COLUMBIA LAW REVIEW

ARTICLES

NOTES

ESSAY

VOL. 123 **OCTOBER 2023** **NO. 6**

COLUMBIA LAW REVIEW

VOL. 123 **OCTOBER 2023** **NO. 6**

CONTENTS

ARTICLES

NOTES

ESSAY

COLUMBIA LAW REVIEW

VOL. 123 **OCTOBER 2023** **NO. 6**

ABSTRACTS

ARTICLES

In the 2022 case of Oklahoma v. Castro-Huerta, *the Supreme Court departed from one of the foundational cases in federal Indian law,* Worcester v. Georgia. *Chief Justice John Marshall's 1832 opinion had dismissed state power over Indian Country. But in* Castro-Huerta, *the Court took precisely the kind of arguments about state power that Chief Justice Marshall rejected in* Worcester *and turned them into the law of the land—without any recognition of the arguments' Indian Removal–era origins.*

This Article corrects the Court's oversight. Relying on rarely utilized archival sources, it provides a historical narrative of the development of what the Article terms the theory of state supremacy, *first articulated by the southern state legislatures in the Removal Era to justify state power over Native nations and eradicate Native sovereignty. Even though* Worcester *rejected this theory, Supreme Court Justices and state litigants have continued to invoke its tenets in Indian law cases from the late nineteenth century to the present.* Castro-Huerta, *then, is just the latest and most egregious example. And the decision's use of Removal-era arguments revives the specter of Indian Removal in the present day.*

This Article reveals that the continued use of state supremacy arguments defies constitutional law and federal Indian affairs policy, produces an inaccurate history of Native nations and federal Indian law, and perpetuates the racism and violence that characterized the Removal Era. Ultimately, this Article seeks to counter future attacks on tribal sovereignty and combat the broader revival of long-rejected federalism arguments.

Textualism promises simplicity and objectivity: Focus on the text, the whole text, and nothing but the text. But the newest version of textualism is not so simple. Now that textualism is the Supreme Court's dominant interpretive theory, most interpretive disputes implicate textualism, and its inherent complexities have surfaced. This Article is the first to document the major categories of doctrinal and theoretical

Climate-change–induced sea-level rise threatens the very existence of Small Island Developing States. Not only will this crisis create extreme climate conditions that can physically devastate these states, it also threatens their place in the international legal system. For a country to gain or maintain access to the international legal system, it needs to be classified as a "state." The common understanding is that a state needs to have territory, a population, a government, and independence. For low-lying coastal states, sea-level rise threatens the first two criteria directly and the second two indirectly. This Note explores whether these states can transition their governance system to online and digital platforms and thereby retain their status states. In doing so, this Note draws on Estonia's development of the "e-state" that has proven that such a digital governance system can exist practically and politically. With the advent of e-identification, e-governance, and e-banking, among other innovations, this Note argues that the "e-statehood" fulfills enough of the holistic goals of territorial statehood to survive in the international legal system.

This Note is the first to explore the legal justifications and ramifications of a digital state, especially when the state no longer fulfills the traditional criteria of statehood. Ultimately this Note hopes to suggest a path forward that respects and maintains the autonomy of these small island states.

ESSAY

Drawing from the experience of coauthoring scholarship with two activists who were sentenced to life without parole over three decades ago, this piece outlines the theory and practice of Participatory Law Scholarship (PLS). PLS is legal scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. By foregrounding lived experience in law's injustice, PLS unearths and disrupts the prevailing narratives undergirding the law. Through amplifying counternarratives to the law's dominant discourse, this methodology creates more space for social and legal change. By design, PLS also reminds us of the humanity behind the law, acting as a moral check and balance. Building from the tradition of Critical Race Studies and an emerging body of Movement Law Scholarship, PLS thus aims to press the boundaries of what legal scholarship traditionally looks like by evoking lived experience as evidence and developing legal meaning alongside social movements. Its methodology raises critical questions about how knowledge is produced and by whom, asking what role legal academics should play in facilitating social change in the material world. The piece also responds to skeptics who believe this approach abdicates a scholar's "moral obligation" to truth, explaining why PLS is not just legitimate but urgently needed to address the fissures and fault lines law has created.

Columbia University

SCHOOL OF LAW

Minouche Shafik, Ph.D.	*President of the University*
Dennis A. Mitchell, D.D.S., M.P.H.	*Interim Provost of the University*
Gillian Lester, J.S.D.	*Dean of the Faculty of Law*

THE FACULTY OF LAW

Ashraf Ahmed, J.D., Ph.D., M.Phil., *Associate Professor of Law*
Kate Andrias, J.D., *Patricia D. and R. Paul Yetter Professor of Law*
Shyamkrishna Balganesh, J.D., M.Phil., *Sol Goldman Professor of Law*
Mark Barenberg, J.D., M.Sc., *Isidor and Seville Sulzbacher Professor of Law; Director, Program on Labor Law and Political Economy*
Amber Baylor, J.D., LL.M., *Associate Clinical Professor Of Law; Director, Criminal Defense Clinic*
George A. Bermann, J.D., LL.M., *Walter Gellhorn Professor of Law; Jean Monnet Professor of European Union Law; Director, Center for International Commercial and Investment Arbitration*
Vincent Blasi, J.D., *Corliss Lamont Professor of Civil Liberties*
Philip C. Bobbitt, J.D., Ph.D., *Herbert Wechsler Professor of Federal Jurisprudence*
Lee C. Bollinger, J.D., *Professor of Law; Seth Low Professor of the University; President Emeritus of the University*
Anu Bradford, LL.M., S.J.D., *Henry L. Moses Professor of Law and International Organization; Director, The European Legal Studies Center*
Richard Briffault, J.D., *Joseph P. Chamberlain Professor of Legislation; Director, Legislative Drafting Research Fund*
Jessica Bulman-Pozen, J.D., M.Phil., *Betts Professor of Law; Co-Director, Center for Constitutional Governance*
Alexandra Carter, J.D., *Clinical Professor of Law; Director, Mediation Clinic*
Mala Chatterjee, J.D., Ph.D., *Associate Professor of Law*
Sarah H. Cleveland, J.D., M.St., *Louis Henkin Professor of Human and Constitutional Rights; Faculty Co-Director, Human Rights Institute*
John C. Coffee, Jr., LL.B., LL.M., *Adolf A. Berle Professor of Law; Director, Center on Corporate Governance*
Kimberlé W. Crenshaw, J.D., LL.M., *Isidor and Seville Sulzbacher Professor of Law; Director, Center for Intersectionality and Social Policy Studies*
Lori Fisler Damrosch, J.D., *Hamilton Fish Professor of International Law and Diplomacy*
Michael W. Doyle, Ph.D., *University Professor*
Elizabeth F. Emens, J.D., Ph.D., *Thomas M. Macioce Professor of Law; Director, Mindfulness Program*
Jeffrey A. Fagan, Ph.D., *Isidor and Seville Sulzbacher Professor of Law; Professor of Epidemiology*
George P. Fletcher, J.D., M.C.L., *Cardozo Professor of Jurisprudence*
Merritt B. Fox, J.D., Ph.D., *Arthur Levitt Professor of Law; Co-Director, Program in the Law and Economics of Capital Markets; Co-Director, Center for Law and Economic Studies*
Katherine M. Franke, J.D., LL.M., J.S.D., *James L. Dohr Professor of Law; Director, Center for Gender and Sexuality Law*
Kellen R. Funk, J.D., Ph.D., *Professor of Law*
Philip M. Genty, J.D., *Everett B. Birch Innovative Teaching Clinical Professor in Professional Responsibility*
Michael Gerrard, J.D., *Andrew Sabin Professor of Professional Practice; Director, Sabin Center for Climate Change Law*
Talia Gillis, S.J.D., Ph.D., B.C.L., LL.B., *Associate Professor of Law; Milton Handler Fellow*
Jane C. Ginsburg, J.D., D.E.A., LL.D., M.A., *Morton L. Janklow Professor of Literary and Artistic Property Law; Director, Kernochan Center for Law, Media, and the Arts*
Maeve Glass, J.D., Ph.D., *Associate Professor of Law*
Suzanne B. Goldberg, J.D., *Herbert and Doris Wechsler Clinical Professor of Law; Co-Director, Center for Gender and Sexuality Law; Director, Sexuality and Gender Law Clinic*
Jeffrey N. Gordon, J.D., *Richard Paul Richman Professor of Law; Co-Director, Millstein Center for Global Markets and Corporate Ownership; Co-Director, Richman Center for Business, Law and Public Policy; Co-Director, Center for Law and Economic Studies*
Zohar Goshen, LL.B., LL.M., S.J.D., *Jerome L. Greene Professor of Transactional Law; Co-Director, Center for Israeli Legal Studies*
Jamal Greene, J.D., *Dwight Professor of Law*
Josh Gupta-Kagan, J.D., *Clinical Professor of Law*
Monica Hakimi, J.D., *William S. Beinecke Professor of Law*
Philip Hamburger, J.D., *Maurice and Hilda Friedman Professor of Law*
Bernard E. Harcourt, J.D., Ph.D., *Isidor and Seville Sulzbacher Professor of Law; Director, Columbia Center for Contemporary Critical Thought; Professor of Political Science*
Michael A. Heller, J.D., *Lawrence A. Wien Professor of Real Estate Law; Vice Dean for Curriculum*
Bert I. Huang, J.D., Ph.D., *Harold R. Medina Professor of Procedural Jurisprudence*
Clare Huntington, J.D., *Professor of Law*
Conrad A. Johnson, J.D., *Edward Ross Aranow Clinical Professor of Law; Director, Lawyering in the Digital Age Clinic*
Olatunde C.A. Johnson, J.D., *Ruth Bader Ginsburg '59 Professor of Law; Co-Director, Center for Constitutional Governance*
Kathryn Judge, J.D., *Harvey J. Goldschmid Professor of Law; Vice Dean for Intellectual Life*
Avery W. Katz, J.D., M.A., Ph.D., *Milton Handler Professor of Law; Reuben Mark Professor of Organizational Character*
Jeremy Kessler, Ph.D., J.D., M.Phil., *Stanley H. Fuld Professor of Law*
Lina Khan, J.D., *Associate Professor of Law*
Madhav Khosla, LL.B., LL.M., Ph.D., *Associate Professor of Law*
Sarah Maree Knuckey, LL.B., LL.M., *Lieff, Cabraser, Heimann, and Bernstein Clinical Professor of Law; Director, Smith Family Human Rights Clinic; Faculty Co-Director, Human Rights Institute*
Jody Kraus, J.D., M.A., Ph.D., *Alfred McCormack Professor of Law*
Gillian Lester, J.S.D., LL.B., *Dean of the Faculty of Law; Lucy G. Moses Professor of Law*
Benjamin L. Liebman, J.D., *Robert L. Lieff Professor of Law; Director, Hong Yen Chang Center for Chinese Legal Studies*
James S. Liebman, J.D., *Simon H. Rifkind Professor of Law; Founder, Center for Public Research and Leadership*
Hon. Debra A. Livingston, J.D., *Paul J. Kellner Professor of Law*
Clarisa Long, J.D., *Max Mendel Shaye Professor of Intellectual Property Law*
Michael Love, J.D., Ph.D., *Associate Professor of Law*
Dorothy S. Lund, J.D., *Professor of Law*
Ronald J. Mann, J.D., *Albert E. Cinelli Enterprise Professor of Law; Co-Director, Charles E. Gerber Transactional Studies Center*
Petros C. Mavroidis, LL.B., LL.M., Dr. Jur., *Edwin B. Parker Professor of Foreign and Comparative Law*
Justin McCrary, Ph.D., *Paul J. Evanson Professor of Law*
Lev Menand, J.D., *Associate Professor of Law*
Thomas W. Merrill, J.D., *Charles Evans Hughes Professor of Law*
Gillian Metzger, J.D., *Harlan Fiske Stone Professor of Constitutional Law; Co-Director, Center for Constitutional Governance*
Joshua Mitts, J.D., Ph.D., *Davis J. Greenwald Professor of Law*
Eben Moglen, J.D., M.Phil., Ph.D., *Professor of Law*
Henry Paul Monaghan, LL.B., LL.M., *Professor of Law*
Edward R. Morrison, J.D., M.A., Ph.D., *Charles Evans Gerber Professor of Law*
Christopher Morten, J.D., Ph.D., *Associate Clinical Professor of Law; Director, Science, Health, and Information Clinic*
Elora Mukherjee, J.D., *Jerome L. Greene Clinical Professor of Law; Director, Immigrants' Rights Clinic*
Kerrel Murray, J.D., *Associate Professor of Law*
Camille Pannu, J.D., *Associate Clinical Professor of Law*
Lynnise E. Phillips Pantin, J.D., *Pritzker Pucker Family Clinical Professor of Transactional Law; Director, Community Development and Entrepreneurship Clinic*
Katharina Pistor, LL.M., M.P.A., Dr. Jur., *Edwin B. Parker Professor of Comparative Law; Director, Center on Global Legal Transformation*
Christina D. Ponsa-Kraus, J.D., M.Phil., Ph.D., *George Welwood Murray Professor of Legal History*
David Pozen, J.D., M.Sc., *Charles Keller Beekman Professor of Law*
Alex Raskolnikov, J.D., M.S., *Wilbur H. Friedman Professor of Tax Law; Co-Chair, The Charles E. Gerber Transactional Studies Center*
Daniel C. Richman, J.D., *Paul J. Kellner Professor of Law*
Charles F. Sabel, Ph.D., *Maurice T. Moore Professor of Law*
Carol Sanger, J.D., *Barbara Aronstein Black Professor of Law*
David M. Schizer, J.D., *Dean Emeritus; Harvey R. Miller Professor of Law and Economics*
Thomas P. Schmidt, J.D., M.Phil., *Associate Professor of Law*
Sarah A. Seo, Ph.D., J.D., *Michael I. Sovern Professor of Law*
Colleen Flynn Shanahan, LL.M., J.D., *Clinical Professor of Law; Director, Community Advocacy Lab Clinic; Vice Dean for Experiential Education*
Susan P. Sturm, J.D., *George M. Jaffin Professor of Law and Social Responsibility; Director, Center for Institutional and Social Change*
Eric Talley, J.D., Ph.D., *Isidor and Seville Sulzbacher Professor of Law; Co-Director, Millstein Center for Global Markets and Corporate Ownership*
Kendall Thomas, J.D., *Nash Professor of Law; Director, Studio for Law and Culture*
Matthew Waxman, J.D., *Liviu Librescu Professor of Law; Faculty Director, National Security Law Program*
Timothy Wu, J.D., *Julius Silver Professor of Law, Science and Technology*

PROFESSORS EMERITI

Vivian O. Berger, J.D.
Barbara Aronstein Black, LL.B., Ph.D.
Brett Dignam, J.D., M.A.
Harold S.H. Edgar, LL.B
R. Randle Edwards, J.D., M.Phil., A.M.
Ronald J. Gilson, J.D.
Victor P. Goldberg, M.A., Ph.D.
Michael J. Graetz, LL.B.
James L. Hoover, J.D., M.L.Libr.
Carol B. Liebman, J.D., M.A.
Lance Liebman, J.D., M.A.
Gerard E. Lynch, J.D.
Subha Narasimhan, J.D., M.S., Ph.D.
Andrzej Rapaczynski, J.D., Ph.D.
Barbara A. Schatz, J.D.
Elizabeth S. Scott, J.D.
Robert Scott, J.D., S.J.D
William H. Simon, J.D.
Jane M. Spinak, J.D.
Peter L. Strauss, LL.B.
Patricia J. Williams, J.D.
Mary Marsh Zulack, J.D.

AFFILIATED COLUMBIA UNIVERSITY FACULTY

Paul Appelbaum, M.D., *Elizabeth K. Dollard Professor of Psychiatry, Medicine and Law; Director, Division of Psychiatry, Law and Ethics, Department of Psychiatry*
Steven Bellovin, Ph.D., M.S., *Percy K. and Vida L.W. Hudson Professor, Department of Computer Science*
Jagdish N. Bhagwati, Ph.D., *University Professor, Economics and Political Science*
Jonathan R. Cole, Ph.D., *John Mitchell Mason Professor of the University; Provost and Dean of Faculties Emeritus*
Lawrence Glosten, Ph.D., M.S., *S. Sloan Colt Professor of Banking and International Finance, Columbia Business School; Co-Director, Program in the Law and Economics of Capital Markets*
Turkuler Isikel, Ph.D., *Associate Professor of Political Science*
Merit E. Janow, J.D., *Dean Emerita, School of International and Public Affairs; Professor of Professional Practice, International Economic Law and International Affairs*

VISITORS

Abbye Atkinson, J.D., *Pritzker-Pucker Family Visiting Professor of Law*
I. Bennett Capers, J.D., *Visiting Professor of Law*
Robin Effron, J.D., *Visiting Professor of Law*
Martin Flaherty, J.D., M.A., M.Phil., *Visiting Professor of Law*
Cynthia Godsoe, J.D., *Visiting Professor of Law*
Anjum Gupta, J.D., *Visiting Professor of Law*
Assaf Hamdani, J.D., *Visiting Professor of Law*
John Jacobi, J.D., *Visiting Professor of Law*
Andrew Kent, J.D., *Visiting Professor of Law*
Asaf Lubin, J.D., M.A., *Visiting Associate Professor of Law*
James MacLeod, J.D., *Visiting Professor of Law*
Jens Meierhenrich, J.D., M.Phil., D.Phil., *Stephen and Barbara Friedman Visiting Professor of Law*
Ashira P. Ostrow, J.D., *Visiting Professor of Law*
Reid Kress Weisbord, J.D., *Visiting Professor of Law*
Rebecca Wexler, J.D., M.Phil., *James S. Carpentier Visiting Professor of Law*

OTHER OFFICERS OF INSTRUCTION

David Abramowicz, J.D.
Erin Abrams, J.D.
Floyd Abrams, J.D.
Devora Allon, J.D.
Akhil K. Amar, J.D.
Mehdi Ansari, J.D.
Israel Appel, J.D.
Ralph Arditi, J.D.
Keri L. Arnold, J.D.
Eric Askanase, J.D.
Kimberly Austin, Ph.D.
Todd H. Baker, J.D.
Robert Balin, J.D.
Ejaz Baluch Jr., M.S., J.D.
Norman J. Bartczak, Ph.D.
Precious Benally, J.D.
Seyla Benhabib, Ph.D.
Daniel Berger, J.D.
Saul J. Berman, J.D.
Elizabeth Bernhardt, M.A., J.D., Ph.D.
Sophia Bernhardt, J.D.
Hon. Joseph Bianco, J.D.
Michael A. Blair, J.D.
Bryan Bloom, J.D.
Douglas Bregman, J.D.
Katherine Buckel, J.D.
Michael Burger, J.D., M.F.A.
Jonathan Bush, J.D.
Karen Cacace, J.D.
Nicoletta Caferri, J.D.
Karessa Cain, J.D.
Jennifer Camillo, J.D.
Simon Canick, J.D.
James Cavallaro, J.D., Ph.D,
Adriel Cepeda Derieux, J.D.
Hannah Chanoine, J.D.
Elizabeth Chu, M.A., Ph.D.
Oreste Cipolla, M.B.A., LL.M., LL.B.
Christopher Cogburn, J.D.
Nicola Cohen, J.D.
Debra Cohn, J.D.
Larcenia Cooper, J.D.
Jennifer Conn, J.D.
Peggy Cross-Goldenberg, J.D.
Shannon Cumberbatch, J.D.
Rick D'Avino, J.D.
Lev Dassin, J.D.
Anthony E. Davis, M.A., LL.M.
Frederick Davis, J.D.
Joanne De Silva, J.D.
Joseph DeMarco, J.D.
Timothy Demasi, J.D., LL.M.
Rebecca Dent, M.L.S., J.D.
Anna Diakun, M.A., J.D.
Richard Dicker, J.D., LL.M.
Kabir Duggal, LL.M.
Martin Edel, J.D.
Scott Edwards, J.D.
Amín Guevarra-Fernández, J.D.
Joshua Haber, J.D., M.A.
Sarah Han, L.L.B., L.L.L.
Hon. Dorothy Harbeck, J.D.
Natasha Harnwell-Davis, J.D.
Christopher Harwood, J.D.
Gail Heatherly, J.D.
Patricia Hennessey, J.D.
Jey Hernandez, J.D.
Gregory Herrera, J.D.
Jay Allen Hewlin, J.D.
Eric Hochstadt, J.D.
Courtney Hogg, J.D.
Brian Holdbrook, J.D.
Kim Hopper, Ph.D.
David Paul Horowitz, J.D.
Jeffrey Horowitz, J.D.
Steven Horowitz, M.P.P., J.D.
Richard Horsch, J.D.
June M. Hu, J.D.
Corrine Irish, J.D.
Nobuhisa Ishizuka, J.D.
Danielle Jackson, J.D.
Kevin Jason, M.A., J.D.
Lawrence Jacobs, J.D.
Jessica Jimenez, J.D.
Emily Johnson, J.D.
Kelsey Jost-Creegan, J.D.
Martha Kammoun, LL.M., LL.B.
Cathy Kaplan, J.D.
Roberta Kaplan, J.D.
Michael Katz, J.D.
George Kendall, J.D.
Andrew Kent, J.D.
Scott Kessler, J.D.
Bassam Khawaja, J.D.
Igor Kirman, J.D.
Edward Klaris, J.D.
Rachel Kleinman, J.D.
Saritha Komatireddy, J.D.
Hon. Rachel Kovner, J.D.
Akshaya Kumar, J.D., LL.M.
Lucy Kweskin, J.D.
Julema La-Force, J.D.
Diane LaGamma, J.D.
Hon. Gerald Lebovits, J.D., LL.M.
Henry Lebowitz, J.D.
Jay P. Lefkowitz, J.D.
Peter Lehner, J.D.
Dorchen Leidholdt, M.A., J.D.
Jared Lenow, J.D.
Andrew Levander, J.D.
Jane A. Levine, J.D.
Jenna E. Levine, J.D.
Hon. Robert M. Levy, J.D.
Tashi Lhewa, J.D.
Hon. Lewis J. Liman, M.Sc., J.D.
Jeremy Liss, J.D.
Victor Olds, J.D.
Paul Oosterhuis, J.D.
Delphine O'Rourke, J.D.
Michel Paradis, J.D., Ph.D.
Hon. Michael Park, J.D.
Hillel I. Parness, J.D.
Susan Paulson, J.D.
Madhuri Pavamani, J.D.
Hon. Myrna Pérez, J.D.
Brence Pernell, J.D., M.Ed.
Alena Perszyk, J.D.
Jill Pilgrim, J.D.
Mitchell Presser, J.D.
Omar Pringle, J.D.
Steven Rabinowitz, J.D.
Paul B. Radvany, J.D.
Hon. Jed Rakoff, J.D., M.Phil.
Kumar Rao, J.D.
Arielle Reid J.D.
Hon. Timothy Reif, J.D.
Katherine Reilly, J.D.
Hon. Rosalyn Richter, J.D.
Seann Riley, J.D., LL.M., M.S.W.
Kenneth Rivlin, J.D.
Jennifer Rodgers, J.D.
Alejo Rodriguez, M.P.S.
Justin Rodriguez, J.D.
Jeong-Ho Roh, J.D.
Gabor Rona, J.D., LL.M.
Kathy Rose, J.D.
Richard Rosen, J.D.
Menachem Z. Rosensaft, J.D., M.A.
Eric Rosof, J.D
David Ross, J.D., LL.M.
Lisa Sachs, M.A., J.D.
Benjamin Salas Kantor
Caroline Sandberg, LL.M.
Karen Sandler, J.D.
Karl Sauvant, Ph.D.
William Savitt, J.D., M.Phil.
Ben Schatz, J.D.
Hon. Ann Ehrenpreis Scherzer, J.D.
Hon. Cathy Seibel, J.D.
Marcia Sells, J.D.
Jeffrey Senger, J.D.
Hina Shamsi, J.D.
Steven R. Shapiro, J.D.
Edward Sherwin, J.D.
Omavi Shukur, J.D.
Graeme Simpson, M.A., LL.B.
Riti Singh, J.D.
Teri Silvers, J.D.
Shervon Small., J.D.
Robert Smit, J.D., D.E.A., Diplôme d'études approfondies
Elizabeth Lazzara Smith, J.D.
Trisha L. Smith, J.D., LL.M.
Richard Sobelsohn, J.D.

Stephen Ehrlich, J.D
Les Fagen, J.D.
Dennis Fan, J.D.
Kristen Ferguson, J.D.
Jacob Fiddelman, J.D.
Louise Firestone, J.D.
Alice Fontier, J.D.
Flores Forbes, M.U.P.
Maria Foscarinis, M.A., J.D.
Mavis Fowler-Williams, J.D.
Michael Fox, J.D.
Andrew Frackman, J.D.
Josh Freeman, J.D.
Gabriel Freiman, J.D.
Andrew Friedman, J.D.
Alejandro M. Garro, J.S.D., LL.M.
Lee Gelernt, J.D.
Hon. Robert Gerber, J.D.
Hon. Martin Glenn, J.D.
Madeline M. Gomez, J.D.
Hon. Hector Gonzalez, M.A., J.D.
Leah Pacht Gopin, J.D.
Stephen Gordon, J.D.
Nicolas Grabar, J.D.
Richard Gray, J.D.
Michelle Greenberg-Kobrin, J.D.
Benjamin Grimes, J.D., LL.M.
Edward F. Greene, LL.B.
Robert Grey, J.D., LL.M.
Benjamin Gross J.D., M.Phil.
Peter Grossi, J.D., M.A.

Abbe Lowell., J.D
Philippa Loengard, M.Sc., J.D., LL.M.
Mitchell Lowenthal., J.D.
Jenny Ma, J.D.
Fred Magaziner, J.D.
Gary Mandel., M.B.A., J.D. LL.M.
David Marriott, J.D.
Viren Mascarenhas, J.D., LL.M.
Kathleen Massey, J.D.
Amy Mccamphill., J.D.
Amy Mcfarlane, J.D.
Michael McGinnis, J.D.
Brendan McGuire, J.D.
James McHugh, J.D.
Lindsay McKenzie, J.D.
Ryan McLeod, J.D.
Nicole Mesard, J.D.
Janis M. Meyer, M.A., J.D.
Alison Moe, J.D.
Tiffany Moller, J.D.
Rahim Moloo, LL.B., LL.M.
Michelle Moriarty, J.D.
Matthew Morreale, J.D., M.S.
Daniel Nadel., J.D., M.S.
Mariana Newman, J.D.
Mark D. Nielsen, J.D.
Ilan Nissan, J.D.
Julie North, J.D.
Mark Nielsen, J.D.
Trevor Norwitz, LL.M.
William Ohlemeyer, J.D.

Michael Solender, J.D.
Jackeline Solivan, J.D.
Eudokia Spanos, J.D.
Hon. Steven Statsinger, J.D.
Ilene Strauss, J.D.
Hon. Richard Sullivan, J.D.
Andrew Tannenbaum, J.D.
Steven G. Tepper, J.D.
Matthew Tropp, J.D.
Mia Unger, J.D.
Mark Vecchio, J.D.
Jess Velona, J.D.
Donald Verrilli, Jr., J.D.
Monica Wagner, J.D.
Morri Weinberg, J.D.
Seth Weinberg, J.D.
Fran Weiner, J.D.
Michael Weiner, J.D.
Alexandra Whittaker, J.D.
Thomas White, J.D.
R. Martin Witt, M.L.I.S., J.D.
Marianne Yen, J.D.
Katerina Yiannibas, J.D.
Nam Jin Yoon, M.L.I.S., J.D.
Rachel Yu, J.D.
Richard Zabel., J.D.
Mark Zeno, J.D.

ACADEMIC FELLOWS

Gregory Antill., Ph.D., J.D.
Sania Anwar, J.D., LL.M.

Raúl Armando Carrillo, J.D.
Emily Chertoff, J.D.
James Hicks, Ph.D., J.D.

Monika Leszczynska, Ph.D., LL.M.
Kate Redburn, J.D.

COLUMBIA LAW REVIEW

VOL. 123 **OCTOBER 2023** **NO. 6**

COLUMBIA LAW REVIEW

VOL. 123 OCTOBER 2023 NO. 6

ARTICLES

THE SPECTER OF INDIAN REMOVAL: THE PERSISTENCE OF STATE SUPREMACY ARGUMENTS IN FEDERAL INDIAN LAW

*W. Tanner Allread**

In the 2022 case of Oklahoma v. Castro-Huerta, *the Supreme Court departed from one of the foundational cases in federal Indian law,* Worcester v. Georgia. *Chief Justice John Marshall's 1832 opinion had dismissed state power over Indian Country. But in* Castro-Huerta, *the Court took precisely the kind of arguments about state power that Chief Justice Marshall rejected in* Worcester *and turned them into the law of the land—without any recognition of the arguments' Indian Removal–era origins.*

This Article corrects the Court's oversight. Relying on rarely utilized archival sources, it provides a historical narrative of the development of what the Article terms the theory of state supremacy, *first articulated by the southern state legislatures in the Removal Era to justify state power over Native nations and eradicate Native sovereignty. Even though* Worcester *rejected this theory, Supreme Court Justices and state litigants have continued to invoke its tenets in Indian law cases from the late nineteenth century to the present.* Castro-Huerta, *then, is just the latest and most egregious example. And the decision's use of Removal-era arguments revives the specter of Indian Removal in the present day.*

This Article reveals that the continued use of state supremacy arguments defies constitutional law and federal Indian affairs policy, produces an inaccurate history of Native nations and federal Indian law, and perpetuates the racism and violence that characterized the Removal

* J.D. 2022, Stanford Law School; Ph.D. Candidate in History, Stanford University; Citizen, Choctaw Nation of Oklahoma. *Yakoke* to Gregory Ablavsky, Elizabeth Hidalgo Reese, Alison LaCroix, Dylan Hedden-Nicely, K-Sue Park, Lorenzo Gudino, Dallas Lopez, Jonathan Gienapp, Kathryn Olivarius, Jennifer Burns, Gautham Rao, Barbara Fried, the students of the Stanford Legal Studies Workshop, the attendees of the Society for Historians of the Early American Republic 2022 Annual Meeting, and the 2023 Discussion Group on Constitutionalism at the University of Maryland Carey School of Law for their generous and insightful feedback on this Article and its research. A special *yakoke* to my partner, Josh Stickney, who has been my constant supporter throughout this academic journey. *Chi hullo li.*

Era. Ultimately, this Article seeks to counter future attacks on tribal sovereignty and combat the broader revival of long-rejected federalism arguments.

"Could Alabama, if denied the right to legislate co-extensive with her limits, be said to be sovereign? Can she be considered sovereign, when the operation of her laws, although she wills it otherwise, is confined to particular districts and sections of the State?"

— Alabama House of Representatives Committee on Indians and Indian Affairs (1831).[1]

"Indian country is part of the State, not separate from the State. . . . [A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country."

— *Oklahoma v. Castro-Huerta* (2022).[2]

INTRODUCTION

Almost two centuries separate the statements above, yet both address the same issue: a state's authority to exercise its jurisdiction over Cherokee Nation territory lying within the state's borders.[3] In 1830, the Alabama legislature was frustrated with the Cherokee Nation,[4] which held title to a substantial portion of the lands within the state and had erected a

1. H.R. Journal, 12th Sess., at 93 (Ala. 1831).

2. 142 S. Ct. 2486, 2493 (2022).

3. As discussed in more detail throughout this Article, the experience of the Cherokee Nation parallels that of the Chickasaw, Choctaw, Muscogee (Creek), and Seminole Nations, which are collectively known as the "Five Civilized Tribes." Grant Foreman, The Five Civilized Tribes: Cherokee, Chickasaw, Choctaw, Creek, Seminole, at vii (1934). These Native nations, whose original homelands comprise the current southeastern United States and who were removed to Indian Territory (present-day Oklahoma) in the 1830s and 1840s, are designated as "civilized" because of their early acceptance of Christianity and Anglo-American forms of agriculture, education, political institutions, and dress. See id. (stating that the name resulted from those tribes' "progress and achievements"). Because of the paternalistic nature of the "civilized" label, I have chosen to use the term "Five Tribes" when referring to these nations as a group. For a recent history of the nations' experience of the United States' "civilization" programs and Indian Removal, see generally Claudio Saunt, Unworthy Republic: The Dispossession of Native Americans and the Road to Indian Territory (2020).

4. In 1830, the Alabama legislature—following the example of Georgia and Mississippi—considered a bill to extend state law over Native lands and peoples within the state's borders to induce the Native nations to cede their lands and remove west of the Mississippi River. Ala. H.R. Journal, 12th Sess., at 14, 118; see also Act of Dec. 19, 1829, 1829 Ga. Laws 98; Act of Jan. 19, 1830, ch. 1, 1830 Miss. Laws 5. The bill was referred to the House Committee on Indians and Indian Affairs, which produced a report justifying Alabama's authority to exercise such jurisdiction based on history, the U.S. Constitution and treaties, and other states' laws. Ala. H.R. Journal, 12th Sess., at 27, 92–96. In supporting Alabama's jurisdictional rights, the report denigrated Cherokee sovereignty over its territory, referring to the Cherokee as "a conquered people." Id. at 95. The proposed bill failed, id. at 257, but the Alabama legislature eventually succeeded in passing a state law extension act in 1832. See Act of Jan. 16, 1832, 1831–1832 Ala. Laws 7. For more details on this history and the justifications in the Committee on Indians and Indian Affairs report, see infra sections I.B, II.A.

constitutional government.[5] Competing with other polities within its own limits and unable to exercise jurisdiction over the whole of its claimed territory, Alabama questioned whether it could be considered truly sovereign.[6]

In 2022, the Cherokee Nation's territory—now in Oklahoma following the Trail of Tears—was at issue once again. In *Oklahoma v. Castro-Huerta*, the Supreme Court considered whether Oklahoma could exercise criminal jurisdiction over non-Indians who committed crimes against Indians[7] within the Cherokee Nation Reservation, which stretches across fourteen counties and includes the city of Tulsa.[8] In 2020, *McGirt v. Oklahoma* recognized that portions of eastern Oklahoma remained Indian Country, precluding state jurisdiction over certain crimes.[9] Enraged by this decision, Oklahoma appealed to the Court to restore its authority, characterizing *McGirt*'s effect on its criminal justice and civil regulatory systems as "calamitous."[10] Like Alabama, Oklahoma worried about its status, claiming that "the fundamental sovereignty of an American State is at stake."[11]

Despite the different times and different circumstances, Alabama's and Oklahoma's appeals were strikingly similar: They relied on strong notions of state sovereignty. Both communicated their beliefs in a concept of absolute territorial jurisdiction in which sovereigns exercise their authority over all their claimed territory and the peoples who reside on it.[12] Without this ability, they claimed their status as sovereigns was no

---

5. See William G. McLoughlin, Cherokee Renascence in the New Republic 388–401 (1986) (studying the development and content of the Cherokee Constitution of 1827); Saunt, supra note 3, at 37–38 (describing the extent of Cherokee lands within southern states).

6. See Ala. H.R. Journal, 12th Sess., at 92–93 ("The question under consideration presents, first, the *vexata quaestio* whether Alabama is a sovereign State."); id. at 93 ("[E]ither Alabama or the Cherokees must give up their pretentions to govern; otherwise we shall exhibit . . . the novel spectacle of two sovereigns . . . making laws for the government of the same people, at the same time; . . . a state of things that never has or can exist.").

7. This Article uses the terms "Native" and "Indian" to describe the Indigenous peoples of the United States. The term "Indian" is used in its historical context and as part of key terms of art like "Indian affairs" and "Indian Country." See Michael Yellow Bird, What We Want to Be Called: Indigenous Peoples' Perspectives on Racial and Ethnic Identity Labels, Am. Indian Q., Spring 1999, at 1, 7–11.

8. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491–92 (2022). For a description of the Cherokee Reservation, see Maps, Cherokee Nation, https://www.cherokee.org/about-the-nation/maps/ [https://perma.cc/89VE-YXT2] (last visited July 31, 2023).

9. 140 S. Ct. 2452, 2459 (2020).

10. Petition for a Writ of Certiorari at 3, *Castro-Huerta*, 142 S. Ct. 2486 (No. 21-429), 2021 WL 4296002.

11. Id.

12. For background on territorial sovereignty and its rise, see generally Lisa Ford, Settler Sovereignty: Jurisdiction and Indigenous People in America and Australia, 1788-1836 (2010) (studying the early nineteenth-century relationship between white settlers' claims of territorial sovereignty and the exercise of criminal jurisdiction over Indigenous peoples in Georgia and New South Wales); Charles S. Maier, Once Within Borders: Territories of

longer secure. Furthermore, the two states pointed to the same culprit undermining their jurisdiction: Native sovereignty. Tribal power, they argued, threatened state power by prohibiting jurisdiction over Native lands and Native peoples physically within state borders.[13] Alabama and Oklahoma used state sovereignty rhetoric as a response to this threat, hoping to gain public support and federal protection for the maintenance of state supremacy.

Yet, other than the times in which they were articulated, there is one major difference between the states' arguments: their status as law. In the 1830s, politicians from Alabama and other southern states made arguments based on state sovereignty to justify legally eradicating Native nations in their push for Indian Removal. But the U.S. Supreme Court rejected the southern states' theory wholesale in *Worcester v. Georgia*,[14] "[t]he foundational case in federal Indian law."[15] Chief Justice John Marshall held that state law "can have no force" within the territories of Native nations because the Constitution gave the federal government authority over Indian affairs and recognized the independence of Native nations.[16]

But in 2022, the Supreme Court took the states' rejected arguments from two centuries earlier and made them law. In *Castro-Huerta*, the Court proclaimed that states have jurisdiction over their entire territories notwithstanding the presence of Native nations.[17] Finding no federal law preempting state authority, the Court held that states possess the ability to exercise jurisdiction over non-Indian-on-Indian crimes within Indian Country.[18] In the span of a few sentences, *Castro-Huerta* upended foundational principles of Indian law by endorsing the very theory of state supremacy the Court's predecessors had rebuffed.[19] And it did so without recognizing the roots of the state supremacy arguments it sanctioned.

Power, Wealth, and Belonging Since 1500 (2016) (charting the development of modern territoriality and its connection to ideas of sovereignty). For more discussion of this concept as used by the southern states in the Removal Era, see infra section II.A.4.

13. See infra section I.B (discussing the conflict over jurisdiction).

14. See 31 U.S. (6 Pet.) 515, 561 (1832) ("The whole intercourse between the United States and [the Cherokee] nation, is, by our constitution and laws, vested in the government of the United States. The act of the state of Georgia, under which the plaintiff in error was prosecuted, is consequently void, and the judgment a nullity.").

15. Sidney L. Harring, Crow Dog's Case: American Indian Sovereignty, Tribal Law, and United States Law in the Nineteenth Century 25 (1994).

16. *Worcester*, 31 U.S. (6 Pet.) at 561.

17. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

18. Id. at 2491, 2494–501.

19. Id. at 2504 ("To be clear, the Court today holds that Indian country within a State's territory is part of a State, not separate from a State. Therefore, a State has jurisdiction to prosecute crimes committed in Indian country unless state jurisdiction is preempted.").

As many Indian law scholars have pointed out, the *Castro-Huerta* decision is a fundamentally flawed one.[20] The majority ignored history, precedent, and the current direction of Indian affairs policy to reach its result.[21] In his dissent, Justice Neil Gorsuch labeled the case "an embarrassing new entry into the anticanon of Indian law" and derided the majority: "Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."[22]

As this Article contends, however, the *Castro-Huerta* decision did not happen overnight. Similarities between recent arguments in the Court and Alabama's Removal-era appeal are not a mere coincidence. Rather, they are part of a larger historical phenomenon in legal controversies over tribal sovereignty. For Indian affairs has long been the site of jurisdictional conflict between the federal and state governments and Native nations, or, in the words of nineteenth-century Georgia legislators, the site of "collisions of rival sovereignty."[23] And as part of these conflicts over the past two centuries, states and jurists have responded to Native nations' assertions of sovereignty with a collection of arguments—all based on the notion that states are the only legitimate and constitutionally grounded sovereigns within their territory—that seek to delegitimize the existence and exercise of tribal power.[24] This *theory of state supremacy*—this Article's term for the ideology from which these arguments emanate—comprises three tenets: (1) State territorial jurisdiction is absolute; (2) tribal sovereignty is nonexistent; and (3) federal power is a limited yet valuable asset for upholding state authority against internal threats, namely tribal

---

20. See, e.g., Gregory Ablavsky, Too Much History: *Castro-Huerta* and the Problem of Change in Indian Law, 2023 Sup. Ct. Rev. 293, 313–20, 344–50 [hereinafter Ablavsky, Too Much History] (arguing that the *Castro-Huerta* decision exemplified "bad history" in Indian law); Dylan R. Hedden-Nicely, The Reports of My Death Are Greatly Exaggerated: The Continued Vitality of *Worcester v. Georgia*, 52 Sw. L. Rev. 255, 259 (2023) [hereinafter Hedden-Nicely, The Reports of My Death] (arguing that if "taken out of context," *Castro-Huerta* "could be read as a total abrogation of *Worcester*"); Gregory Ablavsky & Elizabeth Hidalgo Reese, Opinion, The Supreme Court Strikes Again—This Time at Tribal Sovereignty, Wash. Post (July 1, 2022), https://www.washingtonpost.com/opinions/2022/07/01/castro-huerta-oklahoma-supreme-court-tribal-sovereignty/ (on file with the *Columbia Law Review*) (pointing out that *Castro-Huerta* relies on "cherry-picked ancillary cases and late-19th-century arguments with subsequently overruled foundations"); Elizabeth Hidalgo Reese, Conquest in the Courts, The Nation (July 6, 2022), https://www.thenation.com/article/society/supreme-court-castro-huerta/ (on file with the *Columbia Law Review*) ("The opinion is unmoored from the key cases of federal Indian law and divorced from the realities of American history."); Nick Martin, The Supreme Court's Attack on Tribal Sovereignty, Explained, High Country News (July 1, 2022), https://www.hcn.org/articles/indigenous-affairs-justice-law-the-supreme-courts-attack-on-tribal-sovereignty-explained (on file with the *Columbia Law Review*) (stating that *Castro-Huerta* "breaks with centuries of established federal Indian law").

21. See infra Part IV.

22. *Castro-Huerta*, 142 S. Ct. at 2511, 2521 (Gorsuch, J., dissenting).

23. Resolution of Dec. 18, 1829, 1829 Ga. Laws 267, 270.

24. See infra Part II and sections III.A–.B.

power. And from the Removal Era to the present day, states have continually sought to use arguments deriving from these tenets to establish their supremacy over Native nations.

But these arguments are not just abstract articulations of jurisdiction or the implementation of historical ideas regarding federalism. At its core, the theory of state supremacy was a results-oriented logic for Native deportation.[25] In the 1820s and 1830s, a cadre of elite, southern, Euro-American politicians constructed the state supremacy theory to appease the voracious land hunger of their settler constituents.[26] This "legal ideology of removal"[27] sought to nullify federal law that protected Native nations and justify the Euro-American invasion and appropriation of Native lands. As several U.S. senators put it, state laws supported by this ideology would force Native peoples either to submit to conquest by "being incorporated into the body politic" or to "be speedily induced to remove to the west of the Mississippi."[28]

The subjugation of Native peoples was not the state supremacy theory's only goal; the theory also sought to perpetuate the subjugation of Black people. Afraid that federal power over Native peoples would lead to the abolition of slavery, Alabama legislators claimed: "If [Congress] can say to the state of Alabama, that Indians cannot be citizens, it can by a similar exercise of municipal power within its limits, say that Negroes shall not be slaves."[29]

Worse, the southerners' arguments were ultimately successful. Even though the Supreme Court rejected the state supremacy theory, southern state courts, President Andrew Jackson, and Congress endorsed it.[30] This multipronged legal assault—combined with settler violence and military

25. For a discussion of Indian Removal as a form of "deportation," see K-Sue Park, Self-Deportation Nation, 132 Harv. L. Rev. 1878, 1884–85, 1898–904 (2019). Although several scholars have recently, and convincingly, argued that "removal" was a capacious term in the early republic and served as euphemism for "expulsion," "deportation," and "genocide," this Article continues to use the term to reflect the language used at the time. See Jeffrey Ostler, Surviving Genocide: Native Nations and the United States From the American Revolution to Bleeding Kansas 6–7, 365–68 (2019) (debating whether Removal qualifies as "genocide" or "ethnic cleasning"); Saunt, supra note 3, at xiii–xiv (noting that "'Removal' is . . . unfitting for a story about the state-sponsored expulsion of eighty thousand people"); Samantha Seeley, Race, Removal, and the Right to Remain 7–8 (2021) (describing how the multiple meanings of "removal" helped to "hid[e] its devastation" and occlude its true impact).

26. For a more detailed explanation of the theory's historical origins and uses, see infra Part II and section I.B.

27. See Tim Alan Garrison, The Legal Ideology of Removal: The Southern Judiciary and the Sovereignty of Native American Nations 5 (2002) (defining the "southern removal ideology" as the percolation of "threads of the long tradition of anti-Indian legal prejudice into a formal legal position that justified the expropriation of Native American land").

28. The Report, S. Recorder (Milledgeville, Ga.), Apr. 9, 1827, at 2, 2.

29. H.R. Journal, 10th Sess., at 221 (Ala. 1829).

30. See Garrison, supra note 27, at 237–39 (arguing that responsibility for Indian Removal rested with southern state leaders and judges, President Jackson, and Congress).

force—led to Native nations' expulsion from their homelands to Indian Territory and the loss of thousands of lives on the Trail of Tears.[31] And on the Native nations' former lands, southerners built their Cotton Kingdom and initiated the forced migration of one million enslaved Black people to their plantations.[32] Fundamentally, the state supremacy theory served the ends of settler colonialism, erasing Native presence for the benefit of Euro-American conquest and racial hierarchy.[33]

But the continued use of the state supremacy arguments ignores their problematic origins in the Removal Era. The Court and states frame the arguments as abstract and race-neutral principles of federalism when they are anything but. In fact, the Removal-era state supremacy theory is another instance of federalism—specifically state sovereignty—being weaponized to further oppress marginalized communities.[34] Although nullification, secession, and other states' rights positions have been rejected for their racist origins and constitutional infirmities, state supremacy arguments in federal Indian law cases remain in use. Unlike their rejected counterparts, these arguments are accepted as viable legal positions and have been used time and time again.[35] And with the *Castro-Huerta* decision, the Court has taken a theory birthed in the colonialism, greed, and violence of the nineteenth century and made it law in the

---

31. See Saunt, supra note 3, at 53–111, 231–302 (discussing the debate over Removal and the subsequent expulsion and extermination of Native peoples).

32. Walter Johnson, Soul by Soul: Life Inside the Antebellum Slave Market 214–15 (1999); Saunt, supra note 3, at 309–12. For a history of the early nineteenth-century expansion of slavery in the southern states, see generally Adam Rothman, Slave Country: American Expansion and the Origins of the Deep South (2005).

33. For an extended discussion of the application of settler colonialism to Native American history, see Frederick E. Hoxie, Retrieving the Red Continent: Settler Colonialism and the History of American Indians in the U.S., 31 Ethnic & Racial Stud. 1153, 1159–63 (2008).

34. There are numerous instances throughout U.S. history in which state sovereignty arguments have been used to subjugate certain racial groups, immigrants, and other minorities. The most famous examples are the federalism conflicts that arose over the continued oppression of Black people. State sovereignty arguments swirled around the perpetuation of slavery during the antebellum period of the nineteenth century, including during the Nullification Crisis, the admission of new states, and disputes over abolition activities and the recovery of escaped enslaved people. See generally 1 William W. Freehling, The Road to Disunion: Secessionists at Bay, 1776–1854 (1990) (discussing federalism conflicts involving southern states in the late eighteenth and early nineteenth centuries, including the Nullification Crisis); 2 William W. Freehling, The Road to Disunion: Secessionists Triumphant, 1854–1861 (2007) (studying the lead-up to and outbreak of the Civil War). And in the twentieth century, white Americans, intent on maintaining state-sanctioned racial segregation, employed states' rights arguments to resist federal policies and court orders that sought to remedy discrimination against Black Americans. See generally George Lewis, Massive Resistance: The White Response to the Civil Rights Movement (2006) (recounting the segregationist opposition to civil rights from the 1940s to the 1960s).

35. See infra Part III.

twenty-first century. Now more than ever, it is time to bury the state supremacy arguments with the past.

But doing so must start with the past. Historians have written about the longstanding hostility between Native nations and states.[36] Southern Indian Removal—with its aggressive state officials and courts, constitutional debates, and the famed Cherokee cases—has garnered a large share of attention in Native history,[37] legal history,[38] and American constitutional history.[39] And historians of federalism have begun to focus on how states in the early republic continually appealed to the Constitution and the federal government to rid themselves of competing sovereigns, including Native nations.[40]

---

36. For key recent works on this topic, see generally Gregory Ablavsky, Federal Ground: Governing Property and Violence in the First U.S. Territories 201–30 (2021) [hereinafter Ablavsky, Federal Ground] (describing conflicts over Indian affairs that occurred with the admission of Tennessee and Ohio to the Union); Deborah A. Rosen, American Indians and State Law: Sovereignty, Race, and Citizenship, 1790–1880 (2007) (tracing the development of state laws that applied to Native peoples); Bethel Saler, The Settlers' Empire: Colonialism and State Formation in America's Old Northwest (2015) (studying the impact of territorial policies and Wisconsin statehood on Native peoples in the region); Gregory Ablavsky, Empire States: The Coming of Dual Federalism, 128 Yale L.J. 1792, 1824–27, 1855–61 (2019) [hereinafter Ablavsky, Empire States] (compiling states' attempts to eradicate tribal sovereignty in the late eighteenth and early nineteenth centuries).

37. For Native histories focused on southern Indian removal, see generally Grant Foreman, Indian Removal: The Emigration of the Five Civilized Tribes of Indians (3d ed. 1972); Michael D. Green, The Politics of Indian Removal: Creek Government and Society in Crisis (1982); Ostler, supra note 25; Theda Perdue & Michael D. Green, The Cherokee Nation and the Trail of Tears (2007); Saunt, supra note 3.

