very least, whether a teleworker works in the state for the purpose of the statute, is in question.[196] A blanket bar to recovery under a presumption against extraterritoriality is therefore inapplicable as applied to this quasi-territorial fact pattern.

III. A "Remote Worker" Classification

An elegant solution is readily available: a court, in the absence of an express legislative statement to the contrary, should find that a teleworker may state a prima facie claim under an employer's state worker protection statute. An "employer's state," for this purpose, can be defined as an employer's principal place of business, its place of incorporation, the location of its headquarters, and any state with an employer-sponsored branch or satellite office within its borders.[197] A "teleworker" may be defined as:

> [A] worker who performs work that is: (a) conducted entirely through virtual means; and (b) has no physical connection with the place in which it is performed.[198]

Under this test, Kathryn Shiber's claim in *Shiber v. Centerview Partners LLC* would not be dismissed for failure to state a claim under the New York State Human Rights Law.[199] Kathryn was employed by an in-state employer; Centerview Partners had physical offices in New York City, and Kathryn brought the claim under the New York State Human Rights Law and New York City Human Rights Law.[200] Because of the COVID-19 pandemic, Kathryn performed all of her work remotely, using Zoom calls to perform her job-related duties.[201] As such, her work had no necessary physical correlation with the place in which

194 *See* Restatement (Third) of Agency § 1.01 cmt. c (Am. L. Inst. 2006).

195 *See* Section II.A.

196 *See* Section II.A.

197 *See* Restatement (Second) of Conflict of Ls. § 188(e) (Am. L. Inst. 1971).

198 At least one court has attempted to establish a test to define a teleworker, though the context was somewhat different. *See* Malloy v. Superior Ct. of L.A. Cnty., 83 Cal. App. 5th 543, 546–48 (App. Ct. 2022).

199 No. 21 Civ. 364, 2022 WL 1173433, at *1 (S.D.N.Y. Apr. 20, 2022).

200 *Id.*

201 *Id.*

it was performed—New Jersey—even though she physically lived and worked in New Jersey from the outset of her employment.[202]

Notably, this simple solution can be implemented by the parties themselves. An employment contract will often include a choice-of-law clause naming the employer's state law as the law.[203] These choice-of-law clauses, however, are usually interpreted as governing only the interpretation of *the contract itself*, and not the entirety of the employment relationship.[204] Where a choice-of-law provision lists the employer's state law in the teleworker context, these should be interpreted as governing the entirety of the employment relationship.[205] Certainly where the parties selected the employer's state to govern one element of their relationship, it will come as no surprise that the clause is interpreted to govern other aspects of the relationship as well.

To address one counter perspective. Some courts have commented that allowing recovery under the employer's state statute would create a "free-for-all," such that employees with any virtual connection with the state would be able to recover.[206] This definition of "teleworker" articulated above, however, is narrowly proscribed. Only those employees of an in-state entity with no meaningful work-related ties to any other state can take advantage of this teleworker rule and the relevant state statute. While a corporation may employ thousands of teleworkers across all fifty states, this arrangement is limited by an employer's own discretion: an employer can require teleworkers to show up to work in-person at any time.[207] Therefore, under this scheme, an employer's liability is "limited and determinate."[208]

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202 *Id.*

203 *Cf.* John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 WASH. L. REV. 631, 707 (2017) (finding that while some canons of construction of choice-of-law clauses produce the results desired by the contracting parties, others do not).

204 *See, e.g.*, Poudel v. Mid Atl. Pros., Inc., No. 21-1124, 2022 WL 345515, at *5 (D. Md. Feb. 4, 2022) ("[B]ecause that provision does not explicitly state that the parties agree to the applicability of the Maryland wage laws as a term of the contract, the Court declines to interpret it as having done so by implication."); Cotter v. Lyft, Inc., 60 F. Supp. 3d 1059, 1064–65 (N.D. Cal. 2014) (declining to apply a California choice-of-law clause to a statutory wage claim because doing so "conflates statutory claims that exist independent of the contract with claims that arise from the agreement itself").

205 *See* Goldsmith, *supra* note 47, at 1208 ("Most contractual choice-of-law clauses govern the contracts within which they are embedded. But the scope of this private legal control is not limited to traditional contractual issues. In many circumstances, parties can agree to a governing law for torts and related actions that arise from their contractual relations.").

206 *See, e.g.*, Munenzon v. Peters Advisors, LLC, 553 F. Supp. 3d 187, 202 (D.N.J. 2021); *Poudel*, 2022 WL 345515, at *5.

207 *See, e.g.*, Tobey v. U.S. Gen. Servs. Admin., 480 F. Supp. 3d 155, 168 (D.D.C. 2020) (employer requiring employee with disabilities to show up in person and denying telework as a reasonable accommodation does not rise to the level of a hostile work environment claim).

208 Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 159 (1932) (citations omitted).

To that end, this solution creates no "unfair surprise" under the Due Process Clause: "[F]or a State's substantive law to be selected in a constitutionally permissible manner, that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[209] This standard is understood to impose a very modest limit on a state's choice of law.[210] Here, it would hardly be surprising to either party that a statute in the employer's state law would apply to an employment-related dispute if both parties were on notice as to an employer's primary location.

Conclusion

The COVID-19 pandemic has permanently altered the American "workplace." Yet our legal system is slow to update its approach. A court should take a generous view of an employer's state statute to mend this gap, thereby tethering a teleworker to at least one state's jurisdiction—the employer's jurisdiction. While teleworkers facing mistreatment wait for Congress to pass better worker protections on the federal level, state statutes are their main hope for finding justice against mistreatment. Courts should allow plaintiffs to state these claims.

209 Allstate Ins. Co. v. Hague, 449 U.S. 302, 312–13 (1981).

210 *See* Sullivan v. Oracle, 662 F.3d 1265, 1271 (9th Cir. 2011) ("A state court is rarely forbidden by the Constitution to apply its own state's law." (citing Phillips Petrol. Co. v. Shutts, 472 U.S. 797, 814–23 (1985); *Allstate*, 449 U.S. at 304–20)).


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