38. For legal histories focused on southern Indian removal, see generally Ford, supra note 12; Garrison, supra note 27; Harring, supra note 15, at 25–44; Jill Norgren, The Cherokee Cases: The Confrontation of Law and Politics (1996).

39. For American constitutional histories focused on southern Indian removal, see generally Akhil Reed Amar, The Words that Made Us: America's Constitutional Conversation, 1760–1840, at 634–40 (2021) (examining Removal with a focus on the interaction between the executive and judicial branches of the federal government); Gerald Leonard & Saul Cornell, The Partisan Republic: Democracy, Exclusion, and the Fall of the Founders' Constitution, 1780s–1830s, at 200–07 (2019) (exploring Removal as a conflict in which the Marshall Court and Andrew Jackson's Democratic Party fought over constitutional meaning); Jill Lepore, These Truths: A History of the United States 215–16 (2018) (arguing that Removal was a Jacksonian policy made possible by Jackson ignoring Supreme Court decisions); Stephen Breyer, The Cherokee Indians and the Supreme Court, 87 Ga. Hist. Q. 408, 425–26 (2003) (arguing that the Cherokee cases ultimately strengthened the power of the Supreme Court); Joseph C. Burke, The Cherokee Cases: A Study in Law, Politics, and Morality, 21 Stan. L. Rev. 500, 501, 530–31 (1969) (using the Cherokee cases as a study of the Marshall Court's motivations).

40. See Alison L. LaCroix, The Interbellum Constitution: Union, Commerce, and Slavery in the Age of Federalisms (forthcoming 2024) (manuscript at 249–348) (on file with the *Columbia Law Review*) [hereinafter LaCroix, The Interbellum Constitution Manuscript] (tracing the development of "fractal federalism" in the legal relationship between the Cherokee Nation, Georgia, and the United States); Ablavsky, Empire States, supra note 36, at 1795–96, 1824–27, 1855–61 (partially finding American federalism's origins in conflicts between states and Native nations in the post-Revolution and Founding Eras).

Building on these histories, this Article's first aim is descriptive. It provides a historical narrative of the development of the state supremacy theory, returning to the progenitors of this theory—Removal-era southern state legislatures—to describe the theory's legal and rhetorical features. And it constructs this narrative by relying on rarely utilized archival sources, namely reports written by southern U.S. senators and state legislators that first justified the extension of state law over Native peoples and lands as a means of erasing tribal power. The Article then explores how the theory has continued to influence Indian law cases from the late nineteenth century to the present.

In brief, the narrative goes like this: Rooted in state hostility from the Founding Era, states' arguments for authority over Indian affairs first coalesced into a comprehensive legal and rhetorical onslaught in the early nineteenth century. In the 1820s and 1830s, Euro-American politicians in the South constructed a novel theory of state supremacy to justify southern state laws that sought to eliminate Native nations within their borders legally and physically.[41] Although the U.S. Supreme Court rejected the southern states' arguments in the 1832 case of *Worcester v. Georgia*,[42] the states emerged victorious when the federal government forcibly removed the Cherokee, Choctaw, Chickasaw, Muscogee (Creek),[43] and Seminole Nations from the South to Indian Territory.[44] As if the dispossession and death accompanying Removal were not enough of a blow to tribal power, the southern state supremacy theory endured in the field of federal Indian law. In the late nineteenth century, the Court utilized state supremacy arguments to assist in the assimilation of Native peoples and lands into the United States.[45] And in the late twentieth and early twenty-first centuries, Native power's resurgence prompted both Justices and state litigants to revive the arguments to undermine tribal sovereignty.[46] As this history shows, the legacy of Indian Removal continues to impact the progress of Native nations.

The second aim of this Article is to provide a new analytical approach to federal Indian law. Indian law scholars have made forceful arguments about how the Doctrine of Discovery, racism, and outdated stereotypes concerning Native peoples have shaped Indian law cases since the

---

41. See infra Part II and section I.B.

42. 31 U.S. (6 Pet.) 515, 544–45, 549–51, 559–62 (1832).

43. When referencing the Muscogee Nation or its people, I have dropped the "Creek" identifier for the remainder of this Article to improve readability and to align my work with the Muscogee Nation's recent efforts to drop the misnomer coined by British officials. See Angel Ellis, New Branding Campaign Launched by Muscogee Nation, Mvskoke Media (May 5, 2021), https://www.mvskokemedia.com/new-branding-campaign-launched-by-muscogee-nation/ [https://perma.cc/X67S-C4CF].

44. See sources cited supra note 37.

45. See infra section III.A.

46. See infra section III.B.

beginning of the field.[47] Others have taken a more time-bound approach, studying possible explanations for the Rehnquist and Roberts Courts' overwhelming opposition to tribal interests and solicitude for states.[48] Viewing Indian law cases through the lens of state supremacy offers a new perspective: The state supremacy theory has served as a consistent throughline in the field of federal Indian law. First, the theory explains why Indian law cases have historically used the expansion of state authority as an opportunity to curb tribal power. Second, focusing on the theory reveals a disturbing trend whereby these supremacy arguments from the Removal Era—arguments that are constitutionally infirm, historically inaccurate, and racist—are gaining widespread acceptance among Justices and states. Third, the perpetuation of Removal-era state supremacy arguments in recent Indian law cases uncovers how tied members of the current Court are to a view that state and tribal jurisdictional conflicts are zero-sum games and that states—as opposed to tribes—are the legitimate constitutional sovereigns.[49] And this view contradicts both the original

47. See, e.g., Robert J. Miller, Jacinta Ruru, Larissa Behrendt & Tracey Lindberg, Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies 52–61 (2010) (discussing how federal courts have consistently applied the Doctrine of Discovery in controversies involving Native nations over the last 200 years); Robert A. Williams, Jr., Like a Loaded Weapon: The Rehnquist Court, Indian Rights, and the Legal History of Racism in America 151–52 (2005) (identifying a "principle of racism" throughout the Justices' Indian law opinions); Adam Crepelle, Lies, Damn Lies, and Federal Indian Law: The Ethics of Citing Racist Precedent in Contemporary Federal Indian Law, 44 N.Y.U. Rev. L. & Soc. Change 529, 533 (2021) ("Based both in impermissible racial stereotypes and a doctrine of white supremacy, [federal Indian law] case law is overtly racist."); Kathryn E. Fort, The Vanishing Indian Returns: Tribes, Popular Originalism, and the Supreme Court, 57 St. Louis U. L.J. 297, 300 (2013) (noting the continued use of the "vanishing Indian" stereotype in the Court's historical narratives).

48. Legal scholarship has extensively reviewed the Supreme Court's hostility to tribal interests over the past several decades. Matthew Fletcher has argued that tribal losses often stemmed from the Court's interest in larger constitutional problems as opposed to Indian law issues and its tendency to grant certiorari to opponents of tribal interests. See Matthew L.M. Fletcher, Factbound and Splitless: The Certiorari Process as Barrier to Justice for Indian Tribes, 51 Ariz. L. Rev. 933, 935–37 (2009) (discussing certiorari disparities); Matthew L.M. Fletcher, The Supreme Court's Indian Problem, 59 Hastings L.J. 579, 580, 582–83 (2008) (arguing that the Supreme Court lacks desire to "decide tribal interests" even in cases involving federal Indian law). The late David Getches argued that a proclivity to institute a form of colorblind jurisprudence and uphold American cultural values resulted in antitribal holdings. David H. Getches, Beyond Indian Law: The Rehnquist Court's Pursuit of States' Rights, Color-Blind Justice and Mainstream Values, 86 Minn. L. Rev. 267, 268–69 (2001) [hereinafter Getches, Beyond Indian Law]. In particular, Getches contended that the Rehnquist Court's robust support for states' rights resulted in a line of cases from the mid-1980s to 2000 in which state interests prevailed over tribal parties at a disproportionate rate. Id. at 268, 320–23, 344–45.

49. For a similar analysis of federal Indian law as a problem of jurisdictional overlap between Native nations and states that leads to "competitive sovereign erosion," see Michael D.O. Rusco, *Oklahoma v. Castro-Huerta*, Jurisdictional Overlap, Competitive Sovereign Erosion, and the Fundamental Freedom of Native Nations, 106 Marq. L. Rev. 889, 919–30 (2023).

understanding of Indian affairs authority and the Native nations' constitutional status.[50]

This particular view of states and tribes adds to Indian law scholars' analysis of the Court's "subjectivist approach" to Indian law cases.[51] According to these scholars, the Rehnquist and Roberts Courts have ignored foundational Indian law principles in favor of a subjectivist approach that "gauges tribal sovereignty as a function of changing conditions—demographic, social, political, and economic—and the expectations they create in the mind of affected non-Indians."[52] As this Article suggests, the Justices utilize state supremacy arguments in their reasoning to provide both historical and legal justifications for their preferred pro-state-sovereignty outcomes.[53] Even if, as the scholars argue, the Court uses late nineteenth-century allotment policy as the "touchstone" for determining the scope of tribal power in its subjectivist approach,[54] the state supremacy theory indicates that the Court reaches even further back for the incorrect legal principles it deploys to uphold state interests over tribal ones. Thus, we may need to add the Court's reliance on the state supremacy theory to the "rules of judicial subjectivism" going forward.[55]

---

50. The recognition of Native nations' sovereignty is enshrined in U.S. constitutional law. "Indian tribes" are listed in the Commerce Clause alongside other sovereigns: foreign nations and the states. U.S. Const. art. I, § 8, cl. 3. And the foundational Indian law cases—*Cherokee Nation v. Georgia* and *Worcester v. Georgia*—explicitly recognize tribal sovereignty under various clauses of the Constitution. See Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559 (1832) ("The constitution, by declaring treaties already made, as well as those to be made, to be the supreme law of the land, has adopted and sanctioned the previous treaties with the Indian nations, and consequently admits their rank among those powers who are capable of making treaties."); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 16–20 (1831) (recognizing that the acts of the United States under the Treaty Power and Commerce Clause "plainly recognize the Cherokee nation as a state").

51. For an excavation and critique of the "subjectivist" trend in the Supreme Court's Indian law decisions at the end of the twentieth century and beginning of the twenty-first century, see David H. Getches, Conquering the Cultural Frontier: The New Subjectivism of the Supreme Court in Indian Law, 84 Calif. L. Rev. 1573, 1575–76 (1996) [hereinafter Getches, Conquering the Cultural Frontier]; Dylan R. Hedden-Nicely & Stacy L. Leeds, A Familiar Crossroads: *McGirt v. Oklahoma* and the Future of the Federal Indian Law Canon, 51 N.M. L. Rev. 300, 305–07 (2021).

52. Getches, Conquering the Cultural Frontier, supra note 51, at 1575; see also Hedden-Nicely & Leeds, supra note 51, at 305 (citing Getches, Conquering the Cultural Frontier, supra note 51, at 1575).

53. See infra sections III.B, IV.A.

54. Getches, Conquering the Cultural Frontier, supra note 51, at 1622–26; Hedden-Nicely & Leeds, supra note 51, at 339.

55. Getches, Conquering the Cultural Frontier, supra note 51, at 1620. Getches noted three "[r]ules of [j]udicial [s]ubjectivism": (1) the "retreat[]" from Indian canons of construction; (2) the use of nineteenth-century allotment and assimilation policies as the "benchmark" for defining tribal sovereignty; and (3) the balancing of non-Indian interests to reduce the scope of tribal sovereignty "to the Court's own notion of what it ought to look like." Id.

This Article's historical narrative and analytical approach stemming from the state supremacy arguments also break new ground in emphasizing the roles that states have played in the development of federal Indian law. In scholarship focused on Native nations and peoples, legal scholars have almost exclusively focused on the *federal*[56] and *Indian* (or tribal)[57] aspects of federal Indian law. This tendency has obscured the huge influence that states and their arguments have had on current understandings of Native history and the principles of federal Indian law, even when some of the most important Indian law cases pitted a state against a Native nation.[58] Analysis of states and their authority has usually only appeared in scholarship that compares the political statuses of states and Native nations[59] or that explores how states and tribes should work with one another in certain policy areas.[60] By bringing more

---

56. See generally Maggie Blackhawk, Federal Indian Law as Paradigm Within Public Law, 132 Harv. L. Rev. 1787 (2019) [hereinafter Blackhawk, Federal Indian Law as Paradigm] (advocating for a new paradigm of federal constitutional law that centers federal Indian law and colonialism); Matthew L.M. Fletcher, Politics, Indian Law, and the Constitution, 108 Calif. L. Rev. 495 (2020) (arguing that the Constitution authorizes Congress to legally classify on the basis of Indian status); Philip P. Frickey, (Native) American Exceptionalism in Federal Public Law, 119 Harv. L. Rev. 433 (2005) (analyzing the incoherence of federal Indian law); Nell Jessup Newton, Federal Power Over Indians: Its Sources, Scope, and Limitations, 132 U. Pa. L. Rev. 195 (1984) (surveying the scope of federal power over Native peoples).

57. See generally Gregory Ablavsky, "With the Indian Tribes": Race, Citizenship, and Original Constitutional Meanings, 70 Stan. L. Rev. 1025 (2018) (uncovering the meaning of "tribe" and "Indian" in the late eighteenth-century); Elizabeth A. Reese, The Other American Law, 73 Stan. L. Rev. 555 (2021) (advocating for the integration of tribal law into mainstream understandings of American law); Angela R. Riley, (Tribal) Sovereignty and Illiberalism, 95 Calif. L. Rev. 799 (2007) (arguing for the recognition of tribal sovereignty even when tribal decisions conflict with Western liberal ideals); Gloria Valencia-Weber, Tribal Courts: Custom and Innovative Law, 24 N.M. L. Rev. 225 (1994) (characterizing tribes as a "third sovereign" that must be included in the legal discourse).

58. For a piece of historical scholarship that examines the impact of state law on Native peoples (though omitting thorough analysis of the historical connection between state power and federal Indian law), see generally Rosen, supra note 36 (studying the application of state law to Native peoples from the late eighteenth to the late nineteenth century). When Indian law scholars have focused on the history of states' arguments or authority, it has been to describe the origins of a specific legal principle. See, e.g., Gregory Ablavsky, Beyond the Indian Commerce Clause, 124 Yale L.J. 1012, 1039–52 (2015) [hereinafter Ablavsky, Indian Commerce Clause] (examining the origins of the federal government's exclusive authority over Indian affairs in the Founding Era); Gloria Valencia-Weber, The Supreme Court's Indian Law Decisions: Deviations From Constitutional Principles and the Crafting of Judicial Smallpox Blankets, 5 U. Pa. J. Const. L. 405, 409–13 (2003) (excavating the history of state authority to undermine the constitutional basis for the principles underlying the Court's reasoning in Nevada v. Hicks, 533 U.S. 353 (2001)).

59. See, e.g., Gregory Ablavsky, Sovereign Metaphors in Indian Law, 80 Mont. L. Rev. 11, 20–27 (2019) (discussing analogies between states and Native nations both historically and in the modern era).

60. See, e.g., Matthew L.M. Fletcher, Retiring the "Deadliest Enemies" Model of Tribal–State Relations, 43 Tulsa L. Rev. 73, 81–83 (2007) [hereinafter Fletcher, Deadliest Enemies] (describing how "negotiation and agreement" now characterize tribal–state

attention to state supremacy, especially in the wake of *Castro-Huerta*, this Article hopefully will spur other scholars in the field to consider it alongside federal power and tribal sovereignty in their analyses.[61]

This work on the state supremacy theory has implications for broader federalism issues beyond Indian law. In particular, the revival of state supremacy arguments in the modern Indian law cases suggests that the Rehnquist and Roberts Courts' formalist approach to federalism has been influenced by the history of Indian law.[62] The Court's "New Federalism," which purports to be a return to the original understanding of federalism, involves the resurrection of general ideas about federal, state, and tribal sovereignty that did not hold sway in the early republic and should not today.[63] Furthermore, the recent Indian law cases invoking state supremacy tropes to cabin tribal power reinforce the trend whereby the Court uses dubious constructions of state sovereignty to undermine racial remediation policies.[64] Therefore, Indian law may not be the only

---

relations); Katherine Florey, Making It Work: Tribal Innovation, State Reaction, and the Future of Tribes as Regulatory Laboratories, 92 Wash. L. Rev. 713, 763–84 (2017) (analyzing ways in which tribes and states can benefit each other through regulatory innovations).

61. This Article joins a handful of other recent articles that have begun analyzing state power in relation to federal Indian law in the wake of *Castro-Huerta*. See generally Ablavsky, Too Much History, supra note 20 (calling *Castro-Huerta* indicative of the Court's problematic approach of using "too much history" in Indian law jurisprudence); Michael Doran, Tribal Sovereignty Preempted, 89 Brook. L. Rev. (forthcoming 2023), https://ssrn.com/abstract=4473476 [https://perma.cc/FT8N-JJZH] (tracking how the "symmetry for state and tribal authority" has been dismantled, leading to *Castro-Huerta*); Hedden-Nicely, The Reports of My Death, supra note 20 (arguing that *Worcester*'s broad principles remain good law even after *Castro-Huerta*); Dylan R. Hedden-Nicely, The Terms of Their Deal: Revitalizing the Treaty Right to Limit State Jurisdiction in Indian Country, 27 Lewis & Clark L. Rev. 457, 481–91 (2023) [hereinafter Hedden-Nicely, The Terms of Their Deal] (advocating for the application of treaty-rights analysis in Indian law preemption cases rather than *Castro-Huerta*'s balancing test); John P. LaVelle, Surviving *Castro-Huerta*: The Historical Perseverance of the Basic Policy of *Worcester v. Georgia* Protecting Tribal Autonomy, Notwithstanding One Supreme Court Opinion's Errant Narrative to the Contrary, 74 Mercer L. Rev. 845 (2023) (examining Supreme Court cases addressing state power over Native nations to critique the Court's opinion in *Castro-Huerta*); Rusco, supra note 49 (considering *Castro-Huerta*'s role in the erosion of tribal sovereignty). But it departs from this scholarship by providing an overarching historical and theoretical framework for understanding the legal principles used in *Castro-Huerta* within the context of federal Indian law doctrine.

62. This formalist approach is evident in recent Court developments in several areas of constitutional law, including the creation of the anticommandeering doctrine under the Tenth Amendment, see Printz v. United States, 521 U.S. 898, 918–22 (1997), the expansion of state sovereign immunity, see Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 60–73 (1996), and the limitations of Congress's spending power, see NFIB v. Sebelius, 567 U.S. 519, 575–85 (2012).

63. For a critique of the Court's modern originalist approach to federalism, see Alison L. LaCroix, The Interbellum Constitution: Federalism in the Long Founding Moment, 67 Stan. L. Rev. 397, 440–45 (2015) (uncovering understandings of Congress's spending power in the early nineteenth century).

64. See, e.g., Shelby County v. Holder, 570 U.S. 529, 544 (2013) (striking down the coverage formula in section 4 of the Voting Rights Act as a violation of states' "equal

doctrinal area in which robust-yet-inaccurate notions of state power must be confronted. And this analysis of the state supremacy theory will help jurists and legal scholars who work outside the field of federal Indian law to recognize the larger phenomenon of the Court using states' rights arguments shorn of their historical foundations to upset various doctrines.

Still, the overarching purpose of this Article is to undermine the use of state supremacy arguments in federal Indian law cases before the Supreme Court. In tracing the construction of the state supremacy theory by southern state officials in the 1820s and 1830s, it uncovers the flawed reasoning, racist undertones, and goals of legal and cultural elimination that underlay state supremacy arguments.[65] It argues that these enduring arguments not only pose a threat to legitimate sovereigns—Native nations—but also contradict the original understanding of constitutional and Indian law jurisprudence, defying the very first Indian law opinions written by Chief Justice John Marshall.[66] Furthermore, this Article contends that nothing—not history, changes in Indian affairs policy, or Supreme Court precedents—has made the state supremacy theory legally or morally sound in the interim. Rather, the theory's continued use actually defies constitutional law and federal Indian affairs policy, produces an inaccurate history of Native nations and federal Indian law, and perpetuates the racism and violence that characterized the Removal Era.[67]

If Indian Removal is not just the deportation of Native nations and peoples from their homelands but a legal assault on tribal sovereignty, it continues to haunt federal Indian law to this day. Just as the southern states used state law and the theory of state supremacy to legally eradicate Native nations within their borders in the Removal Era, now some states and Justices are seeking to constitutionalize state supremacy to do so once again. And they are using Removal-era arguments marred by colonialism, racial prejudice, and violence. The Court's endorsement of the rejected and flawed state supremacy theory should not go unchallenged at a time when the Court has called for invalidating laws based on racism and

---

sovereignty"). For an analysis and critique of the Court's equal sovereignty principle and its use in *Shelby County*, see Leah M. Litman, Inventing Equal Sovereignty, 144 Mich. L. Rev. 1207, 1209–10 (2016).

65. This Article's use of the term "elimination" signifies Euro-American attempts to eradicate indigeneity on the North American continent through cultural assimilation, legal incorporation, and even violence. Its use aligns with the concept in settler colonial theory that the development of settler colonies and states, such as the United States, were "premised on the elimination of native societies." Patrick Wolfe, Settler Colonialism and the Transformation of Anthropology: The Politics and Poetics of an Ethnographic Event 2 (1999).

66. See infra section II.C.

67. See infra section IV.B.

colonialism.[68] Advocates, jurists, and legal scholars must counter the Court's and states' use of these Removal-era holdovers. This Article will prepare them to do so.

This Article proceeds in four parts. Part I provides a brief history of the relationship between state authority and Indian affairs in the Founding and Removal Eras, describing the development of the Indian affairs legal regime that southern states challenged in the early nineteenth century. Part II uncovers the creation of the southern states' theory of state supremacy, which arose as they sought to extend state law over Native nations and eradicate tribal power. It identifies the legal bases and rhetorical themes of the state supremacy arguments. The Part also describes the rejection of these arguments in the foundational Indian law case of *Worcester v. Georgia*.[69] Part III turns to the persistence of the state supremacy arguments in the late nineteenth century and then to their revival in the early twenty-first century. It uncovers examples of Justices appropriating these arguments against tribal interests as well as states invoking them as parties to recent Indian law cases before the Court. Part IV argues that the theory of state supremacy now reigns victorious in Indian law with the Court's decision in *Castro-Huerta*.[70] It analyzes the various ways the *Castro-Huerta* majority relied on Removal-era arguments. It also points to the overarching problems in the Court's and state litigants' use of state supremacy arguments in the present day. As the Part illustrates, the constitutional, historical, and racial bases for the state supremacy theory render the theory illegitimate. The Part concludes by considering the potential impacts of *Castro-Huerta* on federal Indian law doctrine.

I. SOVEREIGNTY CONTESTS: STATE AUTHORITY AND INDIAN AFFAIRS IN THE EARLY REPUBLIC

Since the American Revolution, three groups of sovereigns—the national government, the states, and Native nations—have struggled with one another to assert authority over the peoples and territory of the United States. During the first several decades of the early republic, many debates in Indian affairs centered on which level of government—the federal or the state—had the power to treat with Native nations and, by extension, the power to acquire Native lands.[71] As Native peoples soon found out, state governments were more responsive to their land-

68. See Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (suggesting that the Court must evaluate the racist origins of laws when assessing their constitutionality). In particular, Justice Neil Gorsuch has called for the Court to overturn the *Insular Cases*, which justify the federal government's power over unincorporated territories, because they rely on "racial stereotypes" that were used to justify U.S. imperialism at the end of the nineteenth century. United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring).

69. 31 U.S. (6 Pet.) 515 (1832).

70. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

71. See infra notes 75–79 and accompanying text.

hungry citizenry and were not above employing fraud, violence, and the law to dispossess Native peoples of their land.[72] In comparison to the federal government, states also felt more threatened by the presence of Native nations within their borders, as Native nations could exclude extensive territories from states' jurisdiction.[73] Thus, much of early Indian affairs consisted of states' attempts to fend off the other two sovereigns: They sought to cabin federal power with regard to Native nations while also denying the existence of any form of Native sovereignty. These efforts led to the creation of the state supremacy theory.

This Part recounts that history. It highlights how states, particularly those in the South, challenged federal authority in Indian affairs and tribal sovereignty even as the U.S. Constitution and increasing federal power attempted to restrict states' ability to direct Indian affairs policy. Beginning with the Founding Era, this Part traces the changes in the law regarding which level of U.S. government had authority over Indian affairs, focusing on how the Articles of Confederation gave way to the Constitution and how the Washington Administration instituted the nation's first federal Indian policy. Moving to the Removal Era, it then explains how events led southern states to pursue much more aggressive tactics against Native nations, most explicitly in the form of state law extension acts. Discussion of these acts lays the groundwork for an analysis of the state supremacy arguments that state legislators constructed to support them, the subject of the next Part.

A. *The Founding Era*

1. *State Aggression Under the Post-Revolutionary Legal Order.* — Even as Americans declared their independence from Great Britain, much of the United States did not belong to them. Rather, large portions of territory remained in the possession of Native nations. For example, the Haudenosaunee Confederacy dominated upstate New York, and the Muscogee Confederacy and Cherokee Nation kept Georgia's settlements concentrated along the coast.[74] With the presence of Native nations hampering the states' newly acquired independence and jurisdictions—and many nations siding with the British—state officials quickly sought to eradicate Native peoples' physical presence through either war or

72. See infra notes 75–79, 93–97, 114–123, and accompanying text.

73. See infra notes 74–75, 100–106, and accompanying text.

74. See Robbie Franklyn Ethridge, Creek Country: The Creek Indians and Their World 31 (2003) (recounting the history of the Muscogee in the late eighteenth and early nineteenth centuries); McLoughlin, supra note 5, at 27–30 (studying the history of the Cherokee Nation in the post-Revolutionary period); Alan Taylor, The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution 111–44 (2006) (describing the history of the Haudenosaunee Confederacy during and after the Revolution).

treaties.[75] And after the Revolutionary War, states sought to placate their land-hungry citizens by asserting state authority over Native peoples and divesting them of their lands.[76]

The post-Revolutionary legal order provided a basis for the states' actions. The Articles of Confederation presented an opening for the exercise of state power over Native peoples: Even as it bequeathed the Confederation Congress with the "sole and exclusive right and power" to manage Indian affairs, it limited Congress from interfering with "the legislative right of any State, within its own limits."[77] The ambiguity of the provision created conflict. Congress and state officials constantly clashed over which government had the right to treat with Native nations, and these disputes were on full display at treaty negotiations with the Cherokee, Chickasaw, Choctaw, and Haudenosaunee in 1784 and 1785.[78] In the South, North Carolina and Georgia openly flouted congressional policy, pursuing coercive treaties with Native nations and illegally selling Native land.[79] Caught between states' expansionist aims and federal weakness, Native nations turned to violence. In Georgia, the Muscogee Nation ejected Euro-American settlers from its lands, and the ensuing violence threatened war.[80]

2. *Federal Supremacy in Indian Affairs Under the Constitution.* — Such conflicts led to the creation of a new legal regime. As Greg Ablavsky has expertly traced, concerns over Indian affairs—particularly the aggressive actions of states—served as a major impetus for the drafting and adoption of the U.S. Constitution.[81] In place of the ambiguous provisions of the Articles of Confederation, the Constitution's drafters explicitly positioned Indian affairs within the purview of the federal government's authority.[82] The Constitution gave the federal government control of commerce with the Native

---

75. See Colin G. Calloway, The American Revolution in Indian Country: Crisis and Diversity in Native American Communities 108–28, 182–212 (1995) (describing the violence and diplomacy that pervaded Revolution-era relations between the Haudenosaunee and New York and between the Cherokee and Virginia, North Carolina, and Georgia).

76. See Ablavsky, Empire States, supra note 36, at 1826 (highlighting Georgia's and North Carolina's efforts to seize Native lands through treaties and state statutes).

77. Articles of Confederation of 1781, art. IX, para. 4.

78. Gregory Ablavsky, The Savage Constitution, 63 Duke L.J. 999, 1018–33 (2014).

79. Id. at 1027–28.

80. Id. at 1031.

81. Id. at 1033–39.

82. See Ablavsky, Indian Commerce Clause, supra note 58, at 1039–45 (characterizing the Constitution's provisions and early federal practice in Indian affairs as preemptive of state authority); Robert N. Clinton, The Dormant Indian Commerce Clause, 27 Conn. L. Rev. 1055, 1147–90 (1995) (arguing that the Constitution, particularly the Commerce Clause, gave the federal government authority over Indian affairs exclusive of the states); see also U.S. Const. art. I, § 8, cl. 3 (granting Congress the power "[t]o regulate Commerce . . . with the Indian Tribes").

nations[83] and the exclusive power to enter treaties[84] and declare war,[85] with no exceptions for state sovereignty.

The Washington Administration bolstered this view of federal supremacy, using the Constitution's grant of powers to the federal government to create a centralized Indian policy.[86] In particular, the Administration recognized Native nations as sovereigns, departing from states' claims that these nations were conquered peoples.[87] President George Washington and Henry Knox, the Secretary of War, formulated a policy that focused on pursuing diplomatic relations—treaties—with the Native nations, protecting the nations' rights to land, and instituting "civilization" programs that promoted the adoption of Euro-American forms of agriculture, education, and the market economy.[88]

Yet the creation of federal Indian affairs policy was only one aspect of the Administration's work. Federal officials had to sell Native peoples on the merits of the new Constitution.[89] As part of these "Native ratification debates," Native peoples considered whether the newly empowered federal government would actually restrain the states and Euro-American settlers and promote the autonomy and diplomatic relationships that Native nations expected.[90] Ultimately, many Native nations rejected the Constitution, turning to British and Spanish allies and war to maintain their sovereignty.[91]

In the end, events proved the Native nations right. The Constitution's alteration of Indian affairs authority failed to arrest states' attempts to assert jurisdiction over Native peoples and seize their lands.[92] Angry at the federal government for invalidating earlier land cessions from the Muscogee in the 1790 Treaty of New York, Georgia declared that the exercise of federal power in guaranteeing Indian title within the state was unconstitutional.[93] In 1795, Georgia defied the treaty by selling the state's western territory, which included the disputed Muscogee lands, to land

83. U.S. Const. art. I, § 8, cl. 3.

84. Id. art. I, § 10, cl. 1.

85. Id. art. I, § 8, cl. 11.

86. Ablavsky, Indian Commerce Clause, supra note 58, at 1041–43.

87. Id. at 1061–64.

88. See Colin G. Calloway, The Indian World of George Washington: The First President, the First Americans, and the Birth of the Nation 322–31, 340–41 (2018) [hereinafter Calloway, The Indian World of George Washington] (detailing Washington and Knox's efforts to "define and implement a national Indian policy"); Dorothy V. Jones, License for Empire: Colonialism by Treaty in Early America 166–69 (1982) (discussing Knox's approach to federal Indian affairs policy).

89. Gregory Ablavsky & W. Tanner Allread, We the (Native) People?: How Indigenous Peoples Debated the U.S. Constitution, 123 Colum. L. Rev. 243, 271–86 (2023).

90. Id. at 276–78.

91. Id. at 281–82.

92. Id. at 266–67.

93. Ablavsky, Indian Commerce Clause, supra note 58, at 1045–47.

companies, initiating a decades-long legal dispute.[94] Georgia's vitriol subsided once it entered into the Compact of 1802 with the federal government.[95] In exchange for the state's western territory, the United States agreed to extinguish all remaining Indian title within the state's boundaries.[96] The compact would eventually prove to be another source of frustration, however, when Georgia and other states began to push for the expulsion of Native nations from their borders two decades later.[97]

B. *The Removal Era*

Even though the federal government asserted its supremacy in Indian affairs, the sovereignty contests of the early republic were far from over. In the early decades of the nineteenth century, the federal executive's civilization policy—premised on the eventual assimilation of Native peoples into the United States—gave way to one of deportation, euphemistically known as Indian Removal.[98] Bolstered by the prospect of securing Native lands within their borders, southern states once again attacked federal supremacy and tribal sovereignty in an effort to eliminate the presence of Native nations.

1. *The Escalation of Southern States' Campaigns for Native Land.* — Although the southern states' campaigns for Native land had never completely subsided over the first decade of the nineteenth century, the War of 1812 and its aftermath set the stage for their escalation.[99] Home to the powerful and populous Cherokee, Chickasaw, Choctaw, Muscogee, and Seminole Nations, the southern states remained divided between Euro-American and Native lands.[100] The defeat of the British signaled the

---

94. See Charles F. Hobson, The Great Yazoo Lands Sale: The Case of *Fletcher v. Peck* 11–55 (2016) (telling the history of Georgia's actions and the Supreme Court case that resulted from it); see also Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 139–43 (1810) (concluding that the land sale was a binding contract and could not be repealed, invalidating Georgia's rescission of such land sales).

95. See Articles of Agreement and Cession, U.S.-Ga., Apr. 24, 1802, reprinted in The Revised Code of the Laws of Mississippi in Which Are Comprised All Such Acts of the General Assembly, of a Public Nature, as Were in Force at the End of the Year 1823; with a General Index 502, 502 (George Poindexter ed., Natchez, Francis Baker 1824) [hereinafter Compact of 1802]; Ford, supra note 12, at 25 (describing the content and significance of the Compact of 1802).

96. See Ford, supra note 12, at 25 (explaining that under the Compact, the United States would "extinguish indigenous title within Georgia's boundaries as soon as it was peaceably possible" (citing Compact of 1802, supra note 95, at 502)).

97. See id. at 137 (highlighting the Georgia governor's invocation of the Compact when advocating for Cherokee Removal in the early 1820s).

98. See Saunt, supra note 3, at 22–26 (describing the transition from the "civilizing" policy to the deportation policy); see also supra note 25.

99. Ford, supra note 12, at 133.

100. See Saunt, supra note 3, at 11–14 (describing the hybrid geographical, political, cultural, and economic reality of the U.S. South in the early nineteenth century).

end of European interest in the Southeast, foreclosing the nations from ever again pursuing their diplomatic strategy of playing off the American and European powers.[101] This end to European interference, as well as the later defeat of the Muscogee Red Sticks—allies of the British—solidified the United States' hold on the region.[102] And the postwar influx of settlement resulted in the admission of Alabama and Mississippi—two states with substantial amounts of territory still in Indian hands[103]—into the Union.[104] The peace also increased British demand for American cotton, heightening settlers' desire for more farmland.[105] Finding themselves with nominal jurisdiction and facing pressure from their citizens to acquire more land for cotton cultivation, the southern states slowly revived arguments for the recognition of their territorial rights and the extinguishment of Indian title.[106]

By the 1820s, these campaigns erupted in force as southern state governments perceived themselves to be under attack from all sides. First, the federal executive failed to secure removal and cession treaties with the Five Tribes despite its declared intentions to remove them west of the Mississippi River.[107] Even worse, President John Quincy Adams "declined to recognize" the 1825 Treaty of Indian Springs, which "ceded the remaining [Muscogee] territory in Georgia," frustrating Georgia's efforts to gain large amounts of Native land for white settlement and angering state officials.[108] The southern states not only protested the federal government's inability to implement its new policy but also

101. See Ford, supra note 12, at 133 ("The peace with Britain in 1814 . . . cut southeastern Indians off from European trade and diplomacy.").

102. See id. (noting how the 1814 defeat of the Red Sticks led to "huge cessions" of Muscogee land).

103. See Saunt, supra note 3, at 37–38 (noting that the Muscogee owned over 10,000 square miles of land in Alabama and the Choctaw and Chickasaw owned 25,000 square miles of land in Mississippi).

104. J. Michael Bunn & Clay Williams, Mississippi's Territorial Years: A Momentous and Contentious Affair (1798–1817), Miss. Hist. Now (Nov. 2008), https://www.mshistorynow.mdah.ms.gov/issue/mississippis-territorial-years-1798-1817 [https://perma.cc/38YL-34R5] (describing how the population of the Mississippi Territory increased to over 200,000 following the Red Stick War, leading to Mississippi and Alabama statehood).

105. Ford, supra note 12, at 133.

106. Id. at 133–35.

107. See Saunt, supra note 3, at 34–37 (describing how the Cherokee, Choctaw, and Chickasaw Nations refused to cede any lands to the federal government and how the Muscogee Nation extracted guarantees for the security of its lands in Alabama after the cession of its Georgia territory); The Report, supra note 28, at 2 (expressing southern politicians' frustrations with the federal government for the collapse of treaty negotiations with the Choctaw and Chickasaw in 1826).

108. Saunt, supra note 3, at 35–36; see also Treaty of Indian Springs, Creek Nation-U.S., art. I, Feb. 12, 1825, 7 Stat. 237 (ceding Muscogee land).

claimed that the federal treaty abrogation had violated states' rights vested in the treaties.[109]

Second, state officials had to contend with the threat that Native nations' increasing political and economic power posed to them. The combination of the federal government's "civilization" programs and the need to ensure tribal unity around the issue of land cessions led tribal nations to embark on dramatic political state-building projects in the early nineteenth century.[110] The Choctaw and Cherokee nations wrote their first constitutions in 1826 and 1827, respectively.[111] In addition to adopting Euro-American forms of governance, both constitutions enshrined the nations' refusal to cede their land.[112] In writing these constitutions, the Choctaw and the Cherokee confirmed state governments' fears that their territory would forever be divided between two different peoples and two separate governments.

2. *The Southern State Law Extension Acts.* — Caught between the federal government's failure to negotiate removal treaties and perceived Native threats to state sovereignty, southern states took matters into their own hands. Following the advice of U.S. senators from Georgia, Mississippi, and Alabama,[113] state legislatures began enacting laws that extended state civil and criminal jurisdiction over Native lands and the peoples residing on them.[114] The senators predicted that such laws would force the Native nations to either remove west of the Mississippi or incorporate into the state polity without their tribal status or any

---

109. See Resolution of Jan. 13, 1827, 1826–1827 Ala. Laws 119, 120; H.R. Journal, 8th Sess., at 183–85 (Ala. 1827).

110. See Duane Champagne, Social Order and Political Change: Constitutional Governments Among the Cherokee, the Choctaw, the Chickasaw, and the Creek 124–75 (1992) (describing changes in the governments of Cherokee, Choctaw, Chickasaw, and Muscogee Nations and these nations' adoption of written law in the 1810s and 1820s).

111. Constitution of the Cherokee Nation of 1827, reprinted in Cherokee Nat'l Council, Laws of the Cherokee Nation 118 (Tahlequah, Cherokee Advoc. Off. 1852) [hereinafter Cherokee Constitution of 1827]; Entries From August 5, 1826, *in* Peter Perkins Pitchlynn, A Gathering of Statesmen: Records of the Choctaw Council Meetings, 1826–1828, at 45 (Marcia Haag & Henry Willis eds. and trans., 2013) [hereinafter Choctaw Constitution of 1826].

112. See Cherokee Constitution of 1827, supra note 111, art. I, § 2 ("The sovereignty and Jurisdiction of this Government shall extend over the country . . . and the lands therein are, and shall remain, the common property of the Nation . . . ."); Choctaw Constitution of 1826, supra note 111, at 50–51 ("The land where we reside belongs to all who are called Choctaw people. If any single district wants to sell its land, and the other two districts do not agree, the single district cannot sell its land.").

113. See The Report, supra note 28, at 2 (relaying the views of Senators John McKinley of Alabama, Thomas Buck Reed of Mississippi, and Thomas Cobb of Georgia, who advocated for the extension of state law over Native peoples).

114. See Garrison, supra note 27, at 3 (detailing the steps that southern state legislatures took to extend jurisdiction over Native lands).

pertinent rights.[115] Eager to eliminate the Native presence within the state either legally or physically, Georgia passed the first extension act in 1828 and two more in the subsequent two years.[116] Mississippi followed with extension acts in 1829 and 1830.[117] The Alabama legislature passed its law in 1832,[118] and the Tennessee legislature passed the South's final extension act in 1833.[119]

When analyzing and comparing all the southern states' extension acts, it is clear that the acts were major developments in the legal disputes over Indian affairs. Wresting jurisdiction away from the federal and tribal governments, southern legislatures deployed various strategies to achieve their aims. Georgia's and Mississippi's legislatures passed the acts but delayed the extension of state laws to Native peoples, hoping to induce them to remove beforehand.[120] These two states also directly attacked Native sovereignty, outlawing the convening of tribal governments, the application of tribal law, and the exercise of any power by tribal officials—with criminal penalties attached.[121] The southern state legislatures also limited or denied citizenship rights to Native peoples—restricting their ability to testify in court and serve in the militia or on juries—as they subsumed Native peoples within their polity.[122] Although none of these laws physically eradicated Native people from within state borders, they legally eliminated Native nations from the states' claimed territories.[123]

---

115. See The Report, supra note 28, at 2 ("Either 1st, the Indians will be speedily induced to remove to the west of the Mississippi, or, 2d, being incorporated into the body politic, will soon lose their distinctive character, language, and colour.").

116. Act of Dec. 22, 1830, 1830 Ga. Laws 114; Act of Dec. 19, 1829, 1829 Ga. Laws 98; Act of Dec. 20, 1828, 1828 Ga. Laws 88.

117. Act of Jan. 19, 1830, ch. 1, 1830 Miss. Laws 5; Act of Feb. 4, 1829, ch. 77, 1829 Miss. Laws 81.

118. Act of Jan. 16, 1832, 1831–1832 Ala. Laws 7.

119. Act of Nov. 8, 1833, ch. 16, 1833 Tenn. Pub. Acts 10.

120. See § 7, 1828 Ga. Laws at 89 (delaying implementation to June 1, 1830); ch. 77, § 2, 1829 Miss. Laws at 81–82 (extending civil process to Choctaw and Chickasaw lands but excluding its application to Native peoples).

121. See §§ 7–13, 1829 Ga. Laws at 99–101; § 8, 1828 Ga. Laws at 89; §§ 1, 5, 1830 Miss. Laws at 5–6.

122. See, e.g., §§ 3–4, 1831–1832 Ala. Laws at 7 (allowing Native peoples to testify in state court and record wills and bills of sale but exempting them from military duty, road work, jury service, and taxes); § 9, 1828 Ga. Laws at 89 (denying Native peoples the right to testify in state court).

123. In addition to directly attacking tribal sovereignty and Native peoples, the states added Native lands to counties prior to their cession. Georgia specifically undertook surveys of these lands and held lotteries to distribute the lands to Euro-American settlers. For the history of the ties between county formation and Native dispossession, see K-Sue Park, Property and Sovereignty in America: A History of Title Registries & Jurisdictional Power, 133 Yale L.J. (forthcoming 2023) (manuscript at 38–46), https://ssrn.com/abstract=4374259 [https://perma.cc/UTG8-BYA7].

The states' actions transformed the Removal debates into a constitutional crisis over dueling sovereignties.[124] President Jackson stood behind the states and disclaimed federal authority, stating that the Native nations either had to remove west or submit to state law.[125] Debates in Congress on the Indian Removal Act raged over whether the states had the power to pass the extension acts.[126] And Native peoples wrote letters, submitted petitions, and pursued litigation to make their own constitutional arguments.[127] Ultimately, the Removal debates boiled down to two constitutional questions: Which level of American government had the authority to manage Indian affairs? And did the Constitution recognize and protect Native sovereignty? As discussed in the next Part, the southern states felt that they had clear answers to these questions.

II. CONSTRUCTING THE STATE SUPREMACY ARGUMENTS

The conflict over Removal initiated a new stage in the legal and constitutional debates over Indian affairs authority and tribal sovereignty. Although various states had long deployed justifications for their attempts to assert jurisdiction over Native peoples,[128] the Removal Era witnessed the creation and consolidation of arguments for the principle of state supremacy. Because the southern state governments had taken the unprecedented step of enacting state law extension acts, southern politicians and state legislatures needed to justify their actions. Thus, they wove together a creative—and incorrect—interpretation of the law of nations, the Constitution, British and American policies, and numerous treaties and compacts to construct the *theory of state supremacy*. This theory claimed that state territorial jurisdiction was absolute, tribal sovereignty was nonexistent, and federal power was a limited yet valuable asset for upholding state authority against internal threats, namely tribal power.

It was this theory of state supremacy that led to the creation of the field now known as federal Indian law. Native peoples and their allies responded to the states' justifications and extension acts with their own legal arguments. And their challenges to the state laws, specifically challenges by the Cherokee Nation and Euro-American missionaries, resulted in the Cherokee cases, now known as the foundational Indian law

---

124. See Ablavsky & Allread, supra note 89, at 286–89 (describing divergent constitutional interpretations regarding sovereignty and federalism by Native peoples and their Jacksonian opponents).

125. Andrew Jackson, Message From the President of the United States, S. Doc. No. 21-1, at 19–22 (1830).

126. See 6 Reg. Deb. 309–20, 325–29, 344–57 (1830) (recounting congressional speeches that discussed the southern state law extension acts).

127. Ablavsky & Allread, supra note 89, at 288, 291–99.

128. See Ablavsky, Indian Commerce Clause, supra note 58, at 1045–50 (analyzing state sovereignty arguments used to justify state jurisdiction over Native peoples in the early Founding period).

cases.[129] In *Cherokee Nation v. Georgia*[130] and *Worcester v. Georgia*,[131] the Supreme Court distilled the principles that supported the existence of tribal sovereignty, asserted federal Indian affairs authority, and rejected any notion of state supremacy with regard to Native nations and peoples.[132]

This Part draws from state legislative committee reports, an 1827 report authored by three U.S. senators from the South, and the statements of the Jackson Administration to uncover the state supremacy arguments advanced by southern states in the Removal Era.[133] These sources represent the first instances in which state and federal officials laid out a comprehensive case for state jurisdiction over Native peoples and lands within their borders. These officials were the architects of the state law extension acts and federal Removal policy, so looking to their words elucidates the legal interpretations that justified their actions. Also, the Cherokee cases hold the distinction of being significant Supreme Court cases in which the respondent—the State of Georgia—refused to participate, leaving no briefs or oral arguments to analyze.[134] Although many legal scholars have analyzed the Cherokee cases, none have relied on these sources—the actual documents that state officials produced to lay out their arguments for state supremacy.[135] Therefore, to fully excavate the origins of federal Indian law and its ties to the theory of state supremacy, this Part traces the development of the state supremacy arguments utilized in these reports to justify the states' theory. It describes the legal bases southern politicians claimed for their actions, the rhetorical themes they

129. For an in-depth study of these cases, see generally Norgren, supra note 38.

130. 30 U.S. (5 Pet.) 1 (1831).

131. 31 U.S. (6 Pet.) 515 (1832).

132. See infra notes 223–248 and accompanying text.

133. The report authored by the U.S. senators was the product of a conspiracy among southern representatives and senators in the winter of 1826 to 1827 to generate ideas for states to seize Native lands. Saunt, supra note 3, at 37–41. A subcommittee composed of Senators John McKinley of Alabama, Thomas Buck Reed of Mississippi, and Thomas Cobb of Georgia wrote the report, advocating for the use of state law extension acts. The Report, supra note 28, at 2–3. The report also provided a detailed justification for these acts based on state sovereignty principles. Id. Although the committee disbanded, the report was published in the *Southern Recorder* newspaper, which was based in Georgia's then-capital, Milledgeville, and likely spread throughout the South from there. Id. at 2.

134. See Garrison, supra note 27, at 129–30, 176 (noting Georgia officials' refusal to appear before the Supreme Court in both *Cherokee Nation* and *Worcester*).

135. For these works, see supra notes 38–39. Up to this point, Tim Alan Garrison has provided the most detailed study of the southern state supremacy arguments during the Removal Era, but he draws them from three southern state supreme court cases that upheld the state law extension acts and largely repeated the same arguments that state legislators had made years earlier. Garrison, supra note 27, at 5–11. This focus on state supreme courts misses the state legislatures' contemporary role as the recognized "organ of . . . State Sovereignty," H.R. Journal, 8th Sess., at 184 (Ala. 1827), and as the originators of a comprehensive legal theory whose tenets would continue to impact federal Indian law doctrine.

employed, and the Supreme Court's rejection of all these aspects of state supremacy in *Worcester v. Georgia*.[136]

A. *Legal Bases*

At its core, the state supremacy theory was a legal case for state power. This section details the various legal justifications—interpretations of the law of nations, the Constitution, and concepts of territorial sovereignty—that southern politicians deployed to construct their theory.

1. *The Law of Nations.* — Even though the law of nations may seem like a strange starting point for states in the wake of the ratification of the Constitution, it was here that southern officials believed they had the strongest support for territorial supremacy over Native nations.[137] And southerners bolstered their case by relying on the eighteenth-century Swiss jurist Emer de Vattel's treatise *The Law of Nations*, the canonical book on international law during the early republic.[138]

In brief, southern officials' interpretation of the law of nations went like this: First, states, as the successors to a "discovering" nation, possessed the right to exercise absolute dominion over their territory and the people residing thereon.[139] According to their reading of Vattel, nations that discovered North America possessed the right to "possess, occupy and colonize" the continent.[140] Settlement on lands bestowed "absolute sovereignty," which contained the rights of "domain" and "empire," over territory to the discovering nation.[141] In the case of the United States, the discovery of the east coast of North America vested sovereignty in Great Britain, which passed it to the states—specifically "the people of each State within its own limits"—after the Revolution.[142] Even though the people "surrendered a portion of their right of empire or sovereign command" to the federal government when the Constitution was adopted, the states retained the remaining portions of these rights.[143] Moreover, new states acquired these rights because "the United States transferred to the people

136. 31 U.S. (6 Pet.) 515.

137. The law of nations exerted an immense amount of influence on the legal development of the early republic and the discourses of colonialism used to legally subjugate Native peoples, so it is not strange to find that states relied on it. For a useful list of works discussing the law of nations' use in the early republic, see Gregory Ablavsky, Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795, 106 J. Am. Hist. 591, 591–592 & nn.2–3 (2019).

138. See Garrison, supra note 27, at 69–73 (exploring the manner in which American legal professionals and jurists invoked Vattel's treatise, particularly the false narrative that Native peoples did not cultivate their lands, as a rationale for dispossessing them of their lands); see also Emer de Vattel, The Law of Nations 77 (Béla Kapossy & Richard Whatmore eds., Thomas Nugent trans., Liberty Fund, Inc. 2008) (1758).

139. The Report, supra note 28, at 2.

140. Id.

141. Id.

142. Id.

143. Id.

of such States[] all of 'high domain' and of 'empire,' acquired by cession from the old States."[144] In other words, the United States transferred this sovereignty to new states that were carved out of the former western territories of the original states. Thus, states both old—Georgia—and new—Mississippi, Alabama, and Tennessee—gained title to all of their territory as well as the ability to exercise jurisdiction over it.

Second, the states contended that Indians were not civilized peoples, so Native nations possessed no rights of soil or sovereignty.[145] Rather, these nations only held a usufructuary interest in their lands.[146] According to southerners' interpretation of Vattel, the ability to cultivate and wholly occupy lands determined the rightful owners of a territory.[147] The discoverers of the North American continent found no such peoples with this ability.[148] Instead, the civilized nations could pursue one of two options, depending on the types of aboriginal people they encountered. For "savage" inhabitants who chose "to live by rapine," the discoverers could exterminate them.[149] Alternatively, the civilized nations could confine those "erratic" inhabitants who were not savage but still refused to labor and were unable to occupy the whole territory.[150] Because of these supposed weaknesses, the Indigenous inhabitants possessed no rights that would prevent civilized nations from exercising their right to "possess, occupy and colonize" the continent.[151]

The Alabama legislature thought recognizing tribal sovereignty at the expense of state jurisdiction "would . . . reverse the judgments of all civilized nations, from the first discovery of America."[152] Additionally, the legislature argued that all settlements in the United States and all extensions of sovereignty from these settlements "have been predicated upon the principle that the Indians have only a usufructuary interest in the soil, and that this interest is subservient to the higher rights of civil society."[153] Therefore, the southerners' view of the law of nations supported southern states' annihilation of Native title and appropriation of Native lands for the benefit of white settlers.[154]

---

144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
149. Id.
150. Id.
151. Id.
152. H.R. Journal, 10th Sess., at 222 (Ala. 1829).
153. Id.
154. While representing only one of several perspectives on the law of nations, the southerners' interpretation largely followed the positions that the U.S. Supreme Court had endorsed in the 1823 case of Johnson v. M'Intosh, 21 U.S. (8 Wheat.) 543, 584–85 (1823) ("[E]ither the United States, or the several States, had a clear title to all the lands . . . ,

2. *The U.S. Constitution.* — While the law of nations provided the foundation for state supremacy, the U.S. Constitution, in southerners' eyes, provided further support. Although the document contains no mention of state sovereignty, southern politicians argued that it did not limit fundamental aspects of state sovereignty and that it actually required the federal government to protect state governments.

To support absolute state jurisdiction using the Constitution, southerners argued that there was no provision that granted the federal government either the power to legislate over lands within state limits or authority over Indian affairs. They asserted that the Property Clause[155] did not apply to lands within state borders because the federal government neither could erect a territory within a state's boundaries nor held title to Indian lands within states, since the law of nations granted the right of soil to states.[156] Possessing no territorial jurisdiction over states, the federal government also lacked the authority to control Indian affairs.[157]

Even though the federal government had continually relied on its treatymaking power to enter into agreements with Native nations, the southern states declared that such agreements were not legitimate treaties, unlike those with foreign nations.[158] In the states' view, the treatymaking power could not apply to Native nations because the tribes were not sovereign. According to southern senators, not only did "[s]tates claim and exercise a sovereignty a thousand times greater than can be supposed to exist in any tribe or tribes of Indians within the limits of these states" but also "the idea of making Treaties with them, in the true and legitimate sense of the word, is worse than ridiculous."[159]

The provision of the Constitution that garnered the most attention was the Commerce Clause.[160] Southern politicians creatively interpreted the Constitution to reject Congress's ability to regulate Indian affairs via the Commerce Clause. The southern U.S. senators claimed

---

subject only to the Indian right of occupancy, and . . . the exclusive power to extinguish that right, was vested in that government which might constitutionally exercise it.").

155. U.S. Const. art. IV, § 3, cl. 2.

156. See Resolution of Dec. 27, 1827, 1827 Ga. Laws 236, 244 ("[N]othing in this part of . . . the Constitution *expressly* or *impliedly* divest[ed] Georgia of the right of sovereignty . . . , and from the very fact, that no such right was surrendered [to] . . . the United States, we are warranted in asserting that the right was *retained* by the State."); H.R. Journal, 20th Sess., at 44 (Tenn. 1833) (finding that "[t]he power to dispose of, and make needful rules and regulations respecting the property of the United States, and the power to exercise general jurisdiction over persons upon it, are essentially different and independent").

157. See Tenn. H.R. Journal, 20th Sess., at 44 ("[The Property Clause] refers to territorial rights. To the power to control and regulate these, and not to the exercise of jurisdiction over Indians, living within the country claimed by them.").

158. See The Report, supra note 28, at 3 (suggesting that treaties between Native Americans and the federal government are mere agreements and therefore unenforceable).

159. Id.

160. U.S. Const. art. I, § 8, cl. 3.

that the Commerce Clause only concerned "the establishing of rules, according to which the traffic of equivalent values should be prosecuted."[161] The Tennessee legislature agreed, explaining that the provision "is a power to regulate commerce, and not to exercise jurisdiction."[162] If Congress possessed jurisdiction over Native nations based on its commerce power, then it also had jurisdiction over foreign nations.[163] If not, "entirely different meanings are to be given to the same words in the same sentence," an absurdity in legal interpretation.[164] Moreover, southern states revealed their underlying fears of a broader interpretation of the Commerce Clause. The senators believed that the federal government, in exercising jurisdiction over Native peoples, would transform them from tribal members to citizens of the United States.[165] If the federal government possessed the power under the Commerce Clause to admit Native peoples to the privileges of citizenship, the senators feared it could also do so for Black people, stripping states of their ability to police citizenship rights and maintain slavery.[166] Because such an interference with state powers was unthinkable to them, southern states declared the commerce power limited in scope.

In contrast to their rejection of the provision of any Indian affairs powers in the Constitution, the southerners found several clauses that allegedly required the federal government to protect them from internal threats. The New State Clause[167] was one of these provisions. Echoing southern states' arguments about territorial jurisdiction and the impossibility of imperium in imperio—a government within a government—President Andrew Jackson explicitly asserted that the New State Clause, which forbade the creation of a new state within the territory of an existing one without its consent, bound his hands.[168] According to Jackson, the clause prevented him from interfering with legitimate state laws on behalf of Native peoples.[169] And the clause prohibited the erection of tribal governments within states' limits.[170] Jackson argued that if the Constitution prohibited the creation of a new state within the territory of an established state against its consent, "much less

161. The Report, supra note 28, at 2. For an in-depth analysis of the original meaning of the Indian Commerce Clause, see Ablavsky, Indian Commerce Clause, supra note 58, at 1023–52.

162. Tenn. H.R. Journal, 20th Sess., at 44.

163. Id.

164. Id.

165. The Report, supra note 28, at 3.

166. Id.

167. U.S. Const. art. IV, § 3, cl. 1.

168. Andrew Jackson, Message From the President of the United States, H.R. Doc. No. 21-2, at 15–16 (1829).

169. Id.

170. Id.

could it allow a foreign and independent government to establish itself there."[171]

Additionally, southern state legislatures invoked Article IV, Section 4 of the Constitution, which authorized the federal government to protect states against "domestic violence."[172] The Alabama legislature framed the situation it faced as a dire threat, stating that the erection of the Cherokee Nation government was "calculated . . . to increase the dangers of domestic insurrection."[173] Even in suggesting that southern states adopt extension acts, the U.S. senators argued that any resistance by Native peoples against the exercise of state jurisdiction "would be such an insurrection as, under the Constitution, the U. States would be bound to repress."[174] Thus, southern states believed themselves constitutionally able to rely on the federal government for the elimination of threats to their sovereignty.

3. *The Equal Footing Doctrine.* — The southern states also relied on the Equal Footing Doctrine—the principle that all states entered the Union with the same rights—to support their theory of state sovereignty. Although not enshrined in the Constitution, the Equal Footing Doctrine had achieved constitutional significance by the 1820s.[175] Initially included in the Northwest Ordinance,[176] "equal footing" language was present in the Compact of 1802[177] for any states that would be carved out of Georgia's western land cessions as well as in the admission acts of Tennessee,[178] Mississippi,[179] and Alabama.[180]

Southern states latched onto this language. They asserted that they not only received the same rights of territorial jurisdiction granted to original states through the law of nations but also possessed the same

---

171. Id. at 15.

172. U.S. Const. art. IV, § 4.

173. H.R. Journal, 10th Sess., at 220 (Ala. 1829).

174. The Report, supra note 28, at 3.

175. See Valerie J.M. Brader, Congress' Pet: Why the Clean Air Act's Favoritism of California Is Unconstitutional Under the Equal Footing Doctrine, 13 Hastings W.-Nw. J. Env't L. & Pol'y 119, 133–36 (2007) (summarizing the early statutory history of the Equal Footing Doctrine); see also Ablavsky, Federal Ground, supra note 36, at 201–06 (discussing Tennessee's rejection of federal authority over public lands and Indian affairs shortly after statehood using "equal footing" arguments).

176. See An Ordinance for the Government of the Territory of the United States North West of the River Ohio (1787), reprinted in 32 Journals of the Continental Congress 1774–1789, at 314, 317–20 (1936) (explaining that the Northwest territories shall be admitted on "equal footing" to older states); see also Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 50–51 (conforming the Northwest Ordinance to the Constitution).

177. See Compact of 1802, supra note 95, at 504 ("That the Territory thus ceded, shall form a State . . . with the same privileges, and in the same manner as is provided in the Ordinance of Congress of the thirteenth day of July [1787] . . . .").

178. Act of June 1, 1796, ch. 47, 1 Stat. 491, 491.

179. Act of Mar. 1, 1817, ch. 23, § 1, 3 Stat. 348, 348.

180. Act of Mar. 2, 1819, ch. 47, § 1, 3 Stat. 489, 490.

power to pass legislation concerning Native peoples.[181] As the Alabama legislature pointed out, "[M]ost of the states have, at some time or other, either exercised the power in question, or the still stronger power of forcibly expelling the Indians from their limits . . . ."[182] If Alabama did not possess the power to extend her jurisdiction over Native peoples within her borders, "a power which has been so frequently exercised by other states," then "her sovereignty is not at a footing with the older states."[183] President Jackson echoed these sentiments, contending that because Congress admitted Alabama on the same footing as the original states, the state had the same power over Native peoples as other states—such as Maine and New York—that had long exercised authority over some of their Indigenous inhabitants.[184] Because these states would not support the erection of tribal governments within their borders, the Equal Footing Doctrine allowed Alabama to oppose the same.[185]

4. *Territorial Sovereignty.* — The southern theory of state supremacy relied heavily on the concept of territorial jurisdiction, an idea states had only begun to pursue. In the late eighteenth and early nineteenth centuries, understandings of the nature of jurisdiction were in flux.[186] Although southern states claimed extensive territories, they only sought to exercise jurisdiction over certain races—white and Black—within actual Euro-American settlements.[187] The presence of Native nations within states' claimed territory, paired with states' constrained institutional capacity—their inability to control inferior courts and local law enforcement—discouraged notions of full territorial jurisdiction.[188] As these states sought to fully incorporate their claimed territory and increase the amount of land available for settlement and cotton production,

---

181. See The Report, supra note 28, at 3 ("[T]he Federal government has not acquired the *exclusive* right . . . to extinguish the Indian title, or to extend the operation of the municipal laws of any State over the persons of the Indians . . . . [T]hey are *retained* by [the States], and may be exercised at discretion.").

182. H.R. Journal, 10th Sess., at 221 (Ala. 1829).

183. Id.

184. Andrew Jackson, Message From the President of the United States, H.R. Doc. No. 21-2, at 15–16 (1829) ("There is no constitutional, conventional, or legal provision, which allows them less power over the Indians within their borders, than is possessed by Maine and New York."). Although New York and Maine claimed jurisdiction over Native peoples, the exercise of this jurisdiction was both haphazard and strongly contested by Native peoples. For the history of New York's attempts to subject Native peoples to state law in the early nineteenth century, see Rosen, supra note 36, at 23–38.

185. Id.

186. See Ford, supra note 12, at 4 (emphasizing how "settler polities redefined sovereignty at the same time as it was recast in other centers, peripheries, and places in between" in the early nineteenth century).

187. See id. at 30–42, 108–20 (demonstrating how, prior to the 1820s, Georgia settlers refused to prosecute crimes that either involved Native peoples or occurred beyond the boundaries of Euro-American settlements in Indian Country).

188. See id. (analyzing early nineteenth-century instances in which localism prevented Georgia's exercise of state criminal jurisdiction over Native peoples).

however, they transitioned to a territorial basis for jurisdiction.[189] This territorial focus allowed states to not only exercise their authority over profitable lands but also claim the right to appropriate Native lands within their borders.[190]

Southern states' notion of territorial sovereignty contained several premises. First, states argued that they possessed the ability to exercise jurisdiction over all the territory within their boundaries.[191] This right derived from states holding ultimate title to all of their land claims, including lands on which Native nations resided.[192] As the Georgia Senate explained in 1831, no one could deny the state's right to place conditions upon a person residing in the statehouse square in the capital of Milledgeville.[193] Similarly, the state had the power to prescribe conditions on white people seeking to reside in Cherokee territory, as it did in one of its extension acts, because "[s]o far as all the world . . . is concerned, there is no difference between the title, which the State has to her state-house square, and her title to the Cherokee lands."[194] If states could not exercise their jurisdiction coextensive with their limits—a problem created by the recognition of tribal sovereignty—then, according to legislators, states were not truly sovereign.[195]

Because states based their jurisdiction on territory, southern legislators asserted that they possessed the right to legislate for all peoples residing in the state's territory. Alabama legislators stated, "General laws are made for a particular section of country, and they operate with equal force upon every variety of the human species, whatever may be the characteristic differences of complexion, or language . . . ."[196] Therefore, a Turk living in Alabama would be subject to state authority as much as a native-born Alabamian.[197] According to the southern states, because

189. See id. at 133 (observing that because of the demand for land in the wake of the Red Stick War, "Georgia's executive, its legislature, and a goodly portion of its citizens set their hopes on indigenous removal and with it perfect settler sovereignty").

190. See id. at 130 ("State representatives mobilized old common-law doctrines of discovery and conquest not only to divest indigenous people of land but also to defend a thoroughly new understanding of settler statehood.").

191. See, e.g., H.R. Journal, 10th Sess., at 220 (Ala. 1829) ("Upon general principles, [the committee] hold[s] it unquestionable, that all sovereign states have a right of jurisdiction over their entire charged limits and that this right does not depend on the class of subjects upon which it operated.").

192. See supra text accompanying notes 139–154.

193. Resolution of Dec. 26, 1831, 1831 Ga. Laws 266, 272.

194. Id.

195. See, e.g., H.R. Journal, 12th Sess., at 93 (Ala. 1831) ("Can [Alabama] be considered sovereign when the operation of her laws although she wills it otherwise, is confined to particular districts and sections of the State?").

196. Ala. H.R. Journal, 10th Sess., at 220.

197. See id. ("A Turk resident in any part of Alabama, would be as much under the jurisdiction of the state as a native born citizen."). The Georgia legislature echoed the same sentiments: "Georgia has the right to extend her authority and laws over her whole territory, and to coerce obedience to them from all descriptions of people, be them white, red or

people who resided on Native lands lived on territory within state borders, the states' laws should apply to them.

The final premise of this notion of territorial sovereignty was that only one sovereign could exist within a territory. Southern states resurrected the idea that an imperium in imperio was untenable. States conveniently ignored the fact the Constitution created a system of federalism—a system premised on governments existing within a government—when facing the rise of tribal governments within their borders.[198] After the Cherokee Nation wrote its first constitution, the Alabama legislature responded, arguing that either the Cherokee Nation or Alabama would need to give up its "pretensions to govern."[199] If not, the two governments would "exhibit to the world the novel spectacle of two sovereigns, no way dependent upon each other, making laws for the government of the same people at the same time."[200] Because this situation presented "a state of things that never has or can exist,"[201] the Alabama legislature contended that the Cherokee Nation no longer possessed its sovereignty and, therefore, no longer had the authority to govern.[202] Only one sovereign could exist within a territory; for the southern states, that sovereign would be them.

B. *Rhetorical Themes: Development, Criminality, and Humanitarianism*

Beyond legal and constitutional justifications to extend state jurisdiction, southern states also used particular forms of rhetoric to develop the state supremacy theory. Specifically, southern politicians expressed concerns about both internal affairs and the well-being of Native peoples to explicate the political, economic, and moral dimensions of their legal actions.

One of these concerns related to internal development, specifically the obstacle that Native nations presented to the construction of infrastructure as well as to white settlement. Alabama blamed the Cherokee Nation for its undeveloped state, arguing that the Cherokee constitutional government intended "to retard the progress of the internal improvements; and to exclude, from citizenship that valuable portion of emigrants which would otherwise seek among us their permanent houses, and contribute essentially to the wealth and prosperity of the state."[203] Mississippi Governor Gerard Brandon expressed the same concerns,

---

black, who may reside within her limits." Resolution of Dec. 27, 1827, 1827 Ga. Laws 236, 249.

198. For an in-depth discussion of the concept of imperium in imperio and its effects on American constitutional thought, see Alison L. LaCroix, The Ideological Origins of American Federalism 13–15, 132–35, 201 (2010) [hereinafter LaCroix, Ideological Origins].

199. Ala. H.R. Journal, 12th Sess., at 93.

200. Id.

201. Id.

202. Id. at 93–95.

203. H.R. Journal, 10th Sess., at 220 (Ala. 1829).

stating that "the prosperity of the state is greatly retarded by a large portion of the most fertile and desirable part of our country still remaining in the possession of savage tribes of Indians."[204] In politicians' eyes, if Alabama and Mississippi failed to extend their laws over Native nations and assert their rights to appropriate lands for infrastructure and white settlement, their states would remain backwaters.

Another southern state concern was the supposed prevalence of crime in Indian territory. States contended that Native nations provided a haven for criminal activity since they were beyond the states' jurisdiction, leaving the states' citizens to suffer. Acting Governor Sam Moore of Alabama claimed that the state's "citizens residing near the borders of those unceded lands, are frequently interrupted in their rights of person and property, by lawless persons, who elude to the pursuit of justice, by being beyond the jurisdiction of our courts."[205] Tennessee feared that in failing to extend its criminal jurisdiction over Cherokee territory, it would "proclaim to all the lovers of disorder and misrule, that an asylum was provided for them, within the jurisdictional limits of one of the sovereign states of the Union."[206] While these statements implied that Native nations were incapable of enforcing criminal laws, Georgia took this line of argument a step further by explaining that it extended its criminal laws for the benefit of Native peoples as well.[207] The legislature contended that the discovery of gold in the Cherokee Nation "had brought into the territory, a numerous body of men, lawless, abandoned, and hostile to the policy of the State."[208] Therefore, the extension act "was necessary to the protection of the persons and property of the Indians from the violence, the intrigues, and the corruptions of the whites."[209] According to these statements, southern states perceived themselves to be fulfilling their responsibilities as sovereigns by using their laws to root out crime.

As seen in Georgia's explanation, southern states claimed that their actions drew from humanitarian concerns for Native peoples. First, despite the economic and political prosperity that Native nations were experiencing, southern states argued that Native peoples remained savage peoples on the brink of extinction due to their proximity to white people.[210] The Georgia legislature pushed for removal because "the association of the white man with the red has generally, if not

204. H.R. Journal, 12th Sess., at 12–13 (Miss. 1829).

205. H.R. Journal, 13th Sess., at 16 (Ala. 1832).

206. H.R. Journal, 20th Sess., at 42 (Tenn. 1833).

207. Resolution of Dec. 26, 1831, 1831 Ga. Laws 266, 268–70.

208. Id.

209. Id. at 269.

210. For an extended discussion of this argument from the period, see generally Lewis Cass, Review of Documents and Proceedings Relating to the Formation and Progress of a Board in the City of New York, for the Emigration, Preservation, and Improvement of the Aborigines of America, 30 N. Am. Rev. 62 (1830).

uniformly, proved injurious to both."[211] Removal would place Native peoples "beyond the operation of those causes which evidently tend to retard their improvement."[212] Alabama stated that if Indians were not removed, they would "dwindle out a miserable existence in peril of starvation and of violence."[213]

Second, southern states contended that Native peoples required protection from oppressive tribal elites. State legislators latched onto the idea that tribal leaders were the ones who refused to remove and who prevented other tribal members from emigrating. In reference to the Cherokee government prescribing punishments for any tribal member who attempted to sell Cherokee land and emigrate west, the Tennessee legislature asserted that by enacting these penalties, "the artful 'chief' of an ignorant band maintains his usurpations against the benevolent persuasions of the General Government, and against the best *interest* of the deluded Indian."[214] Rather than ignoring the wishes of the Native nation, Tennessee framed the exercise of its jurisdiction as an attempt to aid those Native peoples who were "held in abject and servile control, by a few cunning and artful men."[215] Since many of these tribal leaders were biracial, the states believed that they were not fully Indian and that they lacked legitimacy to speak for the nations.[216] Thus, southern states would save Native peoples, through either state law or forced removal.

A final concern for southern state governments was the rights of their white citizens. Although the states' references to settlement and criminal law were already racialized, some state legislatures specifically invoked the rights of white people in arguing for the extension of state law. In particular, the Tennessee legislature appealed to this concept while calling out its opponents' concerns for Native rights.[217] Legislators asked, "Whilst sympathising for acts of pretended violence, perpetrated on the 'Indian,' shall it be forgotten that the 'white man' too has some rights?"[218] The legislature expressed its frustration that the state's white citizens should be subjected to crime and uncertainty "to gratify the insatiate avarice and ambition of a few lawless 'chiefs' tyrannizing over an ignorant horde."[219] In referring to the rights of white people, states confirmed

211. Resolution of Dec. 18, 1829, 1829 Ga. Laws 267, 268.

212. Id. at 270.

213. Joint Memorial to the President and Senate of the United States of Jan. 9, 1836, 1835–1836 Ala. Laws 175, 176.

214. H.R. Journal, 20th Sess., at 41 (Tenn. 1833).

215. Id.

216. For discussion of the mixed-race status of many southern Native leaders in the early nineteenth century, see generally Theda Perdue, "Mixed Blood" Indians: Racial Construction in the Early South (2003).

217. See Tenn. H.R. Journal, 20th Sess., at 41.

218. Id.

219. Id.

that their theory of state supremacy was a racialized one tied to the interests of their white citizens.

C. *Rejecting the Pretenses of State Supremacy:* Worcester v. Georgia

The southern states wove together threads from various sources to construct a robust theory of state supremacy—a theory that advanced legal, constitutional, and political arguments. But the reality was that the states' tapestry of supremacy was poorly made and highly contested. Southern legislators' interpretations were not only constitutionally and legally suspect but also at odds with history and fact.

Contemporaries—including Native peoples, their Euro-American allies, and several Supreme Court Justices—recognized these faults. Because President Andrew Jackson had supported the southern states in demanding that the Five Tribes either submit to state law or emigrate west,[220] and Congress had endorsed this position with the passage of the Indian Removal Act,[221] the Cherokee Nation turned to the judicial branch to vindicate their arguments that the state law extension acts were unconstitutional.[222] The first case to appear before the Supreme Court, *Cherokee Nation v. Georgia*, never reached the merits. The Court, in an opinion by Chief Justice John Marshall, held that it did not have original jurisdiction to hear the Cherokee's case, labeling Native nations as "domestic dependent nations," not foreign ones.[223]

But the Supreme Court eventually rejected the southern states' theory. In the 1832 case *Worcester v. Georgia*, the Court, again speaking through Marshall, invalidated Georgia's state law extension acts targeting the Cherokee.[224] The Court held that the state's laws interfered with the Constitution's commitment of Indian affairs to the federal government, with treaties between the United States and the Cherokee Nation, and with acts of Congress that regulated intercourse with Native peoples.[225] In constructing this holding, Marshall undermined the theory of state supremacy's foundational premises while adopting concepts of sovereignty, federalism, and Indian affairs

---

220. Andrew Jackson, Message From the President of the United States, H.R. Doc. No. 21-2, at 15–16 (1829) (expressing Jackson's view that state law applied to Native peoples within state borders, so Native peoples would have to remove west to continue adhering to their own laws).

221. See Saunt, supra note 3, at 68–76 (describing how the House and Senate debated and voted on the Indian Removal Act).

222. Scholars have described the Cherokee's litigation campaign in great detail. See generally Garrison, supra note 27; LaCroix, The Interbellum Constitution Manuscript, supra note 40; Norgren, supra note 38.

223. Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831).

224. 31 U.S. (6 Pet.) 515, 562 (1832).

225. Id. at 561–62.

authority that aligned with original understandings of the Constitution and the historical development of the United States.[226]

First off, southern states' commitment to absolute territorial sovereignty denied the reality of federalism and the states' own admission into the Union. The Constitution explicitly approved of an imperium in imperio, providing that the states would be governments within a government—that of the United States.[227] Also, the southern states' refusal to recognize the power of any other sovereign within their borders ignored the powers that the Constitution granted to the federal government, powers that acted upon individuals and entities within state borders.[228] Furthermore, the Property Clause's acknowledgement that the federal government possessed lands within states and the power to legislate regarding those lands undermined southerners' claims that states held title to all lands within their borders, an essential premise of the territorial jurisdiction for which they argued.[229]

In addition to being at odds with the Constitution's text and structure, southern states' notion of territorial supremacy disregarded the fact that they all had joined the Union with substantial amounts of their territory still in Indian hands.[230] Thus, Congress had knowingly granted sovereign status to territories that it admitted as states despite the fact that certain lands and peoples within those states were subject to another sovereign. In *Worcester*, Marshall clarified that such an arrangement was historically accurate because Native nations had always been considered independent polities separate from any state, even if the nation resided within a state's limits.[231] He also held that a territory divided between two sovereigns was still legally tenable, declaring that the Cherokee Nation was "a distinct community occupying its own territory, with boundaries accurately described, in which the laws of Georgia can have no force."[232]

---

226. Marshall's *Worcester* opinion also aligned with southern Native nations' understandings of the U.S. Constitution. During the Removal debates, these nations argued that the Constitution assigned exclusive Indian affairs authority to the federal government, recognized the supremacy of treaties, and supported Native nations' status as separate sovereigns. Ablavsky & Allread, supra note 89, at 289–96.

227. See LaCroix, Ideological Origins, supra note 198, at 172–74 ("[T]he Supremacy Clause signaled that multiplicity had become the defining concept of the new republic, a new normative vision distinct from past Anglo-American practice and ideology.").

228. See U.S. Const. art. I, § 8 (granting Congress the power to tax, regulate certain commercial entities, naturalize individuals, and establish post offices and roads within states).

229. The Property Clause says that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." Id. art. IV, § 3, cl. 2.

230. See Saunt, supra note 3, at 37–38 (describing the vast lands Native peoples held in Alabama, Mississippi, and Georgia).

231. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 559–60 (1832) (affirming Native nations' sovereignty irrespective of state borders).

232. Id. at 561.

Moreover, southerners' interpretation of Vattel and the law of nations was incorrect. As Marshall pointed out, the law of nations did not grant the right of soil, and thereby title, to the discovering nation.[233] Rather, discovery gave the nation "the sole right of acquiring the soil and of making settlements on it."[234] Only the discovering nation possessed the ability to purchase lands from the aboriginal occupants; otherwise, Native peoples maintained their ownership of the land.[235] Additionally, Marshall spurned southern officials' contentions that the ability to purchase Native lands passed from Great Britain, the discovering nation, to the states themselves after the Revolution. The *Worcester* opinion stated that the United States now held this right. It was a "universal conviction that the Indian nations possessed a full right to the lands they occupied, until that right should be extinguished by the United States, with their consent."[236]

Most glaringly, the southern theory of state supremacy contradicted both the plain meaning and the original understanding of the Constitution. When considering the text of the Constitution and historical practice since the Founding, southern states' arguments that the federal government did not possess the power to treat with Native nations within state borders fell flat. While politicians in the 1820s and 1830s clamored that Native nations were not sovereign and could not enter into treaties, the Washington Administration and the First Congress had recognized these nations as sovereigns and had pursued diplomatic relations with them.[237] In *Worcester*, Marshall reinforced the historical and constitutional practice of treatymaking with tribes. He pointed out that the United States had used numerous treaties, including one with the Delaware in 1778 and one with the Cherokee in 1785, to establish relationships with Native nations before the Constitution was ratified.[238] His opinion also affirmed that the ratification of the Constitution, with its Supremacy Clause, had transformed all of the Native treaties made before and after 1788 into the supreme law of the land.[239] Thus, the southern state legislatures defied not only fifty years of uninterrupted practice but also constitutional doctrine in passing their state law extension acts.

Southerners' fixation on the Commerce Clause also committed two errors: first, treating the clause as if it could be the sole source of Indian affairs power, and second, conflating authority over Indian affairs with jurisdiction over Native peoples. Although the Commerce Clause had

233. Id. at 545.

234. Id. at 544.

235. Id. at 544–45.

236. Id. at 560.

237. See Calloway, The Indian World of George Washington, supra note 88, at 357–60 (discussing the First Congress's funding of treaty commissioners and President Washington's efforts at treatymaking); Ablavsky, Indian Commerce Clause, supra note 58, at 1041–43 (describing the Washington Administration's Indian affairs policy).

238. *Worcester*, 31 U.S. (6 Pet.) at 549–51.

239. Id. at 559–60.

always been an essential part of the federal government's authority over Indian affairs, the Washington Administration had viewed it as only one piece of an array of Indian affairs powers, alongside the treatymaking power and the war powers.[240] Chief Justice Marshall placed the Court's imprimatur on this view forty years later. He stated that under the Constitution, Congress possessed the power to declare war, make treaties, and regulate commerce with Indian tribes, thereby claiming full and exclusive jurisdiction over Indian affairs for the federal government.[241] Marshall wrote, "These powers comprehend all that is required for the regulation of our intercourse with the Indians."[242] This statement also pointed out that authority over Indian affairs did not translate into jurisdiction over Native nations and peoples. As Marshall put it, Native nations were "distinct, independent political communities";[243] even though they had come under the protection of the United States, the nations still possessed their "right of self government."[244] With the Native nations existing as sovereign states, the federal government possessed the ability to legislate only on intercourse between itself and the nations, not over the nations and peoples themselves.[245]

The remaining constitutional clauses and doctrines the southern states invoked did not support their cause either. The New State Clause applied only to states wishing to be admitted into the Union, not Native nations that existed outside the United States' constitutional structure.[246] Further, the Constitutional Convention had explicitly rejected proposals for broad federal protection of state territorial jurisdiction in the Clause, desires that southern officials had projected onto it once again.[247] Additionally, the Equal Footing Doctrine did not address the fact that the Constitution committed authority over Indian affairs, including relations with Native nations and Native peoples within state borders, to the federal government.[248] Therefore, despite the states' status as constitutional sovereigns, there existed no provision in the Constitution that delineated

240. Ablavsky, Indian Commerce Clause, supra note 58, at 1041–43.

241. *Worcester*, 31 U.S. (6 Pet.) at 559.

242. Id.

243. Id.

244. Id. at 561.

245. Id.

246. See Ablavsky, Empire States, supra note 36, at 1839–41 (describing how the debates regarding the New State Clause focused on states entering the Union).

247. See id. at 1835–47 (discussing rejected language that would have provided constitutional support for state territorial jurisdiction).

248. The first U.S. Supreme Court case to consider the Equal Footing Doctrine, Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845), would not be decided until 1845. However, in *Pollard's Lessee*, the Court stated that while new states "succeeded to all the rights of sovereignty, jurisdiction, and eminent domain" that the original states possessed, the states' authority was "subject to the rights surrendered by the Constitution to the United States." Id. at 223, 229.

the bounds of state sovereignty or guaranteed absolute territorial jurisdiction to the states.

Although southern politicians' creative interpretations of numerous sources had gained support from the executive and legislative branches of the federal government, the Supreme Court demolished the legal underpinnings of state supremacy. The *Worcester* decision demonstrated that the elaborate theory southerners had constructed for upholding state supremacy and delegitimizing tribal sovereigns was constitutionally and historically baseless.

* * *

Despite its status as a legal victory for Native sovereignty, *Worcester* failed to stop the removal of the Five Tribes. For the Chickasaw and Choctaw Nations, the decision came too late.[249] The Cherokee, Muscogee, and Seminole Nations attempted to hold out, but the avarice of white settlers and the application of military force eventually overcame Native opposition.[250] By the early 1840s, the federal government had removed the Five Tribes to Indian Territory, and thousands of Native lives had been lost en route on the Trail of Tears.[251] Although *Worcester* delivered a blow to the legal premises of the state law extension acts, southern states' desires were ultimately vindicated with Removal.

The effects of the Removal Era, however, were not limited to the violent and destructive deportation of Native nations from the South. The Removal Era also constituted a significant moment in the constitutional history of the United States.[252] The debates in this period provided the foundation of federal Indian law, with its overarching principles of federal authority over Indian affairs and tribal sovereignty.[253] But the debates also formed a theory of state supremacy. And even though the Supreme Court quickly rejected this theory, its legacy would haunt federal Indian law for the next two centuries.[254]

---

249. See Saunt, supra note 3, at 87–90, 109 (describing the lead-up to the removal, through coerced treaties, of the Chickasaw and Choctaw Nations).

250. See id. at 238, 247–54, 268–71, 275–81, 300 (describing the violent lead-up to the forced removal of the Cherokee, Muscogee, and Seminole Nations).

251. On the death tolls on the Trail of Tears, see Ostler, supra note 25, at 256, 263, 273–74, 286.

252. See Ablavsky & Allread, supra note 89, at 286–89 (highlighting how the Removal Era featured "debates . . . about many constitutional questions").

253. See id. at 295–96 (describing how, during this period, "the U.S. legal system grappled with Native understandings of sovereignty and federal supremacy, ultimately enshrining their arguments into U.S. constitutional jurisprudence").

254. Although this Article exclusively reviews U.S. Supreme Court cases to trace the impact of the state supremacy theory on federal Indian law doctrine, it should be recognized that during the nineteenth century, the state supremacy theory had the most impact in state supreme courts. Beginning with Georgia, Alabama, and Tennessee during the Removal Era, the theory spread to other state supreme courts as they sought to justify state jurisdiction over Native peoples. See Garrison, supra note 27, at 8–9 (discussing justifications offered by

III. THE PERSISTENCE OF THE STATE SUPREMACY ARGUMENTS

Worcester was nowhere near the final word on the principle of state supremacy in federal Indian law. Over the next two centuries, as Euro-American settlement proceeded across the continent, federal Indian policy vacillated dramatically from Native peoples' expulsion to their assimilation and finally to tribal self-determination.[255] And federal Indian law underwent dramatic changes as well, with the Supreme Court continually tinkering with the bounds of federal, state, and tribal power to reflect the government's—and the Justices'—views on the place of Native peoples within the American empire.[256]

Still, the fact that the contest between federal, state, and tribal sovereigns has continually played out within Indian affairs has given the field of federal Indian law more doctrinal coherence than many recognize. Many of the most impactful Indian law cases have continued to revolve around the role of state authority with regard to Native nations, peoples, and territories. And these ongoing disputes over state power in Indian affairs have allowed the Removal-era state supremacy arguments to persist. Despite their rejection at the outset of the field, Justices and state litigants have appropriated these arguments time and time again. And they have done so to achieve the same ends that southern officials sought during Removal: destroying tribal sovereignty and establishing states' right to absolute territorial jurisdiction.

This Part tracks state supremacy arguments' persistence by analyzing language and concepts in Supreme Court cases that either invoked state supremacy or pitted state interests against those of Native nations.[257] It proceeds chronologically, beginning with cases decided in the late nineteenth century that allowed federal and state power to encroach on tribal sovereignty. It then turns to late twentieth-century cases that coincided with changing notions of federalism, specifically the move from exclusively federal or state jurisdictions to concurrent, overlapping authority embodied in the modern law of preemption.[258] It ends with early twenty-first-century cases that have involved the boldest assertions of state supremacy since Removal.

---

state courts to endorse the exercise of state jurisdiction over Indian tribes); see also Rosen, supra note 36, at 46–79 (analyzing post–Removal Era state supreme court cases discussing the issue of state civil and criminal jurisdiction over Native peoples).

255. See infra notes 259–260, 281, and accompanying text.

256. See infra notes 262–308 and accompanying text.

257. This Article does not claim to be comprehensive in its review of Supreme Court cases invoking state supremacy arguments over the course of the almost two centuries since *Worcester*. Rather, this Part focuses on the Indian law cases that relied on state supremacy arguments and characterizations of state interests to announce significant doctrinal principles in the field.

258. See Ablavsky, Too Much History, supra note 20, at 338–39 (describing the simultaneous "change[] in federal Indian law between the late nineteenth and early twentieth centuries" and change in the "law of concurrent jurisdiction").

A. *The Late Nineteenth-Century Cases*

The late nineteenth century witnessed the most destructive period against Native peoples in United States history. As the territory of the United States dramatically expanded, the federal government turned from the expulsion of Native nations through Removal to containment on reservations, using a campaign of land grabs and violence to subdue Native peoples.[259] And with the passage of the General Allotment Act in 1887, the federal government made the breakup of the reservations and the assimilation of Native peoples its overarching goal in Indian affairs.[260] Ultimately, officials hoped that allotment would pave the way for the flurry of new political entities in the West—the federally organized territories and newly admitted states—to assume complete control of the peoples and lands within their borders.[261]

Accompanying this assimilation policy was a series of Indian law cases that bolstered federal and state power at the expense of Native autonomy. In the 1886 case *United States v. Kagama*,[262] the Supreme Court placed its imprimatur on this new order of governance for Indian affairs. In upholding the Major Crimes Act, which gave the federal government criminal jurisdiction over certain crimes committed between Indians,[263] the Court declared that federal power over Indian affairs was not only exclusive but also plenary.[264] Justice Samuel Miller, in delivering the opinion of the Court, rooted this sweeping power in his conception of Native peoples' status, characterizing them as "wards of the nation" who were "*dependent* on the United States."[265] Because of this status, the federal government now had the recognized authority to fully "govern [Native nations] by acts of Congress."[266]

Although *Kagama*'s holding focused on federal power, the case signaled that a new approach to state sovereignty was on the rise at the Court. First, Justice Miller's reasoning revealed that Removal-era notions of state supremacy still brooded under the surface of Indian law doctrine.

---

259. See Francis Paul Prucha, The Great Father: The United States Government and the American Indians 315–409 (1984) (describing the federal government's transition to a reservation system in the mid-nineteenth century).

260. See Frederick E. Hoxie, A Final Promise: The Campaign to Assimilate the Indians, 1880–1920, at 70–78 (Bison Books ed. 2001) [hereinafter Hoxie, A Final Promise] (discussing the policy debates that influenced the passage and content of the General Allotment (Dawes) Act of 1887, ch. 119, 24 Stat. 388).

261. See Paul Frymer, Building an American Empire: The Era of Territorial and Political Expansion 153, 162–65 (2017) (describing how the Dawes Act contributed to the subsequent admission of several western states, particularly Oklahoma).

262. 118 U.S. 375 (1886).

263. Act of Mar. 3, 1885, ch. 341, § 9, 23 Stat. 362, 385 (codified at 18 U.S.C. § 1153 (2018)).

264. See *Kagama*, 118 U.S. at 379–85.

265. Id. at 383–84.

266. Id. at 382.

For example, Miller ignored *Worcester*'s deference for tribal sovereignty, embracing the southern states' binary system. He wrote that "[t]he soil and the people" within the boundaries of the United States were "under the political control of the Government of the United States, or the States of the Union. There exist within the broad domain of sovereignty but these two."[267]

More significantly, *Kagama*'s announcement of plenary power over Indian affairs—while supposedly a power of the federal government—ended up benefiting states as well. As Justice Gorsuch has recognized, *Kagama* "had predictable downstream effects on the relationship between States and Tribes. As Congress assumed new power to intrude on tribal sovereignty, the Constitution's 'concomitant jurisdictional limit on the reach of state law' began to wane."[268] In other words, plenary power bolstered state supremacy at the expense of Native nations.

The cases in which the Court explicitly relied on the Equal Footing Doctrine to value state interests over those of Native nations most clearly expressed this phenomenon. In *United States v. McBratney*[269] and *Draper v. United States*,[270] the Court infringed on federal and tribal jurisdiction by holding that states had criminal jurisdiction over crimes committed between non-Indians on reservations.[271] Using the Equal Footing Doctrine, the decisions asserted that states possessed jurisdiction over non-Indians on Indian lands within state borders unless Congress expressly reserved federal authority.[272] As Justice Edward White wrote in *Draper*, "equality of statehood is the rule."[273] Southern states had argued in the early nineteenth century that the Equal Footing Doctrine granted states absolute territorial jurisdiction.[274] Decades later, the *Draper* Court pirated that argument and held that criminal jurisdiction, even on Native lands, belonged to a state "in virtue of its existence as an equal member of the Union."[275] With much of Indian Country now lying within state borders, *McBratney* and *Draper* implicitly overruled *Worcester*'s holding that state law could not apply within Native territories.

In the same year that the Court decided *Draper*, it also used the conception of state equality to curtail the rights of Native peoples while they were off-reservation. In *Ward v. Race Horse*, the Court held that the Equal Footing Doctrine abrogated the Bannock Nation's off-reservation

267. Id. at 379.

268. Haaland v. Brackeen, 143 S. Ct. 1609, 1658 (2023) (Gorsuch, J., concurring) (quoting McClanahan v. State Tax Comm'n of Ariz., 411 U.S. 164, 171 (1973)).

269. 104 U.S. 621 (1881).

270. 164 U.S. 240 (1896).

271. *Draper*, 164 U.S. at 247; *McBratney*, 104 U.S. at 624.

272. *Draper*, 164 U.S. at 243–44, 247; *McBratney*, 104 U.S. at 623–24.

273. *Draper*, 164 U.S. at 244.

274. See supra notes 181–185 and accompanying text.

275. *Draper*, 164 U.S. at 247.

hunting rights in Wyoming.[276] According to the Court, "the power of a State to control and regulate the taking of game cannot be questioned."[277] Because the act of admission for Wyoming declared that it would enter the Union on an equal footing with other states, Wyoming possessed the authority to regulate hunting throughout its territory, thereby restricting the Bannocks' right.[278] If Wyoming did not have this power, the opinion stated that "Wyoming, then, will have been admitted into the Union, not as an equal member, but as one shorn of a legislative power vested in all the other States of the Union."[279] In allowing state equality to trump treaty rights, the Court echoed the concerns expressed by Alabama legislators and President Jackson that states had the right to exercise jurisdiction over Native peoples; otherwise, the southern states would not possess the full sovereignty of other states.[280] Thus, at the close of the nineteenth century, the Court had begun to undermine Native sovereignty by employing the flawed arguments that the Marshall Court had rejected six decades earlier.

B. *The Modern Cases*

Despite the destruction that the allotment, assimilation, and termination policies of the federal government wrought, Native nations proved resilient over the course of the twentieth century, ushering in an era of tribal reconstruction and self-determination.[281] The Native resurgence of the late twentieth century and early twenty-first century, however, unwittingly brought about a revival in Removal-era state supremacy arguments. As Native nations asserted their governmental powers, major disputes between them and the states proliferated, resulting in increased litigation. And even as the Executive Branch and Congress supported Native autonomy,[282] the Rehnquist and Roberts Courts took the opposite tack, narrowing the bounds of tribal sovereignty. The Court took on an increasing number of Indian law cases that involved questions of federalism and states' rights, often ruling for states and against tribal interests.[283] And in these cases, the Justices deeply interested in federalism and state sovereignty wrote opinions that appropriated the same state supremacy arguments that the southern states had used in the early nineteenth century.

---

276. 163 U.S. 504, 514 (1896), overruled by Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019).

277. *Race Horse*, 163 U.S. at 507.

278. Id. at 511, 514.

279. Id. at 514.

280. See supra notes 182–185 and accompanying text.

281. For a history of the resurgence of Native power in the late twentieth century, see generally Charles F. Wilkinson, Blood Struggle: The Rise of Modern Indian Nations (2005).

282. See id. at 177–268.

283. See Getches, Beyond Indian Law, supra note 48, at 268, 320–21, 344–45 (revealing the trend of the Rehnquist Court ruling in favor of state interests in Indian law cases).

At first, the Supreme Court's solicitude for state interests in Indian law appeared in cases that relied more on statutory and treaty interpretation and balancing tests than on foundational principles. For example, in *White Mountain Apache Tribe v. Bracker*, the Court constructed a test to determine whether federal law preempted the operation of state law on non-tribal members on reservations.[284] Dismissing the need to solely rely on Indian law principles, Justice Thurgood Marshall wrote, "This inquiry is not dependent on mechanical or absolute conceptions of state or tribal sovereignty, but has called for a particularized inquiry into the nature of the state, federal, and tribal interests at stake."[285] While this test appeared to be a functional and neutral one, later cases began to stack the deck in favor of states. In *New Mexico v. Mescalero Apache Tribe*, the Court provided a way for state law to prevail over federal law even when it interfered with strong federal and tribal interests.[286] According to the opinion, "State jurisdiction is pre-empted by the operation of federal law if it interferes or is incompatible with federal and tribal interests reflected in federal law, *unless the state interests at stake are sufficient to justify the assertion of state authority*."[287] And finally, in *Cotton Petroleum Corp. v. New Mexico*, the Court used the preemption test to allow New Mexico to tax oil wells operated by a non-Indian corporation on the Jicarilla Apache Reservation.[288]

Preemption analysis was not the only area in which the Court gave state power more latitude over tribal sovereignty. Cases involving the state taxation of Indian lands and businesses as well as the diminishment of reservations—which, if found, would allow for the exercise of state jurisdiction—went in states' favor.[289] The Court also located state sovereignty in the Constitution, finding that the Eleventh Amendment guaranteed state sovereign immunity from suits by Native nations.[290]

---

284. 448 U.S. 136, 144–45 (1980). For an in-depth examination of the Court's preemption cases, see Hedden-Nicely, The Terms of Their Deal, supra note 61, at 481–91.

285. *Bracker*, 448 U.S. at 145.

286. 462 U.S. 324, 334 (1983).

287. Id. (emphasis added).

288. 490 U.S. 163, 186–87 (1989).

289. See South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 358 (1998) (holding that the state has primary jurisdiction over certain tracts that were originally part of the Yankton Sioux Reservation because "Congress diminished the . . . Reservation in the 1894 Act"); Hagen v. Utah, 510 U.S. 399, 421 (1994) (holding that a town situated on the Uintah Indian Reservation is under state jurisdiction because the "Reservation has been diminished by Congress"); South Dakota v. Bourland, 508 U.S. 679, 697 (1993) (holding that the state has primary jurisdiction because the Cheyenne River Tribe lacked regulatory control over its lands); County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation, 502 U.S. 251, 270 (1992) (permitting the state to impose an ad valorem tax on the Yakima Indian Reservation); Washington v. Confederated Tribes of Colville Indian Rsrv., 447 U.S. 134, 161 (1980) (permitting the state's tax on cigarette purchases on the Colville Indian Reservation).

290. See Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 268–69, 277–78 (1997) (holding that Tribe's suit against Idaho seeking declaration of ownership of submerged

Even though these cases used balancing and multifactor tests instead of explicitly relying on state supremacy arguments, the Court's continued erosion of tribal sovereignty in Indian law cases paved the way for state supremacy arguments' revival. As described below, both Justices and state litigants began to boldly employ Removal-era state supremacy arguments to not only restrict tribal power but also reverse the foundational principles of Indian law.

1. *Reviving State Supremacy:* Nevada v. Hicks. — The revival began with *Nevada v. Hicks*.[291] In *Hicks*, the State of Nevada challenged a tribal court's jurisdiction over civil claims against the state's game wardens.[292] The game wardens had executed a search warrant against a tribal member on the reservation for a suspected violation of state law outside the reservation.[293] When the search was unsuccessful, the tribal member sued the state officials in tribal court for trespass, abuse of process, and violation of his civil rights.[294] Utilizing the *Montana* test for tribal jurisdiction over nonmembers,[295] the Court held that the Fallon Paiute-Shoshone Tribes did not possess legislative authority over the state officers; therefore, the tribal court lacked jurisdiction over the claims brought against the officers.[296] Writing for the majority, Justice Antonin Scalia explained that the tribe's interest in the authority was not sufficiently weighty because this jurisdiction was not "essential to tribal self-government or internal relations," and Nevada's "interest in the execution of process is considerable."[297] Unlike the late twentieth-century cases, which considered state jurisdiction over nonmembers in Indian Country, Justice Scalia explicitly contemplated state authority over Indians on Indian land.[298] And in supporting such authority, Justice Scalia wove together

---

lands was barred by the Eleventh Amendment); Seminole Tribe of Fla. v. Florida, 517 U.S. 44, 76 (1996) (holding that the Eleventh Amendment prevented Congress from abrogating state sovereign immunity under the Indian Gaming Regulatory Act to allow for suits by tribes).

291. 533 U.S. 353 (2001).

292. Id. at 357.

293. Id. at 356.

294. Id. at 356–57.

295. In Montana v. United States, 450 U.S. 544 (1981), the Court established a test for determining whether a tribe could exercise civil jurisdiction over nonmembers on the reservation. Although the Court set out the "general proposition that the inherent sovereign powers of an Indian tribe do not extend to the activities of nonmembers of the tribe," it provided for two exceptions. Id. at 565. The first exception allows a tribe to regulate "the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." Id. The second exception allows a tribe to "exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe." Id. at 566.

296. *Hicks*, 533 U.S. at 374.

297. Id. at 364.

298. Id. at 362 ("When, however, state interests outside the reservation are implicated, States may regulate the activities even of tribe members on tribal land . . . .").

various precedents and statements to declare that "[s]tate sovereignty does not end at a reservation's border"; the Court no longer adhered to *Worcester*.[299] He also wrote that when an activity implicates state interests outside the reservation, states possess regulatory authority over tribal members on tribal land.[300] The Court's holding suggested that because it was the state's prerogative to investigate a possible violation of state law, the tribe had no power to interfere despite the fact that the investigation occurred on tribal land.

Beyond its blatant disregard for tribal sovereignty, the Court's opinion echoed the state supremacy arguments from the Removal Era to reverse the foundational principles of Indian law. First, it adopted the view of state territorial sovereignty in which a state has the authority to exercise jurisdiction over all lands and peoples within its borders.[301] Thus, because the Paiute-Shoshone Reservation was located within Nevada's limits, Justice Scalia asserted that the state possessed sovereignty over the reservation.[302] In rejecting tribal authority over the state's officers, he also suggested that the state's territorial jurisdiction was absolute, precluding tribal jurisdiction over a matter involving a tribe's members that occurred on the tribe's lands.[303] Without citing any constitutional provision for this position, the Court weaponized the southern states' contention that states were legitimate constitutional sovereigns while tribal nations were not.[304] This reasoning not only ignored the principles of *Worcester*, which protect tribal sovereignty from state interference, but also endorsed the radical view of jurisdiction that southern states had espoused in the 1820s and 1830s—that only one sovereign had authority over territory within a state.[305]

Second, in claiming that Nevada possessed a substantial interest in executing process for a possible violation of state law,[306] the Court parroted southern states' arguments concerning the enforcement of criminal law on and near tribal lands. The opinion implied that if Nevada could not

299. See id. at 361 (referencing the Court's departure from Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832), as articulated in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980)).

300. Id. at 362.

301. See supra section II.A.4.

302. *Hicks*, 533 U.S. at 361–65.

303. See id. at 365 ("[A] State 'can act only through its officers and agents,' and if a tribe can 'affix penalties to acts done under the immediate direction of the [state] government, and in obedience to its laws,' . . . 'the [state] government may at any time be arrested at the will of the [tribe].'" (first, third, and fourth alterataions in original) (quoting Tennessee v. Davis, 100 U.S. 257, 263 (1879))).

304. See id. at 361–62 (citing White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 141 (1980); Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962); Utah & N. Ry. Co. v. Fisher, 116 U.S. 28 (1885)).

305. See supra section II.A.4 (constructing the state supremacy argument around territorial sovereignty).

306. *Hicks*, 533 U.S. at 363–64, 372–73.

execute search warrants against tribal members on tribal land, the reservation would become a haven for those who violated state law outside the reservation and then returned to the reservation to escape state jurisdiction.[307] Moreover, the Court's holding meant that tribes had no authority to regulate state criminal investigations on the reservation. Just as Alabama, Georgia, and Tennessee had asserted that their officials could enter the Cherokee and Creek nations to arrest criminals,[308] now other states could do the same on reservations, with tribal nations having no say in the matter. In relying on arguments regarding territorial jurisdiction and criminality associated with tribal lands, *Hicks* marked a return to the use of state supremacy principles to cabin tribal sovereignty.

2. *Repackaging the Theory: The Thomas Dissents.* — Although the Court's opinion in *Hicks* demonstrated a willingness to revive and endorse the state supremacy theory of the Removal Era, Justice Clarence Thomas has most clearly embraced the theory in Indian law cases. In several dissents, Thomas repackaged the state supremacy arguments for the modern era. And in doing so, he framed Indian law cases as a zero-sum battle between states and Native nations and indicated a clear preference for the sovereignty of states.

A prime example of Thomas's thinking is his dissent in *Michigan v. Bay Mills Indian Community*.[309] In *Bay Mills*, Michigan sued the Bay Mills Indian Community for operating a casino outside the tribe's reservation in violation of the Indian Gaming Regulatory Act (IGRA)[310] and a compact between the state and the tribe.[311] A majority of the Court held that while IGRA authorized suits to enjoin gaming on Indian lands, the law did not authorize suits for off-reservation gaming activity.[312] Therefore, the tribe's sovereign immunity, which extends to off-reservation commercial activity, precluded Michigan's suit against it.[313] In a dissenting opinion joined by Justices Samuel Alito, Ruth Bader Ginsburg, and Antonin Scalia, Justice Clarence Thomas argued that the Court should overturn tribes' sovereign immunity for off-reservation commercial activities.[314] Thomas contended that such broad tribal immunity was inconsistent with the justifications of sovereign immunity, the limitations on tribal power, and the breadth of

307. See id. ("[T]he reservation of state authority to serve process is necessary to 'prevent [such areas] from becoming an asylum for fugitives from justice.'" (second alteration in original) (quoting Fort Leavenworth R.R. Co. v. Lowe, 114 U.S. 525, 533 (1885))).

308. See supra text accompanying notes 205–209.

309. 572 U.S. 782, 814 (2014) (Thomas, J., dissenting).

310. 25 U.S.C. §§ 2701–2721 (2018).

311. *Bay Mills*, 572 U.S. at 785–87.

312. Id. at 804.

313. See id. at 804 (declining to "create a freestanding exception to tribal immunity for all off-reservation commercial conduct").

314. Id. at 814 (Thomas, J., dissenting).

state sovereignty.[315] In particular, allowing a tribe to escape suits undermined "a State's broad regulatory authority over Indians within its own territory."[316] Additionally, Justice Thomas wrote, "Tribal immunity significantly limits, and often extinguishes, the States' ability to protect their citizens and enforce the law against tribal businesses."[317] In Justice Thomas's eyes, tribal sovereign immunity was a loophole through which tribes evaded state regulation and responsibility for harms against state citizens.

By rooting his argument against tribal immunity in state sovereignty concerns, Justice Thomas brought forth several Removal-era arguments. In pointing to states' authority over Indians within state borders, Thomas revealed his sympathy for the idea that a state has absolute jurisdiction over any persons within its territory.[318] According to his dissent, no modicum of sovereignty that tribal nations still possessed justified their exemption from state regulation.[319] When referring to states' inability to protect their citizens and enforce the law against tribal violators, Thomas invoked the southern states' fear of tribal entities harming the states' citizens and undermining states' sovereignty.[320] For Justice Thomas, tribal immunity was the modern-day iteration of the tribal haven of criminality, except now it could be extended outside tribal lands and into the territory of the state, rendering state jurisdiction over its own lands null. His dissent even suggested that tribal immunity threatened the continuing existence of states by allowing tribes to avoid paying state taxes and to violate campaign finance laws.[321] Such a contention raised the same specter that Alabama had constructed in alleging that the existence of the Cherokee Nation prevented the state's development and threatened its existence as a sovereign.[322] Finally, Thomas's emphasis on how immunity injures state citizens—such as by bolstering payday lending and harming tort victims—rather than how it benefits tribal nations and citizens echoed Tennessee's concerns about the need to recognize the rights of white citizens.[323] When viewing tribal commercial activities through Justice Thomas's dissenting opinion, one only sees a threat to states and their citizens—a threat that the Court must eliminate.

Four years later, Justice Thomas offered his most vigorous defense of state supremacy in a little-known dissent. In *Upstate Citizens for Equality, Inc.*

315. Id.

316. Id. at 818.

317. Id. at 823.

318. See supra section II.A.4.

319. *Bay Mills*, 572 U.S. at 815–19 (Thomas, J., dissenting).

320. See supra text accompanying notes 205–209.

321. *Bay Mills*, 572 U.S. at 824–25 (Thomas, J., dissenting).

322. See supra notes 198–203 and accompanying text.

323. *Bay Mills*, 572 U.S. at 824–25 (Thomas, J., dissenting); see also supra text accompanying notes 217–219.

v. United States,[324] a local government and citizens from upstate New York challenged the Secretary of the Interior's decision to take land that the Oneida Nation owned into trust under the Indian Reorganization Act (IRA).[325] After losing at the Second Circuit, the group petitioned for a writ of certiorari, which the Court denied.[326] Justice Thomas, however, issued a dissent from the denial. Concerned about the Secretary's ability "to take state land and strip the State of almost all sovereign power over it," Justice Thomas argued that the Court should take the case to reconsider its precedents under the Indian Commerce Clause.[327] According to the dissent, under the original understanding of the provision, the Indian Commerce Clause only "regulat[es] trade with Indian tribes."[328] Because the IRA allows land to be taken into trust that the tribe already owns, no exchange takes place because "neither money nor property changes hands."[329] Justice Thomas argued that since there is no exchange, there is no trade with Indians taking place.[330] Therefore, the land-into-trust process exists beyond the scope of the Indian Commerce Clause.[331]

Additionally, Justice Thomas expressed his anxieties about the power of the federal government to transfer to the Oneida land that had been under New York's jurisdiction for 200 years. He claimed that such action "would '"seriously burde[n] the administration of state and local governments" and would adversely affect landowners neighboring the tribal patches.'"[332] Furthermore, contrary to the Founders' understanding, the Indian Commerce Clause now gave Congress "the power to destroy the States' territorial integrity."[333] In sum, Justice Thomas found the IRA's land-into-trust procedures contrary to the Constitution's view of state power.

Justice Thomas's dissent fully embodied the southern states' theory of state supremacy from the Removal Era. His creative interpretation of the Commerce Clause, in which the federal government could only regulate trade, followed earlier arguments that the federal government could only establish rules "according to which the traffic of equivalent values should

---

324. 841 F.3d 556 (2d Cir. 2016), cert. denied, 140 S. Ct. 2587 (2017).

325. 25 U.S.C. § 5108 (2018).

326. *Upstate Citizens*, 140 S. Ct. at 2587.

327. Id. at 2587 (Thomas, J., dissenting from the denials of certiorari).

328. Id. (internal quotation marks omitted) (quoting Adoptive Couple v. Baby Girl, 570 U.S. 637, 660 (2013) (Thomas, J., concurring)).

329. Id. at 2588.

330. Id.

331. See id. ("It is highly implausible that the Founders understood the Indian Commerce Clause, which was virtually unopposed at the founding, as giving Congress the power to destroy the States' territorial integrity.").

332. Id. (alteration in original) (quoting City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197, 220 (2005)).

333. Id. (citing *Adoptive Couple*, 570 U.S. at 659 (Thomas, J., concurring)).

be prosecuted."[334] Also, Thomas's concerns about the Indian Commerce Clause giving Congress the ability to interfere with states' territorial integrity reiterated southern states' apprehensions about the clause giving the federal government the power to bestow citizenship upon Indians and enslaved people.[335] Because Thomas's view was contrary to the original understanding of the clause, he had to rely on Removal-era interpretations that nothing in the Commerce Clause authorized the federal government to interfere in states' internal affairs.[336]

The dissent's fears about the transfer of territory and sovereignty over that territory strongly echoed southern rhetoric about the need to protect states' supremacy. Thomas's disbelief in the Secretary of the Interior's authority to take a substantial amount of state land and declare it sovereign Indian territory repeated the southern states' arguments that tribes could not violate states' territorial sovereignty by asserting jurisdiction over portions of land within state boundaries.[337] Similarly, just as southern politicians asserted that allowing the erection of tribal governments within state limits would render the states nonexistent,[338] Thomas contended that the land-into-trust process meant that "Congress could reduce a State to near nonexistence by taking all land within its borders and declaring it sovereign Indian territory."[339] Southern officials and Justice Thomas expressed that a true interpretation of the Constitution did not sanction such action.[340] For them, the Constitution provided protection for state sovereignty.[341] Even though this shared vision of robust state supremacy had no grounding in the original understanding of the Constitution, Justice Thomas resurrected it to eliminate tribal threats and federal overreach.

Thomas's dissenting opinions explicitly took up the banner for the state supremacy arguments in the wake of *Hicks*. And even as Native nations eked out several victories at the Court during this time,[342] Thomas's continual advocacy for state supremacy meant the Removal-era theory persisted during the early Roberts Court. With some of the Justices divulging their openness to the arguments, state litigants and other

334. The Report, supra note 28, at 2.

335. See supra text accompanying notes 165–166.

336. See supra text accompanying notes 161–166.

337. See supra text accompanying notes 198–202.

338. See supra text accompanying notes 198–202.

339. Upstate Citizens for Equality, Inc. v. United States, 140 S. Ct. 2587, 2588 (2017) (Thomas, J., dissenting from the denials of certiorari).

340. See id. ("It is highly implausible that the Founders understood the Indian Commerce Clause . . . as giving Congress the power to destroy the States' territorial integrity.").

341. Id.; see also supra text accompanying notes 160–171.

342. See, e.g., Michigan v. Bay Mills Indian Cmty., 572 U.S. 782 (2014) (deciding case 5-4 in favor of the tribe).

Justices followed suit, appropriating the arguments in hopes of swaying the Court.

3. *Advocating for Supremacy: The States as Litigants.* — The Justices were not the only ones involved in reviving the state supremacy theory. As cases that pitted states against tribal interests came before the Roberts Court, state litigants increasingly invoked state supremacy arguments. For example, in *Nebraska v. Parker*, the State of Nebraska challenged the Omaha Tribe's application of its Beverage Control Ordinance to liquor retailers in the town of Pender.[343] In its brief, Nebraska argued that the Court could not allow a tribe to legitimately exercise its authority over a portion of the state's territory occupied by a population that was 98% non-Indian.[344] Invoking the state's continual claim of jurisdiction over the area and the rights of non-Indians, the state contended that "[f]or over 130 years, the people and businesses of the Pender, Nebraska area have developed justifiable expectations that their community was under the jurisdiction of the State of Nebraska"; therefore, the Court should maintain the status quo.[345]

Three years later, the State of Wyoming took an even stronger stance for state supremacy in *Herrera v. Wyoming*.[346] *Herrera* arose out of Wyoming's prosecution of a member of the Crow Tribe, Clayvin Herrera, for hunting elk in the Bighorn National Forest in violation of state law.[347] Herrera challenged his conviction, arguing that an 1868 treaty between the Crow Tribe and the United States granted tribal members the right to hunt on "unoccupied lands."[348] Wyoming marshalled arguments based on the power of statehood in its brief. The state claimed that the treaty's hunting right "was a temporary right not intended to survive Wyoming's statehood."[349] And Wyoming equated the arrival of a settler government—in the form of statehood—with the outdated

---

343. 136 S. Ct. 1072, 1078 (2016).

344. Brief for Petitioners at 20–25, *Parker*, 136 S. Ct. 1072 (No. 14-1406), 2015 WL 7294863.

345. Id. at 51–52. Nebraska's arguments echo those made by the Court in City of Sherrill v. Oneida Indian Nation of N.Y., 544 U.S. 197 (2005). There, the Court prevented the Oneida Nation from exercising sovereignty over parcels it had regained possession of after two centuries due to the longstanding history of New York's sovereign control over the territory and its overwhelmingly non-Indian character. 544 U.S. at 214–21 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude OIN from gaining the disruptive remedy it now seeks.").

346. 139 S. Ct. 1686 (2019).

347. Id. at 1693–94.

348. See id. at 1691 (internal quotation marks omitted) (quoting Treaty Between the United States of America and the Crow Tribe of Indians, Crow Tribe-U.S., art. IV, May 7, 1868, 15 Stat. 650).

349. Brief for Respondent at 20, *Herrera*, 139 S. Ct. 1686 (No. 17-532), 2018 WL 6012360.

concept of the establishment of civilization.[350] According to the brief, statehood "was the moment when civilization arrived."[351] The state's implicit belief that the arrival of Euro-American settlers marked the beginning of civilization in the territories echoed the southern officials' contentions that Native nations could not be recognized as civilized, precluding them from possessing sovereignty equivalent to that of Euro-American governments.[352] Additionally, the assertion that statehood ended the treaty right implied that Wyoming perfected its territorial sovereignty at the moment it entered the Union. Just as the southern states had argued,[353] Wyoming's transition to statehood gave it absolute jurisdiction over all the territory within its borders. Because the state was the only legitimate sovereign, not only did the tribe lose its rights, but its members were also subjected to state regulation.[354]

Nebraska and Wyoming ultimately lost in *Parker* and *Herrera*, with the Court relying on statutory and treaty interpretation to dismiss the states' appeals for supremacy.[355] And in *Herrera*, the Court even overruled *Ward v. Race Horse*,[356] repudiating the notion that statehood impliedly abrogated treaty rights because of the Equal Footing Doctrine.[357]

Still, the state litigants' arguments paved the way for even bolder iterations of Removal-era state supremacy arguments in *Sharp v. Murphy*[358] and *McGirt v. Oklahoma*.[359] *Murphy* and *McGirt* were criminal appeals that presented the same question: whether the 1866 territorial boundaries of the Muscogee Nation constituted an Indian reservation.[360] Both cases involved a tribal member who was convicted in Oklahoma state court for crimes that occurred within the Muscogee Nation's territorial

350. See id. at 48 ("Political leaders saw early settlers as 'uninformed, and perhaps licentious people' whose 'routine defiance of state and federal land laws' was but one disagreeable aspect of the character needed to settle the rough frontier. Statehood, in contrast . . . was the moment when civilization arrived." (citation omitted) (quoting Peter S. Onuf, Territories and Statehood, *in* 3 Encyclopedia of American Political History 1283, 1283 (Jack P. Greene ed., 1984))).

351. Id.

352. See supra text accompanying notes 145–154.

353. See supra text accompanying notes 181–185.

354. See Brief for Respondent, supra note 349, at 20–21 ("Wyoming statehood was not just a legal event, it was a recognition the once wild frontier was no more. And the Crow Tribe understood that its hunting right had ended.").

355. See *Herrera*, 139 S. Ct. at 1694–1700, 1702–03 (holding that statehood does not obliterate treaty rights); Parker v. Nebraska, 136 S. Ct. 1072, 1079–80, 1082–83 (2016) (holding that isolated historical evidence presented by the parties is insufficient to override the textual support of written treaties).

356. 163 U.S. 504 (1896).

357. *Herrera*, 139 S. Ct. at 1697.

358. 140 S. Ct. 2412 (2020) (per curiam).

359. 140 S. Ct. 2452 (2020).

360. Brief for Petitioner at 1–2, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 583959 [hereinafter *McGirt* Petitioner Brief]; Brief for Petitioner at i, *Murphy*, 140 S. Ct. 2412 (No. 17-1107), 2018 WL 3572365 [hereinafter *Murphy* Petitioner Brief].

boundaries.[361] Those members argued that the state lacked jurisdiction over them because only the federal and tribal governments have jurisdiction over crimes committed by or against Indians on a reservation.[362]

In its briefs in *Murphy* and *McGirt*, the State of Oklahoma argued that the recognition of the Muscogee Reservation—and subsequent loss of state jurisdiction—would result in disaster for the state. First, the state in *Murphy* contended that if the Muscogee Nation maintained a reservation, similar treaties and history with the other Five Tribes required the recognition of the other tribes' reservations.[363] Such a result would reincarnate Indian Territory, "cleaving the State in half" and creating a series of contiguous reservations in eastern Oklahoma encompassing more than 19 million acres of land, 1.8 million residents, and the City of Tulsa.[364] Second, Oklahoma found it implausible that Congress intended to create a new state by combining the Oklahoma and Indian territories while allowing federal and tribal jurisdiction to continue in the eastern half. This division of jurisdiction would contravene the Equal Footing Doctrine because Oklahoma would not have the same rights over this portion of its territory as the original thirteen states had over theirs.[365] Third, the state asserted that the existence of a Muscogee Reservation would "upset[] a century of settled expectations."[366] The state in *McGirt* said this would "force a sea-change in the balance of federal, state, and tribal authority in eastern Oklahoma."[367] The nature of criminal jurisdiction would drastically change, as the federal and tribal courts would acquire criminal jurisdiction over crimes involving Indians. Dozens of federal criminal laws would go into effect, and "thousands of state convictions" would be at risk of reopening.[368] Additionally, tribes could criminally prosecute non-Indians for certain domestic violence offenses.[369] On the civil side, Oklahoma contended that Indians would avoid state taxes—"decimat[ing] state and local budgets"—and that tribal courts would have exclusive jurisdiction over all adoptions and custody disputes involving Indian children.[370] The application of tribal law on these lands would allow tribal nations to regulate the oil and gas industry and exercise

361. *McGirt* Petitioner Brief, supra note 360, at 16; *Murphy* Petitioner Brief, supra note 360, at 1–2.

362. *McGirt* Petitioner Brief, supra note 360, at i, 45; *Murphy* Petitioner Brief, supra note 360, at 15–18.

363. *Murphy* Petitioner Brief, supra note 360, at 2.

364. Id. at 2–3.

365. Id. at 22–23.

366. Id. at 56.

367. Brief for Respondent at 43, McGirt v. Oklahoma, 140 S. Ct. 2452 (2020) (No. 18-9526), 2020 WL 1478582 [hereinafter *McGirt* Respondent Brief].

368. Id.

369. See id. at 45 (describing the impact new conceptions of tribal jurisdiction would have on criminal law).

370. Id. at 44.

civil jurisdiction over non-Indians.[371] Ultimately, Oklahoma argued that it would face "uncertainty for decades to come."[372]

Perceiving the recognition of Indian reservations as a direct threat to its existence, Oklahoma made boldly forthright invocations of the state supremacy arguments. Its rhetoric about being cleft in half directly repeated southern states' claims that the existence of tribal nations within their borders prevented their exercise of territorial jurisdiction.[373] Similar to Alabama questioning whether it could truly be sovereign if portions of its territory were exempt from state jurisdiction,[374] Oklahoma claimed that the Court's recognition of reservations in the former Indian Territory would result in "the largest judicial abrogation of state sovereignty in American history."[375] The *Murphy* briefs also reiterated state legislatures' earlier reliance on the Equal Footing Doctrine, arguing that if the state could not exercise total jurisdiction over the peoples and lands within its eastern half, then it was not equal to the original states.[376] Oklahoma even went beyond the southern states' arguments concerning equal footing, contending that Congress never would have admitted Oklahoma as a state if it had intended for a substantial amount of the state's land to remain under federal and tribal authority.[377] The briefs in each case constructed a historical narrative to support this contention. They pointed out that Congress had prepared Indian Territory for statehood by breaking up the tribes' communal land holdings; replacing federal jurisdiction with territorial, and then state, jurisdiction; and abolishing the tribal governments.[378] Thus, according to Oklahoma, both constitutional principle—the Equal Footing Doctrine—and congressional action supported absolute state supremacy.

Oklahoma also resurrected arguments about criminality, internal development, and the rights of non-Indians. In recounting the history of Indian Territory, Oklahoma framed the federal government's desire to make it a state as a response to the "[r]ampant disorder and lawlessness [that] reigned" there.[379] Southern states' fears about the status of tribal lands as a haven for criminal activity were reiterated in Oklahoma's characterization of Indian Territory as "plagued by corruption, misrule, and crime."[380] Oklahoma repeated this idea in a modern-day context by

371. Id. at 45.

372. Id. at 46.

373. See supra notes 198–202 and accompanying text.

374. See supra note 6 and accompanying text.

375. *McGirt* Respondent Brief, supra note 367, at 3.

376. See *Murphy* Petitioner Brief, supra note 360, at 22–23.

377. See id. at 21.

378. See *McGirt* Respondent Brief, supra note 367, at 14–34 (articulating a history of dismantling tribal sovereignty); *Murphy* Petitioner Brief, supra note 360, at 23–46 (describing the disestablishment of tribal borders as a prerequisite for statehood).

379. *Murphy* Petitioner Brief, supra note 360, at 6.

380. Id. at 9.

citing the case's risk of "reopening thousands of state convictions."[381] The state asserted that as the territorial sovereign, it bore "ultimate responsibility for seeking justice for Indian crime victims."[382]

The briefs adopted this same line of argument for concerns about internal development. Oklahoma argued that contemporaries had pushed for abolishing communal land tenure and tribal sovereignty in Indian Territory because they were obstacles to economic development.[383] Like southern states' contentions that the Five Tribes prevented the construction of infrastructure and white settlement in the South,[384] Oklahoma claimed that non-Indians were frustrated by their inability to own land, participate in tribal governments that taxed them, and enforce business agreements.[385] Updating these arguments for the present day, the state cited concerns from "farmers, ranchers, and other businesses" about the uncertainty attendant with federal and tribal jurisdiction.[386] Additionally, Oklahoma framed the possibility of Indians evading state taxes as a threat to the existence of the state and local governments as they lost revenue.[387] For Oklahoma, the effects on business development and the state government's ability to serve its citizens would repeat the problems non-Indians faced in Indian Territory, contravening Congress's original intent to eradicate these issues with statehood.

Relatedly, Oklahoma raised again the specter of undermining non-Natives' rights by subjecting them to tribal jurisdiction. Echoing southern state legislators' tales of woe concerning white people living near tribal lands,[388] the *McGirt* brief described how non-Indian parents of Indian children would be dragged to tribal court for adoption and custody disputes.[389] And the brief decried how non-Indians would be subjected to tribal criminal jurisdiction for domestic violence offenses and exposed to uncertain tribal civil jurisdiction, including regulations and taxes.[390] Oklahoma also revived southern states' obsession with Native peoples evading state law inside tribal territories by claiming that reservations would create two societies in eastern Oklahoma, one where state law applied to non-Indians and another where Indians would be immune from it.[391] Latching onto Nebraska's argument in *Parker*, the state asserted that upsetting "a century of settled expectations across half of Oklahoma"

381. *McGirt* Respondent Brief, supra note 367, at 43.
382. Id. at 46.
383. *Murphy* Petitioner Brief, supra note 360, at 7.
384. See supra notes 203–204 and accompanying text.
385. *Murphy* Petitioner Brief, supra note 360, at 7.
386. Id. at 56.
387. *McGirt* Respondent Brief, supra note 367, at 44.
388. See supra notes 205–209, 217–219, and accompanying text.
389. *McGirt* Respondent Brief, supra note 367, at 44–45.
390. Id.
391. See id.

made this inequity even greater.[392] As the briefs argued, with large Indian reservations composing the eastern portion of the state, Oklahoma would lose its ability to protect and provide for its non-Indian citizens.[393] Stripping the state of its sovereignty, revived tribal sovereignty would "redraw the map of Oklahoma into a simulacrum of its pre-statehood form."[394]

* * *

On July 9, 2020, some Oklahomans woke up to find themselves living in the Muscogee Reservation. For on that day, the Supreme Court issued its decision in *McGirt*, holding that the Muscogee Reservation had never been disestablished.[395] For the purposes of the Major Crimes Act, the Court recognized that a large portion of eastern Oklahoma is—and always was—Indian Country.[396] Therefore, only the federal government and tribal governments—not the state—had jurisdiction over any crimes involving Indians in the Muscogee Reservation.[397] While headlines inaccurately declared that half of Oklahoma now belonged to the Indians,[398] Oklahoma found that its borders and status as a sovereign state remained intact despite the existence of a large Indian reservation within state limits. Moreover, the "parade of horribles"[399] that Oklahoma

392. *Murphy* Petitioner Brief, supra note 360, at 56.

393. See id. ("1.8 million Oklahomans live in eastern Oklahoma. Their lives would be drastically changed if this Court were suddenly to declare them all residents of an Indian reservation.").

394. Id.

395. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020). The Court used the holding in *McGirt* to affirm the Tenth Circuit's decision in *Murphy*, which had held that the Muscogee Reservation was not disestablished. Sharp v. Murphy, 140 S. Ct. 2412, 2412 (2020) (citing *McGirt*, 140 S. Ct. 2452).

396. *McGirt*, 140 S. Ct. at 2459, 2479.

397. For an in-depth analysis of the *McGirt* decision and its impact on federal Indian law doctrine, see generally Hedden-Nicely & Leeds, supra note 51, at 336–48; Robert J. Miller & Torey Dolan, The Indian Law Bombshell: *McGirt v. Oklahoma*, 101 Boston U. L. Rev. 2049, 2068–104 (2021).

398. See, e.g., Cary Aspinwall & Graham Lee Brewer, Half of Oklahoma Is Now Indian Country. What Does that Mean for Criminal Justice There?, Marshall Project (Aug. 4, 2020), https://www.themarshallproject.org/2020/08/04/half-of-oklahoma-is-now-indian-territory-what-does-that-mean-for-criminal-justice-there [https://perma.cc/7T9H-VRST] (inaccurately stating in its headline that the Court recognized half of Oklahoma as part of an Indian reservation); Lawrence Hurley, U.S. Supreme Court Deems Half of Oklahoma a Native American Reservation, Reuters (July 9, 2020), https://www.reuters.com/article/us-usa-court-oklahoma/u-s-supreme-court-deems-half-of-oklahoma-a-native-american-reservation-idUSKBN24A268 [https://perma.cc/P9D5-9DPA] (same); Laurel Wamsley, Supreme Court Rules that About Half of Oklahoma Is Native American Land, NPR (July 9, 2020), https://www.npr.org/2020/07/09/889562040/supreme-court-rules-that-about-half-of-oklahoma-is-indian-land [https://perma.cc/A434-EZ5T] (same).

399. Transcript of Oral Argument at 23, *McGirt*, 140 S. Ct. 2452 (No. 18-9526), 2020 WL 2326045.

described in its argument did not come to pass. Although the Oklahoma Court of Criminal Appeals subsequently recognized the continued existence of the Five Tribes' reservations,[400] the State of Oklahoma and the Five Tribes already had been working on compacts and sovereignty commissions to determine the best path forward for sharing territory and jurisdiction.[401] And even as tribal members have challenged their state criminal convictions and federal prosecutors have had to deal with an influx of criminal cases,[402] the Five Tribes have drastically expanded the capacity of their criminal justice systems.[403] And the Oklahoma Court of Criminal Appeals ultimately held that *McGirt* could not be applied retroactively, stemming any further dismissal of cases.[404]

So what is the significance of the revival of the state supremacy arguments if they rarely secured a majority of the Court's support, at least through *McGirt*? Most of all, these arguments' persistence reveals that the

---

400. Chris Casteel, Choctaw, Seminole Reservations Recognized by Oklahoma Appeals Court, The Oklahoman (Apr. 1, 2021), https://www.oklahoman.com/story/news/2021/04/01/choctaw-seminole-reservations-oklahoma-appeals-court-recognizes/4835019001/ [https://perma.cc/M4FY-EF2X]. The Oklahoma Court of Criminal Appeals has also recognized the continued existence of the Quapaw, Ottawa, Peoria, and Miami reservations, keeping nine reservations intact in the state. Curtis Killman, Ottawa, Peoria and Miami Reservations Still Exist, Oklahoma Appeals Court Says, Tulsa World (May 11, 2023), https://tulsaworld.com/news/local/crime-and-courts/appeals-court-decides-reservation-status-of-some-ottawa-county-tribes/article_87d1e676-ef47-11ed-bd43-93ec7ef4af62.html [https://perma.cc/A7JT-5NZD] (last updated June 18, 2023).

401. See, e.g., Intergovernmental Agreement Between the State of Oklahoma and the Choctaw Nation of Oklahoma Regarding Jurisdiction Over Indian Children Within the Tribe's Reservation, Aug. 17, 2020, https://www.sos.ok.gov/documents/filelog/93655.pdf [https://perma.cc/62UL-E5TQ] (setting regulations governing state and tribal jurisdiction over Indian children within the Choctaw Reservation); Muscogee (Creek) Nation, Exec. Order No. 20-03, An Executive Order to Establish the Mvskoke Reservation Protection Commission (July 29, 2020), https://turtletalk.files.wordpress.com/2020/07/executive-order-no.-3-mvskoke-reservation-protection-commission.pdf [https://perma.cc/EAX6-S5VP] (creating commission to analyze post-*McGirt* opportunities and obstacles for Muscogee Reservation governance).

402. For an example of a tribal member challenging a state court conviction, see Petitioner's Post-Hearing Brief Regarding Proposition I of His Successive Application for Post-Conviction Relief at 1, Bosse v. State, 499 P.3d 771 (Okla. Crim. App. 2021) (No. PCD-2019-124), cert. denied, 142 S. Ct. 1136 (2022). For reporting on the influx of criminal cases for federal prosecutors, see Janelle Stecklein, Prosecutors Reviewing Cases, Refiling Charges in Wake of *McGirt* Ruling, Enid News & Eagle (Mar. 26, 2021), https://www.enidnews.com/news/state/prosecutors-reviewing-cases-refiling-charges-in-wake-of-mcgirt-ruling/article_3d370a5e-8e7f-11eb-8c8e-771bb0097483.html [https://perma.cc/37JC-8TFN].

403. See, e.g., Cherokee Nation Works to Ensure Criminal Justice Served Following Oklahoma Court of Criminal Appeals Ruling, Anadisgoi (Mar. 11, 2021), https://anadisgoi.com/index.php/government-stories/527-cherokee-nation-works-to-ensure-criminal-justice-served-following-oklahoma-court-of-criminal-appeals-ruling [https://perma.cc/49PM-PWQT] (describing the Cherokee Nation's $10 million investment in its court system, law enforcement agency, and victims services in the wake of *McGirt*).

404. State ex rel. Matloff v. Wallace, 497 P.3d 686, 694 (Okla. Crim. App. 2021).

jurisdictional arrangement of federal Indian law was far from settled. Even as majorities of the Court continually relied on foundational principles stemming from *Worcester*—recognition of federal plenary power over Indian affairs and respect for tribal sovereignty—legal actors consistently invoked the state supremacy theory of the Removal Era to challenge those principles.

For example, despite Justice Gorsuch's dismissal of Oklahoma's arguments in his majority opinion in *McGirt*, the four-person dissent—authored by Chief Justice John Roberts and joined by Justices Clarence Thomas, Samuel Alito, and Brett Kavanaugh—validated the state's arguments.[405] The dissenting Justices repeated the state's rehashing of the Removal-era state sovereignty arguments, declaring that "the Court has profoundly destabilized the governance of eastern Oklahoma."[406] Thus, even this victory for tribal interests served as a dire warning that the nineteenth-century arguments were still not dead. Rather, these arguments gained new life as Chief Justice Roberts, Justice Alito, and Justice Kavanaugh became determined to protect state power against federal and tribal interference, joining Justice Thomas. Therefore, the many opinions and briefs parroting the state supremacy theory—from the late nineteenth to the twenty-first century—have kept these arguments as viable, if misguided, legal assertions.

IV. STATE SUPREMACY VICTORIOUS: *OKLAHOMA V. CASTRO-HUERTA*

In its 2022 Term, the Court fully adopted the state supremacy theory in a case dealing with the uncertainty surrounding *McGirt*. In *Oklahoma v. Castro-Huerta*,[407] the Court upended the foundational principles of Indian law and the long-settled expectations of criminal jurisdiction in Indian Country. And to justify its decision, the Court finally enshrined the Removal-era theory of state supremacy into the doctrine of Indian law. This came almost two centuries after *Worcester* rejected the theory as incompatible with the Constitution, international law, and tribal sovereignty.

This Part analyzes *Castro-Huerta* through the lens of the state supremacy theory, revealing how the majority opinion closely follows—and endorses—the arguments southern states made. Following the statement of some commentators that the "decision is an act of conquest,"[408] this Part argues that *Castro-Huerta* is the culminating victory for the state supremacy theory and could lead to a dramatic reworking of the jurisdictional landscape in Indian affairs.

405. McGirt v. Oklahoma, 140 S. Ct. 2452, 2482 (2020) (Roberts, C.J., dissenting).

406. Id.

407. 142 S. Ct. 2486 (2022).

408. Ablavsky & Hidalgo Reese, supra note 20.

Oklahoma's intense legal campaign against Native sovereignty—and the Supreme Court's support of it—reveal that even if the era of Native deportation is over, the legacy of Indian Removal endures. For if Removal is not just the deportation of Native nations and peoples from their homelands but a legal assault on tribal sovereignty, it is clear that such an assault continues to this day. Just as the southern states used state law extension acts and the theory of state supremacy to legally eradicate the existence of Native nations within their borders,[409] Oklahoma, along with other states and some of the Justices, are now seeking to constitutionalize state supremacy to do so once again. Threatened by more assertive exercises of tribal jurisdiction, some states are working to undermine Indian law to establish themselves as the only legitimate sovereign—other than the federal government—within their borders. And now they are bolstered by *Castro-Huerta*.

Yet Native peoples have always countered legal attacks with their own theories and advocacy movements.[410] In the Removal Era, Native peoples were even successful at enshrining their own arguments regarding federal supremacy, the solemnity of treaties, and tribal sovereignty into U.S. constitutional law through a public relations and litigation campaign that resulted in *Worcester*.[411] Knowing that Native nations can do so once again, this Part also charts out potential paths forward in the wake of *Castro-Huerta*. It identifies the constitutional, historical, and dignitary consequences of reviving and legitimizing the state supremacy arguments, hoping to empower legal practitioners and scholars to counter their use. It also maps out the effects of *Castro-Huerta* on federal Indian law doctrine thus far and suggests ways in which advocates can cabin the case's impact.

A. *The Decision*

Brought to the Court in the wake of *McGirt*, *Castro-Huerta* served as the vehicle for undermining the exercise of federal and tribal power in Oklahoma. In the case, the State of Oklahoma argued that it possessed

409. See supra sections I.B, II.A–.B.

410. See, e.g., Paul Chaat Smith & Robert Allen Warrior, Like a Hurricane: The Indian Movement From Alcatraz to Wounded Knee 272–79 (1997) (describing how the American Indian Movement in the 1960s and 1970s galvanized Native activism and led to innovative, if unsuccessful, policy proposals); Wilkinson, supra note 281, at 102–06, 112 (describing successful challenges to state laws and attempts to advocate for tribes during Senate termination hearings); Maggie Blackhawk, On Power and the Law: *McGirt v. Oklahoma*, 2020 Sup. Ct. Rev. 367, 372–74 (describing "antisubordination measures" that allowed Native peoples to form their own governments and supply social services and infrastructure within the framework of existing federal Indian law).

411. See Ablavsky & Allread, supra note 89, at 289–96 (recounting how Native nations deployed constitutional arguments through newspapers, appeals to the Executive, petitions to Congress, and cases before the Supreme Court).

criminal jurisdiction over non-Indians who committed crimes against Indians in the re-recognized reservations.[412] The state also sought to overturn *McGirt*, citing the alleged chaos in Oklahoma that resulted from the decision.[413] Although the Court refused to reconsider *McGirt*,[414] in a 5-4 decision, the Court narrowed *McGirt*'s effects by holding that states had the authority to prosecute non-Indians who committed crimes against Indians in Indian Country.[415] Interpreting the General Crimes Act, which grants the federal government criminal jurisdiction over non-Indian-on-Indian crime, the majority stated that the Act did not preempt the exercise of state jurisdiction.[416] Therefore, the long-accepted notion that only the federal government had this authority was overturned.[417]

Even though *Castro-Huerta*'s holding itself was monumental, the more far-reaching consequence of the decision was how the Court justified it. Writing for the majority, Justice Kavanaugh began by rejecting one of *Worcester*'s tenets: that Indian Country was separate from the territory of a state, exempting it from state law.[418] He wrote that this principle had "yielded to closer analysis"[419] and that "the *Worcester*-era understanding of Indian country as separate from the State was abandoned later in the 1800s."[420] Justice Kavanaugh then cited snippets of dicta and irrelevant holdings from a range of Indian law cases—including *McBratney*, *Draper*, and *Hicks*—to hold that "the Court's precedents establish that Indian country is part of a State's territory and that, unless preempted, States have jurisdiction over crimes committed in Indian country."[421] With this "background principle" established, the opinion proceeded to analyze the General Crimes Act and Public Law 280 and to engage in *Bracker* balancing.[422] It ultimately concluded that none of these statutes

412. Petition for a Writ of Certiorari, supra note 10, at i, 3–4.

413. Id. at 4.

414. Oklahoma v. Castro-Huerta, 142 S. Ct. 877, 877–78 (2022) (granting certiorari on the question of state jurisdiction alone).

415. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2491 (2022).

416. Id. at 2494–99.

417. See Felix S. Cohen, Handbook of Federal Indian Law 364 (1942) ("Generally speaking, offenses by non-Indians against Indians are punishable in federal courts . . . .").

418. *Castro-Huerta*, 142 S. Ct. at 2493.

419. Id. (internal quotation marks omitted) (quoting Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962)).

420. Id. at 2497.

421. Id. at 2493–94.

422. Id. at 2494–502. *Bracker* balancing refers to the preemption test for state jurisdiction in Indian County as set out in White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143–45 (1980); see also supra text accompanying notes 284–285. Dylan Hedden-Nicely has critiqued the Court and specifically the *Castro-Huerta* majority for their reliance on a balancing test within the preemption analysis, arguing that such an analysis originally relied on treaty interpretation, not on the balancing of federal, state, and tribal interests. Hedden-Nicely, The Terms of Their Deal, supra note 61, at 502–20.

or tests disturbed the supposedly well-established law of state criminal jurisdiction.[423]

In rejecting *Worcester*, Justice Kavanaugh transformed the once-repudiated, Removal-era state supremacy arguments into constitutional principles. He wrote:

> To begin with, the Constitution allows a State to exercise jurisdiction in Indian country. Indian country is part of the State, not separate from the State. . . . [A]s a matter of state sovereignty, a State has jurisdiction over all of its territory, including Indian country. See U.S. Const.[] [amend. X]. As this Court has phrased it, a State is generally "entitled to the sovereignty and jurisdiction over all the territory within her limits."[424]

This assertion—that the Constitution allows for the exercise of state jurisdiction in Indian Country—adopted southern state legislators' arguments that nothing in the Constitution allowed the federal government to carve out areas of the state from state authority.[425] And Kavanaugh's citation of the Tenth Amendment—which includes no mention of state territorial jurisdiction[426]—converted the provision into a source of constitutional protection of state sovereignty in Indian affairs, much like the New State Clause and Guarantee Clause in the Removal Era.[427] Furthermore, his quotation of *Pollard's Lessee*[428]—the first Supreme Court case concerning the Equal Footing Doctrine[429]—suggested that the doctrine affirmed every state's right to exercise jurisdiction over Native lands through the state's admission into the Union, an argument southern state officials had made.[430] Later in the opinion, Kavanaugh expressly relied on *McBratney* and *Draper* to buttress this point, claiming that statehood and state equality rendered unenforceable any treaty that limited state criminal jurisdiction in Indian Country.[431]

Thus, in the span of a few sentences, the Court had taken the state supremacy arguments of the Removal Era, constitutionalized them, and placed them at the foundation of Indian law. In doing so, it resurrected a concept of absolute territorial sovereignty that had never actually existed in the United States and that does not reflect the

---

423. *Castro-Huerta*, 142 S. Ct. at 2494–502.

424. Id. at 2493 (quoting Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212, 228 (1845)).

425. See supra section II.A.2.

426. See U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

427. See supra text accompanying notes 167–174.

428. 44 U.S. (3 How.) 212.

429. See supra note 248.

430. See supra text accompanying notes 175–185.

431. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022).

overlapping, cooperative constitutional structure that exists today.[432] It also flipped the presumption that had characterized Indian law since *Worcester*: Instead of tribal sovereignty preventing the exercise of state authority, state authority should now be assumed unless preempted by federal law.[433] In the Court's view in *Castro-Huerta*, the southern states of the Removal Era were right all along to insist on the supremacy of states over the other sovereigns within the United States.

Castro-Huerta's statement of constitutional principles is not its only issue; its account of the history of Indian law is also fundamentally flawed. Not only did Justice Kavanaugh ignore the fact that *Worcester* involved the same situation—the exercise of state criminal jurisdiction on Native lands within state borders[434]—and came out the other way, but he also asserted that the *Worcester* principle of territorial separation had changed in the late nineteenth century.[435] Justice Gorsuch questioned in his dissent: "But exactly when and how did this change happen? The Court never explains."[436] Rather, the majority looked to *McBratney* and a "grab bag of decisions" to highlight instances in which the Court either allowed for the narrow application of state authority in Indian Country or wrote dicta supporting the exercise of state jurisdiction.[437]

In light of the history recounted in Part III, the *Castro-Huerta* majority made two mistakes with its historical narrative. First, it failed to recognize the historical context of previous decisions. As discussed above, the cases of the late nineteenth century, especially *McBratney* and *Draper*, were decided when the federal government sought to break up Native landholdings and organize them into states and territories.[438] The late nineteenth-century Court supported federal allotment and assimilation policies and sanctioned the supposed end of tribal sovereignty through the use of state supremacy arguments.[439] But the *Castro-Huerta* majority ignored the fact that Native nations overcame the trials

---

432. See Heather K. Gerken, Slipping the *Bond*s of Federalism, 128 Harv. L. Rev. 85, 87 (2014) ("The states and the federal government regulate shoulder-to-shoulder in the same, tight policymaking space. In doing so, they have forged vibrant, interactive relationships that involve both cooperation and conflict. They are not . . . engaged in the governance equivalent of parallel play.").

433. *Castro-Huerta*, 142 S. Ct. at 2502–03; see also id. at 2511–13 (Gorsuch, J., dissenting) (critiquing the majority's opinion on the basis that it reversed the presumption that the Court applies to tribes).

434. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 537–38 (1832) (noting that Worcester was prosecuted for a crime committed on Cherokee lands).

435. *Castro-Huerta*, 142 S. Ct. at 2493–94, 2497.

436. Id. at 2520 (Gorsuch, J., dissenting).

437. Id.

438. See supra text accompanying notes 260–261.

439. See supra notes 262–280 and accompanying text.

of the nineteenth century.[440] And in place of the attack on tribal sovereignty, the federal government instituted new policies that provided for tribal self-determination and revitalized the exercise of tribal power within state borders in the late twentieth century—a shift the Court recognized and reinforced.[441] Thus, the political and cultural underpinnings of these cases have long since eroded.

The *Castro-Huerta* majority's second mistake lay in its acceptance of previous cases' parroting of the state supremacy arguments as accurate statements of Indian law doctrine. As discussed above, even as the Court placed its imprimatur on the exercise of state authority in the nineteenth-century cases, it did nothing to disturb the foundational principles of *Worcester*: federal authority over Indian affairs and the recognition of inherent tribal sovereignty.[442] In fact, the Court reiterated and even strengthened these principles, for example, by establishing federal plenary power in *Kagama*.[443] And even when the Court tinkered with the bounds of state and tribal authority in the twentieth century and translated the holding of *Worcester* to the modern era, these background presumptions remained intact.[444] As Justice Hugo Black wrote in *Williams v. Lee*, "Over the years this Court has modified these principles in cases where essential tribal relations were not involved and where the rights of Indians would not be jeopardized, but the basic policy of *Worcester* has remained."[445] For the *Castro-Huerta* majority to utilize the invocations of state supremacy to dislodge this "basic policy" and fundamentally disrupt criminal jurisdiction in Indian Country is to make a "declaration . . . as if by oracle, without any sense of the history recounted above and unattached to any colorable legal authority."[446]

As if principles and history were not enough to tie *Castro-Huerta* to the Removal Era, Justice Kavanaugh's preemption analysis provides one final connection—a concern for criminal activity in Indian Country. He harkened back to the rhetoric of the southern states in claiming that Oklahoma "has a strong sovereign interest in ensuring public safety and criminal justice within its territory."[447] Just as the southern state legislators claimed that state jurisdiction over Native lands was necessary to curb

---

440. See Hoxie, A Final Promise, supra note 260, at 243–44 (describing how Native nations rebuffed assimilation efforts).

441. See Wilkinson, supra note 281, at 177–268 (discussing political and legal shifts empowering tribal sovereignty).

442. See supra text accompanying notes 263–280.

443. See supra text accompanying notes 263–268.

444. See supra text accompanying notes 284–290; see also Ablavsky, Too Much History, supra note 20, at 338–43 (discussing how subsequent case law adapted *Worcester*'s principles for a modern era).

445. 358 U.S. 217, 219 (1959).

446. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2511 (2022) (Gorsuch, J., dissenting).

447. Id. at 2501 (majority opinion).

criminality,[448] Justice Kavanaugh relied on Oklahoma's interests in "protecting all crime victims" and "ensuring that criminal offenders . . . are appropriately punished."[449] Additionally, he turned this concern regarding criminality into a humanitarian one. Justice Kavanaugh stated that Oklahoma had an interest in protecting both non-Indian and Indian crime victims and that if those who committed crimes against Indians were allowed to escape state prosecution, these victims would be treated as "second-class citizens."[450] Thus, in allowing states to exercise criminal jurisdiction over Indian Country, the Court characterized state power as a protection for, not a threat to, Native peoples. And in framing Oklahoma's interests in such a definitive way, Kavanaugh seemingly disregarded Justice Marshall's admonition in *Bracker* to not depend "on mechanical or absolute conceptions of state or tribal sovereignty" in a preemption analysis.[451]

Ultimately, state supremacy emerged victorious with *Castro-Huerta*. The decision fundamentally reversed almost every principle that Chief Justice Marshall had proclaimed in *Worcester* and that had defined federal Indian law ever since. According to Justice Gorsuch in his characterization of the majority's theory of state jurisdiction, "Truly, a more ahistorical and mistaken statement of Indian law would be hard to fathom."[452] And although *Castro-Huerta* appears at first glance to strike at federal power—Justice Kavanaugh claimed that "state jurisdiction here would not infringe on tribal self-government"[453]—the decision's ahistorical narrative and endorsement of the Removal-era state supremacy theory will likely have lasting ramifications on the exercise of tribal sovereignty.

B. *The Consequences of Endorsing Removal-Era Arguments in* Castro-Huerta

Castro-Huerta's endorsement of Removal-era state supremacy theory has made countering the theory more important than ever. Thankfully, Native nations have a plethora of arguments available to them, specifically those naming the many harms caused by the continued use of state supremacy arguments. This section reflects on how Removal-era state supremacy theory harms Indian law jurisprudence as well as Native nations and peoples. It also provides Indian law practitioners and scholars with the tools necessary to counter the theory. It contends that modern-day reliance on the state supremacy theory defies original constitutional jurisprudence and current federal Indian affairs policy, produces inaccurate history, and perpetuates the racism and violence that attended the southern states' actions in the early nineteenth century.

---

448. See supra notes 205–209 and accompanying text.

449. *Castro-Huerta*, 142 S. Ct. at 2501–02.

450. Id. at 2502.

451. White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 145 (1980).

452. *Castro-Huerta*, 142 S. Ct. at 2511 (Gorsuch, J., dissenting).

453. Id. at 2501 (majority opinion).

1. *Defying Original Constitutional Understandings and Current Indian Affairs Policy.* — As Part II described, the Removal-era theory of state supremacy misinterpreted constitutional doctrine at the time, and nothing in the interim has changed to support its constitutionality.[454] *Castro-Huerta* cited the Tenth Amendment as support for state territorial jurisdiction, but that amendment has never been used to support state jurisdiction in Indian Country.[455] As several scholars have shown, the Constitutional Convention explicitly rejected any guarantee of state territorial integrity,[456] and the anticommandeering doctrine is largely inapplicable to Indian law.[457] Although *Hicks* suggested that states have broad authority, even over tribal members on tribal land, no federal court has cited Justice Scalia's opinion for that proposition.[458] Moreover, no other Justices have expressed support for Justice Thomas's mistaken construction of the Indian Commerce Clause—a construction its history thoroughly repudiates.[459]

Additionally, *Herrera*'s overruling of *Race Horse* suggests that states no longer can rely on the Equal Footing Doctrine to constrain tribal rights in the name of full territorial sovereignty.[460] Justice Kavanaugh completely bypassed that more recent precedent in *Castro-Huerta* when citing *Pollard's Lessee*, *McBratney*, and *Draper*.[461] He also overlooked the many precedents

---

454. See supra section II.C.

455. Cf. Ablavsky, Too Much History, supra note 20, at 316–17 ("Had the Court actually dug into the conventional sources of constitutional law, it would have found th[e] [Tenth Amendment] principle difficult to justify . . . .").

456. E.g., Ablavsky, Empire States, supra note 36, at 1835–42, 1844–47.

457. See Matthew L.M. Fletcher & Randall F. Khalil, Preemption, Commandeering, and the Indian Child Welfare Act, 2022 Wis. L. Rev. 1199, 1202–04 (arguing that the Indian Child Welfare Act (ICWA) avoids commandeering concerns through preemption law and Section 5 of the Fourteenth Amendment); see also Haaland v. Brackeen, 143 S. Ct. 1609, 1631–38 (2023) (rejecting anticommandeering challenges to ICWA).

458. The only Supreme Court case that has extensively cited *Hicks* is *Plains Commerce Bank v. Long Family Land & Cattle Co.*, yet it only did so for its statements on tribal jurisdiction over non-Indians. See 554 U.S. 316, 333–35 (2008). The majority opinion in *Castro-Huerta* included two citations to *Hicks*, but neither supported the proposition that states may have jurisdiction over tribal members in Indian Country. 142 S. Ct. at 2494, 2501. Additionally, a Westlaw search of lower federal court cases citing *Hicks* reveals no instances of a court using this precedent to support state jurisdiction over tribal members on tribal land. Westlaw, https://westlaw.com/ (last visited Aug. 18, 2023) (open the case Nevada v. Hicks, 533 U.S. 353 (2001) and select "Citing References"; then select "Cases" within the "Content types" tab and select "federal courts" and "reported decisions" within the "Filters" tab). Reviewing the 156 cases in the search results discloses no holdings in which a court declares that a state possesses jurisdiction over tribal members on tribal land.

459. See supra text accompanying notes 240–242, 327–342. The Court also rejected a similar interpretation of the Indian Commerce Clause in *Haaland v. Brackeen*. See 143 S. Ct. at 1630–31 ("As we already explained, . . . Congress's power under the Indian Commerce Clause encompasses not only trade but also 'Indian affairs.'" (quoting Cotton Petroleum Corp. v. New Mexico, 490 U.S. 163, 192 (1989))).

460. Herrera v. Wyoming, 139 S. Ct. 1686, 1697 (2019).

461. *Castro-Huerta*, 142 S. Ct. at 2493–94.

in which the Court had allowed the federal government to reserve its authority over Native lands and peoples within state borders despite statehood.[462]

Both Justices and states should recognize that *Worcester* provides an original understanding of the Constitution regarding Indian affairs. And they should recognize that *Worcester* repudiated the southern states' theory of state supremacy—namely, their misguided interpretations of the law of nations, absolute territorial sovereignty, and the Constitution.[463] Therefore, invoking these arguments in a modern-day context not only defies an originalist interpretation of the Constitution but also ignores the Court's foundational Indian law jurisprudence.[464]

Beyond the Constitution, the state supremacy arguments defy the current state of federal Indian affairs policy, putting the Court out of step with the political branches. Despite the disastrous Indian affairs policies of the nineteenth and early twentieth centuries, the Executive Branch and Congress have strongly supported tribal self-determination over the past five decades.[465] In particular, Congress has often treated Native nations as states in various pieces of legislation, recognizing that tribes can exercise certain regulatory powers within state boundaries.[466] In its past preemption cases, the Court acknowledged and gave weight to the direction of these policies.[467] Although it did not in *Castro-Huerta*, the Court should once again defer to the Indian affairs policies of the political branches and reject the untenable and outdated notion of state supremacy.

2. *Producing Inaccurate History.* — The perpetuation of state supremacy arguments also legitimizes inaccurate history. The use of history in law often has profound consequences on both Americans' views

462. See Litman, supra note 64, at 1225 & n.100 (listing cases in which the Court "upheld [state admission] conditions regulating commerce with Native Americans or commerce on Native American lands"); see also David E. Wilkins, Tribal–State Affairs: American States as 'Disclaiming' Sovereigns, Publius, Fall 1998, at 55, 67–73 (discussing instances in which states disclaimed authority over Native peoples and lands through enabling acts and state constitutions).

463. See supra section II.C.

464. For more discussion on how federal Indian law should fit within an originalist framework, see generally M. Alexander Pearl, Originalism and Indians, 93 Tul. L. Rev. 269, 321–36 (2018).

465. See Wilkinson, supra note 281, at 177–268 (discussing political and legal shifts empowering tribal sovereignty).

466. This treatment is especially prevalent in environmental statutes, such as the Clean Air Act, 42 U.S.C. § 7601(d) (2018), the Clean Water Act, 33 U.S.C. § 1377(e) (2018), and the Safe Drinking Water Act, 42 U.S.C. § 300j-11.

467. See, e.g., New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 341 (1983) ("The assertion of concurrent jurisdiction by New Mexico not only would threaten to disrupt the federal and tribal regulatory scheme, but would also threaten Congress' overriding objective of encouraging tribal self-government and economic development.").

of the past and the meaning of law itself.[468] As historian Alfred Kelly once wrote, the Supreme Court's citation of history results in the Court "ma[king] history, since what it declare[s] history to be [is] frequently more important than what the history might actually have been."[469] This connection between law and history is especially consequential in the field of federal Indian law because courts frequently resolve cases based on the historical narratives they construct.[470] Thus, it is important to recognize—and counter—the various ways in which litigants and courts create inaccurate history by utilizing state supremacy arguments.

First, the reliance on state supremacy arguments in *Castro-Huerta* and *Hicks* creates a false historical narrative of the development of federal Indian law doctrine. These opinions suggest that the history of Indian law has been one in which state law has increasingly applied to Native lands and peoples.[471] Yet as discussed above, federal Indian affairs policy has vacillated dramatically over the past two centuries.[472] And the Court has continually tinkered with the bounds of federal, state, and tribal power to align with the direction of federal Indian affairs policy.[473] But federal authority in Indian Country and the maintenance of tribal sovereignty have served as consistent throughlines, cabining state power. This is why the foremost treatise on federal Indian law explicitly states, "Congress's plenary authority over Indian affairs and the tradition of tribal autonomy in Indian country combine to preempt the operation of state law."[474]

The state supremacy theory's hostility to tribal sovereignty also risks undermining the robust historical scholarship that both demonstrates the resilience of Native nations and features the voices of Native peoples.[475] In

---

468. See, e.g., Charles A. Miller, The Supreme Court and the Uses of History 25 (1969) ("By writing history into its opinions the Court contributes to the public's view of the American past as much as, and sometimes even more than, professional historians . . . ."); Richard H. Fallon, Jr., The Many and Varied Roles of History in Constitutional Adjudication, 90 Notre Dame L. Rev. 1753, 1759–97 (2015) (analyzing the various ways in which history is used to determine constitutional meaning).

469. Alfred H. Kelly, Clio and the Court: An Illicit Love Affair, 1965 Sup. Ct. Rev. 119, 123.

470. See Ablavsky, Too Much History, supra note 20, at 298–320 (arguing that there is "too much history" in Indian law, which leads the Court to construct "good" and "bad" history opinions in Indian law cases); Fort, supra note 47, at 301–08 ("Because of the nature of federal Indian law, which requires analysis of treaties and other historical documents, the Court must use historical narrative when deciding Indian law cases." (footnote omitted)).

471. See supra text accompanying notes 299–305, 438–446.

472. See supra text accompanying notes 81–97, 107–127, 259–261, 281–283.

473. See supra text accompanying notes 259–290.

474. Cohen's Handbook of Federal Indian Law § 6.01(1) (Nell Jessup Newton, Robert T. Anderson, Bethany R. Berger, Carole E. Goldberg, John P. LaVelle, Judith V. Royster, Joseph William Singer & Kevin Washburn eds., 2012).

475. See generally Ned Blackhawk, The Rediscovery of America: Native Peoples and the Unmaking of U.S. History (2023) (recounting the central role that Native nations and peoples played in U.S. history); Wilkinson, supra note 281 (demonstrating how Native peoples contributed to the resurgence of tribal sovereignty in the twentieth century).

echoing southern states' views of Native lands as havens for criminal activity and Native nations as incompetent entities, states like Wyoming and Oklahoma present the views of tribal opponents as historical truth.[476] Solely relying on these observations misses the fact that some statements were likely rhetoric calculated to achieve Native dispossession and subjugation. Adopting them also increases the likelihood that future litigants and courts will replicate this inaccurate, one-sided history in briefs and opinions.

Additionally, these framings of the past influence present-day views of Native nations; historically inaccurate arguments reproduce erroneous understandings. As the historian Albert Hurtado has observed, "[V]irtually all historical writing on Indian topics has the potential to affect contemporary Indian life."[477] And legal scholars have compellingly shown how problematic historical narratives and stereotypes continue to shape perspectives on tribes.[478] For example, Kate Fort has shown how the "vanishing Indian" stereotype of the nineteenth century gave rise to a history in which Native nations and peoples are assumed to be absent.[479] The Court has then relied on this history to limit tribal powers because it assumes these powers ceased to exist sometime in the past.[480] Similarly, in the context of the state supremacy theory, state litigants' and the Court's assumption that statehood incorporated Native lands and peoples fully into the state has been used to question tribal sovereignty's continuing existence.[481] Moreover, as seen most explicitly in Oklahoma's briefs and in *Castro-Huerta*, states have projected their characterizations of history into the present, claiming that restored tribal sovereignty will increase criminal

476. These arguments also value the perspective and intentions of settlers and non-Indians over Indians. In *McGirt*, Justice Gorsuch repudiated this tactic. Replying to Oklahoma's contention that "many of its residents will be surprised to find out they have been living in Indian country this whole time," Gorsuch wrote, "But we imagine some members of the 1832 Creek Tribe would be just as surprised to find them there." McGirt v. Oklahoma, 140 S. Ct. 2452, 2479 (2020). For a similar argument that the Court should not give weight to the expectations of settlers from the Allotment era in reservation-diminishment cases, see Ann E. Tweedy, Unjustifiable Expectations: Laying to Rest the Ghosts of Allotment-Era Settlers, 36 Seattle U. L. Rev. 129, 130–31 (2012).

477. Albert L. Hurtado, Public History and the Native American: Issues in the American West, Mont. Mag. W. Hist., Spring 1990, at 58, 59.

478. See, e.g., Williams, supra note 47, at xxvi (arguing that there is a "deeply entrenched national mythology of Indian savagery, epitomized, for example, by the tale of the Indians selling Manhattan for twenty-four dollars"); Russel Lawrence Barsh & James Youngblood Henderson, The Betrayal: *Oliphant v. Suquamish Indian Tribe* and the Hunting of the Snark, 63 Minn. L. Rev. 609, 617–31 (1979) (critiquing Justice William Rehnquist's use of history in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)).

479. Fort, supra note 47, at 308–20.

480. See id. at 321–24 ("The Court's work now treats tribal powers of self-governance as already gone, and the Court's work is taking an active role in creating (diminished recognition of tribal sovereignty) what it claims has already happened (diminished tribal sovereignty).").

481. See supra text accompanying notes 374–378, 424–431.

activity and sow chaos because of the uncertainty and ineptitude that surrounds tribal governments.[482]

As a result, the Removal-era state supremacy theory continues to reach its hand into the present, portraying Native nations as historical and legal contradictions. For modern-day adherents to the theory, Native nations exist as either anachronistic obstacles to law and order or entities that lack any attributes of sovereignty. And these views live on despite the fact that today's Native nations effectively exercise their sovereignty and maintain their existence through good governance.[483]

3. *Perpetuating Racism and Violence.* — The state supremacy arguments have also imposed and continue to impose racial and dignitary harms on Native peoples. Although these harms are closely intertwined with the production of false historical narratives—which are ultimately grounded in white supremacy[484]—it is important to emphasize the specific ways in which the state supremacy theory both overtly racializes state sovereignty arguments and obscures their violent past. Only then can society reckon with the violence that legal actors still perpetrate against tribal sovereignty and Indigeneity when deploying state supremacy arguments.

First, the southern states' theory rested on racist underpinnings. Desiring Native lands, southern officials constructed racial arguments for the dispossession of Natives, contending that savages could neither hold title to land, nor exercise self-government, nor live next to whites.[485] On the other hand, state sovereignty—the power of white citizens—could exercise authority over lands and all peoples residing on them, whether they were white, Black, or Native.[486] This construction of state sovereignty as the embodiment of white supremacy was also calculated to prevent the federal government from interfering with states' internal affairs. Southerners feared that if the federal government had jurisdiction over Indians living within state borders—and could use this authority to transform them into citizens—then it could do the same for enslaved Black people.[487] This history requires the Justices to recognize the racist context that gave rise to the state sovereignty arguments. During its 2019

---

482. See supra text accompanying notes 363–394, 447–450.

483. See Matthew L.M. Fletcher, Indian Tribes Are Governing Well. It's the States that Are Failing, Wash. Monthly (Sept. 30, 2021), https://washingtonmonthly.com/2021/09/30/indian-tribes-are-governing-well-its-the-states-that-are-failing/ [https://perma.cc/9VQX-UQCV]; see also Angela R. Riley, Good (Native) Governance, 107 Colum. L. Rev. 1049, 1061–1107 (2007) (analyzing examples of "good Native governance").

484. See supra notes 476–483 and accompanying text.

485. See supra text accompanying notes 145–151, 210–213, 217–219.

486. See supra text accompanying notes 191–197.

487. See The Report, supra note 28, at 3 ("[I]t will be found that the extension of rights to the *Indians* within a State, differs from the like extension of rights to the free negroes and slaves within the same *limits, only in the shade of colour* between the two races—*Abstractly*, there is no difference."); see also supra text accompanying notes 158–159.

Term, in striking down nonunanimous jury verdict laws arising from the Jim Crow era, the Court suggested that it must grapple with the racist origins of laws when assessing their constitutionality.[488] Similarly, the Court and states should contend with the validity of state sovereignty arguments grounded in white supremacy.

Legal practitioners and scholars must also point out how these arguments actually perpetuate racial prejudices. As Bethany Berger has argued, the purpose of defining tribes as racial groups historically has been to "deny tribes the rights of governments."[489] And the state supremacy theory clearly aligns with this trend. Justice Thomas's concern about the harms of tribal sovereign immunity and the states' anxieties about subjecting non-Indians to tribal jurisdiction reiterate the underlying belief that tribal values and institutions are incompatible with the preferences of other races.[490] Rather than recognizing tribes as nations with the powers that other sovereigns possess, some of the Justices and states see only the creation of a racially segregated society with Indians unfairly ruling over non-Indians.[491] Viewing Native peoples as racially biased actors, non-Indians then uphold a racial hierarchy in which Euro-American institutions are supreme.

Finally, the stain of violence associated with these arguments renders them illegitimate. In treating the southern states' theory of state supremacy as a valid legal concept, modern proponents have forgotten how this theory was constructed to justify the mass expulsion of thousands of Native peoples from the Southeast. The Trail of Tears that followed the southern states' actions resulted in the loss of not only the Five Tribes' ancestral homelands but also millions of dollars in Native property and thousands of Native lives.[492] To continue to rely on concepts so intimately tied with Removal is to sanction the destruction and death that accompanied it.

And because Removal is a manifestation of one of America's original sins—colonialism—the other original sin—slavery—can help reveal the

---

488. See Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (criticizing the plurality opinion in Apodaca v. Oregon, 406 U.S. 404 (1972), for failing to address "the racist origins of Louisiana's and Oregon's laws"); id. at 1410 (Sotomayor, J., concurring) (pointing to the "legacy of racism" underlying the laws in question as "worthy of this Court's attention").

489. Bethany R. Berger, Red: Racism and the American Indian, 56 UCLA L. Rev. 591, 599 (2009).

490. See supra text accompanying notes 317–323, 344–345, 388–394.

491. See, e.g., Carmen Forman, Stitt Again Blasts *McGirt* Ruling, Saying Martin Luther King Jr. Might Be 'Disgusted' by Decision, The Oklahoman (Jan. 17, 2022), https://www.oklahoman.com/story/news/2022/01/17/martin-luther-king-jr-mlk-day-2022-kevin-stitt-mcgirt-ruling/6557404001/ [https://perma.cc/9EXE-H3CK] (quoting Oklahoma Governor Kevin Stitt as stating that "the ruling created two sets of rules for Oklahomans, based on their race" and that "[i]n eastern Oklahoma right now, there is not equal protection under the law").

492. Saunt, supra note 3, at 280–81, 315.

ongoing legacies of such violence in the law.[493] As Justin Simard has compellingly shown, modern courts still commonly cite "slave cases," those cases involving enslaved people, as good law.[494] But, as he argues, modern courts' citations to "slave cases" cause "dignitary harms" by failing to recognize the brutality of slavery.[495] Additionally, these citations often fail to recognize that "[e]very case that treated an enslaved person as property signaled legal approval of a slave society premised on white supremacy."[496] Similarly, jurists' current reliance on the Removal-era state supremacy theory causes dignitary harms. The blatant use of state sovereignty arguments that resulted in the forced emigration of Native peoples not only overlooks the violence involved in Removal but also "ignores the humanity of those subjected to legal subjugation and treats white supremacist [officials] as respected authorities."[497] Furthermore, support of the state supremacy theory signals approval of what the Jackson Administration and southern states did: eliminate Native nations in the South for the benefit of states and their Euro-American citizens.[498] Worse, unlike the law of slavery, the state supremacy theory was not the law in the past.[499] So even as the United States' oppressive treatment of Native nations in the past "has been overruled in the court of history,"[500] the Court in *Castro-Huerta* finally allowed the legal theory that supported such violence to become law and continue its destructive effects.[501]

C. *Federal Indian Law in the Wake of* Castro-Huerta

Castro-Huerta has done more than reveal the problems inherent in relying on the Removal-era state supremacy theory. It also has introduced an immense amount of uncertainty into federal Indian law. With *Worcester* no longer providing the base rule for the application of state law in Indian Country, it is unclear how the Supreme Court and lower courts will use the principle of absolute state territorial jurisdiction. As the Indian law scholar Stacy Leeds has stated, "Read in its most expansive light, this case seems to

493. For discussion of colonialism and slavery as America's original sins, see Blackhawk, Federal Indian Law as Paradigm, supra note 56, at 1805–06.

494. Justin Simard, Citing Slavery, 72 Stan. L. Rev. 79, 81–82 (2020).

495. Id. at 84.

496. Id. at 112.

497. Id. at 84.

498. See supra notes 113–123, 249–251, and accompanying text.

499. See supra section II.C.

500. Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (condemning Korematsu v. United States, 323 U.S. 214 (1944)). The literature on the violent and destructive impacts of U.S. Indian affairs policy is substantial. For recent works, see generally Benjamin Madley, An American Genocide: The United States and the California Indian Catastrophe, 1846–1873 (2016); Ostler, supra note 25; Michael John Witgen, Seeing Red: Indigenous Land, American Expansion, and the Political Economy of Plunder in North America (2022).

501. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505 (Gorsuch, J., dissenting) ("Where our predecessors [in *Worcester*] refused to participate in one State's unlawful power grab at the expense of the Cherokee, today's Court accedes to another's.").

support many types of state intrusion into Indian Country with the erasure of Indigenous nations and their rights to be governed by their own laws to the exclusion of state law."[502] There is a possibility that the Court will take the state supremacy theory to its extreme, allowing state law to apply to Native peoples and override tribal law.

And there are currently opportunities for the Supreme Court and other courts to endorse more state supremacy arguments. Conflicts are brewing over federal industrial and environmental regulations[503] and the exercise of state civil jurisdiction in Indian Country.[504] Armed with *Castro-Huerta*, courts may cabin federal and tribal authority further in these areas. And in a recent alarming opinion by the Oklahoma Court of Criminal Appeals, the majority—even as it recognized the existence of the Miami, Ottawa, and Peoria Reservations—suggested that a state may have jurisdiction over Indians who commit crimes against non-Indians in Indian Country because of *Castro-Huerta*.[505] Thus, *Castro-Huerta* opened a Pandora's box of novel legal arguments that may further erode foundational federal Indian law principles.

Native nations still have the chance to contest *Castro-Huerta*, though. First, Native nations can avoid the courts altogether. They can do so by either securing legislation from Congress to explicitly preempt state law—the suggestion made by Justice Gorsuch in his dissent[506]—or entering into compacts with states that provide for a jurisdiction-sharing arrangement—a successful strategy from the past few decades.[507] Second, even if Native nations find themselves in litigation, they may be able to argue around *Castro-Huerta*. The most powerful of these arguments would be that *Castro-Huerta*'s territorial jurisdiction principle applies only to state jurisdiction being exercised over non-Indians in Indian Country and cannot interfere with tribal or federal law as applied to Indians.[508] According to Indian law scholar Dylan Hedden-Nicely, even though the Court departed from *Worcester*'s categorical prohibition on state law's application in Indian Country in some twentieth-century Indian law cases, it did so only "in cases where

502. Martin, supra note 20 (internal quotation marks omitted) (quoting an interview with Leeds).

503. See, e.g., Oklahoma v. U.S. Dep't of Interior, 640 F. Supp. 3d 1130, 1134–35 (W.D. Okla. 2022) (denying Oklahoma's challenge to the federal government's exercise of jurisdiction over surface mining activities within the Muscogee Reservation).

504. See, e.g., Milne v. Hudson, 519 P.3d 511, 516 (Okla. 2022) (upholding state court jurisdiction over civil protection orders between Indians in Indian Country).

505. See State v. Brester, 531 P.3d 125, 137–38 (Okla. Crim. App. 2023).

506. *Castro-Huerta*, 142 S. Ct. at 2527 (Gorsuch, J., dissenting).

507. See Fletcher, Deadliest Enemies, supra note 60, at 82–83 (describing the increasing trend of tribes and states entering compacts regarding various areas of governance).

508. See 142 S. Ct. at 2526 (Gorsuch, J., dissenting) ("Most significantly, the Court leaves undisturbed the ancient rule that States cannot prosecute crimes by Native Americans on tribal lands without clear congressional authorization—for that would touch the heart of 'tribal self-government.'" (quoting id. at 2500 (majority opinion))).

essential tribal relations were not involved and where the rights of Indians would not be jeopardized."[509] Therefore, Native nations could argue that the case did nothing to displace *Worcester*'s support of tribal self-government, a tenet of Indian law that has been consistently reaffirmed by the Court.[510]

The Court's past Term may also provide some hope that it will cabin the effects of *Castro-Huerta*. In *Haaland v. Brackeen*,[511] a case in which the State of Texas challenged the constitutionality of the Indian Child Welfare Act (ICWA),[512] the Court flatly rejected all the state sovereignty arguments involved. In *Brackeen*, Texas had taken a page out of the southern states' playbook, arguing that the Constitution provided Congress with no power to interfere in state child-custody proceedings.[513] It also contended that the federal government's mechanisms for protecting Indian children and families in these proceedings violated the Tenth Amendment's anticommandeering principle.[514] Texas even cited *Castro-Huerta* in its brief for the proposition that it was allowed to govern child welfare without interference from Congress.[515] Yet the Court held that Congress had the power to enact ICWA because its power in Indian affairs is both "plenary and exclusive."[516] Echoing the *Worcester* principle that federal Indian affairs authority is exclusive, Justice Amy Coney Barrett wrote, "Our cases leave little doubt that Congress's power in this field is muscular, superseding . . . state authority."[517] In particular, she rejected Texas's parroting of the Removal-era state supremacy arguments. She found that the Indian Commerce Clause and other constitutional provisions both bestowed Indian affairs authority to the federal government—to the exclusion of states—and allowed Congress to displace state law.[518] The

509. Hedden-Nicely, The Reports of My Death, supra note 20, at 269 (internal quotation marks omitted) (quoting Williams v. Lee, 358 U.S. 217, 219 (1959)).

510. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2476–77 (2020) (citing Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 557 (1832), approvingly for the proposition that tribes are "subject to no state authority"); see also Hedden-Nicely, The Reports of My Death, supra note 20, at 269–70 (arguing that *Worcester*'s principle on the tribal right to independence and self-government "remain[s] the law"). Additionally, as Hedden-Nicely has argued, any preemption analysis of the exercise of state authority within a tribe's reservation must rely on that tribe's treaties, not on the balancing of amorphous state and tribal interests as conceived by the Court. Hedden-Nicely, The Terms of Their Deal, supra note 61, at 510.

511. 143 S. Ct. 1609 (2023).

512. Reply Brief for Petitioner the State of Texas at 1, *Brackeen*, 143 S. Ct. 1609 (Nos. 21-376, 21-377, 21-378, 21-380), 2022 WL 5305089.

513. Id. at 4–11.

514. Id. at 23–24.

515. See id. at 4 ("After all, even in cases involving Indians, 'States do not need a permission slip from Congress to exercise their sovereign authority.'" (quoting Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2503 (2022))).

516. *Brackeen*, 143 S. Ct. at 1627 (internal quotation marks omitted) (quoting United States v. Lara, 541 U.S. 193, 200 (2004)).

517. Id.

518. Id. at 1627–31.

Court also held that ICWA aligned with the Tenth Amendment, thereby overcoming the anticommandeering challenges.[519]

With *Brackeen*—and its refusal to accept any state supremacy arguments—following so closely on the heels of *Castro-Huerta*, the question of *Castro-Huerta*'s impact on federal Indian law doctrine remains. ICWA applies inside and outside of Indian Country, yet surprisingly, the Court made no mention of states' territorial jurisdiction like it did in *Castro-Huerta*. In fact, the only citation to the *Castro-Huerta* majority opinion appeared in a footnote in Justice Thomas's dissent.[520] Therefore, the future situations in which the Court will choose to invoke the state supremacy theory to undermine federal and tribal power are unclear. Still, the *Brackeen* dissents held fast to the state supremacy arguments. Justice Alito argued that family law is "a field long-recognized to be the virtually exclusive province of the States."[521] And Justice Thomas once again reiterated his position—and that of Removal-era southern state officials—that nothing in the Constitution authorizes the federal government to encroach on state sovereignty in the name of Indian affairs.[522] Thus, the state supremacy theory lives on at the Court, even if its significance as law remains uncertain.

* * *

As this Article has shown, *Castro-Huerta* is more than a case about a particular issue—criminal jurisdiction in Indian Country. Fundamentally, it is the culmination of two centuries of states and jurists countering the foundational principles of Indian law with the unsound theory of state supremacy. Now, the specter of Indian Removal casts a shadow on Native nations, as the state supremacy arguments have been transformed into legal principles that threaten tribal sovereignty. Still, this Article's description of the harms perpetuated by *Castro-Huerta* will equip advocates with powerful arguments to undermine their continued use. And Native nations always can invoke the promises that the United States has made to them in treaties and policies that still bind the nation to this day. So even as *Castro-Huerta* stands as a victory for state supremacy, it is hopefully a short-lived one.

519. Id. at 1631–38.

520. See id. at 1669 n.4 (Thomas, J., dissenting) (citing Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2502 (2022), for the proposition that Indian reservations are "treated as part of the State they are within").

521. Id. at 1685 (Alito, J., dissenting).

522. Id. at 1677–83 (Thomas, J., dissenting).

CONCLUSION

It is ironic that as the Court says it is more open than ever to overruling precedents grounded in racism and colonialism,[523] it has taken the Removal-era state supremacy theory and made it the law. And the Court did so without any recognition of the theory's historical context or the overwhelming amount of destruction and violence it led to. Yet, in considering the federal government's power over the U.S. territories, some Justices finally have expressed their openness to overruling the racist and imperialist *Insular Cases* of the early twentieth century.[524] This sentiment has extended to Indian law in some respects, with Justices recently questioning the powers of Courts of Indian Offenses, which originally were intended to assimilate Native peoples.[525] Thus, there may be an opening for the Court to chip away at *Castro-Huerta*'s state supremacy principles if it begins to reconsider precedents rooted in colonialism. This small opening, however, remains overshadowed by the Court's continued proclivity to employ arguments shorn of their historical context in order to reach the Justices' preferred legal outcomes—just as it did in *Castro-Huerta*.[526]

But the origins of the state supremacy theory are not the only issue the Court must confront. It must also recognize that state supremacy arguments are being weaponized once again to reenact the jurisdictional conflicts of the Removal Era, with legal actors advocating for the Supreme Court to remove the powers Native nations possess for the benefit of state authority. As several Indian law scholars have argued, the problematic precedents in the field have long served "like a loaded weapon" that can be used to erode the rights of Native nations and peoples.[527] But now the continually rejected and problematic arguments of the past—not precedents—have been resurrected to undermine those rights. Therefore, it is imperative that legal practitioners and scholars compel the Court and states to recognize this harm and relegate this vein of state supremacy arguments to the dustbin of history. There, they can join those state rights' concepts formerly used to uphold slavery and segregation. And rejecting

---

523. See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390, 1405 (2020) (partially invalidating nonunanimous jury verdict law based on racist origins); Trump v. Hawaii, 138 S. Ct. 2392, 2423 (2018) (condemning Korematsu v. United States, 323 U.S. 214 (1944)); see also supra notes 68, 488.

524. See United States v. Vaello Madero, 142 S. Ct. 1539, 1552 (2022) (Gorsuch, J., concurring); id. at 1560 n.4 (Sotomayor, J., dissenting).

525. See Denezpi v. United States, 142 S. Ct. 1838, 1849–50, 1851, 1854–56 (2022) (Gorsuch, J., dissenting).

526. See supra notes 62–64 and accompanying text.

527. Williams, supra note 47, at 136 (internal quotation marks omitted) (quoting *Korematsu*, 323 U.S. at 246 (Jackson, J., dissenting)); see also Crepelle, supra note 47, at 532 ("Jurisprudence loaded with grotesque 19th-century racist stereotypes and factual errors about American Indians remains valid precedent.").

them once and for all can lessen the impact of the nation's continuing legacy of settler colonialism and racial oppression.

Promises are powerful. Justice Gorsuch's majority opinion in *McGirt* began with a bold statement recognizing such: "On the far end of the Trail of Tears was a promise. Forced to leave their ancestral lands in Georgia and Alabama, the Creek Nation received assurances that their new lands in the West would be secure forever."[528] And *McGirt* validated this promise by recognizing the continuing existence of the Muscogee Reservation, leading to the re-recognition of the other Five Tribes' reservations. Two years later, however, the Court partially reversed itself in *Castro-Huerta* by allowing Oklahoma to exercise jurisdiction over crimes involving Native peoples within those reservations. In the words of Justice Gorsuch, the Court "failed" to do its "duty to honor this Nation's promises."[529]

Justice Gorsuch, however, points out that treaties are not the only sources of promises for Native nations: "Our Constitution reserves for the Tribes a place—an enduring place—in the structure of American life. It promises them sovereignty for as long as they wish to keep it. And it secures that promise by divesting States of authority over Indian affairs . . . ."[530] Thus, tribal sovereignty—and the rejection of state supremacy—lies at the heart of the Constitution itself. And from *Worcester* to *McGirt*, Native nations have endured and successfully overcome states' assaults on Native sovereignty.[531] Now, in the wake of *Castro-Huerta*, tribal advocates and the Court must strive to defy states' "unlawful power grab[s]"[532] again and ultimately dispel the threat that state supremacy poses to Native nations' continuing existence.

528. McGirt v. Oklahoma, 140 S. Ct. 2452, 2459 (2020).

529. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2527 (2022) (Gorsuch, J., dissenting).

530. Haaland v. Brackeen, 143 S. Ct. 1609, 1661 (2023) (Gorsuch, J., concurring).

531. See *McGirt*, 140 S. Ct. at 2463–68, 2482.

532. *Castro-Huerta*, 142 S. Ct. at 2505 (Gorsuch, J., dissenting).

TEXTUALISM'S DEFINING MOMENT

William N. Eskridge, Jr., Brian G. Slocum** & Kevin Tobia****

Textualism promises simplicity and objectivity: Focus on the text, the whole text, and nothing but the text. But the newest version of textualism is not so simple. Now that textualism is the Supreme Court's dominant interpretive theory, most interpretive disputes implicate textualism, and its inherent complexities have surfaced. This Article is the first to document the major categories of doctrinal and theoretical choices that regularly divide modern textualists and for which their theory currently provides no clear answers. Indeed, as practiced by the Justices, the newest textualism undermines the rule of law that is its theoretical foundation.

As we demonstrate, there are at least twelve categories of analytical choices faced by textualists in the hard cases that dominate the Supreme Court's docket and academic discourse. At present, the new textualist Court is riven with internal divisions and sends less-than-clear messages to the lower courts. And the objective, text-based evidence the Justices claim to apply does not constrain the Court's results. This Article argues that textualists must better define their methodology and should jettison the most activist or idiosyncratic doctrines that have become prominent in Roberts Court legisprudence. The Article concludes with some best practices that would build on the Court's text-centric focus but render that focus better suited to the Court's proper role as a neutral partner to Congress in elaborating statutory schemes.

---

* Alexander M. Bickel Professor of Public Law, Yale Law School.

** Stearns Weaver Miller Professor, Florida State University College of Law.

*** Associate Professor of Law, Georgetown University Law Center.

We appreciate the comments from participants in workshops at the Yale Law School, 2023 Legislation Roundtable (Georgetown Law), and 2023 AALS Conference, and in seminars at the Stanford and Yale Law Schools. For outstanding research assistance, we thank Kart Kandula, Caroline Lefever, Caleb Linville, Gabriela Monico Nunez, Christopher Slama, and Chen Wang, and for excellent editorial assistance, we thank the staff of the *Columbia Law Review.*

INTRODUCTION

Justice Antonin Scalia's greatest legacy is his "new textualism," which inspired a Kuhnian revolution in statutory interpretation.[1] Its basic interpretive principle requires a simple, fact-based linguistic focus: Courts should determine "the meaning that would reasonably have been conveyed to a citizen at the time a law was enacted, as modified by the relationship of the statute to later enactments."[2] Crucially, the new textualism rejected the view that interpretation should seek "legislative intent," often identified via consideration of legislative history.[3]

For generations before the current dominance of the new textualism, judges typically followed a pragmatic approach that sought to determine the statutory meaning (1) understood by legislators, (2) passing a statute that advances public purposes, (3) as reasonably applied to current

1. See Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 23–25 (Amy Gutmann ed., 1997) [hereinafter Scalia, A Matter of Interpretation] (explaining and defending Scalia's textualist philosophy of interpretation); William N. Eskridge, Jr., The New Textualism, 37 UCLA L. Rev. 621, 656–60 (1990) ("In each year that Justice Scalia has sat on the Court . . . his theory has exerted greater influence on the Court's practice.").

2. Daniel A. Farber & Phillip Frickey, Legislative Intent and Public Choice, 74 Va. L. Rev. 423, 454 (1988) (internal quotation marks omitted) (quoting Judge Antonin Scalia, D.C. Cir., Speech on the Use of Legislative History 15 (1985)); accord Off. of Legal Pol'y, DOJ, Using and Misusing Legislative History: A Re-Evaluation of the Status of Legislative History in Statutory Interpretation 33–34 (1989) [hereinafter OLP, Using and Misusing Legislative History] (arguing that the Article III power to interpret requires the judiciary to interpret laws in their actual, not intended, meaning); Frank H. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J.L. & Pub. Pol'y 59, 65–66 (1988) ("We should look at the statutory structure and hear the words as they would sound in the mind of a skilled, objectively reasonable user . . . . The meaning of statutes is to be found not in the subjective, multiple mind of Congress but in the understanding of the objectively reasonable person."); see also John F. Manning & Matthew Stephenson, Legislation and Regulation: Cases and Materials 22–23, 55–79, 203–28 (3d ed. 2017) (analyzing the merits of textualism versus purposivism and outlining various canons of construction for textualist statutory interpretation).

3. Cf. John F. Manning, Second-Generation Textualism, 98 Calif. L. Rev. 1287, 1289–90 (2010) (explaining that "second-generation textualism" does not focus primarily on whether courts should consult legislative history).

circumstances.[4] This Article refers to this approach as "traditional pragmatism." In contrast, Scalia's new textualism offered a seemingly straightforward alternative methodology that determined the meaning (1) understood by the ordinary person, (2) applying standard rules of semantics, definitions, and grammar,[5] (3) at the time the statute was enacted.[6] This methodology seemingly could be boiled down to ten words: the text, the whole text, and nothing but the text.

The new textualists also offered sophisticated normative justifications for their methodology. In particular, Scalia claimed that textualism is the only methodology faithful to the rule of law, which requires that legal interpretive rules be stable and that their application be predictable, consistent, objective, and neutral.[7] Thus, "textualism will provide greater certainty in the law, and hence greater predictability and greater respect for the rule of law."[8] Moreover, Scalia maintained, textualism limits judicial discretion and is in fact the only method consistent with Article III's grant of the "judicial Power," which contemplates the neutral and objective application of preexisting rules to narrow, fact-based controversies.[9] A restrained, text-focused judiciary is required by the Constitution's separation of lawmaking authority (Congress), from law implementation (President) and application (Court), and by the Article I,

4. See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, The Legal Process 1374–80 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994) (1958) (describing the pragmatic approach to statutory interpretation).

5. See Manning & Stephenson, supra note 2, at 203–08 (detailing the judiciary's use of ordinary meaning and semantic canons of construction).

6. Condition (3) refers to statutory originalism. In theory, one could be textualist but not originalist, but many modern textualists are also originalists. See Victoria F. Nourse, Textualism 3.0: Statutory Interpretation After Justice Scalia, 70 Ala. L. Rev. 667, 676 (2019) [hereinafter Nourse, Textualism 3.0] (discussing the presence of originalism in textualism and its expansion over time).

7. See Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts, at xxvii–xxx (2012) (arguing that textualism is the "most principled" interpretive method); Antonin Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175, 1179, 1183–84 (1989) ("Even where a particular area is quite susceptible of clear and definite rules, we judges cannot create them out of whole cloth, but must find some basis for them in the text that Congress or the Constitution has provided."); see also OLP, Using and Misusing Legislative History, supra note 2, at 34–37 (arguing that the rule of law is undermined by laws that lack a stable and ascertainable meaning).

8. Scalia & Garner, supra note 7, at xxix.

9. See Scalia, A Matter of Interpretation, supra note 1, at 16–23; see also OLP, Using and Misusing Legislative History, supra note 2, at 33 ("[S]tatutes must be interpreted according to actual meaning, rather than intended meaning, . . . [because] the power to interpret the laws is part of the judicial power of Article III and not of the legislative power of Article I."); John F. Manning, Justice Scalia and the Idea of Judicial Restraint, 115 Mich. L. Rev. 747, 772 (2017) [hereinafter Manning, Justice Scalia and Judicial Restraint] (reviewing Scalia, A Matter of Interpretation, supra note 1) (explaining the connection between Scalia's commitment to textualism and his outlook on the "judicial Power" vested in Article III courts). See generally Antonin Scalia & John F. Manning, A Dialogue on Statutory and Constitutional Interpretation, 80 Geo. Wash. L. Rev. 1610 (2012) (discussing Scalia's opposition to judicial use of legislative history in statutory interpretation).

Section 7 process by which statutes are enacted.[10] Statutory text is all that Congress, with the President's approval, may enact, and so textualism is the method most consistent with the democratic premises of constitutional lawmaking.[11]

Many legal academics are skeptical that the new textualism constrains judges as well as the traditional pragmatic approach does.[12] Specifically, critics have demonstrated, with both qualitative and quantitative analyses of leading cases, that Scalia and like-minded jurists have applied textualism much more flexibly than their theory would predict.[13] Thus, the new textualism has failed to demonstrate a rule-of-law advantage over other theories or to show that it is required by or even consistent with democratic or constitutional values.[14]

Despite these criticisms, the textualist momentum is not slowing, at least not within the judiciary. The Supreme Court is now dominated by devoted textualists: Justices Clarence Thomas, long an enthusiastic booster of the new textualism;[15] Samuel Alito, whose Burkean jurisprudence

---

10. See John F. Manning, Textualism as a Nondelegation Doctrine, 97 Colum. L. Rev. 673, 711–19 (1997); see also OLP, Using and Misusing Legislative History, supra note 2, at 26–33 (arguing that the Constitution assumes a textualist approach to statutory interpretation).

11. Scalia & Garner, supra note 7, at 3–4.

12. For a recent review of critiques of textualism, see generally Erik Encarnacion, Text Is Not Law, 107 Iowa L. Rev. 2027 (2022). On law professors' views about textualism, see generally Eric Martínez & Kevin Tobia, What Do Law Professors Believe About Law and the Legal Academy?, 112 Geo. L.J. (forthcoming 2023), https://ssrn.com/abstract=4182521 [https://perma.cc/66LA-PD7N] (reporting a survey of over six hundred American law professors, in which many report favorable views toward textualism).

13. See, e.g., James J. Brudney & Lawrence Baum, Oasis or Mirage: The Supreme Court's Thirst for Dictionaries in the Rehnquist and Roberts Eras, 55 Wm. & Mary L. Rev. 483, 492–93 (2013) (arguing that by consulting dictionaries, Justices confer a deceptive sense of objectivity to their interpretations); Ryan D. Doerfler, Late-Stage Textualism, 2021 Sup. Ct. Rev. 267, 275–82 (2022) (arguing that modern judges' flexibility in applying textualism facilitated the rise of manipulable canons of construction); Cary Franklin, Living Textualism, 2020 Sup. Ct. Rev. 119, 169–95 (2021) (showing that both liberal and conservative judges inevitably incorporate extratextual considerations into their textual analysis); Victoria F. Nourse, Picking and Choosing Text: Lessons for Statutory Interpretation From the Philosophy of Language, 69 Fla. L. Rev. 1409, 1423–30 (2017) (concluding, based on analysis of cases, that textualists, including Scalia, impose meaning by picking and choosing text).

14. William N. Eskridge, Jr., The New Textualism and Normative Canons, 113 Colum. L. Rev. 531, 577 (2013) [hereinafter Eskridge, The New Textualism and Normative Canons] (reviewing Scalia & Garner, supra note 7); William N. Eskridge, Jr. & Victoria F. Nourse, Textual Gerrymandering: The Eclipse of Republican Government in an Era of Statutory Populism, 96 N.Y.U. L. Rev. 1718, 1737 (2021); William N. Eskridge, Jr., Textualism, the Unknown Ideal?, 96 Mich. L. Rev. 1509, 1548 (1998) (reviewing Scalia, A Matter of Interpretation, supra note 1).

15. See H. Brent McKnight, The Emerging Contours of Justice Thomas's Textualism, 12 Regent U. L. Rev. 365, 365 (2000) ("[Thomas] is leaving his mark on the new textualist movement as he explores the boundaries of sole recourse to the text.").

has increasingly bent toward textualism;[16] Neil Gorsuch, the boldest heir to Scalia's persistent, uncompromising textualism;[17] Brett Kavanaugh, inspired by Scalia to focus "on the words, context, and appropriate semantic canons of construction";[18] and Amy Coney Barrett, Scalia's former clerk and sympathetic commentator.[19] In addition, Chief Justice John Roberts presents himself as an umpire, applying statutory text according to established rules of interpretation.[20] In constitutional cases, there are intense debates between these five or six red-blooded textualist Justices and the three true-blue pragmatic Justices on opposing sides in predictable conservative–liberal splits,[21] but in statutory cases, it is textualism all the way down. Typically, the pragmatic minority silently joins a textualist majority or dissenting opinion, or they write their own, very similar, text-based opinions.[22]

---

16. See John O. McGinnis, The Contextual Textualism of Justice Alito, Harv. J.L. & Pub. Pol'y Per Curiam, Spring 2023, no. 14, at 1, 1, https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/04/McGinnis-John-vFF.pdf [https://perma.cc/93EG-DCUL] ("Alito does have a consistent approach [to statutory interpretation], which would best be described as 'contextual textualism.'").

17. See Neil M. Gorsuch, Of Lions and Bears, Judges and Legislators, and the Legacy of Justice Scalia, 66 Case W. Rsrv. L. Rev. 905, 906 (2016).

18. Brett M. Kavanaugh, Keynote Address: Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions, 92 Notre Dame L. Rev. 1907, 1912 (2017).

19. See, e.g., Amy Coney Barrett, Substantive Canons and Faithful Agency, 90 B.U. L. Rev. 109, 120 (2010) [hereinafter Barrett, Substantive Canons] (sympathetically examining Scalia's efforts to consider linguistic and substantive canons).

20. See Confirmation Hearing on the Nomination of John G. Roberts, Jr. to Be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 56 (2005) (statement of John G. Roberts, Jr., J., D.C. Cir.) ("I will remember that it's my job to call balls and strikes, and not to pitch or bat.").

21. See, e.g., Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2240 (2022) (exemplifying the split between the newest-textualist majority and the three dissenting pragmatists).

22. See, e.g., Yegiazaryan v. Smagin, 143 S. Ct. 1900, 1905 (2023) (noting that the pragmatic minority joined Sotomayor's majority opinion, along with Roberts, Kavanaugh, and Barrett, all of whom accepted respondent's contextualist argument); Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1167 (2021) (noting that the pragmatic minority joined Sotomayor's majority opinion); Lockhart v. United States, 136 S. Ct. 958, 959 (2016) (Sotomayor, J.) ("Although § 2252 (b)(2)'s list of state predicates is awkwardly phrased (to put it charitably), the provision's text and context together reveal a straightforward reading. A timeworn textual canon is confirmed by the structure and internal logic of the statutory scheme."); id. at 969 (Kagan, J., dissenting) ("That ordinary understanding of how English works, in speech and writing alike, should decide this case."). At the time of writing, Justice Ketanji Brown Jackson has authored six majority opinions, all concerning statutory issues. This is too small a sample from which to draw confident conclusions, but there are clearly indications of some form of textualism. In one opinion, Jackson remarks, "Start with the text." MOAC Mall Holdings LLC v. Transform Holdco LLC, 143 S. Ct. 927, 937 (2023). Another notes that the interpretive issue "boils down to what Congress intended, as divined from text and context." Health & Hosp. Corp. of Marion Cnty. v. Talevski, 143 S. Ct. 1444, 1459–60 (2023). Other opinions look to statutory "language" and "plain language," Santos-Zacaria v. Garland, 143 S. Ct. 1103, 1116 (2023); "plain text," Delaware v. Pennsylvania, 143

Textualism is now clearly ascendant and will remain so for the foreseeable future. At the same time, it is splintering, or at least the veneer of methodological consensus that textualism supposedly represents is eroding. Curiously, the Court's textualists frequently disagree—not merely about *how* to apply text-based interpretive principles to resolve hard cases but also about *what* the relevant rules are. In other words, the newest textualists disagree about the definition of textualism itself.[23]

This post-Scalia era is *textualism's defining moment*. Three crucial questions ought to be answered. First, can the newest-textualist majority come together to entrench a rigorous and workable textualism without losing the methodology's simple appeal? Second, can they figure out how to balance historic stability and current predictability, twin rule-of-law goals that are often in conflict? Third, can the newest textualism be applied with the genuine neutrality required by the rule of law without the ideological shade that haunted "Ninoprudence"?[24]

The most salient intratextualist methodological battle occurred in *Bostock v. Clayton County*, in which the Court interpreted Title VII's bar on job discrimination "because of . . . sex" to protect employees from being fired because of their sexual orientation or gender identity. [25] Joined by Roberts and four pragmatic Justices, Gorsuch's opinion for the Court purported to apply "ordinary public meaning."[26] In dissent, however, Alito, joined by Thomas, accused the majority opinion of being a "pirate ship" that falsely "sails under a textualist flag"[27] and argued that the Court was updating Title VII to suit current LGBT-friendly norms.[28] Similarly, Kavanaugh also applied "ordinary public meaning"[29] and accused the majority of confusing "ordinary meaning" with "literal meaning" and ignoring how the public would actually interpret Title VII.[30]

S. Ct. 696, 705 (2023); "ordinary meaning," id. at 708; or "common expressions," Lac du Flambeau Band of Lake Superior Chippewa Indians v. Coughlin, 143 S. Ct. 1689, 1696 (2023).

23. See Tara Leigh Grove, Which Textualism?, 134 Harv. L. Rev. 265, 269, 279, 281–84 (2020) (arguing that formalists like Gorsuch and contextualists like Kavanaugh reflect different visions for the new textualism); cf. Brett M. Kavanaugh, Fixing Statutory Interpretation, 129 Harv. L. Rev. 2118, 2121 (2016) [hereinafter Kavanaugh, Fixing Interpretation] (calling for clearer "rules of the road" to determine the "best reading" of statutory texts).

24. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, Progressive Textualism, 110 Geo. L.J. 1437, 1443 (2022) (noting that textualism has been critiqued as an attempt to effectuate a conservative legal agenda).

25. 140 S. Ct. 1731 (2020).

26. See id. at 1738 (referring to "ordinary public meaning").

27. Id. at 1755 (Alito, J., dissenting).

28. Id. at 1755–56.

29. Id. at 1825 (Kavanaugh, J., dissenting).

30. Id. at 1824.

Bostock is the most jurisprudentially rich disagreement among the textualist majority, but it is far from the only one. In case after case, the Court's textualists have disagreed not just about results but also about what textualism as a method entails. The debates have covered a broad range of interpretive issues, including:

Historical and common law context in Arizona v. Navajo Nation.[31] — In an 1868 treaty establishing the Navajo reservation in the Colorado Basin area, the United States recognized water rights and other rights of the Navajo Nation. Writing for all the Court's textualists except Gorsuch, Kavanaugh rejected the Nation's petition to hold the United States responsible for its water rights, finding that the treaty did not provide an affirmative duty on the part of the United States as trustee.[32] Joined by the three pragmatic Justices in dissent, Gorsuch interpreted the treaty in light of its historical circumstances and common law trust doctrine to require the United States to live up to its trustee duties.[33] Concurring in the Court's opinion, Thomas doubted the precedents recognizing such a trustee relationship.[34]

Semantic meaning in Sackett v. EPA.[35] — The Clean Water Act (CWA) prohibits discharging pollutants into "navigable waters," which the Act defines as "waters of the United States."[36] Alito's opinion for the Court (joined by all the new-textualist Justices except Kavanaugh) limited the statute's regulatory ambit to "streams, oceans, rivers, and lakes" and to adjacent wetlands that are "indistinguishable" from those bodies of water due to a continuous surface connection.[37] Concurring in the Court's judgment but dissenting from its interpretation of the CWA, Kavanaugh (joined by the three pragmatic Justices) relied on the 1977 CWA Amendments that explicitly codified "adjacent" wetlands within the CWA's ambit,[38] an interpretation EPA and Congress have followed for the last generation.[39] Concurring in the Court's opinion, Thomas (joined by Gorsuch) would have narrowed the CWA to cover only "navigable waters" as that term was understood in 1789 (and assertedly codified in the Commerce Clause, which is the basis for congressional clean water regulation).[40]

Statutory precedent in Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174.[41] — An 8-1 Court ruled

31. 143 S. Ct. 1804 (2023).
32. Id. at 1809–10.
33. Id. at 1819–22, 1827–28 (Gorsuch, J., dissenting).
34. Id. at 1816–18 (Thomas, J., concurring).
35. 143 S. Ct. 1322 (2023).
36. 33 U.S.C. §§ 1311(a), 1362(7), (12)(A) (2018).
37. *Sackett*, 143 S. Ct. at 1336, 1340–41.
38. 33 U.S.C. § 1344(g)(1).
39. *Sackett*, 143 S. Ct. at 1343 (Kavanaugh, J., concurring in the judgment).
40. Id. at 1357–58.
41. 143 S. Ct. 1404 (2023).

that the National Labor Relations Act of 1935 (NLRA) did not preempt a state court lawsuit charging that union members destroyed the employer's property in the course of a labor dispute.[42] Writing for Roberts, Kavanaugh, as well as pragmatist Justices Sonia Sotomayor and Elena Kagan, Barrett's majority opinion applied longstanding precedent requiring the employer to show that the aggrieved conduct did not even "arguably" fall within the NRLA's ambit (a test the employer met).[43] Concurring only in the judgment, Thomas (joined by Gorsuch) argued that the longstanding precedent should be overruled because it was "strange[]" in light of the Court's federalism jurisprudence.[44]

Reconciling statutes in Turkiye Halk Bankasi A.S. v. United States.[45] — Federal courts have jurisdiction to hear criminal charges against foreign states and their instrumentalities.[46] Joined by Roberts, Thomas, Barrett, and the three pragmatists, Kavanaugh's opinion for the Court held that the limitations in the Foreign Sovereign Immunities Act of 1976 (FSIA) did not apply to such criminal prosecutions.[47] In dissent, Gorsuch (joined by Alito) argued that the FSIA's foreign sovereign immunity defense applied in criminal as well as civil cases.[48]

Choosing among textual canons in Bittner v. United States.[49] — The Bank Secrecy Act requires Americans with certain financial interests in foreign accounts to keep records and file reports.[50] Section 5321 authorizes the Treasury Secretary to impose a civil penalty of up to $10,000 for "any violation" of the statutory requirements.[51] Writing for Roberts, Alito, Kavanaugh, and Jackson, Gorsuch employed textual canons in interpreting the penalty to apply to every false report filed and not to every false account contained in the filed reports.[52] Joined by Thomas, Sotomayor, and Kagan, Barrett's dissenting opinion countered with other textual canons in emphasizing the broad statement of the penalty provision.[53]

Choosing between statutory provisions in Biden v. Texas.[54] — President Joe Biden revoked his predecessor's policy of returning to Mexico all

---

42. Id. at 1410.

43. San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236, 245–46 (1959) (holding that state courts are disabled from adjudicating state-law claims that concern conduct "arguably" protected under the NLRA).

44. *Glacier Nw.*, 143 S. Ct. at 1417 (Thomas, J., concurring in the judgment).

45. 143 S. Ct. 940 (2023).

46. 18 U.S.C. § 3231 (2018).

47. *Turkiye Halk Bankasi*, 143 S. Ct. at 944.

48. Id. at 952 (Gorsuch, J., concurring in part and dissenting in part).

49. 143 S. Ct. 713 (2023).

50. 31 U.S.C. § 5314(a) (2018).

51. Id. § 5321(a)(5).

52. *Bittner*, 143 S. Ct. at 720.

53. See id. at 727–29 (Barrett, J., dissenting).

54. 142 S. Ct. 2528 (2022).

undocumented immigrants coming across the U.S.–Mexico border.[55] Writing on the merits for Kavanaugh, Barrett, and the pragmatists,[56] Roberts interpreted the relevant immigration provision to vest enforcement officials with broad discretion.[57] In contrast, Alito (with Thomas and Gorsuch) read the discretionary text in light of other mandatory provisions and would have ruled that the previous policy was required by law.[58]

Semantic meaning in Patel v. Garland.[59] — An immigrant sought discretionary adjustment of status from the Attorney General, but the administrative law judge found that he was barred for lying on a state driver's license application.[60] Arguing that the error was an honest mistake, Patel sought judicial review.[61] Writing for all the textualists except Gorsuch, Barrett's opinion applied 8 U.S.C. § 1252(a)(2)(B)(i),[62] barring judicial review of "any judgment regarding the granting of relief" under the adjustment-of-status provision.[63] Joined by the pragmatists, Gorsuch argued that the Court read "regarding the granting of relief" out of the statute.[64]

The role of the rule of lenity and legislative history in Wooden v. United States.[65] — A unanimous Court interpreted the Armed Career Criminal Act to treat sequential storage-unit burglaries in one night as one "occasion" (and not several) for sentence enhancement purposes.[66] Concurring in most of the majority opinion, Barrett and Thomas objected to its reliance on a statutory amendment and on legislative history.[67] Concurring in the judgment, Gorsuch rejected the majority's multifactor balancing approach and would have resolved the case with the rule of lenity.[68] Kavanaugh's concurring opinion argued against the lenity canon because it had rarely made much difference in previous cases and distracted judges from textual analysis.[69] Like Kavanaugh, Roberts joined the Court's full opinion, and Alito

55. Id. at 2534.

56. Id. at 2548 (Kavanaugh, J., concurring) (noting that Barrett agreed with the majority on the merits, though she dissented on process grounds).

57. Id. at 2541 (majority opinion).

58. Id. at 2555 (Alito, J., dissenting).

59. 142 S. Ct. 1614 (2022).

60. Id. at 1620.

61. Id.

62. 8 U.S.C. § 1252(a)(2)(B)(i) (2018) (limiting review for several proceedings, including discretionary adjustment of status under § 1255).

63. *Patel*, 142 S. Ct. at 1618–28.

64. Id. at 1632 (Gorsuch, J., dissenting) (internal quotation marks omitted) (quoting 8 U.S.C. § 1252(a)(2)(B)(i)).

65. 142 S. Ct. 1063 (2022).

66. Id. at 1067.

67. Id. at 1076–79 (Barrett, J., concurring in part and concurring in the judgment).

68. Id. at 1079–86 (Gorsuch, J., concurring in the judgment).

69. Id. at 1075–76 (Kavanaugh, J., concurring).

(without comment) joined all but the part (II-B) discussing statutory history and purpose.[70]

Semantic meaning in Van Buren v. United States.[71] — The Computer Fraud and Abuse Act of 1986 (CFAA) makes it a crime to "access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled so to obtain or alter."[72] Barrett wrote for the Court (including Gorsuch and Kavanaugh) to void the conviction of a police officer accused of using his office computer for private searches that police department policy prohibited him from doing.[73] Joined by Roberts and Alito, Thomas dissented in favor of the Government.[74] The majority and dissent fiercely debated the meaning of "so" and "entitled." Although disclaiming reliance on the rule of lenity, Barrett closed her opinion with concern for the broad reach of the CFAA if the Government's approach had prevailed.[75]

The major questions doctrine in Biden v. Missouri.[76] — Interpreting congressional authorization to issue rules regulating the operation of hospitals receiving federal funds, HHS mandated that hospital employees be vaccinated against the COVID-19 virus.[77] In a per curiam opinion joined by Roberts, Kavanaugh, and the three pragmatists, the Court upheld the mandate.[78] Thomas's dissenting opinion (joined by Alito, Gorsuch, and Barrett) invoked the major questions doctrine (MQD) in arguing that a more specific or targeted text was required to authorize an agency to adopt such a far-reaching policy.[79]

Literalism in Niz-Chavez v. Garland.[80] — The 1996 immigration law requires the government to serve a "notice to appear" on individuals it wishes to remove from this country; the notice serves as the termination (the "stop-time") point for the requirements that the immigrant must meet to seek discretionary relief.[81] The notice must include the

---

70. Id. at 1065 (case syllabus).

71. 141 S. Ct. 1648 (2021).

72. 18 U.S.C. § 1030(e)(6) (2018).

73. *Van Buren*, 141 S. Ct. at 1652.

74. Id. at 1662–69 (Thomas, J., dissenting).

75. See id. at 1662 (majority opinion) ("On the Government's reading, . . . the conduct would violate the CFAA only if the employer phrased the policy as an access restriction. An interpretation that stakes so much on a fine distinction controlled by the drafting practices of private parties is hard to sell as the most plausible.").

76. 142 S. Ct. 647 (2022).

77. Id. at 650.

78. Id.

79. See id. at 655–59 (Thomas, J., dissenting).

80. 141 S. Ct. 1474 (2021).

81. 8 U.S.C. § 1229b(d)(1) (2018) (providing that the stop-time rule is triggered "when the alien is served a notice to appear under section 1229(a)").

reasons for removal as well as the date, time, and place for a hearing.[82] Writing for Thomas, Barrett, and the three pragmatists, Gorsuch hyperfocused on the indefinite article "a" and interpreted the provisions to require the government to include all that information in a single notice.[83] Joined by Roberts and Alito, Kavanaugh's dissent argued that the Court's interpretation was too literal and that the government could satisfy the statute with sequential notices that, together, provided all the required information.[84]

Choices about contextual evidence in McGirt v. Oklahoma.[85] — In nineteenth-century treaties, Congress recognized sovereignty by the Muscogee (Creek) Nation over reservation land in what is now Oklahoma.[86] A state criminal prosecution of an American Indian defendant would have been invalid if his crime had occurred on the Muscogee Reservation.[87] Supporting Oklahoma's position, Roberts, Thomas, Alito, and Kavanaugh focused on nontextual evidence that Congress had implicitly "disestablished" the Muscogee Reservation.[88] Writing for the Court, Gorsuch found that no statute actually disestablished the reservation.[89] In *Oklahoma v. Castro-Huerta*, Kavanaugh's majority ignored *McGirt* and held that Oklahoma could prosecute crimes by non-Indians committed on Indian reservations.[90] Gorsuch, joined by the pragmatists, dissented.[91]

Semantic meaning in Atlantic Richfield Co. v. Christian.[92] — Interpreting the Superfund Act broadly to empower EPA to supersede state law in directing large-scale environmental clean-up operations, Roberts was joined by Alito, Kavanaugh, and the four pragmatists.[93] Joined by Thomas, Gorsuch dissented from such a broad understanding of the law—particularly the term "potentially responsible," which he argued would turn the modest environmental law into a scheme for "paternalist central planning."[94]

---

82. Id. § 1229(a)(1) (explaining that "written notice (in this section referred to as a 'notice to appear') shall be given . . . to the alien . . . specifying" the time and place of his hearing and other facts required by statute).

83. *Niz-Chavez*, 141 S. Ct. at 1480 ("Admittedly, a lot here turns on a small word.").

84. Id. at 1491–92 (Kavanaugh, J., dissenting).

85. 140 S. Ct. 2452 (2020).

86. Id. at 2459.

87. Id.

88. Id. at 2482 (Roberts, C.J., dissenting).

89. Id. at 2463 (majority opinion) (noting how Congress has "sought to pressure many tribes to abandon their communal lifestyles and parcel their lands into smaller lots owned by individual tribe members" but never statutorily terminated the Reservation).

90. 142 S. Ct. 2486, 2491 (2022).

91. Id. at 2505–27 (Gorsuch, J., dissenting).

92. 140 S. Ct. 1335 (2020).

93. Id. at 1344.

94. Id. at 1366 (Gorsuch, J., concurring in part and dissenting in part).

Other recent debates have pitted Kavanaugh against Thomas and Alito in *Reed v. Goertz*,[95] Gorsuch against Barrett in *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*,[96] Barrett against Gorsuch in *Goldman Sachs Group, Inc. v. Arkansas Teacher Retirement System*,[97] and Gorsuch against Kavanaugh (and Roberts, Thomas, and Alito) in *United States v. Davis*.[98] In yet other recently contested statutory cases, one of the pragmatic Justices has written for one or more textualist Justices, with other textualist Justices in text-based dissent.[99]

These "Text Wars" suggest that the newest textualism is failing to deliver its promised rule-of-law benefits: If all these smart textualist judges, assisted by teams of well-trained law clerks, cannot agree on answers, then textualism does not produce consistent, predictable, and knowable results in hard cases. Although the new textualists do not claim that their method always produces interpretive closure or complete predictability,[100] the recent divisions undermine their claim that textualism

---

95. 143 S. Ct. 955 (2023). Kavanaugh delivered the opinion of the Court, writing also for Roberts, Barrett, and the three pragmatists. Id. at 959–62. Thomas dissented in opposition, id. at 962–72 (Thomas, J., dissenting), and Alito wrote a separate dissent joined by Gorsuch, id. at 972–77 (Alito, J., dissenting).

96. See 141 S. Ct. 2172 (2021). Gorsuch delivered the opinion of the Court, writing also for Roberts, Thomas, Breyer, Alito, and Kavanaugh. See id. at 2175–83. Barrett dissented, writing also for Sotomayor and Kagan. See id. at 2183–90 (Barrett, J., dissenting).

97. 141 S. Ct. 1951 (2021). Barrett delivered the opinion of the Court, joined by Roberts, Kavanaugh, and the three pragmatists. See id. at 1957–63. Gorsuch dissented in part, joined by Thomas and Alito. See id. at 1965–70 (Gorsuch, J., concurring in part and dissenting in part).

98. 139 S. Ct. 2319 (2019). Gorsuch delivered the opinion of the Court, joined by Ginsburg, Breyer, Sotomayor, and Kagan. See id. at 2323–36. Kavanaugh issued a dissent, joined by Roberts, Thomas, and Alito. See id. at 2336–55 (Kavanaugh, J., dissenting).

99. For examples from the 2022 Term, see, e.g., Axon Enter. v. Fed. Trade Comm'n, 143 S. Ct. 890, 900–06 (2023) (interpreting the Federal Trade Commission and Securities Exchange Acts, Kagan for a majority including all but Gorsuch, and to some extent Thomas, applied precedent to determine whether the statutory scheme preempts district court jurisdiction to hear constitutional claims); Wilkins v. United States, 143 S. Ct. 870, 875–878, 883–886 (2023) (interpreting the Quiet Title Act, Sotomayor, for a majority including Gorsuch, Kavanaugh, and Barrett, relied on a clear statement requirement for finding a provision jurisdictional; Thomas, Roberts, and Alito found the clear statement rule inapplicable in cases against the government); Delaware v. Pennsylvania, 143 S. Ct. 696, 711–12 (2023) (interpreting the Federal Dispositions Act, Jackson, for a majority including Roberts and Kavanaugh, relied on legislative history to clarify an undefined term, with Thomas, Alito, Gorsuch, and Barrett declining to join that part of the opinion); Helix Energy Sols. Grp. v. Hewitt, 143 S. Ct. 677, 682–83, 692–95 (2023) (interpreting the Fair Labor Standards Act, Kagan for a majority including Roberts, Thomas, and Barrett, parsed the agency regulations, against anti-regulatory doubts raised by Gorsuch, Kavanaugh, and Alito); see also Arizona v. Navajo Nation, 143 S. Ct. 1804, 1809–16, 1819–33 (2023) (interpreting a peace treaty, Kavanaugh wrote for a majority, while Gorsuch wrote the dissent joined by Sotomayor, Kagan, and Jackson).

100. Scalia & Garner, supra note 7, at 6.

is any *more* objective, yields *more* predictable results, or constrains discretion *better* than pluralist, pragmatic approaches. At the Supreme Court, the newest textualism, as applied in statutory cases, may be less predictable than the traditional approach. Significantly, Sotomayor, Kagan, and Breyer or Jackson were all in the majority for thirteen of these nineteen cases. Roberts and Kavanaugh were in the majority for fifteen cases and Barrett for eleven of the fifteen cases for which she sat. But Thomas, Alito, and Gorsuch were in the majority for only seven cases apiece. Interestingly, Roberts and Kavanaugh voted more often in these cases with Sotomayor and Kagan than with Thomas and Gorsuch.

The recent debates among the newest textualists are important for several reasons, which this Article documents. First is the illusory expectation of text-centric simplicity. As applied, the new textualism is much more complicated than Scalia and his followers have advertised. The Court's recent cases demonstrate that there are many analytical choices necessary to resolve hard statutory cases. Textualist methodology now requires as many as twelve important choices, many of which have subchoices—and even sub-subchoices. These choices create numerous flashpoints in which a judge may, often unconsciously, look out over the crowd and pick out their friends. A challenge for this complex and opaque textualism is to find ways to police its tendency to channel judicial preferences into statutory texts.

Second is the end of judicial consensus about the methodological consequences of the new textualism. There is no doubt that the new textualism announced by Scalia unsettled traditional practices of statutory interpretation. The newest-textualist majority is not inclined to restore the old order, but its Justices also have not replaced it with anything coherent. The Supreme Court's newest-textualist majority is fundamentally divided on important methodological and even jurisprudential issues.[101] For almost a generation, textualism spoke with one voice—Scalia's. Post-Nino, there are more voices, and the newest-textualist Justices' sharp debates include such fundamental issues as whether the rule of lenity should have any bite,[102]

101. See Grove, supra note 23, at 266–67 (observing that *Bostock* revealed tensions among the textualist Justices); Kevin Tobia & John Mikhail, Two Types of Empirical Textualism, 86 Brook. L. Rev. 461, 486 (2020) (distinguishing two types of modern textualism); Anita Krishnakumar, The Multiple Faces of Textualism, Jotwell (Jan. 15, 2021), https://lex.jotwell.com/the-multiple-faces-of-textualism/ [https://perma.cc/9YJ4-6NLH] (summarizing Grove's categorization of textualism into formalistic and flexible textualism).

102. See, e.g., Wooden v. United States, 142 S. Ct. 1063, 1076, 1085–87 (2022) (Kavanaugh minimizing the rule of lenity, Gorsuch extolling it).

what role semantic canons ought to play in statutory cases,[103] how attentive the Court should be to statutory precedents and stare decisis,[104] what role historical meaning ought to play,[105] whether it's legitimate for the Court to read texts by aggregating the meanings of individual words or by understanding the phrase or clause as a whole,[106] and so forth.

Third is a normative crisis—the Supreme Court's legitimacy meltdown. Many of the current disputes among textualist Justices go to the conceptual underpinnings of textualism and the very definition of the theory. The normative foundation for textualism is the rule of law, including values like (1) stability of legal rules, (2) transparency and predictability of rule application, and (3) neutrality and objectivity for judges predictably applying the stable rules.[107] Given statutory and agency precedents generated by changed circumstances, long-term, historical stability in the law often comes at the cost of shorter-term predictability: Society expects the Court to follow current rules and precedent (predictability today), but the newest textualists are sometimes reluctant to do so when they feel rules and precedents are inconsistent with original meaning (restoring historical stability over time).[108] Conversely, when an originalist Court "discovers" new constitutional baselines (historical stability), their application in statutory cases will generate surprising results, sometimes scrambling textual plain meaning (predictability today).[109]

---

103. See, e.g., Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) (cautioning against the categorical use of grammar canons even though textualists are known for their frequent citations to such canons).

104. See, e.g., Ramos v. Louisiana, 140 S. Ct. 1390, 1404–05, 1425 (2020) (dramatically illustrating differences among Gorsuch's, Thomas's, and Alito's treatment of precedent and their understanding of stare decisis).

105. See Arizona v. Navajo Nation, 143 S. Ct. 1804, 1816, 1824 (2023) (illustrating the difference between Kavanaugh, who focuses on the text of the treaty, and Gorsuch, who uses historical meaning to inform his reading of the treaty); Bostock v. Clayton County, 140 S. Ct. 1731, 1750 (2020) (describing how the law is by nature dependent on context, which requires sensitivity to the likelihood of change).

106. See *Bostock*, 140 S. Ct. at 1739, 1828 (contrasting Gorsuch's focus on the words "because of" and "sex," with Kavanaugh's focus on the phrase "discrimination because of sex").

107. See Lon Fuller, The Morality of Law 153–55 (1963) (describing the law's neutrality and its accompanying "internal morality"); Friedrich von Hayek, The Constitution of Liberty 218 (Ronald Hamowy ed., 2011) (arguing that "law in its ideal form might be described as a 'once-and-for-all' command that is directed to unknown people and that is abstracted from all particular circumstances of time and place").

108. Compare Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1341–44 (2023) (Alito, J.) (announcing a new rule for wetlands regulation that the majority felt was most consistent with the original statutory meaning and principles of federalism and due process), with id. at 1362–63 (Kavanaugh, J., concurring in the judgment) (supporting the approach followed for a generation by EPA and ratified by Congress in the 1977 CWA Amendments).

109. See id. at 1356–57 (Thomas, J., concurring) (arguing for an even narrower understanding of "waters" that the federal government can regulate).

A Supreme Court that upends settled legal rules is bound to make many Americans nervous, and it does not help that the Court does so inconsistently. When the Court generates surprising and especially unfair results under the aegis of "we are just applying the law," the citizenry expects super-rigorous justification, but the textualist majority is divided as to what approach to statutory text justifies their work, especially in controversial cases. The recent cases illustrate how the simple and broad slogan of textualism—give textual words the meaning they "would reasonably have . . . conveyed to a citizen"[110]—is not specific enough to resolve a wide range of controversies. Today, "textualism" refers, at best, to many different theories that are applied inconsistently among "textualist" Justices and support different answers to many of the cases before the Court.

This Article's primary aims are exegetical as well as critical: We identify twelve categories of choices in modern textualist interpretation and document that today's newest textualists frequently make choices that are at odds with established doctrine, clash with the opposite choices made by other committed textualists (and often with their own previously stated textualist commitments), and are hard to justify as matters of either text or public policy. Our analysis is most sharply critical when the newest textualists—ironically, in these cases, speaking in one voice—depart most dramatically from "just following the plain meaning of the text" by applying judicially created, and often upgraded, clear statement rules inspired by novel interpretations of the Constitution.

The Article's methodology combines qualitative doctrinal analysis with insights from legal theory, philosophy, and linguistics. We analyze dozens of recent cases and elucidate the complex theoretical choices at play. Although we focus on the Supreme Court, we also consider some lower court textualist opinions of significant impact. Our approach complements Professors Anita Krishnakumar's and Victoria Nourse's impressive *quantitative* research on interpretive trends at the Supreme Court, which has documented how often individual Justices cite interpretive tools (e.g., substantive canons) or modalities (e.g., arguments about consequences).[111]

---

110. See supra notes 1–3 and accompanying text.

111. See Anita S. Krishnakumar, Backdoor Purposivism, 69 Duke L.J. 1275, 1298–301 & tbl.2 (2020) (analyzing the use of interpretive tools across 965 opinions in the 2005–2016 Terms); Anita S. Krishnakumar, The Common Law as Statutory Backdrop, 136 Harv. L. Rev. 608, 626 tbl.2 (2022) [hereinafter Krishnakumar, 2005–2019 Data] (analyzing the use of interpretive tools across 1191 opinions in the 2005–2019 Terms); Anita S. Krishnakumar, Cracking the Whole Code Rule, 96 N.Y.U. L. Rev. 76, 98 tbl.2 (2021) (analyzing the use of interpretive tools across 1040 opinions in the 2005–2017 Terms); Anita S. Krishnakumar, Dueling Canons, 65 Duke L.J. 909, 992–95 & tbl.9 (2016) [hereinafter Krishnakumar, Dueling Canons] (analyzing the use of interpretive tools across 528 opinions in the 2005–2010 Terms); Anita S. Krishnakumar, Reconsidering Substantive Canons, 84 U. Chi. L. Rev. 825, 847–49 & tbl.1 (2017) [hereinafter Krishnakumar, Reconsidering Substantive Canons] (analyzing the use of interpretive tools across 584 opinions in the 2005–2011 Terms); Anita

Those important quantitative studies have provided critical insight into modern textualism, and this Article's qualitative approach adds to the account Professors Krishnakumar and Nourse are documenting. First, given the recent addition of several Justices, there is inevitably a small sample size of interpretation cases from the Court's newest members: Gorsuch, Kavanaugh, Barrett, and Jackson. The most recent published quantitative studies do not include opinions from Barrett and Jackson and inevitably include fewer opinions from Gorsuch and Kavanaugh than from Thomas, Alito, and Roberts.[112] Second, interpretation is changing quickly. For instance, there have only been a few recent "major questions" cases.[113] But despite this small number, this new canon is an important part of the modern textualist landscape.[114] Finally, this Article's qualitative approach emphasizes choices that have not been quantified and may not be easily quantifiable. For example, Choice 2 below examines intensional versus extensional approaches to meaning, and Choice 3 examines compositional versus holistic analysis. No prior quantitative study has documented these trends. Although these choices lurk below the surface, this Article argues that they are critical to understanding modern textualism.

S. Krishnakumar, Statutory History, 108 Va. L. Rev. 263, 285–86 tbl.2b (2022) (analyzing the use of interpretive tools across 1119 opinions in the 2005–2018 Terms); Anita S. Krishnakumar, Statutory Interpretation in the Roberts Court's First Era: An Empirical and Doctrinal Analysis, 62 Hastings L.J. 221, 249–51 & tbl.2 (2010) (analyzing the use of interpretive tool across 352 opinions in the 2005–2008 Terms); Victoria Nourse, The Paradoxes of a Unified Judicial Philosophy: An Empirical Study of the New Supreme Court: 2020–2022, 38 Const. Comment (forthcoming 2023) (manuscript at 4), https://ssrn.com/abstract=4179654 [https://perma.cc/KSJ2-VRGZ] (analyzing the use of interpretive tools across 300 opinions in the 2020–2021 Terms); Anita S. Krishnakumar, Textualism in Practice app. tbl.2a (July 29, 2023), https://ssrn.com/abstract=4441426 [https://perma.cc/6TJX-TCKK] (unpublished manuscript) (analyzing the use of interpretive tools across 1254 opinions in the 2005–2020 Terms). To avoid redundant citation, we focus on Krishnakumar, 2005–2019 Data, supra, the most recently published study.

For work employing similar quantitative methods, see Frank B. Cross, The Theory and Practice of Statutory Interpretation 142–48 (2009) (documenting Justices' use of interpretive tools in the 1994–2002 Terms); James J. Brudney & Corey Ditslear, Canons of Construction and the Elusive Quest for Neutral Reasoning, 58 Vand. L. Rev. 1, 15–29 (2005) (documenting Justices' use of interpretive tools in every workplace law case between 1969 and 2003).

112. The most recent published data on individual Justices' statutory interpretation is Krishnakumar, 2005–2019 Data, supra note 111. That dataset includes a rich set of opinions from Thomas (182), Alito (137), Roberts (83), Sotomayor (112), and Kagan (62), but—given the rapidly changing Court—it inevitably includes fewer from Gorsuch (31), Kavanaugh (13), Barrett (0), and Jackson (0). Id. at 626.

113. See Kate R. Bowers, Cong. Rsch. Serv., IF12077, The Major Questions Doctrine (2022), https://crsreports.congress.gov/product/pdf/IF/IF12077 [https://perma.cc/4N8J-2J46] (listing recent "major questions" cases).

114. Compare infra Choice 8, with Krishnakumar, Reconsidering Substantive Canons, supra note 111, at 850 (emphasizing the infrequent invocation of substantive canons).

This Article also responds to Professor Tara Grove's theory that there are now two textualist camps within the Court.[115] The Article contends that there are several broad "modes" of new textualist analysis. Just three include a strict positivist mode that determines statutory meaning by homing in on the conventional social or legal meaning of the most relevant statutory words or phrases; a more methodologically pluralist mode that also considers statutory precedents, agency interpretations, and legislative evidence; and a normativist mode that starts with constitutional or statutory baselines imposing higher burdens of textual or contextual justification on the government. All of the newest-textualist Justices jump from mode to mode—which makes statutory cases more unpredictable today than twenty years ago and may have contributed to the Supreme Court's plunging reputation.[116]

CHOICE 1: WHICH TEXT

The most basic task for a textualist judge—for any judge—is to choose the relevant legal text(s). Although this choice might seem simple, jurists as brainy as Frank Easterbrook, Nino Scalia, and John Roberts have simply missed highly relevant statutory texts.[117] More often, textualist judges have disagreed sharply over which relevant text is most on point or how admittedly relevant texts should be read together.

Consider *King v. Burwell*, in which Roberts and Scalia both started with § 36B(c)(2)(A)(i) of the tax code, which informed modest- and low-income taxpayers how to calculate their tax credits under the Affordable Care Act of 2010 (ACA).[118] The provision defines a "coverage month"—the period when the taxpayer is eligible for subsidies—as one in which the taxpayer is covered by a plan purchased through an "Exchange established *by the State* under [§] 1311."[119] Section 1321(c) provides that if a state does not establish an exchange under § 1311, the Department of Health and Human Services (HHS) will "establish and operate such Exchange."[120] Because more than half the states failed to establish "such Exchange[s]," HHS created federal exchanges for those states.[121] Scalia argued that, as a matter of plain meaning, tax credits were allowed only for taxpayers

115. See supra note 23 and accompanying text.

116. See Jeffrey M. Jones, Confidence in U.S. Supreme Court Sinks to Historic Low, Gallup (June 23, 2022), https://news.gallup.com/poll/394103/confidence-supreme-court-sinks-historic-low.aspx [https://perma.cc/E4FM-XFA5].

117. See Eskridge & Nourse, supra note 14, at 1741–44, 1763–66 (analyzing the choice of text by Easterbrook in In re Sinclair, 870 F.2d 1340 (7th Cir. 1989), and Roberts and Scalia in Bond v. United States, 572 U.S. 844 (2014)).

118. 576 U.S. 473, 486, 498–99 (2015).

119. 26 U.S.C. § 36B(c)(2)(A)(i) (2018) (emphasis added) (referencing 42 U.S.C. § 18051 (2018)).

120. The Patient Protection and Affordable Care Act (ACA), Pub. L. No. 111-148, § 1321(c), 124 Stat. 119, 186 (2010) (codified at 42 U.S.C. § 18041(c)(1)).

121. *King*, 576 U.S. at 513 (Scalia, J., dissenting).

purchasing plans under a state exchange.[122] Roberts tried to dodge such a catastrophic plain meaning by suggesting that HHS might be understood as establishing "such" exchanges for the states and so the ACA was at least ambiguous.[123]

Roberts buried his better textual lead. Section 36B(f)(3), added to the ACA through its reconciliation amendment, requires that "[e]ach Exchange . . . under [§] 1311(f)(3) [State Exchanges] or 1321(c) [Federal Exchanges]" reports to HHS "[t]he aggregate amount of any advance payment of such [tax] credit" and "[a]ny information provided to the Exchange, including any change of circumstances, necessary to determine eligibility for, and the amount of, such credit."[124] Section 36B(f)(3) assumes the availability of tax credits in states with federally operated exchanges. This provision either is on point for the Roberts–Scalia debate about ambiguity or is key (con)text for the proper interpretation of § 36B(c)(2)(A)(i).[125]

Consider also *Bostock v. Clayton County*, in which Gorsuch's majority opinion relied on § 703(a)(1) of the Civil Rights Act's Title VII,[126] which bars workplace discrimination "because of . . . sex."[127] He mentioned but did not rely on § 703(m), added to Title VII by the 1991 Amendments to make illegal any discrimination in which sex "was a motivating factor."[128] Because the plaintiff employees would prevail under either text, Gorsuch's choice of text is defensible—but the dissenters were obliged to respond to both § 703(a)(1) and § 703(m) because they were denying any Title VII coverage. Kavanaugh completely ignored § 703(m),[129] and so his dissenting opinion made a questionable choice of text.

Another recent dispute over choice of text came in *McGirt v. Oklahoma*,[130] which concerned whether Congress had disestablished the reservation created by treaties that promised a "permanent home to

---

122. Id. at 499–500.

123. Id. at 490 (majority opinion).

124. 26 U.S.C. § 36B(f)(3).

125. Compare *King*, 576 U.S. at 490 (majority opinion) (Roberts, C.J.) (arguing that other provisions render the Act ambiguous by assuming that tax credits are available under federally operated exchanges), with id. at 509 (Scalia, J., dissenting) (arguing that the Act clearly denies tax credits under federally operated exchanges).

126. 140 S. Ct. 1731, 1738–39 (2020).

127. Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(1), 78 Stat. 241, 255 (1964) (codified at 42 U.S.C. § 2000e-2(a)(1) (2018)).

128. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), § 2000e-2, 105 Stat. 1071, 1075 (1991) (amending 42 U.S.C. § 2000e-2 (1988)) (codified at 42 U.S.C. § 2000e-2(m)).

129. *Bostock*, 140 S. Ct. at 1823 n.2 (Kavanaugh, J., dissenting) (quoting the "full" statute but omitting § 703(m)); cf. id. at 1757 (Alito, J., dissenting) (addressing both §§ 703(a)(1) and 703(m), which was a defensible choice of text).

130. 140 S. Ct. 2452 (2020).

the whole Creek [N]ation of Indians."[131] Arguing that Congress had disestablished the reservation, Roberts spoke for all the textualist Justices except Gorsuch, whose majority opinion was joined by the then-four pragmatic Justices.[132] The basic disagreement was that the majority demanded a statute taking back the treaty rights repeatedly conferred on the Creek Nation, while the dissent found disestablishment through a trail of national reneging and "subsequent demographic history."[133] Hence, the dissenters failed to deliver a textual smoking gun. The same array of Justices, but with Gorsuch in dissent after the death of Justice Ginsburg, encountered the opposite problem in *Oklahoma v. Castro-Huerta*.[134] Several treaties and statutes were relevant to the defendant's claim that state criminal law had been preempted by federal Indian law. The majority and dissenting opinions overlapped only occasionally, as each looked at almost two centuries of laws and treaties and picked out their friends.[135]

Turkiye Halk Bankasi A.S. v. United States recently revealed a similar dispute among the newest textualists.[136] Section 3231 of Title 18 (criminal law) vests federal courts with subject-matter jurisdiction over cases involving "offenses against the laws of the United States," which on its face would include crimes committed by foreign states and state instrumentalities.[137] The issue on appeal was whether the Foreign Sovereign Immunities Act of 1976 (FSIA) provided a defense for foreign states to § 3231 prosecutions.[138] Section 1604 of Title 28 (civil procedure) provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States," except as provided in §§ 1605 and 1607 of the FSIA.[139] Gorsuch relied on that text to conclude that foreign states are immune from criminal as well as civil prosecution

131. Articles of Agreement, Creek Nation-U.S., pmbl., Feb. 14, 1833, 7 Stat. 417, 418. Between 1833 and 1881, Congress entered additional treaties guaranteeing this land to the Muscogee (Creek) Nation. See *McGirt*, 140 S. Ct. at 2461.

132. Id. at 2482 (Roberts, C.J., dissenting); id. at 2458–59 (majority opinion) (Gorsuch, J.).

133. Id. at 2486 (Roberts, C.J., dissenting) (internal quotation marks omitted) (quoting Solem v. Bartlett, 465 U.S. 463, 471–72 (1984)). Compare id. at 2464–65 (majority opinion) (Gorsuch, J.) (demonstrating that Congress never adopted a statute disestablishing the Creek Reservation as it has done for other reservations), with id. at 2489–502 (Roberts, C.J., dissenting) (relying on precedents finding disestablishment on the basis of evidence of implied congressional "intent" and then demonstrating that Congress "systematically dismantled" the Creek Nation and approved or acquiesced as Oklahoma exercised jurisdiction over reservation land and its residents).

134. 142 S. Ct. 2486 (2022).

135. Compare id. at 2503 (characterizing the dissent's reliance on certain treaties as "[s]traying further afield" because the treaties had been "supplanted" by a statute), with id. at 2525–26 (Gorsuch, J., dissenting) (arguing that the majority failed to adequately address relevant statutes and treaties).

136. 143 S. Ct. 940 (2023).

137. 18 U.S.C. § 3231 (2018).

138. *Turkiye Halk Bankasi*, 143 S. Ct. at 943–44 (2023).

139. 28 U.S.C. § 1604 (2018).

unless the basis for suit fell within one of the FSIA exceptions, such as commercial activity in the United States.[140] But Gorsuch (and Alito, who joined him) were in dissent.[141] Kavanaugh's opinion for the Court anchored on § 3231 and on the FSIA's jurisdictional provision, 28 U.S.C. § 1330(a), which applies only to "civil actions" filed against foreign states and their instrumentalities.[142] In our view, Kavanaugh had the better argument regarding the choice of text and ultimate interpretation: The Department of Justice had repeatedly prosecuted foreign states before 1976, and the FSIA's statutory structure and legislative history demonstrated that the 1976 statute addressed foreign sovereign immunity only in civil cases, consistent with Kavanaugh's choice of § 1330(a) and inconsistent with Gorsuch's choice of § 1604.[143]

CHOICE 2: WHICH DATE—INTENSIONAL VS. EXTENSIONAL MEANING

(a) *Current vs. Historical Meaning.* — Once the textualist has chosen a text, they must choose a date from which to view it. Given its fair notice value and the easier evidentiary burden, current meaning would appear the obvious default rule: How would the statutory text and (con)text be understood today?[144] Although textualism and originalism are distinct theories,[145] many textualists are "statutory originalists,"[146] taking the relevant date to be the historical date at which the text became law. In many cases, there is no material difference between current meaning and

---

140. See *Turkiye Halk Bankasi*, 143 S. Ct. at 952–55 (Gorsuch, J., concurring in part and dissenting in part).

141. Id. at 952.

142. Id. at 947 (majority opinion).

143. See id. at 946–49; Brief for the United States at 37–40, *Turkiye Halk Bankasi*, 143 S. Ct. 940 (No. 21-1450), 2022 WL 17725732.

144. See, e.g., Fred Schauer, Unoriginal Textualism, 90 Geo. Wash. L. Rev. 825, 838–47 (2022) (describing the theoretical foundation of "intention-independent contemporary meaning").

145. See, e.g., Katie Eyer, Disentangling Textualism and Originalism, 13 ConLawNOW 115, 115 (2021) [hereinafter Eyer, Disentangling Textualism] (arguing that "[t]extualism commands adherence to the text," while "[o]riginalism, in contrast, commands adherence to history"); Ilya Somin, 'Active Liberty' and Judicial Power: What Should Courts Do to Promote Democracy?, 100 Nw. U. L. Rev. 1827, 1851 (2006) (explaining that a judge may adopt textualism yet reject originalism, and vice versa, because a textualist follows the text even if doing so contravenes the Framers' expectations, but an originalist may disregard the text if the Framers would have expected a different outcome than that mandated by the text). On originalism in constitutional interpretation, see generally Lawrence Solum, Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate, 113 Nw. U. L. Rev. 1243 (2018).

146. See Katie R. Eyer, Statutory Originalism and LGBT Rights, 54 Wake Forest L. Rev. 64, 65–66 (2019) [hereinafter Eyer, Statutory Originalism] (describing statutory originalism and its entanglement with textualism in the context of the debate over whether Title VII proscribes anti-LGBT discrimination); Nourse, Textualism 3.0, supra note 6, at 676–77 (identifying statutory originalism as a focus on the meaning of a statute at the time it was passed); see also Scalia & Garner, supra note 7, at 41, 83.

historic meaning. *Niz-Chavez*, for instance, grappled with a 1996 statute.[147] There were just a dozen years between statute and decision in *Yates v. United States*.[148] Although *Wooden v. United States* and *Van Buren v. United States* interpreted Reagan-era statutes, the key text in each case ("occasions" in *Wooden* and "so" in *Van Buren*) likely had stable meanings over time.[149]

In other cases, the date matters. For instance, *Bostock* required the Roberts Court to interpret unusually dynamic terms ("discriminate" and "sex") in a statute enacted more than half a century earlier.[150] All nine Justices in *Bostock* signed on to opinions applying "original public meaning"—but neither the Gorsuch majority nor the Kavanaugh dissent reported hard evidence of the meaning § 703 might have had in 1964, and both opinions considered ongoing judicial, administrative, and congressional actions reaching into the new millennium.[151] The Alito dissent viewed Title VII through the lens of 1964 America and for that reason looked completely different from the more present-oriented Gorsuch and Kavanaugh opinions.[152]

Although the historical lens was deployed to support a restrictive, antigay construction of Title VII, the same kind of lens usually supports a generous, pro-American-Indian construction of treaties and statutes relating to tribal rights and state responsibilities.[153] Thus, Alito and Thomas doubled down on history in *Bostock* but joined the Kavanaugh opinion that ignored it in *Navajo Nation*.[154] Conversely, Gorsuch minimized historical context in *Bostock* and *McGirt* but relied on it in *Castro-Huerta* and *Navajo Nation*. Joined by the pragmatists, Gorsuch

147. See Niz-Chavez v. Garland, 141 S. Ct. 1474, 1478 (2021).

148. 574 U.S. 528 (2014) (interpreting 18 U.S.C. § 1519, which was enacted in 2002).

149. See Wooden v. United States, 142 S. Ct. 1063, 1069 (2022) (interpreting the word "occasion" for purposes of the Armed Career Criminal Act, Kagan, writing for the majority, concluded that the ordinary meaning of the word "occasion" does not require occurrence at precisely one moment in time); Van Buren v. United States, 141 S. Ct. 1648, 1655 (2021) (holding that the phrase "is not entitled so to obtain" in §1030(a)(2) of the Computer Fraud and Abuse Act refers to information one is not allowed to obtain "by using a computer that [one] is authorized to access").

150. Bostock v. Clayton County, 140 S. Ct. 1731, 1739–40 (2020).

151. Gorsuch and Kavanaugh took more evolutive stances: Gorsuch contemplated how modern ordinary understandings of "sex" implicate sexual orientation, see id. at 1739–41, while Kavanaugh focused on the distinctions between "sex" and sexual orientation over a fifty-year period, see id. at 1822–37 (Kavanaugh, J., dissenting).

152. Alito argued that ordinary people at the time could not have contemplated that a prohibition on "sex" discrimination included discrimination against "gays and lesbians," for they were considered mentally ill and abnormal at the time of Title VII's enactment in 1964. Id. at 1766–73 (Alito, J., dissenting).

153. There is not consensus concerning whether "Native American" or "American Indian" is preferred. Because the respondent Navajo Nation uses the term "Indian," we have used "American Indian" here.

154. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1809 (2023).

supported tribal rights and state responsibilities in the three federal Indian law cases and gay rights in *Bostock*.

The tension between textualism and originalism is a recurring issue and contributes to the confusion regarding the choice of date.[155] Originalism aspires to fix statutory meaning upon enactment.[156] Public-meaning textualism, in contrast, allows for the possibility of evolving meaning, because of either new societal facts that change the legal analysis (as we see at work in the Gorsuch opinion in *Bostock*)[157] or new judicial decisions and laws (the Kavanaugh opinion in *Bostock*).[158] Current meaning serves the fair notice feature of the rule of law better, comporting more naturally with textualism. Originalism, in contrast, welcomes—even invites—semantic surprises.[159] It seeks a meaning fixed at the time of a statute's enactment, a goal that meshes with the stability feature of the rule of law.[160] But, as we shall see, the newest textualists are often poor historians. In cases like *Bostock*, none of the dissenting Justices seemed to realize that the social group benefiting from the Court's interpretation—gay men, lesbians, and transgender people—did not exist as a social group in 1964, when Title VII was first enacted.[161] (Check your 1964 dictionaries; "gay" meant merry, and you will not find "gender identity," "sexual orientation," or "transgender.")

We urge textualists to avoid anachronistic exercises that generate semantic surprises, perhaps by following a sounder approach that determines original meaning but allows statutory applications to evolve with changing social facts and norms. We discuss this *intensional meaning* approach below.

(b) *Historical Meaning: Which Year?* — If you are going to take an original public meaning approach, you need to know the year of origin—which proved a tricky proposition in *Bostock*.[162] Alito's dissent picked 1964, which stacked the textualist deck against "homosexuals," who were

155. See Eyer, Disentangling Textualism, supra note 145, at 119.

156. See Eyer, Statutory Originalism, supra note 146, at 89–90.

157. See William N. Eskridge, Jr., Brian G. Slocum & Stefan Th. Gries, The Meaning of *Sex*: Dynamic Words, Novel Applications, and Original Public Meaning, 119 Mich. L. Rev. 1503, 1564–70 (2021) [hereinafter Eskridge et al., The Meaning of Sex] (describing how evolving social facts, or "societal dynamism," explain why Title VII should protect homosexual and transgender employees in 2023 even if it would not have in 1964).

158. See id. at 1570–73 (describing "normative dynamism," which explains how changing norms can change legal meaning).

159. See Lawrence B. Solum, Surprising Originalism: The Regula Lecture, 9 ConLawNOW 235, 241–45 (2018) (providing examples of how the original meanings of certain constitutional text no longer conform to current understandings).

160. See Lawrence B. Solum, The Constraint Principle: Original Meaning and Constitutional Practice 66–67 (Apr. 3, 2019), https://ssrn.com/abstract=2940215 [https://perma.cc/9LBR-XMQM] (unpublished manuscript) (describing the rule of law argument in favor of the originalist "Constraint Principle").

161. See Eskridge et al., The Meaning of Sex, supra note 157, at 1561–64.

162. See Eskridge & Nourse, supra note 14, at 1768–77.

considered presumptive criminals, psychopaths, and even child molesters in American public culture before the 1968 Stonewall protests.[163] But the defendant in *Bostock* was Clayton County, Georgia, a government employer not covered by Title VII until its 1972 Amendments[164]—by which point thousands of gay people had streamed out of their closets, renounced antigay stigmas, and demanded equal treatment. Also, Alito viewed § 703(m) as the key provision in play—but that was not part of Title VII until 1991.[165] So what year is the observation point for "original" public meaning? We don't see how it's 1964.

Choosing a year was an even bigger problem for the textualists dissenting in *McGirt* and constituting the majority in *Castro-Huerta*. The *McGirt* dissent and *Castro-Huerta* majority opinion identified neither the actual date that Congress disestablished the Muscogee Reservation (well, sometime between 1890 and 1906[166]) nor the date that Congress dislodged the traditional rule against applying state criminal law to crimes committed by Indians on reservations (well, sometime in the second half of the nineteenth century[167]). But the case represented an unusual textualist battleground because both sides relied heavily on extratextual evidence rather than focusing closely on statutory language as in other cases. Ultimately, the textualists-minus-Gorsuch could not identify a disestablishing statute or a framework law for crimes on a reservation apart from the General Crimes Act of 1834, which supported Gorsuch's argument.

McGirt, *Castro-Huerta*, and *Bostock* illustrate how choice of text and choice of date often interact for statutes that have been periodically amended—especially laws affecting marginalized groups—when legislative and public attitudes have shifted over time.

(c) *Extensional vs. Intensional Meaning*. — If the textualist Justice decides to valorize original meaning and determines the proper date for inquiry, they still face a methodological question that divided the *Bostock* Justices: How does the judge analyze the historical materials in light of the chosen theory of meaning? In *Bostock*, Alito sought original meaning through a time machine: How would the 1964 legislator or ordinary citizen have applied just-enacted Title VII to the precise facts of the current case? Linguists call this an *extensional* approach.[168] Thus, Alito viewed the interpretive question as whether people in 1964 would believe that firing a "homosexual" would be "because of sex" and therefore actionable

163. See Eskridge et al., The Meaning of Sex, supra note 157, at 1560–70.

164. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e (2018)).

165. Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 107(a), 105 Stat. 1071, 1075 (codified at 42 U.S.C. § 2000e-2(m)).

166. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2490–91 (2020) (Roberts, C.J., dissenting).

167. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2493 (2022).

168. Eskridge et al., The Meaning of Sex, supra note 157, at 1526.

under Title VII. He concluded that the American people would have been "shocked" by such a law[169] and that protecting "homosexuals" from discrimination was the last thing Congress would have adopted that year.[170]

For older statutes, the extensional inquiry is exceedingly difficult. "The past is a foreign country: [T]hey do things differently there."[171] Contrary to Alito's analysis, "gay men and lesbians" were not a social group Americans (including "homosexuals") would have recognized in 1964. "Gay" meant happy or merry; "sexual orientation" was not a widely understood concept in our 1964 public culture.[172] Alito's well-researched time machine could not escape serious anachronism—and not just because he and his clerks did not appreciate the historical method.[173] The Congress enacting and the public receiving Title VII in 1964 would, literally, not have understood the issue posed by Gerald Bostock in 2020. His social group ("gay men and lesbians") had no name in 1964 because that population did not exist; by 2020, the "homosexuals and other sex perverts"[174] of the 1960s had been overtaken by a new identity that defines a much-expanded and normatively acceptable population today. "Sex" and "gender" are words that operate in such a different social climate today that the "sex discrimination argument for gay rights" was unintelligible in 1964.

For these reasons, the categorical method followed by Gorsuch—what linguists call an *intensional* approach[175]—is a better way to explore original public meaning: What was the linguistic concept or principle embedded

---

169. See Bostock v. Clayton County, 140 S. Ct. 1731, 1767–73 (2020) (Alito, J., dissenting); accord Zarda v. Altitude Express, Inc., 883 F.3d 100, 158–60 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) ("There is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against *men*, and therefore discriminated not only against men, but also against anyone, male or female, who associated with them.").

170. *Bostock*, 140 S. Ct. at 1767–77 (Alito, J., dissenting); accord *Zarda*, 883 F.3d at 139–40 (Lynch, J., dissenting) ("Discrimination against gay women and men . . . was not on the table for public debate.").

171. L.P. Hartley, The Go-Between 3 (1953).

172. See Eskridge et al., The Meaning of Sex, supra note 157, at 1554–58, 1561–64.

173. For criticisms of originalist efforts in constitutional law, see generally Jonathan Gienapp, Historicism and Holism: Failures of Originalist Translation, 84 Fordham L. Rev. 935 (2015); Jack N. Rakove, Joe the Ploughman Reads the Constitution, or, the Poverty of Public Meaning Originalism, 48 San Diego L. Rev. 575 (2011).

174. Subcomm. on Investigations of the Comm. on Expenditures in the Exec. Dep'ts, Employment of Homosexuals and Other Sex Perverts in Government, S. Doc. No. 81-241, at 1 (2d Sess. 1950).

175. See Eskridge et al., The Meaning of Sex, supra note 157, at 1526; Stefan Th. Gries, Brian G. Slocum & Kevin Tobia, Corpus-Linguistic Approaches to Lexical Statutory Meaning: Extensionalist vs. Intensionalist Approaches, 4 Applied Corpus Linguistics (forthcoming 2024) (manuscript at 14–16), https://ssrn.com/abstract=4568238 [https://perma.cc/GW5V-A5R7].

in the statute in 1964?[176] Gorsuch read the original materials to suggest that Americans would have understood the point of Title VII to assure individuals that their "sex" would not be a reason for employers to fire or otherwise discriminate against them. The lower courts that had followed such an intensional approach found elimination of rigid gender roles to be the conceptual object of the statutory scheme.[177] On this intensional approach, what matters is the original concepts, not the original expected applications: Even if no person would have expected in 1964 that Title VII would apply to *Bostock*'s 2020 circumstances, Title VII's original meaning prohibited the discrimination that Bostock faced.

CHOICE 3: COMPOSITIONAL VS. HOLISTIC ANALYSIS

Whether textualist Justices are searching for historical or current meaning (Choice 2), they must decide how to parse the text they have chosen. Here, too, the newest textualists do not speak with one voice, and each Justice waffles from case to case. Gorsuch and Thomas typically approach texts by applying what linguists would term a narrow *compositional* approach: Define each word separately, and then put them together to determine meaning.[178]

A compositional linguistic analysis was the basis for Gorsuch's majority opinion in *Niz-Chavez v. Garland*.[179] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) authorizes the federal government to allow undocumented immigrants to stay in this country if they persuade officials of exceptional circumstances and maintain continuous presence here for at least ten years. [180] The ten-year clock stops when such an immigrant is served with a "notice to appear" for a deportation proceeding; the notice must provide the time and place of the immigrant's hearing, their rights, and other specified information.[181] Agusto Niz-Chavez was served with a notice to appear before the ten-year

176. Using similar reasoning, Robert Bork argued that *Brown v. Board of Education* was supported by original understanding:

> Since equality and segregation were mutually inconsistent, though the ratifiers did not understand that, both could not be honored. When that is seen, it is obvious the Court must choose equality and prohibit state-imposed segregation. The purpose that brought the fourteenth amendment into being was equality before the law, and equality, not separation, was written into the text.
>
> Had the *Brown* opinion been written that way, its result would have clearly been rooted in the original understanding . . . .

Robert Bork, The Tempting of America 82 (1989).

177. See Zarda v. Altitude Express, Inc., 883 F.3d 100, 120–22 (2d Cir. 2018) (en banc) (Katzmann, C.J.); Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 345 (7th Cir. 2017) (en banc) (Wood, C.J.).

178. Eskridge et al., The Meaning of Sex, supra note 157, at 1519.

179. See 141 S. Ct. 1474, 1480–82 (2021).

180. See 8 U.S.C. § 1229b(b)(1) (2018).

181. Id. § 1229b(d)(1).

cutoff, but the government failed to provide all the statutory information in that notice—so it supplied the missing information in a second notice.[182] Although Niz-Chavez still had not reached ten years, his counsel maintained that the stop-time was not triggered until a *single* notice included *all* the required information.[183]

Gorsuch agreed, based on a word-by-word parsing of the provision, that "written notice (in this section referred to as a 'notice to appear') shall be given" to the immigrant with the required information.[184] Hyperfocusing on the article "a," which usually means "one," Gorsuch reasoned that all of the required information must be in a single notice, "and not a mishmash of pieces with some assembly required."[185] The Government responded that a "written notice" might be a sequence of communications, and its statutory duty is satisfied if the various communications, together, provide the required information.[186] No, replied Gorsuch: "The singular article 'a' thus falls outside the defined term ('notice to appear') and modifies the entire definition."[187] Thus, "even if we were to do exactly as the government suggests and substitute 'written notice' for 'notice to appear,' the law would still stubbornly require 'a' written notice containing all the required information."[188] With tongue firmly in cheek, Gorsuch concluded: "Admittedly, a lot here turns on a small word."[189]

Kavanaugh's dissenting opinion took a different approach to reading the provision. As a matter of "common sense," Kavanaugh wrote, the statutory definition of a "notice to appear" that stops the clock only requires that it (1) be "written," (2) be "given" to the immigrant, and (3) provide all the required information.[190] Reading the clause as a whole, Kavanaugh argued that just as "a job application" can be submitted in installments, so too can "a notice to appear" be a series of documents. Linguists would call his reasoning a *social*, *holistic*, or *non-compositional* approach to meaning: How would an ordinary speaker or reader understand the clause as a whole?[191] The same division occurred during the previous Term in *Bostock*, in which Gorsuch followed a compositional approach to Title VII, while Kavanaugh and Alito took a social or holistic one.[192] Although Thomas strongly favors the compositional

182. See *Niz-Chavez*, 141 S. Ct. at 1479.

183. Id.

184. Id. (citing 8 U.S.C. § 1229b(a)(1)).

185. Id. at 1480.

186. Id. at 1481.

187. Id.

188. Id.

189. Id.

190. Id. at 1488–93 (Kavanaugh, J., dissenting).

191. Eskridge et al., The Meaning of Sex, supra note 157, at 1519.

192. Compare Bostock v. Clayton County, 140 S. Ct. 1731, 1739 (2020), with id. at 1766 (Alito, J., dissenting), and id. at 1834 (Kavanaugh, J., dissenting).

approach when he authors opinions, he joined the Alito dissent in *Bostock*.[193]

Even for Thomas and Gorsuch, policy concerns can override the compositional approach. For instance, they do not follow a compositional approach whenever an agency's authority to take some regulatory action involves a "major question" of "vast 'economic and political significance.'"[194] In such cases, the normal compositional reliance on semantic meaning gives way to a wide-ranging, extratextual search for particularly specific indications that Congress intended to grant the agency such power.

Choice 8 discusses the "major questions" doctrine in more detail. For now, consider the Court's per curiam judgment in *NFIB v. OSHA*.[195] OSHA has statutory authority to ensure workplace safety, including the power to issue "emergency temporary standards" upon a showing that "employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards" and that the "emergency standard is necessary to protect employees from such danger."[196] In 2021, OSHA issued emergency standards for large employers to protect their workers against COVID-19, an agent "determined to be toxic," based upon expert findings that vaccination mandates were "necessary to protect employees from such danger" of workplace infection.[197] Thomas and Gorsuch abandoned their usual compositional approach and joined the per curiam opinion that refused to credit the ordinary meaning of the words chosen by Congress and focused on the legislature's larger policy concerns, whereby an "occupational safety" agency ought not be leading a "public health" campaign.[198] (Never mind that Congress named the agency the Occupational Safety and *Health* Administration.)

CHOICE 4: ORDINARY VS. TERM-OF-ART MEANING

In his treatise with Bryan Garner, the late Justice Scalia admonished judges to give texts their "fair meaning" (the meaning an ordinary English speaker would derive from the text) as the default rule.[199] Following ordinary meaning (rather than specialized meaning) arguably advances

193. Id. at 1754 (Alito, J., dissenting).

194. Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs., 141 S. Ct. 2485, 2489 (2021) (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

195. NFIB v. Occupational Safety & Health Admin., 142 S. Ct. 661 (2022) (per curiam).

196. Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, § 6(c)(1), 84 Stat. 1590, 1596 (codified as amended at 29 U.S.C. § 655(c)(1) (2018)).

197. Id.

198. *NFIB*, 142 S. Ct. at 665 ("The Act empowers the Secretary to set *workplace* safety standards, not broad public health measures.").

199. Scalia & Garner, supra note 7, at 69; accord Brian G. Slocum, Ordinary Meaning: A Theory of the Most Fundamental Principle of Legal Interpretation 2–3 (2015) (discussing the judicial commitment to the ordinary meaning doctrine for legal interpretation).

textualism's claim to simplicity and predictability. Some recent textualists have proposed a further connection between ordinary meaning and democracy. According to Barrett, textualists "view themselves as agents of the people rather than of Congress and as faithful to the law rather than to the lawgiver."[200] On this new line of textualist argument, the ordinary meaning rule serves a notice function that helps maintain faithful agency to the people.[201]

Statutes, however, are full of technical legal terms,[202] and the rhetorical appeal of "just ordinary meaning, thank you" erodes when you actually examine textualist analyses. Most of the Scalia–Garner "canons," and most of the cases analyzed in their treatise, focus on "term-of-art meaning," namely, the meaning a specialized term would have to an expert community such as lawyers or scientists.[203] And statutes are regularly addressed to such expert audiences.[204]

Some textualists have addressed the tension between textualism as democratic interpretation and the often-esoteric nature of statutory contexts, although they have suggested different resolutions. Gorsuch concedes that "[s]ometimes Congress's statutes stray a good way from ordinary English" but nevertheless insists that "affected individuals and courts alike are entitled to assume statutory terms bear their ordinary meaning."[205] Somewhat differently, Barrett suggests that ordinary meaning ought to be understood as the meaning the "ordinary lawyer" would draw from a statute.[206] Because technical meanings are common, ordinary people receive fair notice only by consulting an attorney.

---

200. Amy Coney Barrett, Congressional Insiders and Outsiders, 84 U. Chi. L. Rev. 2193, 2194–95 (2017) [hereinafter Barrett, Congressional Insiders and Outsiders]; accord District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008) ("In interpreting this text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (alteration in original) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931))).

201. On textualism, democracy, and populism, see Anya Bernstein & Glen Staszewski, Judicial Populism, 106 Minn. L. Rev. 283, 309–18 (2021); Jamal Greene, Selling Originalism, 97 Geo. L.J. 657, 711–13 (2009); cf. Mitchell N. Berman, Originalism Is Bunk, 84 N.Y.U. L. Rev. 1, 8 (2009) (expressing concern that originalism is used to pander to populism).

202. See Frederick Schauer, Is Law a Technical Language?, 52 San Diego L. Rev. 501, 508 (2015).

203. Scalia & Garner, supra note 7, at 69–240, 320–26.

204. See Anita S. Krishnakumar, Meta Rules for Ordinary Meaning, 134 Harv. L. Rev. Forum 167, 170–71 (2021), https://harvardlawreview.org/wp-content/uploads/2021/01/134-Harv.-L.-Rev.-F.-167.pdf [https://perma.cc/8Y6X-7AQY] ("[F]or statutes that govern cost-shifting among litigants, jurisdiction or other matters of court procedure, or remedies, the relevant audience or 'ordinary reader' may . . . be judges."); David Louk, The Audiences of Statutes, 105 Cornell L. Rev. 137, 184–86 (2019) (describing tax law as a statutory field that targets industry professionals as the relevant audience).

205. Niz-Chavez v. Garland, 141 S. Ct. 1474, 1481–82 (2021).

206. Barrett, Congressional Insiders and Outsiders, supra note 200, at 2209.

The dialectic relationship between ordinary and technical meaning generates drama when textualists reach Choice 4 and come to different conclusions about which meaning to privilege. As an example, consider *HollyFrontier Cheyenne Refining, LLC v. Renewable Fuels Ass'n*.[207] When Congress amended the Clean Air Act to add the Renewable Fuel Program (RFP) in 2005, it gave small refineries a temporary exemption from compliance with the program.[208] The Environmental Protection Agency (EPA) was vested with authority to grant "extension[s] of the exemption" by reason of "disproportionate economic hardship."[209] The issue in *HollyFrontier* was whether small refineries that once had exemptions and then lost them could apply for extensions.[210] Barrett, in a dissenting opinion, demonstrated that "extension" was "most naturally read" to extend a temporal deadline without a gap between the expiring deadline and a new starting date.[211] For the natural reading of "extension," Barrett relied on a suite of dictionaries.[212]

Although Barrett made a compelling ordinary meaning case,[213] Gorsuch's majority opinion followed Barrett's own law review article and ruled that a proper textualism did not close the door on EPA's practice of allowing an equitable exemption even after the small refinery's exemption had lapsed.[214] Under federal statutory law, he argued, "extension" is a term of art that can be deployed after an exemption had lapsed.[215] Although the majority staunchly claimed that it was rendering the term's "ordinary or natural meaning,"[216] its cogency rested largely on its citation to sources (like *Black's Law Dictionary*, cases, and statutes) that rendered term-of-art meanings.[217] Thus, despite its claims, the Court privileged technical, rather than ordinary, meaning.

Although he was trying to have his cake (populist ordinary meaning) and eat it too (relying on more cogent sources), Gorsuch was right to consider legal meaning because the statutory context will in many cases

---

207. 141 S. Ct. 2172 (2021).

208. Energy Policy Act of 2005, Pub. L. No. 109-58, § 1501(a), 119 Stat. 594, 1073–74 (codified as amended at 42 U.S.C. § 7545(o)(1)(D), (9) (2018)).

209. 42 U.S.C. § 7545(o)(9)(B)(i).

210. *HollyFrontier*, 141 S. Ct. at 2175.

211. Id. at 2184–87 (Barrett, J., dissenting).

212. Id. at 2184–85.

213. See id.

214. See id. at 2177–78 (majority opinion).

215. Id. at 2177–79. Gorsuch cited a number of examples to support his reading of "extension," such as 28 U.S.C. § 2107(c) (2018) and Fed. R. Civ. P. 6(b)(1), as well as statutes providing an "extension" of benefits that previously expired, including the Consolidated Appropriations Act, Pub. L. No. 116-260, § 203, 134 Stat. 1182, 1953 (2021), and Coronavirus Aid, Relief, and Economic Security Act, Pub. L. No. 116-136, § 2114, 134 Stat. 281, 334 (2020).

216. *HollyFrontier*, 141 S. Ct. at 2176 (internal quotation marks omitted) (quoting Fed. Deposit Ins. Corp. v. Meyer, 510 U.S. 471, 476 (1994)).

217. See id. at 2178.

support it as the correct meaning. For instance, although the textualists authoring opinions in *Bostock* disagreed sharply about how to read "because of . . . sex," they all accepted the fact that "because of" entailed but-for causation, as established by statutory precedents and the common law.[218] When ordinary and term-of-art meanings diverge, as they probably did in *HollyFrontier*, statutory purpose(s) and legislative deliberations will likely indicate the correct meaning. Dogmatic insistence on ordinary meaning is often unwarranted.

The criminal law might be a special case because of the fair notice feature of the rule of law. If the lenity canon is grounded in due process notice,[219] then judges ought to focus on the ordinary meaning of the particular provision standing alone. But lenity is also grounded in separation of powers,[220] and that suggests the value of legal meaning, given Congress's professional drafting staff. Consider the application to *Wooden v. United States*, in which Kagan's majority opinion relied mostly on the ordinary meaning of "occasion" but confirmed that analysis by referring to Congress's and the Solicitor General's deployment of the word as a term of art with specific legal meaning.[221]

CHOICE 5: WHICH LINGUISTIC EVIDENCE AND SOURCES

Once Choices 1–4 have been made, the textualist gets down to the nitty-gritty: What linguistic *evidence* and *sources* should the judge consult to determine the meaning of words or phrases in a statute? Following Scalia, the Justices increasingly engage in thoughtful speculation about the meaning statutory terms and phrases would convey to the ordinary speaker.[222] Kagan's *Wooden* opinion started its discussion of "occasion" with thought experiments.[223] If a defendant punched A in the face during a bar-room brawl, and then gut-punched B before kneeing C to the ground, have the defendant's crimes occurred on three different "occasions"?[224]

---

218. Compare Bostock v. Clayton County, 140 S. Ct. 1731, 1739–40 (2020) (majority opinion) (pointing to precedent that establishes but-for causation as the standard for the phrase "because of"), with id. at 1775 (Alito, J., dissenting, joined by Thomas, J.) ("The standard of causation in these cases is whether sex is necessarily a 'motivating factor' when an employer discriminates on the basis of sexual orientation or gender identity. . . . The Court's extensive discussion of causation standards is so much smoke." (quoting 42 U.S.C. § 2000e-2(m) (2018))).

219. See, e.g., Shon Hopwood, Restoring the Historical Rule of Lenity as a Canon, 95 N.Y.U. L. Rev. 918, 934 (2020) (discussing how the lenity canon advances due process principles of fair warning).

220. Id. at 933.

221. See 142 S. Ct. 1063, 1069–70, 1072–74 (2022).

222. See, e.g., id. at 1069 (referring to how "an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe" the defendant's conduct).

223. Id.

224. Id. at 1070.

Inspired by Scalia's colorful style, the Justices have made thought experiments and homey examples a staple of textualist debates within the Court, but they have often reasoned in ways that are hard to generalize to the American population. What might be reasonable to judges who graduated from tony colleges and law schools might not reflect the ordinary meaning comprehended by the average American or the typical legislator. Consider Barrett's repeated references to "common sense" (six times!) in reasoning that a "reasonably informed interpreter would expect Congress to legislate on 'important subjects' while delegating away only 'the details.'"[225] What if Congress considers it "important" to vest an agency with updating power so that its statutes can address unforeseen circumstances, such as a once-in-a-century pandemic?

Other textualists have shown skepticism of "common sense" examples. Consider *Dubin v. United States*, a case concerning the meaning of "uses" (with respect to whether a defendant "uses" another person's identity in relation to certain crimes).[226] Sotomayor's 9-0 majority opinion relied on various intuitive hypotheticals about "uses."[227] Gorsuch's concurrence worried that it is possible to "spend a whole day cooking up scenarios—ranging from the mundane to the fanciful—that collapse even your most basic intuitions . . . . Try making up some of your own and running them by a friend or family member. You may be surprised at how sharply instincts diverge."[228]

Gorsuch's worries about intuitive hypotheticals in *Dubin* apply broadly. The ability to *craft* one intuitive hypothetical (and ignore others) gives textualists enormous flexibility. Moreover, the Justices' views about an example may not be representative, especially insofar as their intuitions may register in an "upper-class, judicially-inflected accent."[229] This possibility puts judicial reliance on the Justices' own intuitions in tension with the Court's "populist"[230] appeals to ordinary people's views of law and language.[231] Finally, those with divergent intuitions may not realize it. Law and psychology have demonstrated that people

225. Biden v. Nebraska, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring) (quoting Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825)).

226. See 143 S. Ct. 1557, 1564 (2023).

227. See id. at 1563 (considering, as an example, whether a waiter who uses electronic billing (that employs the diner's name) to charge a diner for filet mignon while serving flank steak has "used" the diner's means of identification, triggering a mandatory two-year aggravated identity theft prison sentence).

228. Id. at 1575 (Gorsuch, J., concurring).

229. Eskridge & Nourse, supra note 14, at 1728.

230. See generally Bernstein & Staszewski, supra note 201, at 309–18 (arguing that by claiming to find the "plain meaning" of statutory text, textualist judges engage in judicial populism).

231. See Barrett, Congressional Insiders and Outsiders, supra note 200, at 2194, 2200–05 ("While textualists have not always made their assumptions clear, they approach language from the perspective of an ordinary English speaker—a congressional outsider.").

often overestimate others' agreement with their own legal interpretation.[232]

But the textualist Court has also relied on a number of other sources to determine ordinary or term-of-art meaning. In hard cases and many easier ones, there are many choices concerning which sources to emphasize and how to apply the sources to the facts of the case.

(a) *Statutory Definitions: Just a Starting Point?* — Start with something (seemingly) simple: Judges should apply statutory definitions of statutory terms. But the newest textualists sometimes pit the statutory definition against the term's ordinary meaning. Consider *Bond v. United States*.[233] The defendant, Carol Anne Bond, was convicted of violating the Chemical Weapons Convention Implementation Act, which forbids any person to knowingly use "any chemical weapon."[234] Bond had smeared an arsenic-based compound on the mailbox and door of her neighbor who had a sexual relationship with Bond's husband.[235] "Chemical weapon" is defined as "[a] toxic chemical and its precursors, except where intended for a [permissible] purpose."[236] In turn, "toxic chemical" is defined as "any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals."[237]

Bond's use of the arsenic-based compound easily fell within the terms of the statutory definitions. Nevertheless, Roberts, writing for a 6-3 Court, ruled that Bond's conduct did not fall within the statute.[238] The problem with the government's interpretation, he began, was that it was contrary to the law's *ordinary meaning*.[239] Thus, Roberts approached the meaning of "chemical weapon" as though it were left undefined.[240] He reasoned

---

232. Lawrence Solan, Terri Rosenblatt & Daniel Osherson, False Consensus Bias in Contract Interpretation, 108 Colum. L. Rev. 1268, 1268–69 (2008); see also Brandon Waldon, Madigan Brodsky, Megan Ma & Judith Degen, Predicting Consensus in Legal Document Interpretation, 45 Proc. Ann. Conf. Cognitive Sci. Soc'y 1101, 1101 (2023) (conceptually replicating Solan, Rosenblatt & Osherson, supra, and finding that a large language model (LLM) does not robustly predict interpreters' consensus). For a summary of recent empirical work related to ordinary meaning, see Kevin Tobia, Experimental Jurisprudence, 89 U. Chi. L. Rev. 735, 783–91 (2022).

233. 572 U.S. 844 (2014).

234. Id. at 851–53 (internal quotation marks omitted) (quoting Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, div. I, sec. 201(a), 112 Stat. 2681-856, 2681-867 (codified at 18 U.S.C. § 229(a)(1) (2018))).

235. Id. at 852.

236. 18 U.S.C. § 229F(1)(A).

237. Id. § 229F(8)(A).

238. *Bond*, 572 U.S. at 848.

239. Id. at 857 (citing United States v. Bass, 404 U.S. 336, 350 (1971)); see also id. at 860–62.

240. See id. at 861 (explaining that "[i]n settling on a fair reading of a statute, it is not unusual to consider the ordinary meaning of a defined term, particularly when there is dissonance between that ordinary meaning and the reach of the definition").

that "as a matter of natural meaning, an *educated user of English* would not describe Bond's crime as involving a 'chemical weapon.' Saying that a person 'used a chemical weapon' conveys a very different idea than saying the person 'used a chemical in a way that caused some harm.'"[241]

Roberts makes a nice point when he says that a chemical used as a weapon cannot always be referred to as a "chemical weapon."[242] A knife that cuts butter is not necessarily a "butter knife." But the point of a statutory definition is that the legislature has stipulated the meaning of a term (which might well differ from its ordinary meaning). Concurring in the judgment, Scalia (joined by Thomas and Alito) disagreed with the Chief Justice's marginalization of the statutory definition (which Scalia described as "antitextualism").[243] Scalia insisted that "the ordinary meaning of the term being defined is irrelevant, because the statute's own definition—however expansive—is utterly clear."[244] That statutory definition must be followed "even if it varies from that term's ordinary meaning."[245]

Yet Scalia sometimes chose ordinary or term-of-art meaning over statute-defined meaning. For instance, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*,[246] the Court interpreted the Endangered Species Act of 1973 (ESA), which makes it unlawful for any person to "take" endangered or threatened species.[247] The ESA defines "take" to mean to "harass, harm, pursue," "wound," or "kill."[248] The Court had to determine whether "significant habitat modification or degradation where it actually kills or injures wildlife" fell within the terms of the ESA.[249] The majority viewed the interpretive dispute as turning on the ordinary meaning of "harm" within the statutory definition of "take."[250] The Court thus looked, in part, to the textualist's best friend, the dictionary, and, unsurprisingly, found a broad definition: "The dictionary definition of the verb form of 'harm' is 'to cause hurt or damage to: injure.'"[251]

---

241. Id. at 860 (emphasis added).

242. See id.

243. Id. at 868 (Scalia, J., concurring in the judgment).

244. Id. at 871.

245. Id. (emphasis omitted) (internal quotation marks omitted) (quoting Stenberg v. Carhart, 530 U.S. 914, 942 (2000)).

246. 515 U.S. 687, 708 (1995).

247. 16 U.S.C. § 1538(a)(1) (2018).

248. Id. § 1532(19).

249. *Babbitt*, 515 U.S. at 690 (internal quotation marks omitted) (quoting 50 C.F.R. § 17.3 (1994)).

250. See id. at 697 (referring to an "ordinary understanding of the word 'harm'").

251. Id. at 697 (quoting Harm, Webster's Third New International Dictionary 1034 (1966)). The Court also relied on other interpretive evidence, including the legislative history of the ESA. See id. at 704–08.

In dissent, Scalia focused on the statutory term "take" instead of "harm" and relied on that term's common law meaning.[252] Scalia's common law meaning was narrower than the ordinary meaning of the terms used in the statutory definition.[253] He maintained that the "[t]he tempting fallacy—which the Court commits with abandon—is to assume that *once defined*, 'take' loses any significance, and it is only the definition that matters."[254]

The contrast between Scalia's views about statutory definitions in *Bond* and *Babbitt* illustrates the breadth of linguistic choice for textualists. Not only can the textualist choose between ordinary and term-of-art meanings of statutory terms, but in many cases the textualist insists on choosing how much, if at all, to focus on statutory definitions. Definitions ought to control, and they ought to be read in light of congressional purposes and deliberations.

For that reason, Kavanaugh's interpretation of the Clean Water Act in *Sackett v. EPA* is commendable.[255] The CWA as amended defines "navigable waters," admittedly a legal term of art, to mean "waters of the United States,"[256] including "wetlands adjacent" to certain bodies of water.[257] As a matter of "ordinary parlance" (the majority's purported test), "waters" and "adjacent wetlands" are vastly broader terms than the traditional court-understood meaning of "navigable waters." Alito, for the Court, cited *Bond* for the proposition that the potentially broad statutory definition ought to be narrowed in light of the traditional judicial view.[258] This strikes us as contrary to textualism's focus on the semantic meaning of the statutory text as well as undemocratic.

(b) *Dictionaries & Corpus Linguistics: Definition Shopping.* — Federal judges increasingly rely on dictionary definitions to determine the ordinary meaning of statutory words. In doing so, they exercise considerable discretion because they make multiple choices unconstrained by metarules governing dictionary use.[259] Since 2010, Supreme Court opinions have cited dozens of different legal dictionaries (e.g., *Black's*, *Ballentine's*, *Bouvier's*) and ordinary dictionaries (e.g., *Heritage*, *Oxford*, *Funk & Wagnalls*, *Merriam-Webster*), many of which

252. See id. at 717 (Scalia, J., dissenting).

253. See id. at 718.

254. Id. (citation omitted).

255. 143 S. Ct. 1322, 1363–64 (2023) (Kavanaugh, J., concurring in the judgment).

256. 33 U.S.C. § 1362(7) (2018).

257. Id. § 1344(g)(1).

258. *Sackett*, 143 S. Ct. at 1337.

259. See, e.g., Ellen P. Aprill, The Law of the Word: Dictionary Shopping in the Supreme Court, 30 Ariz. St. L.J. 275, 297–300 (1998) (describing the impact of the choice of dictionary in interpretation); Brudney & Baum, supra note 13, at 493 (arguing that dictionaries have been "overused and often abused by the Court").

have multiple editions.[260] Once a judge chooses a specific dictionary (and a specific edition of that dictionary), the judge chooses a definition, often among many possibilities (as is the case for common statutory words). In addition to choosing the dictionary (or several), the correct edition, and the definition on point—all offering possibilities for gerrymandering—the court also might edit the chosen definition.[261]

For a recent example, consider the transit mask mandate case.[262] Most of this Article's analysis focuses on the Supreme Court, but this district court opinion offers an instructive example. The Supreme Court's open-ended textualism inspires and facilitates flexibility for modern textualists in lower courts. This theoretical flexibility, coupled with district courts' eagerness to issue decisions with nation-wide consequences, has created a perfect storm of textualist unpredictability throughout the judiciary. In the transit mask mandate case, for example, the district court's textualist opinion engaged in egregious dictionary and corpus linguistic shopping. The decision had nationwide impacts, vacating the Biden Administration's mandate to wear masks in some transportation settings in extreme pandemic circumstances. The Eleventh Circuit has since vacated the district court's opinion.[263]

In the transit mask mandate case, a Florida district court (the judge a former law clerk to Thomas[264]) ruled that the Centers for Disease Control and Prevention (CDC) did not have the statutory authority to require mask wearing on mass transit as a pandemic mitigation measure.[265] Interpreting the 1944 Public Health Service Act, the court found that the CDC's mask-wearing rule, aimed at preventing the spread of

---

260. Kevin Tobia, Brian G. Slocum & Victoria Nourse, Ordinary Meaning and Ordinary People, 171 U. Pa. L. Rev. 365 app. at 451–55 (2023) [hereinafter Tobia et al., Ordinary Meaning] (presenting empirical research showing the variety of dictionaries relied upon by the Supreme Court).

261. See Nourse, Textualism 3.0, supra note 6, at 681–82 (comparing adding or subtracting meaning from words to gerrymandering). For a recent, high-impact example, see Stefan Th. Gries, Michael Kranzlein, Nathan Schneider, Brian G. Slocum & Kevin Tobia, Unmasking Textualism: Linguistic Misunderstanding in the Transit Mask Order Case and Beyond, 122 Colum. L. Rev. Forum 192, 204–08 (2022), https://columbialawreview.org/wp-content/uploads/2022/12/Gries-Kranzlein-Schneider-Slocum-Tobia-Unmasking_textualism_linguistic_misunderstanding_in_the_transit_mask_order_case_and_beyond.pdf [https://perma.cc/MKW3-3J89] (explaining a Florida district court's gerrymandering of the definition of "sanitation," which supported vacating the Biden mask mandates).

262. Health Freedom Def. Fund, Inc. v. Biden, 599 F. Supp. 3d 1144, 1153 (M.D. Fla. 2022) (vacating the mask mandate issued by the CDC), vacated as moot sub nom. Health Freedom Def. Fund, Inc. v. President of U.S., 71 F.4th 888 (11th Cir. 2023).

263. *Health Freedom Def. Fund*, 71 F.4th at 894.

264. Kathryn Kimball Mizelle, U.S. Dist. Ct. Middle Dist. Fla., https://www.flmd.uscourts.gov/judges/kathryn-kimball-mizelle [https://perma.cc/WK8F-DAVN] (last visited Aug. 31, 2023).

265. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1178.

infectious diseases, was not a "sanitation" measure.[266] The court relied on *Funk & Wagnalls* (among other dictionaries) to support its view that "sanitation['s]" ordinary sense could not include a requirement to wear a mask during a pandemic.[267] The court reported that "sanitation" admitted of two senses: (1) "devising and applying of measures for preserving and promoting public health" and (2) "the removal or neutralization of elements injurious to health."[268] According to the court, only the former sense would permit a mask-wearing rule. The court conducted a corpus linguistic analysis and found what it was looking for: The second definition is more common and thus the ordinary sense of "sanitation."[269]

There are several problems with this use of the dictionary. The court did not comment on the guidance *Funk & Wagnalls* provides about how to read its dictionary: "If a word has two or more meanings, the most common meaning has been given first."[270] Thus, if the court's question is whether sense (1) or (2) is the more common sense of "sanitation," the dictionary explains that (1) is more common. This is the definition that would straightforwardly include a pandemic-related mask-wearing regulation.

All this said, it is more plausible that the dictionary lists *one* long definition, not multiple separate definitions, of "sanitation." The "sanitation" definition in *Funk & Wagnalls* is unnumbered: "The devising and applying of measures for preserving and promoting public health; the removal or neutralization of elements injurious to health; the practical application of sanitary science."[271] Compare this to the definition of "sanity" on the same page of *Funk & Wagnalls*: "**1.** The state of being sane; especially soundness of mind; perfect control of one's sense, reason, and will. See Insanity. **2.** [Archaic.] Physical health."[272] Such bold numbers typically indicate separate senses, while the semicolons separate clauses describing the same sense. The definition of "sanitation" has no such bold numbering to distinguish separate senses. A different version of *Funk & Wagnalls* explains this system: "If the term has two or more different meanings, each definition is set off unmistakably by a bold-faced figure, as **1** . . . **2** . . . **3**."[273]

---

266. Id. at 1163.

267. Id. at 1158–59.

268. Id. (internal quotation marks omitted) (quoting Sanitation, 2 Funk & Wagnalls, New Standard Dictionary of the English Language (Isaac K. Funk, Calvin Thomas & Frank H. Vizetelly eds., 1946)).

269. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1160.

270. 1 Funk & Wagnalls: New Standard Dictionary of the English Language, at xiii (Isaac K. Funk, Calvin Thomas & Frank H. Vizetelly eds., 1946).

271. Sanitation, id.

272. Sanity, id.

273. Funk & Wagnalls: New Practical Standard Dictionary of the English Language, at vii (Charles E. Funk ed., 1946).

Thus, the court blatantly gerrymandered what was most likely one long definition, eliminating the last third (about sanitary science) and splitting the first two clauses into separate definitions.[274] Then, the court overlooked the dictionary's instructions about which sense is most common, instead conducting its own corpus linguistics analysis, albeit without following the statistical protocols for such analysis. In sum, the court's textualist analysis of "sanitation" turned on a judicially crafted definition (the removal or neutralization of elements injurious to health) that reflected only a third of the actual dictionary definition. And the court's dictionary gerrymandering helped to invalidate an important national policy adopted by democratically accountable officials.

Textualists also rely on dictionaries to launder technical meaning under cover of ordinary meaning. Thus, the Justices rely on (technical) legal dictionaries even when claiming to determine "ordinary meaning."[275]

One of the many limitations of dictionaries and statutory definitions is that they generally define words and not word clusters (never mind long clauses). This obvious limitation and the new-textualist impulse to turn statutory interpretation into an apparently empirical (rather than normative) enterprise has generated interest in novel sources of linguistic data, particularly corpus linguistics,[276] which treats collections of naturally occurring text as data. By searching enormous databases drawing from newspapers, magazines, and novels, judges can use corpus linguistics to see how word clusters and phrases have been used 100 years ago, 50 years ago, or today.

Dozens of lower court decisions have relied on corpus linguistics,[277] and it has attracted the attention of the Supreme Court's newest textualists. For example, in his concurring opinion in *Facebook v. Duguid*, Alito proposed that "[t]he strength and validity of an interpretive canon is an empirical question, and perhaps someday it will be possible to evaluate these canons by conducting . . . a corpus linguistics analysis, that is, an analysis of how particular combinations of words are used in a vast

---

274. *Health Freedom Def. Fund*, 599 F. Supp. 3d at 1158; see also Gries et al., supra note 261, at 205–06.

275. See, e.g., Hall v. United States, 566 U.S. 506, 511–12 (2012) (citing *Black's Law Dictionary* for the "plain and natural reading" of "incurred by the estate"); Johnson v. United States, 544 U.S. 295, 315 (2005) (Kennedy, J., dissenting) (citing *Black*'s definition of "discover" as its "ordinary meaning"); Olympic Airways v. Husain, 540 U.S. 644, 654–55 (2004) (citing *Black*'s definition of "event" as the "ordinary" definition of the term).

276. Thomas R. Lee & Stephen C. Mouritsen, Judging Ordinary Meaning, 127 Yale L.J. 788, 795 (2018).

277. See Kevin Tobia, The Corpus and the Courts, U. Chi. L. Rev. Online (2021), https://lawreviewblog.uchicago.edu/2021/03/05/tobia-corpus/ [https://perma.cc/U39E-ANEK] (finding thirty cases using corpus linguistics ranging across jurisdictions from state appellate courts to federal district and circuit courts).

database of English prose."[278] In a dissenting opinion for another case, Thomas found corpus linguistic research valuable, as it demonstrated that people did not associate "search" with "reasonable expectation of privacy" until the phrase appeared in a 1967 Supreme Court opinion.[279] From his originalist perspective, it was telling that the phrase did not appear in corpus searches of the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers.[280]

There are many choices facing a textualist inclined to use legal corpus linguistics or another large database: Which databases should the textualist search? What search terms should they use? Which frequencies or patterns of ordinary usage count as evidence of ordinary meaning? There are also complex choices about how to interpret the resulting data; textualists can often support opposing conclusions from the same set of underlying corpus linguistics data.[281] Finally, there are many choices about how to square legal corpus linguistics with other sources. If corpus linguistics and dictionaries conflict, which should the textualist rely upon? While the difficulty of these questions for nonexperts may counsel against the broad judicial use of corpus linguistics, the methodology does have a role in statutory interpretation. For instance, we agree with Alito's suggestion that more systematic research, including via corpus linguistics, should be done to test the reliability of canons that purport to show ordinary meaning.[282]

(c) *Semantic & Grammar Rules: Canoncopia.* — Dictionaries and definition provisions usually focus on single words, but statutory meaning requires attention to word clusters, phrases, clauses, and sentences.[283] Some repeated contextual patterns are taken to trigger

---

278. Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1174 (2021) (Alito, J., concurring in the judgment).

279. Carpenter v. United States, 138 S. Ct. 2206, 2238–39 (2018) (Thomas, J., dissenting) (finding no uses of the phrase "expectation of privacy" in pre-*Katz* case reporters or early American texts).

280. Id.

281. See Kevin Tobia, Dueling Dictionaries and Clashing Corpora, 71 Duke L.J. Online 146, 158 (2022), https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1092&context=dlj_online [https://perma.cc/G45G-HDGN] (arguing that legal corpus linguistics is unlikely to provide easy answers in hard cases of interpretation because opposing "moves" of legal corpus linguistic argumentation enable judges and advocates to draw opposing conclusions from the same corpus data).

282. The use of interpretive canons can differ significantly between different legal actors. Cf. Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 1016 (2013) (demonstrating empirically that congressional staff do not follow the dictionary canon but do follow the negative implication and associated word canons).

283. See William N. Eskridge, Jr., Interpreting Law: A Primer on How to Read Statutes and the Constitution 44, 62 (2016) [hereinafter Eskridge, Interpreting Law].

regular presumptions about "ordinary meaning."[284] These presumptions are referred to as "textual canons."[285]

It is no coincidence that increased judicial citation to textual canons has corresponded with the dramatic ascendancy of textualism.[286] As semantic baselines, textual canons fit easily within textualist methodology. They are typically characterized as linguistic rules rather than rules based on legal or normative concerns.[287] In turn, textualism is "distinctive because it gives priority to semantic context (evidence about the way a reasonable person uses words) rather than policy context (evidence about the way a reasonable person solves problems)."[288] As then-Professor Barrett argued, it follows that "linguistic canons, which pose no challenge to legislative supremacy, are preferable to substantive canons, which do."[289]

Identifying the set of possible canons,[290] selecting a specific canon,[291] and applying that canon[292] offer numerous opportunities for interpretive choice. As Alito has observed, a textualist ought to be concerned whether

284. See Kevin Tobia, Brian G. Slocum & Victoria Nourse, Statutory Interpretation From the Outside, 122 Colum. L. Rev. 213, 227–28 (2022) [hereinafter Tobia et al., Statutory Interpretation From the Outside].

285. Eskridge, Interpreting Law, supra note 283, at 56–84, 102–08 (identifying, explaining, and illustrating the operation of "textual canons").

286. See Anita S. Krishnakumar & Victoria F. Nourse, The Canon Wars, 97 Tex. L. Rev. 163, 167 (2018) (concluding "[a]ffection for canons of construction has taken center stage in recent Supreme Court cases"); Nina A. Mendelson, Change, Creation, and Unpredictability in Statutory Interpretation: Interpretive Canon Use in the Roberts Court's First Decade, 117 Mich. L. Rev. 71, 73 (2018) (finding in Roberts Court majority opinions, "roughly 67% of statutory issues addressed in all opinions were resolved after considering one or more interpretive canons").

287. See Abbe R. Gluck & Richard A. Posner, Statutory Interpretation on the Bench: A Survey of Forty-Two Judges on the Federal Courts of Appeals, 131 Harv. L. Rev. 1298, 1330 (2018) (distinguishing between "'linguistic' or 'textual' canons, which are presumptions about how language is used," and "substantive" or "policy" canons, which are normative presumptions).

288. John F. Manning, What Divides Textualists From Purposivists, 106 Colum. L. Rev. 70, 70 (2006) [hereinafter Manning, What Divides Textualists].

289. See Barrett, Substantive Canons, supra note 19, at 120.

290. See Scalia & Garner, supra note 7, at xii–xvi (listing fifty-seven canons); see also Eskridge, The New Textualism and Normative Canons, supra note 14, at 537 (noting that at least 134 of 187 canons are "substantive").

291. See Krishnakumar, Dueling Canons, supra note 111, at 909 (characterizing textualism's preferred canons as "susceptible to dueling use" and "judicial manipulation"); Karl N. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 395 (1950) [hereinafter Llewellyn, Remarks] (arguing that most interpretive disputes involve conflicting canons).

292. See Tobia et al., Statutory Interpretation From the Outside, supra note 284, at 228–30 (explaining that once a judge determines that a canon is triggered, the judge must also apply the canon).

a particular textual canon actually reflects ordinary meaning.[293] Take, for instance, the rule against surplusage. This textual canon, which presumes careful drafting by Congress such that every word must add some meaning to the statute, is often applied by textualists—even though its presumption is likely incorrect.[294] It has never been empirically validated, and the leading study found the canon virtually unknown among congressional staff.[295]

The antisurplusage canon is arbitrarily applied and is sometimes criticized by textualists. For instance, in *Babbitt v. Sweet Home Chapter of Communities for a Great Oregon*, the Court relied on the rule against surplusage in finding that "harm" (one of nine verbs Congress used to define "take") must be given a broad meaning.[296] Scalia's dissent indicated that such a "proposition is questionable to begin with, especially as applied to long lawyers' listings such as this."[297] Yet in his 2012 treatise, Scalia conceded that the presumption against surplusage, while "not *invariably* true," is a valid canon and that criticisms of the canon are "ill-founded."[298] The treatise did not, however, offer guidance to help identify when the presumption is rebutted or even offer reasons why the presumption in general is valid. The canon is thus a paradigmatic example of the undefended interpretive choices inherent in the current practice of textualism. *Sweet Home* also illustrates the disconnect between textual canons (the new-textualist doctrine) and ordinary meaning (the new-textualist metatheory). Many of the textual canons are not reliable indicia of ordinary meaning.

Even if the textual canons could reliably be tied to ordinary meaning, the new textualists' theory is so muddled that it creates needless discretionary choice. To begin with, it remains unclear what triggers the operation of such canons. In *Yates v. United States*, for example, the plurality opinion cited the ejusdem generis and noscitur a sociis canons in restricting the meaning of the key statutory phrase "tangible object."[299] In a textualist dissent, Kagan (joined by Scalia, Kennedy, and Thomas) argued that the Court should not have applied the canons because

---

293. See Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1175 (2021) (Alito, J., concurring in the judgment) ("To the extent that interpretive canons accurately describe how the English language is generally used, they are useful tools. But they are not inflexible rules.").

294. See Jesse Cross, When Courts Should Ignore Statutory Text, 26 Geo. Mason L. Rev. 453, 456–57 (2018) [hereinafter Cross, Statutory Text] (describing the rule against surplusage as "anchored in an assumption that Congress views the courts as the intended audience for every word of its statutes" and interpreting this assumption as "incorrect").

295. Gluck & Bressman, supra note 282, at 934.

296. 515 U.S. 687, 698 (1995) (arguing that reluctance to treat statutory terms as surplusage supports the reasonableness of the Secretary's interpretation).

297. Id. at 721 (Scalia, J., dissenting).

298. Scalia & Garner, supra note 7, at 176–79.

299. 574 U.S. 528, 537, 544–46 (2015) (plurality opinion) (Ginsburg, J.) (rejecting the dictionary definitions of "tangible" and "object" as separate words).

they "resolve ambiguity" rather than help determine the linguistic meaning of a provision.[300] This ambiguity-is-required position is not new, but Kavanaugh argues that it undermines the determination of linguistic meaning.[301]

A problem with the ambiguity-is-required trigger is that it creates an incoherent account of textual canons. If a textual canon helps determine the linguistic meaning of a provision, it logically should be applied *before* any determination of ambiguity.[302] And a textual canon that restricts the literal meaning of language, as do ejusdem and noscitur, does not resolve "ambiguity."[303] The ejusdem generis canon does not help a court select between competing lexical meanings (which would make a term ambiguous), but, rather, restricts a catchall to some subset of its literal meaning.[304] Indeed, adding a triggering requirement would create an additional discretionary choice (whether "ambiguity" exists) to the existing discretionary choices described below.[305]

A second way that textual canons create discretionary choices is that applying most such canons requires the interpreter to make a normative evaluation.[306] Noscitur a sociis, for example, requires the judge to determine the principle of similarity reflected in the companion terms. As an example, consider the application of these canons in *Yates* (whether a fish is a "record, document, or tangible object"). The plurality opined that the common theme linking "record, document, or tangible object" was that they were recordkeeping items that could be shredded.[307] Instead

---

300. Id. at 564 (Kagan, J., dissenting).

301. See Kavanaugh, Fixing Interpretation, supra note 23, at 2140, 2143 (arguing that "the clarity versus ambiguity determination" is "too often a barrier to the ideal that statutory interpretation should be neutral, impartial, and predictable" among different judges). For examples treating ambiguity as a prerequisite to application of textual canons, see United States v. Stevens, 559 U.S. 460, 474 (2010) (noting that noscitur a sociis requires an ambiguous term, but finding that the term at issue was clear); Gluck & Bressman, supra note 282, at 924, 930; Anita S. Krishnakumar, Longstanding Agency Interpretations, 83 Fordham L. Rev. 1823, 1866 (2015) (noting that language canons should be used only when a clause is ambiguous).

302. As opposed to a substantive canon that resolves ambiguity, such as the rule of lenity.

303. See Tobia et al., Statutory Interpretation From the Outside, supra note 284, at 238 (explaining that a canon that restricts the literal meaning of language does not help a court select between competing meanings).

304. See id.

305. See Brian G. Slocum, Rethinking the Canon of Constitutional Avoidance, 23 U. Pa. J. Const. L. 593, 616–23 (2021) (arguing that the finding of ambiguity is subjective rather than being based on neutral linguistic principles).

306. See Eskridge, The New Textualism and Normative Canons, supra note 14, at 675 (noting that Scalia's textualism required that judges choose from competing evidence and from canons of construction).

307. See Yates v. United States, 574 U.S. 528, 536 (2015) (finding that "tangible object" should be "read to cover only objects one can use to record or preserve information, not all objects in the physical world").

of arguing about the absence of ambiguity, the dissent could have applied noscitur a sociis and offered a different but broader theory of similarity: All three items were potential sources of incriminating evidence that could be destroyed.[308] If so, how does the textualist adjudicate between the two accounts? And how does the textualist make a "neutral" choice when the method requires them to deny the normativity of their selection?

A third feature of the new textualist toolkit allows for the discretionary choice to pick among applicable canons, thereby allowing a textualist judge to stay within the confines of textualism while pursuing political commitments. That is, in the hard cases, multiple canons might apply—and they will often cut in different directions. The rise of the new textualism has been accompanied by a proliferation of textual as well as substantive canons.[309] Some of the canons directly clash with one another.[310] For example, the Scalia–Garner treatise included among its list of "valid canons" a novel series-qualifier canon, which presumes that "a modifier at the end of the list normally applies to the entire series."[311] But that new canon typically conflicts with the rule of the last antecedent, which presumes that a modifier generally refers to the nearest reasonable antecedent in the absence of a comma before the modifier.[312] Unsurprisingly, the Court has recently debated the validity of the two conflicting canons.[313]

Consider also the rule against surplusage and noscitur a sociis. The noscitur canon provides that the meaning of words placed together in a statute should be determined in light of the words with which they are associated.[314] The principle that context is relevant to meaning is such an obvious and broad linguistic proposition (consider context!) that one

---

308. Arguably, the dissent implicitly applied the canon by limiting "tangible object" to things capable of being "alter[ed], destroy[ed], mutilate[d], conceal[ed], cover[ed] up, falsifie[d]," or subject to a "false entry." Id. at 555–56 (Kagan, J., dissenting).

309. See William N. Eskridge, Jr., James J. Brudney, Josh Chafetz, Philip P. Frickey & Elizabeth Garrett, Cases and Materials on Legislation and Regulation: Statutes and the Creation of Public Policy 1151–71 (6th ed. 2020) (identifying at least 161 different interpretive canons); Eskridge, Interpreting Law, supra note 283, at 407–45 (an even longer list of interpretive canons).

310. Llewellyn, Remarks, supra note 291, at 395.

311. Scalia & Garner, supra note 7, at xiii, 147.

312. See Lockhart v. United States, 577 U.S. 347, 363–64 (2016) (Kagan, J., dissenting); Terri LeClercq, Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers, 40 Tex. J. Bus. L. 199, 204–05 (2004) (describing Jabez Sutherland's creation of the rule of the last antecedent).

313. Compare *Lockhart*, 577 U.S. at 351–53 (Sotomayor, J.) (applying the rule of the last antecedent and rejecting the "series-qualifier principle"), with Facebook, Inc. v. Duguid, 141 S. Ct. 1163, 1169–72 (2021) (Sotomayor, J.) (applying the series-qualifier rule), and id. at 1173–75 (Alito, J., concurring) (noting the mutually negating features of the two canons). See also United States v. Laraneta, 700 F.3d 983, 989 (7th Cir. 2012) (Posner, J.).

314. See Scalia & Garner, supra note 7, at 195.

wonders whether it should qualify as a canon.[315] The noscitur canon is more contestable (and useful) when it is applied to lists. In such cases, it narrows the meaning of one of the words in the list when that word is potentially broader in meaning than the other words in the list.[316] Yet narrowing the meaning of one of the words might be in tension with the rule against surplusage, which presumes that every word adds independent meaning to a statute.[317] In such cases, the court must choose which canon to apply. This was precisely the debate in *Sweet Home*, in which the dissenters invoked noscitur to narrowly interpret the Endangered Species Act's bar to private activity that might "harm" a species and the majority responded that a narrow understanding of "harm" rendered it redundant to the eight other terms in the statutory definition of "take."[318]

The new textualist debates can thus easily explode into a veritable canoncopia, as they did in *Sweet Home*. In a recent exchange, *Bittner v. United States*,[319] Gorsuch's majority opinion sharply disagreed with Barrett's dissenting opinion about which textual canons to emphasize when interpreting the central provisions of the Bank Secrecy Act of 1970. Section 5314 provides that the Secretary of Treasury shall require certain people to "keep records and file reports" when they "mak[e] a transaction or maintai[n] a relation" with a "foreign financial agency."[320] Section 5321(a)(5) authorizes the Secretary to impose civil penalties for every statutory "violation."[321] Invoking expressio unius, a canon of negative implication, the majority maintained that because § 5314's mandatory disclosure provision specified only that "reports" (and not "accounts") be disclosed, § 5321's penalty provision applied only to a failure to file annual reports.[322] The dissenters responded that the "reporting" and "recordkeeping" requirements most sensibly applied to each individual account because the terms are defined elsewhere in the statute, implicitly invoking the in pari materia canon that "identical words used in different parts of the same statute are generally presumed to have

315. Tobia et al., Statutory Interpretation From the Outside, supra note 284, at 242. The basic concept, that context can help select the correct word meaning, is an uncontroversial truism of linguistics. See Nicholas Asher & Alex Lascarides, Lexical Disambiguation in a Discourse Context, 12 J. Semantics 69, 103 (1995).

316. See Tobia et al., Statutory Interpretation From the Outside, supra note 284, at 242.

317. See Cross, Statutory Text, supra note 294, at 456–57.

318. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–98 (1995); id. at 720–21 (Scalia, J., dissenting); see also supra notes 246–254 and accompanying text (discussing the *Sweet Home* case).

319. 143 S. Ct. 713 (2023).

320. 31 U.S.C. § 5314(a) (2018). The Act says that reports must contain information about the identities and addresses of participants in a transaction or relationship and a description of the transaction. Id. § 5314(a)(1)–(4).

321. Id. § 5321(a)(5)(A).

322. *Bittner*, 143 S. Ct. at 719–20.

the same meaning."[323] In turn, the majority buttressed its expressio argument with the meaningful variation canon, pointing to congressional action in 1986 that imposed penalties for willful failures to disclose "accounts," in contrast to its 2004 imposition of penalties for failures to file "reports."[324]

Bittner is an example of canoncopia, or the dueling of linguistic canons, reminiscent of other (in)famous Supreme Court cases like *Sweet Home*. One could conclude that Barrett has the better of the argument, as her view is strongly supported by the statutory text of § 5321(a)(5),[325] the statutory purpose, and the amendment history, which she lucidly analyzed in her dissent. On the other hand, the majority also invoked linguistic canons and supplemented those arguments with a substantive canon, the rule of lenity, which directs that statutory ambiguities be resolved in favor of the defendant.[326] Choice 10 further discusses the discretionary and normative choices inherent in substantive canons.

Are cases like *Bittner* resolvable by selecting the "most natural reading" of the statute, as the dissenters emphasized?[327] A major challenge for such a position is that there are no metacanons that provide priority rules for textual canons.[328] Conflicts among textual canons are thus matters of judicial discretion. In *Sweet Home*, for instance, the Court

---

323. Id. at 727 (Barrett, J., dissenting) (internal quotation marks omitted) (quoting IBP, Inc. v. Alvarez, 546 U.S. 21, 34 (2005)).

324. Id. at 722 (explaining that in 1970, the BSA penalized willful violations; in 1986, Congress authorized penalties on a per-account basis for certain willful violations; and in 2004, Congress amended the law again to authorize penalties for nonwillful violations but without the 1986 "account" language). Gorsuch found this variation meaningful, namely, certain confirmation that Congress did not expect the new provision to apply to erroneous accounts. See id. at 723.

325. Section 5321(a)(5) repeatedly ties statutory "violations" to failure to disclose "accounts." Section 5321(a)(5)(A) authorizes the Treasury Secretary to impose a civil penalty for a "violation"; § 5321(a)(5)(B) contains an exception, under which no penalty may be imposed if the "violation" is due to reasonable cause; § 5321(a)(5)(C) prescribes a higher maximum penalty if the "violation" was willful; the amount is determined in part by rules in § 5321(a)(5)(D). 31 U.S.C. § 5321(a)(5)(A)–(D). The exception in § 5321(a)(5)(B) uses the term "violation" in an account-specific way because whether reasonable cause exists depends in part on whether the "balance in the account" was properly reported for "such violation." 31 U.S.C. § 5321(a)(5)(B)(ii). Moreover, § 5321(a)(5)(C)–(D) use the term "violation" in an account-specific way because the maximum penalty amount for a willful violation "involving a failure to report the existence of an account" is in part a function of "the balance in the account at the time of the violation." 31 U.S.C. § 5321(a)(5)(D)(ii).

326. See *Bittner*, 143 S. Ct. at 724 (discussing how the rule of lenity also weighs against the government).

327. See id. at 731 (Barrett, J., dissenting) ("The most natural reading of the BSA and its implementing regulations establishes that a person who fails to report multiple accounts on the prescribed reporting form violates the law multiple times, not just once.").

328. See Jonathan R. Macey & Geoffrey P. Miller, The Canons of Statutory Construction and Judicial Preferences, 45 Vand. L. Rev. 647, 648 (1992) (arguing that there are no metacanons to guide judges regarding when to use canons).

privileged the presumption against surplusage over the noscitur canon,[329] while Scalia in dissent privileged the noscitur canon over the presumption against surplusage.[330] Both opinions offered additional reasons why their favored interpretation was the correct one, but neither could point to any authority providing a hierarchy of canons.

CHOICE 6: BROAD VS. NARROW READING

Whether the textualist follows ordinary or term-of-art meaning, per Choice 4, the semantic meanings of the relevant statutory words and phrases can be framed broadly or narrowly. This is our Choice 6. If "most interpretive questions have a right answer," as Scalia believed,[331] the correct degree of semantic breadth would be an objective matter in most cases. But the things that determine semantic breadth, such as context and interpretive rules, sources, and theories, are subject to judicial choice, and are thus discretionary and contestable.

Semantic breadth can be determined in explicit and transparent ways, such as by adopting a particular theory of semantic meaning. For instance, a court could establish a presumption that the meanings of statutory terms are limited to their prototypes, thereby adopting a systematically narrow view of semantic meaning.[332] Thus, if determining the meaning of "vehicle," the court might focus on its prototype, thereby certainly including cars and trucks but definitely not a baby stroller and perhaps not a bicycle either.[333] In some cases, the newest textualists determine semantic breadth by reference to constitutional norms. In *Sackett v. EPA*,[334] for example, Alito defended his narrow interpretation of "waters of the United States" and "adjacent wetlands" by referring to the Due Process

329. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 697–98 (1995) (explaining that the ordinary understanding and the dictionary definition of the word "harm" place a duty on respondents to avoid "habitat alteration").

330. See id. at 721 (Scalia, J., dissenting) ("[T]he Court's contention that 'harm' in the narrow sense adds nothing to the other words underestimates the ingenuity of our own species in a way that Congress did not.").

331. Scalia & Garner, supra note 7, at 6; see also Smith v. United States, 508 U.S. 223, 242 (1993) (Scalia, J., dissenting); Manning, Justice Scalia and Judicial Restraint, supra note 9, at 748 (arguing that much of Scalia's "theory of adjudication built on what he took to be a constitutionally warranted view of judicial restraint").

332. See Joel S. Johnson, Vagueness Avoidance, 110 Va. L. Rev. (forthcoming 2024) (manuscript at 43–52), https://ssrn.com/abstract=4309894 [https://perma.cc/6RJA-2TXY] (urging judges to interpret word meanings narrowly in order to avoid vagueness concerns).

333. Cf. Bostock v. Clayton County, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting) ("A statutory ban on 'vehicles in the park' would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word 'vehicle,' in its ordinary meaning, does not encompass baby strollers.").

334. 143 S. Ct. 1322 (2023).

Clause and Our Federalism.[335] Pitching an even narrower view, concurring Thomas invoked the original meaning of Congress's Commerce Clause authority.[336] Notice, as before, how easily norms and even ideologies sneak into statutory interpretation under the new textualist method.

In other cases, the newest textualists select the semantic breadth of a term indirectly or without a lot of thought. This can be accomplished in a variety of ways, such as by choosing between focusing on a statutory word versus a phrase, exaggerating the semantic determinacy of a term, deciding whether to apply a textual canon, or exercising discretion in choosing a dictionary definition or another source of semantic meaning.

Consider the choice between word and phrasal meaning. Choice 3 addressed compositional versus holistic analysis. Even if a judge selects a compositional approach, there are different ways to view an expression's "composite parts."[337] One way is to define each word individually without the influence of the other words in the provision. Another is to define a phrase as a linguistic unit so that the meanings of the words are interdependent.[338] Often, textualists define words individually (and literally), but they do not invariably do so.

The classic case exemplifying the choice between word and phrasal meaning is *Smith v. United States*,[339] which involved the interpretation of 18 U.S.C. § 924(c)(1)(A). That section provides for enhanced punishment of a defendant who "uses" a firearm "during and in relation to . . . [a] drug trafficking crime."[340] In *Smith*, the defendant offered to trade an automatic weapon to an undercover officer for cocaine.[341] Textualists, including Thomas and Rehnquist, joined the Court's opinion, applying a compositional approach that highlighted the dictionary definition of "use," predictably resulting in a broad interpretation of the statute.[342] In one of his most celebrated dissents and an excellent example of

335. Id. at 1342 (explaining that a narrow view of "waters" etc. is supported by respect for state primacy in land regulation); id. at 1342–43 (arguing that because landowners could face criminal as well as civil liability, due process notice concerns supported a narrower, less vague interpretation).

336. Id. at 1345–46 (Thomas, J., concurring).

337. See M. Lynne Murphy & Anu Koskela, Key Terms in Semantics 36 (2010) (explaining that the principle of compositionality states that "the meaning of a complex linguistic expression is built up from the meanings of its composite parts in a rule-governed fashion").

338. There are various versions of "compositionality," with some weaker and able to take more context into account. See Zoltán Gendler Szabó & Richmond H. Thomason, Philosophy of Language 58 (2019) (describing various forms of compositionality, including "weak compositionality (with context)").

339. 508 U.S. 223, 225 (1993).

340. Id. at 227 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(c)(1)(A) (2018)).

341. Id. at 226.

342. Id. at 236–37.

holistic linguistic analysis, Scalia argued that "use," when combined with the other statutory term, "a firearm," has a narrower meaning than "use" by itself.[343] Thus, "[t]o use an instrumentality ordinarily means to use it for its intended purpose."[344] Consequently, "to speak of 'using a firearm' is to speak of using it for its distinctive purpose, i.e., as a weapon."[345]

The word-versus-phrase debate is viewed as implicating the proper focus of ordinary meaning (as illustrated by the *Smith* opinions), thereby sidelining that the issue systematically represents a choice between a narrower (by focusing on phrases) or broader (by focusing on individual words) meaning. Thus, in *Bostock*, Kavanaugh emphasized that "courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase."[346] Accordingly, he maintained that the focus should be on the "phrase 'discriminate because of sex,'" rather than "sex" in isolation, and argued that the Court "dismisses phrasal meaning for purposes of this case."[347] But Kavanaugh did not convincingly establish a narrower meaning for "discriminate because of sex" than for "sex." The choice was therefore not decisive because, in the Court's view, Kavanaugh failed to "offer an alternative account about what these terms mean either when viewed individually or in the aggregate."[348] The Court was thus able to acknowledge without consequence that it "must be attuned to the possibility that a statutory phrase ordinarily bears a different meaning than the terms do when viewed individually or literally."[349]

More covertly, textualists can exercise interpretive choice about semantic breadth by exaggerating the precision of word meanings. Because the ordinary meaning of a term (in the abstract) often underdetermines the precise meaning necessary to resolve interpretive disputes, judges must "precisify" the relevant statutory term based on nonlinguistic evidence such as context or their preferred result. The exercise gives the judge substantial discretion loosely bounded by ordinary meaning and is at odds with the textualist insistence on a simple, mechanical process for identifying that ordinary meaning.[350]

---

343. Id. at 245 (Scalia, J., dissenting).

344. Id. at 242.

345. Id. Scalia argued that, "[w]hen someone asks, 'Do you use a cane?,' he is not inquiring whether you have your grandfather's silver-handled walking stick on display in the hall; he wants to know whether you *walk* with a cane." Id. The words "as a weapon" are thus "reasonably implicit" from the context of the statute. Id. at 244.

346. Bostock v. Clayton County, 140 S. Ct. 1731, 1825 (2020) (Kavanaugh, J., dissenting).

347. Id. at 1834.

348. Id. at 1750 (majority opinion).

349. Id.

350. See Amy Coney Barrett, Assorted Canards of Contemporary Legal Analysis: Redux, 70 Case W. Rsrv. L. Rev. 855, 856 (2020).

To illustrate, recall *Wooden v. United States*.[351] At issue was the meaning of "committed on occasions different from one another" under the Armed Career Criminal Act (ACCA).[352] The defendant had burglarized ten units in a single storage facility over the course of one evening.[353] The government argued for a "temporal-distinctness test" under which the ten counts of burglary would be considered separate "occasions," because an occasion "happens at a particular point in time—the moment when [an offense's] elements are established."[354] Rejecting the government's "single-minded focus on whether a crime's elements were established at a discrete moment in time," the Court appealed to how "an ordinary person (a reporter; a police officer; yes, even a lawyer) might describe Wooden's ten burglaries."[355] Perhaps realizing that such an inquiry was speculative, Kagan's majority opinion considered dictionary definitions of "occasion," indicating a meaning something like "an event, occurrence, happening, or episode."[356] But the definitions were too general to answer the interpretive question (or many future interpretive questions).

Ultimately, Kagan (speaking for everyone but Gorsuch) precisified "occasion," allegedly in accordance with the term's ordinary meaning, but without pointing to any external evidence of such meaning.[357] Based on the statutory purpose, Kagan ruled that a "range of circumstances" should be relevant in deciding whether offenses were committed on different "occasions," including proximity in time, intervening events, proximity of location, and the character and relationship of the offenses.[358] In an opinion concurring only in the judgment, Gorsuch argued that there was "much uncertainty" in the Court's "'multi-factored' balancing test,"[359] but he did not suggest any way of precisifying the provision through language.

By exaggerating the semantic determinacy of "occasions," the Court was thus able to covertly decide its scope. The decision whether to apply a textual canon is not covert in the same sense, but it similarly affords textualists discretion to choose between a narrow meaning (by applying the canon) and a broad meaning (often by choosing the literal or dictionary meaning).[360] For instance, in *Yates* (is a fish a "tangible object"?) a key interpretive choice was between applying the ejusdem

---

351. 142 S. Ct. 1063 (2022).

352. Id. at 1067 (internal quotation marks omitted) (quoting 18 U.S.C. § 924(e)(1) (2018)).

353. Id.

354. Id. at 1069.

355. Id.

356. Id. (citing Occasion, American Heritage Dictionary (1981); Occasion, Webster's Third New International Dictionary (3d ed. 1986)).

357. See *Wooden*, 142 S. Ct. at 1070–71.

358. Id.

359. Id. at 1079 (Gorsuch, J., concurring in the judgment).

360. See supra notes 283–330 and accompanying text (discussing textual canons).

generis (or noscitur a sociis) canon versus adopting the broad dictionary definition of "tangible object."[361] The choice was between a contextually restricted meaning ("tangible object" means an object used to store information) and a broader, literal meaning ("tangible object" means any object that is tangible).[362] Determining which meaning is "correct" is a matter of judgment and thus discretion rather than linguistic science.

A textualist can also covertly choose between broad or narrow meanings via choices about interpretive sources as well as interpretive rules. If they desire a broad meaning, the interpreter can choose a dictionary definition and can pick among many dictionaries and definitions.[363] Conversely, as one of us has empirically demonstrated, an interpreter inclined to interpret narrowly will find frequency-focused corpus searches more fruitful.[364]

There is a strong correlation between the ascendancy of textualism and judicial citation to dictionaries.[365] Sometimes, though, even the most ardent textualists find dictionary definitions to be too broad, thereby demonstrating the discretion inherent in selecting semantic meaning. Consider the Scalia–Garner treatise, which argued that textualism could solve H.L.A. Hart's famous hypothetical involving a "legal rule [that] forbids you to take a vehicle into the public park."[366] Scalia and Garner purported to seek the general, semantic meaning of "vehicle." After consulting various dictionary definitions, they found, to their disappointment, that "[a]nything that is ever called a *vehicle* (in the relevant sense) would fall within these definitions."[367] (That might include wheelbarrows, bicycles, and toy cars.) Because the authors felt the dictionaries gave the term too broad a meaning, they created their own "colloquial" definition of "vehicle" as "simply a *sizable* wheeled conveyance (as opposed to one of any size that is motorized)."[368] (And although we're now at Choice 6, don't forget about Choice 1! If this is a federal "no vehicles" law, 1 U.S.C. § 4 provides a statutory definition of "vehicle."[369])

---

361. Yates v. United States, 574 U.S. 528, 544–46 (2015).

362. Id. at 537.

363. See Aprill, supra note 259, at 297–300 (describing the tendency of Justices to freely choose from a variety of dictionaries and the impact of the choice of dictionary on interpretation).

364. See Kevin P. Tobia, Testing Ordinary Meaning, 134 Harv. L. Rev. 726, 783–85 (2020) (presenting evidence of corpus searches favoring narrow interpretations).

365. See John Calhoun, Note, Measuring the Fortress: Explaining Trends in Supreme Court and Circuit Court Dictionary Use, 124 Yale L.J. 484, 498–501 (2014) (discussing the connection between textualism and the increased judicial reliance on dictionaries over the past few decades).

366. Scalia & Garner, supra note 7, at 36–37 (responding to H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958)).

367. Id.

368. See id. at 37–38.

369. Eskridge, Interpreting Law, supra note 283, at 4; see also Jesse Cross, The Fair Notice Fiction, 74 Ala. L. Rev. (forthcoming 2023) (manuscript at 30),

The authors' ipse dixit undermined the point of their example, which was to demonstrate that text-based interpretation was uniquely replicable by any interpreter and therefore more objective and predictable than any other method. How many ordinary Americans, or even how many lawyers or judges, would have come up with the exact Scalia–Garner definition or would apply the definition in the same ways as the authors?[370] The authors also failed to consider phrasal meaning, which might well indicate that "vehicle" has a different meaning in isolation than it does in the context of "tak[ing] [one] into the public park."[371] Thus, a bicycle is a "vehicle" according to the dictionary, but is a bicycle a "vehicle" when it is being ridden in a recreational park subject to a "no vehicles" ordinance? Not clear. Indeed, we think the bicycle issue cannot be answered without knowing the legislative context and purpose of the ordinance.[372]

CHOICE 7: WHICH (CON)TEXT

Textualists prioritize semantic meaning (Choices 1–6),[373] but they recognize that interpretation depends on context.[374] Drawing inferences from context, however, involves more choices. Which contextual evidence should be considered? Textualists favor related texts, what we call (con)text.[375] Fair enough, but sometimes the newest textualists say that broader context might also be relevant. Like with interpretive canons (Choices 5 & 6), however, there are no stable metarules that constrain textualists from subjectively picking and choosing among possible inferences from context.

Consider the surprising debate among textualists as to whether "social context" should be considered as evidence of how an ordinary American would have understood statutory language. In 2004, Thomas was adamant that the Court had "never sanctioned looking to 'social history' as a

---

https://ssrn.com/abstract=4425730 [https://perma.cc/YW7Y-MELR] (noting that the definition of a vehicle would now be determined by referring to the U.S. Code).

370. Keep in mind that slight differences in the definition selected could result in different outcomes in some cases.

371. H.L.A. Hart, Positivism and the Separation of Law and Morals, 71 Harv. L. Rev. 593, 607 (1958) (introducing the vehicle-in-a-park problem as an issue of legal interpretation).

372. Eskridge, Interpreting Law, supra note 283, at 3–5.

373. Manning, What Divides Textualists, supra note 288, at 76 (claiming that textualism "gives precedence to semantic context" (emphasis omitted)).

374. See Scalia & Garner, supra note 7, at 40 ("The soundest legal view seeks to discern literal meaning in context."); John F. Manning, The Absurdity Doctrine, 116 Harv. L. Rev. 2387, 2456 (2003) [hereinafter Manning, Absurdity Doctrine] (arguing that textualists are different from "their literalist predecessors in the 'plain meaning' school"); Lawrence B. Solum, Communicative Content and Legal Content, 89 Notre Dame L. Rev. 479, 514 (2013) (noting that textualists rely on arguments that are context specific).

375. Eskridge & Nourse, supra note 14, at 1730.

method of statutory interpretation," nor should it ever do so.[376] But in *Bostock*, with the rights of gay and transgender employees on the line, Thomas declined to join Gorsuch's majority opinion or Kavanaugh's dissenting opinion. Both opinions pointedly abjured consideration of anti-homosexual social context.[377] Instead, Thomas joined Alito's dissenting opinion, which opined that "when textualism is properly understood, it calls for an examination of the *social context* in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment."[378] So one discretionary choice facing the textualist Justice is whether to consider social context.

The incoherence of the newest textualism's treatment of historical context is on constant display in Indian law cases. In *Navajo Nation*, Kavanaugh's opinion for the Court stuck to the language of the Treaty of 1868, while Gorsuch explored the rich social and political context of the Treaty.[379] But in *McGirt*,[380] Kavanaugh joined the Chief Justice's history-soaked dissenting opinion. This contrasts with Gorsuch's position, which demanded a statutory text in much the same reasoning that Kavanaugh would deploy in *Navajo Nation*.[381] Alito and Thomas found extensive social history dispositive in *McGirt* and *Castro-Huerta*,[382] but not in *Navajo Nation*. There can be little doubt that text is not dispositive, and often not even relevant, in Indian law cases.[383] Gorsuch

376. Gen. Dynamics Land Sys., Inc. v. Cline, 540 U.S. 581, 607 (2004) (Thomas, J., dissenting).

377. See Bostock v. Clayton County, 140 S. Ct. 1731, 1736–37 (2020); id. at 1824–25 (Kavanaugh, J., dissenting).

378. Id. at 1767 (Alito, J., dissenting) (emphasis added); see also id. at 1769–72 (examining a variety of sources, including sodomy laws, psychiatry manuals, licensing rules, military exclusions, and other indicia of antihomosexual sentiment); Grove, supra note 23, at 286 (explaining that flexible textualism "authorizes interpreters to make sense of the statutory language by looking at social and policy context, normative values, and the practical consequences of a decision").

379. Compare Arizona v. Navajo Nation, 143 S. Ct. 1804, 1810 (2023) ("In light of the treaty's text and history, we conclude that the treaty does not require the United States to take those affirmative steps."), with id. at 1819, 1824 (Gorsuch, J., dissenting) ("[This treaty provision]—read in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law—secures for the Navajo some measure of water rights.").

380. McGirt v. Oklahoma, 140 S. Ct. 2452 (2020).

381. Compare id. at 2482–83 (Roberts, C.J., dissenting) (noting facts that have gone "unquestioned for a century" and highlighting the history of the Muscogee (Creek) Nation), with id. at 2469 (majority opinion) (highlighting that "there is no need to consult extratextual sources when the meaning of a statute's term is clear").

382. Oklahoma v. Castro-Huerta, 142 S. Ct. 2486 (2022).

383. See, e.g., Haaland v. Brackeen, 143 S. Ct. 1609, 1628–29 (2023) (Barrett, J.) (discussing specific constitutional text but ultimately resting her opinion on general powers of federal sovereignty); id. at 1641 (Gorsuch, J., concurring) (deepening Barrett's point); id. at 1686 (Alito, J., dissenting) (relying on the truistic Tenth Amendment). Only Thomas purported to rely on constitutional text—which he read to wipe out more than a century of

consistently views the legal materials through a lens sympathetic to tribal perspectives, as he admits in *Navajo Nation*,[384] while the other conservatives consistently view the materials from the perspective of the reliance interests of white settlers and state governments.

To be sure, the newest textualists are more likely to discuss the many forms of text-based (con)text, but they are inconsistent within cases and across cases—what (con)text is relevant? Does it cut for or against a particular interpretation? How weighty is it in comparison to other sources of meaning? Do norms sneak back in through the (con)textual backdoor? As before, the newest textualists do not have stable metarules to adjudicate these complexities—we offer the diagram below as a friendly way to map and perhaps valorize (con)text. The weightiest (con)text should be that closest to the provision or word at issue. The close (con)text may provide clarity, but if it does not, the textualist might find illuminating the whole act, the whole code, or sometimes even the Constitution's language.[385] Thus, for textualists like Scalia and Thomas, the Kagan dissent in *Yates* was persuasive (more so than the relevant legislative history or even an interpretive canon, noscitur a sociis) because it rested upon evidence that "tangible object" was borrowed from the Model Penal Code and was in pari materia with other statutes or rules using the same term—most of which had been broadly construed to include animals or other living objects.[386]

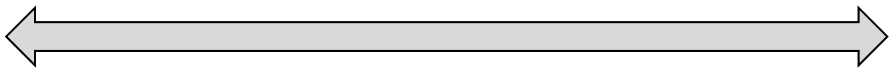
Supreme Court precedent. See id. at 1677–78 (Thomas, J., dissenting). He argued that prior precedent cited by the majority "extended the Federal Government's Indian-related powers beyond the original understanding of the Constitution" but that those questionable precedents could be read much more narrowly, to "at least correspond[] to Founding-era practices." Id.

384. *Navajo Nation*, 143 S. Ct. at 1819–33 (Gorsuch, J., dissenting) (arguing that the treaty provision should be read "in conjunction with other provisions in the Treaty, the history surrounding its enactment, and background principles of Indian law"). This contrasts Gorsuch's position in *Bostock*. See Bostock v. Clayton County, 140 S. Ct. 1731, 1737 (finding that when the "express terms of a statute give us one answer and extratextual considerations suggest another" the "written word" prevails).

385. The language of the Constitution could have addressed the original meaning of "labor or service" at issue in the famous case Holy Trinity Church v. United States, 143 U.S. 457 (1892). See Tammy Gales & Lawrence M. Solan, Revisiting a Classic Problem in Statutory Interpretation: Is a Minister a Laborer? 36 Ga. St. U. L. Rev. 491, 504–06 (2020).

386. See Yates v. United States, 574 U.S. 528, 556 (2015) (Kagan, J., dissenting).

FIGURE 1. SOURCES OF (CON)TEXT



Statutory History; Borrowed Statutes	Neighboring Words & Provisions	Whole Act: Findings; Purpose; Definitions; Similar Provisions; Meaningful Variation	Whole Code: Pari Materia; Meaningful Variation; Clashing Statutes	Constitution; Foreign Law

(a) *Neighboring Words & Provisions*. — As illustrated in *Sweet Home* and *Yates*,[387] the noscitur a sociis and ejusdem generis canons give a textualist discretion to consider how the words surrounding the statutory term at issue help to give it meaning.[388] In other cases, textualist Justices have similarly disagreed about the relevance of these associated-words canons.[389] But the choice about how to consider what we term "(co)text" (all of the language at issue) extends beyond cases where a textual canon is applicable.

Recall the Gun Control Act of 1968, at issue in *Smith v. United States*,[390] which (as amended through 1988) imposed a sentence enhancement if a defendant "uses or carries a firearm" in relation to specified crimes.[391] Textualists were on both sides of cases holding that "uses a firearm" as a word cluster means something different from putting "uses" together with "firearm"[392] and that "carries a firearm" means something more than

387. See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 720–21 (1995) (Scalia, J., dissenting); supra notes 246–254 and accompanying text; see also *Yates*, 574 U.S. at 543; supra notes 299–302 and accompanying text.

388. E.g., Bittner v. United States, 143 S. Ct. 713, 719–20 (2023) ("When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that difference in language to convey a difference in meaning (expressio unius est exclusio alterius).").

389. For example, in Ali v. Federal Bureau of Prisons, 552 U.S. 214, 224–27 (2008), Thomas, writing for the majority, dismissed ejusdem and noscitur arguments embraced by Kennedy for the dissenters.

390. 508 U.S. 223, 226–27 (1993).

391. 18 U.S.C. § 924(c)(1)(A) (1988), as amended by Pub. L. 101-647, Title XXXV, § 3526(b), 104 Stat. 4921, 4924 (1990).

392. In *Smith*, 508 U.S. at 229, the majority, including Thomas and Rehnquist, applied a broad view of "uses" a firearm. Meanwhile, Scalia's dissent argued for a narrower meaning of "uses a firearm." Id. at 241–43 (Scalia. J., dissenting); see also supra notes 334–340 and accompanying text (discussing the case).

packing heat on your person.[393] Based on linguistic evidence about how words combine to form larger meanings,[394] those textualists considering the ordinary meaning of the statutory phrase ("uses a firearm") instead of the individual words ("uses" and "firearm") had a better understanding of how (co)text shapes meaning.[395]

These cases illustrate the difficulty often involved in figuring out how to characterize the relevant (co)text in a case. Gorsuch's majority opinion in *Niz-Chavez v. Garland* viewed the text on point as "a 'notice to appear,'" as opposed to Kavanaugh's dissenting focus on "notice to appear."[396] The minor difference in focus yielded an intense disagreement as to the correct outcome. Similarly, in *Bostock*, was the correct text at issue "because of sex," as Gorsuch maintained, or was it "discriminate because of sex," as Kavanaugh, Alito, and some commentators have argued?[397] Usually, the more (co)text considered, the more linguistically accurate the interpretation.

(b) *Whole Act.* — Even when the text on point seems plain, the new textualist will sometimes check that conclusion against the statute as a whole: Is it consistent with other provisions and the statutory structure?[398]

---

393. In Muscarello v. United States, 524 U.S. 125, 132–36 (1998), the majority, including Thomas, took a broad view of "carries" a firearm. The dissenters, including Scalia, applied a narrower meaning of "carries a firearm." Id. at 140 (Ginsburg, J., dissenting).

394. That is, "using" a "firearm" is different from "using" a "book," and thus a general dictionary definition of "use" might give the word combination too broad of a meaning.

395. Another way of explaining the issues is that a prototypical "pet fish" (e.g., a guppy) need not be a prototypical pet (e.g., a dog) nor a prototypical fish (e.g., a salmon). See Eskridge, Interpreting Law, supra note 283, at 61–63; Andrew C. Connolly, Jerry A. Fodor, Lila R. Gleitman & Henry Gleitman, Why Stereotypes Don't Even Make Good Defaults, 103 Cognition 1, 5 (2007) (describing "pet fish" as the "iconic counter example to the claim that prototype concepts can account for the compositionality of concepts").

396. 141 S. Ct. 1474, 1486 (2021) (Gorsuch, J.); id. at 1489–90 (Kavanaugh, J., dissenting).

397. Bostock v. Clayton County, 140 S. Ct. 1731, 1740–47 (2020) (Gorsuch, J.); id. at 1833–36 (Kavanaugh, J., dissenting).

398. See, e.g., Sackett v. Env't Prot. Agency, 143 S. Ct. 1322, 1336–41 (2023) (Gorsuch, J.) (arguing that the CWA's statutory scheme compels a narrower interpretation of "adjacent wetlands"); id. at 1362–64 (Kavanaugh, J., concurring) ("We must presume that Congress used the term 'adjacent wetlands' to convey a different meaning than 'adjoining wetlands.'"); Turkiye Halk Bankasi v. United States, 143 S. Ct. 940, 947–48 (2023) (Kavanaugh, J.) (confirming the FSIA's limitation to civil actions by considering the civil focus of its provisions); Bittner v. United States, 143 S. Ct. 713, 719–21 (2023) (Gorsuch, J.) (considering nearby provisions of the Bank Secrecy Act to argue that the statute only mandates one penalty per deficient report); id. at 726–28 (Barrett, J., dissenting) ("[T]he applicable statute and regulations make clear that any failure to report a foreign account is an independent violation, subject to independent penalties." (internal quotation marks omitted) (quoting United States v. Boyd, 991 F.3d 1077, 1089 (9th Cir. 2021) (Ikuta, J., dissenting))); Johnson v. Guzman Chavez, 141 S. Ct. 2271, 2289–90 (2021) (Alito, J.) (arguing that the structure of 8 § U.S.C. 1231, a provision about detention and removal of immigrants, confirmed the textual reading of the provision); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623–26 (2018) (Gorsuch, J.) (surveying the broader structure of the National

A critical difference between the majority and dissenting opinions in *Bostock* was that the dissenters focused on the *class* of people (e.g., women, men) protected by Title VII's sex discrimination rule, while the majority focused on the *classification* (namely, "sex").[399] Defending his distinction, Gorsuch invoked the fact that Title VII's rules barred discrimination against an *individual*, in contrast to the Equal Pay Act's bar to discrimination against women as a *group*.[400]

An important issue is whether the whole act can *create* statutory ambiguity rather than merely *resolve* it. For example, in *King v. Burwell*,[401] Roberts's best arguments for ambiguity were structural ones. Although Scalia was adamant that federal exchanges were not established under § 1311 because of the reference to "an Exchange established by the State,"[402] Roberts responded that the ACA repeatedly refers to exchanges "established under [§] 1311" for various other purposes; a narrow view of that phrase would have read federal exchanges substantially out of the ACA, which was an implausible reading of the statutory scheme.[403]

In short, Roberts found statutory ambiguity largely based on the overall statutory scheme rather than the semantic meanings of the individual terms. Doubling down, he then invoked the statutory scheme to disambiguate the provision. "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."[404] The Chief Justice emphasized that the ACA's interconnected structure would fall apart if some people were not eligible for tax credits: The insurance industry could handle the statute's onerous new coverage rules only by expanding

---

Labor Relations Act to assess whether employment agreements requiring individual arbitration were enforceable); Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 317–19 (2014) (Scalia, J.) (examining whether EPA's interpretation of certain provisions of the Clean Air Act was inconsistent with the Act's structure).

399. See supra notes 23–27 and accompanying text.

400. See *Bostock*, 140 S. Ct. at 1738–40.

> The statute answers that question directly. It tells us three times—including immediately after the words "discriminate against"—that our focus should be on individuals, not groups: Employers may not "fail or refuse to hire or . . . discharge any *individual*, or otherwise . . . discriminate against any *individual* with respect to his compensation, terms, conditions, or privileges of employment, because of such *individual's* . . . sex."

Id. (quoting 42 U.S.C. § 2000e–2(a)(1) (2018)).

401. 576 U.S. 473, 496–97 (2015) (finding § 36B ambiguous because of several provisions assuming tax credits would be available on both state and federal exchanges).

402. Id. at 498 (Scalia, J., dissenting).

403. Id. at 489–90 (majority opinion) (Roberts, C.J.).

404. Id. at 492 (alteration in original) (internal quotation marks omitted) (quoting United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988) (Scalia, J.)).

its customer base via the individual mandate (upheld in 2012) and the tax credits for low-income insureds (upheld in *Burwell*).[405]

Joined by Thomas and Alito, Scalia assembled a strong array of structural arguments supporting the view that "state" should be given its literal meaning.[406] It is apparent to us that Roberts wrote for a 6-3 Court mainly because his interpretation was required by, and not just consistent with, what he called the ACA's "plan" or "scheme."[407] Pragmatic Justices still refer to statutory "purpose" as a key source of meaning—and Jarrod Shobe has demonstrated that this linchpin of pragmatic interpretation ought to be more important for the new textualists because hundreds of federal statutes have purpose provisions in the enacted text.[408] In *Sweet Home*, for example, Congress announced its purpose to protect ecosystems of endangered species on the face of the statute—and we think Scalia was wrong to ignore that text in his dissent.[409]

(c) *Whole Code.* — Sometimes, the new textualists confirm plain meanings by reference to other statutes. Most whole-code exercises focus either on similar statutes and how they have been interpreted or on statutes that reveal a meaningful variation from the statute in suit. Because the U.S. Code is an ad hoc collection of laws enacted by dozens of different Congresses, we are dubious of the value added by whole code arguments, which also expand the options for textualist (con)text source shopping.[410]

The most ambitious whole-code debate in recent years was in *McGirt v. Oklahoma*, where the Court held that Congress had never disestablished the Creek Nation Reservation that now occupies a chunk of Oklahoma.[411] The four textualist dissenters relied on a wide array of statutes—ranging from the allotment acts to the 1906 law enabling Oklahoma statehood to laws mentioning the "former" reservation—to argue that the Creek Reservation had at some point between 1890 and 1906 been disestablished.[412] But Gorsuch smacked them all down because no law explicitly disestablished the reservation in terms that Congress has used to disestablish other reservations.[413] Ironically, the majority consisted of

---

405. Id. at 492–95.

406. Id. at 499–518 (Scalia, J., dissenting).

407. Id. at 486, 492, 498 (majority opinion).

408. See Jarrod Shobe, Enacted Legislative Findings and Purposes, 86 U. Chi. L. Rev. 669, 675–77 (2019).

409. See Babbitt v. Sweet Home Chapter of Cmtys. For a Great Or., 515 U.S. 687, 714–35 (1995) (Scalia, J., dissenting).

410. Eskridge, Interpreting Law, supra note 283, at 88–94.

411. 140 S. Ct. 2452, 2459 (2020).

412. See id. at 2482–504 (Roberts, C.J., dissenting).

413. Compare id. at 2489–94, 2498 ("Congress disestablished any reservation possessed by the Creek Nation through a relentless series of statutes leading up to Oklahoma statehood."), with id. at 2462–68 (majority opinion) (Gorsuch, J.) (arguing that the Creek Nation reservation survived allotment because "allowing the transfer of individual plots, whether to Native Americans or others" does not equate to disestablishment).

Gorsuch and four pragmatists insisting on the rule of law for the Muscogee (Creek) Nation pitted against four zealous textualists whose main arguments rested upon legislative intent and white settlers' pragmatic expectations and reliance. Put uncharitably, the textualist dissenters were legitimizing the adverse possession rights of white people who lawlessly took treaty-based rights away from Native people and then relied on their theft, backed up by the authority of the state, for so long that they felt legally entitled.

In sum, (co)text and (con)text present another long and complicated set of textualist choices. First, should a judge look only at text-based context, or should they also consider social context? Second, should the judge prioritize only (co)text or might they consider language outside the provisions at issue (i.e., (con)text) even if it is at the "outer reaches"? Third, once the line is drawn, which types of (con)text count as "close"? Fourth, once the appropriate types of (con)text have been identified, how should the textualist identify the right (con)text—for example, for whole-code arguments, what counts as a "similar" statute? Fifth, once the data are assembled, how should the judge adjudicate among seemingly conflicting (con)texts or between conflicting (co)text and (con)text? This series of complex questions, all within Choice 7, have not yet been answered by the newest textualists in anything close to a unified, consistent, or predictable way.

CHOICE 8: WHAT KINDS OF EXTRINSIC MATERIALS

In addition to the (co)text and (con)text of Choice 7, the Supreme Court has traditionally considered extratextual context (or (extra)text), our Choice 8: internal legislative history, the common law, and agency interpretations. The textualist revolution has generally marginalized such extrinsic materials in Supreme Court opinions; dictionaries, textual canons, and substantive canons have largely supplanted legislative deliberations and purpose, agency views, and (to a lesser extent) the common law (Choice 10 below). As the *McGirt* debate illustrates, discussion of extrinsic materials has hardly disappeared.[414] Indeed, Choice 8 divides the Court's newest textualists: Roberts, Alito, and Kavanaugh are most likely to consider such (extra)text materials, and Thomas, Gorsuch, and Barrett are least likely (except for Gorsuch in Indian law cases). What unites the textualist majority is the view that these materials cannot be authoritative, at least most of the time. At best, the newest textualists consider legislative evidence as confirmatory, the common law as definitional, and agency interpretations as filling in statutory details or gaps. But within that constricted vision, there are many choices such a judge must make.

414. See supra notes 85–92.

(a) *Legislative History: Still Relevant.* — Writing also for Alito and Gorsuch, Thomas opined in his concurring opinion in *Digital Realty Trust Inc. v. Somers* that congressional "intent" ought to be irrelevant to proper interpretation and that when the statute has a plain meaning, judges should not even cite committee reports and the like.[415] Alito joined that concurring opinion—yet he and Thomas relied on the 1964 legislative deliberations in their *Bostock* dissent[416] and joined the Chief Justice's even-more-elaborate discussion of legislative materials in his *McGirt* dissent.[417] In *Wooden*, Thomas, Alito, and Barrett declined to join the Court's brief consideration of the legislative history of an amendment to the ACCA,[418] and Gorsuch concurred only in the judgment.[419] But Roberts and Kavanaugh joined the majority opinion without cavil over its reliance on legislative history.[420]

So the textualist consensus might be that legislative materials may be mentioned only to confirm text-based plain meaning—except when those materials are just too persuasive not to cite in support of strong-arming an ambiguous statute into one having a plain meaning.[421] Scalia partly relied on the congressional sponsors' explanations to establish his view of the statutory structure in *Sweet Home*,[422] and he and Thomas joined Sandra Day O'Connor's lavish deployment of committee hearings, rejected proposals, and committee reports in *FDA v. Brown & Williamson Tobacco Corp.*, which held that the FDA's authority to regulate "drugs" plainly did not extend to addictive nicotine.[423] The discussion of internal legislative materials in *Brown & Williamson* was the most detailed and extensive invocation of legislative history in a Supreme Court majority opinion during the last generation—yet the new textualists joined every sentence and every footnote.[424]

---

415. 138 S. Ct. 767, 783–84 (2018).

416. See Bostock v. Clayton County, 140 S. Ct. 1731, 1755–84 (2020) (Alito, J., dissenting).

417. *McGirt*, 140 S. Ct. at 2489–94 (Roberts, C.J., dissenting).

418. Wooden v. United States, 142 S. Ct. 1063, 1078 (2022) (Barrett, J., concurring in part and concurring in the judgment, joined by Thomas, J.); id. at 1065 (case syllabus) (noting that Justice Alito did not join the majority's discussion of legislative history).

419. Id. at 1079 (Gorsuch, J., concurring in the judgment).

420. Id. at 1067–74 (majority opinion).

421. See James J. Brudney, Confirmatory Legislative History, 76 Brook. L. Rev. 901, 901–02 (2010).

422. Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or., 515 U.S. 687, 727–28 (1995) (Scalia, J., dissenting).

423. See Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 131–59 (2000).

424. See id. at 143–59. The Court's opinion not only rested decisively on its findings that Congress had relied on the FDA's constant assurance that it had no regulatory authority over tobacco products but also included references to hearings, floor debates, and committee reports for the 1938 law regulating food and drugs, the 1965 law creating disclosure rules for cigarettes, and laws enacted in 1969, 1976, 1983, 1984, and 1986, elaborating on a regulatory regime for tobacco products. And, for good measure, the Court

Legislative evidence was recently decisive in *Delaware v. Pennsylvania*.[425] The Federal Disposition Act ("the Act") requires that unclaimed money orders and similar instruments "other than a third party bank check" should escheat (revert) to the state where they were purchased.[426] Delaware invoked the Supreme Court's original jurisdiction to determine whether the Act applied to "[t]eller's [c]hecks" and "[a]gent's [c]hecks," prepaid financial instruments used to transfer funds to a named payee.[427] (MoneyGram, the payer, followed the common law rule, which escheated such property to the state of incorporation, namely, Delaware.)[428] The issues were whether the disputed MoneyGram instruments were "similar" to money orders and, if so, whether they were "third party bank checks" nonetheless exempted from the Act's coverage.[429] In a masterful exegesis of the statutory and financial issues that had stumped the Special Master, Justice Ketanji Brown Jackson's opinion for a unanimous Court found the teller's and agent's checks similar to money orders: All three are prepaid instruments for advancing funds to a named payee; subjecting them to the Act's rule would be consistent with the core statutory purpose.[430]

The harder issue was whether such checks were exempted as "third party bank checks," a term that the Act did not define and that had no accepted commercial meaning. Although teller's and agent's checks could, literally, be considered bank checks payable to third parties, a unanimous Court rejected a broad reading of the parenthetical.[431] The strongest argument, however, was joined by only a bare majority of the Court (Roberts, Sotomayor, Kagan, Kavanaugh, and Jackson): The legislative materials established that the addition of this parenthetical was a "technical" insertion added at the request of the Treasury Department to underline the statutory focus on money orders and similar instruments and was not intended to create a broad exemption that would apply to a wide range of known financial instruments such as teller's checks.[432]

Even more dramatic was the new textualist performance in *McGirt*: All except Gorsuch signed on to the Roberts dissent, which began with the announcement that the *only* relevant inquiry was whether disestablishment of a treaty-guaranteed reservation was Congress's "intent" or "purpose" and text was nothing more than "evidence" of legislative intent and

---

relied on Congress's rejection of a 1929 proposal to regulate such products. Id. Scalia and Thomas joined every bit of this unprecedented level of congressional analysis.

425. 143 S. Ct. 696 (2023).

426. 12 U.S.C. § 2503 (2018).

427. *Delaware v. Pennsylvania*, 143 S. Ct. at 704.

428. Id.

429. Id. at 704–05.

430. See id. at 705–07.

431. Id. at 709–11.

432. Id. at 711–12 (encompassing Part IV.B of the Court's opinion, joined only by Roberts, C.J., and Sotomayor, Kagan & Kavanaugh, JJ.).

purpose.[433] The dissenters relied on congressional committee reports, hearings, and documents to claim that federal legislators, state officials, and even tribal representatives believed the reservation had been terminated.[434] *Castro-Huerta*, decided the next Term, was the occasion for an even bigger surprise, as Gorsuch, dissenting, relied on the legislative history of the General Crimes Act of 1834 to argue that the vague statute's plain meaning had generated the interpretation of the Act that dominated two centuries of legal authorities.[435] And in *Navajo Nation*, Gorsuch relied on the negotiating history of the 1868 treaty establishing the Navajo reservation and, by his view, vesting the United States with fiduciary responsibilities that it has woefully neglected.[436]

Legislative history may represent a growing disconnect between textualist theory and practice. Textualists consult legislative history, but one of textualism's core tenets is intent skepticism and a correlative general rejection of legislative history.[437] Consider Barrett's textualist theory of legislative history. Under that view, textualists can consult legislative history "to shed light on how ordinary speakers use words in a particular context"[438] but *not* to establish that "Congress used language in something other than its natural sense.[439] But the distinction between ordinary usage in a "particular context" (okay) and usage "other than its natural sense" (not okay) is often a matter of judgment and thus discretionary. And the latter might reveal that Congress intended some legal or technical meaning, which might better fit the statutory scheme.

(b) *Common Law: Dynamic?* — The common law, unwritten legal rules developed from precedent, would seem like an unappealing source of evidence for textualists who invoke hard objective evidence of ordinary meaning.[440] For one thing, the ordinary American is probably not aware of the common law meaning of statutory terms. For another thing, the common law is created and amended over time by judges, not by

433. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2485 (2020) (Roberts, C.J., dissenting, joined by Thomas, Alito & Kavanaugh, JJ.).

434. Id. at 2494–97.

435. See Oklahoma v. Castro-Huerta, 142 S. Ct. 2486, 2505, 2507–09 (2022) (Gorsuch, J., dissenting).

436. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1821–22 (2023) (Gorsuch, J., dissenting).

437. See Barrett, Congressional Insiders and Outsiders, supra note 200, at 2205 ("Textualists have long objected to the use of legislative history on the ground that it is designed to uncover a nonexistent, and in any event irrelevant, legislative intent."); John F. Manning, Inside Congress's Mind, 115 Colum. L. Rev. 1911, 1912 (2015) ("[O]ne typically associates 'intent skepticism' with the new textualism . . . .").

438. Barrett, Congressional Insiders and Outsiders, supra note 200, at 2207.

439. Id. at 2194.

440. But see William Baude & Stephen Sachs, The Law of Interpretation, 130 Harv. L. Rev. 1079, 1098 (2017) ("In a common law system like ours, the rules of interpretation can also bubble up from below."); Krishnakumar, 2005–2019 Data, supra note 111, at 610 (uncovering the largely unnoticed frequency with which the Court has historically relied on the common law to guide textualist statutory interpretation).

legislators. At what point does piling one judge-created source of meaning after another destroy the new textualist claim that its method is the only one that constrains judges? How does a method dominated by the products of judicial lawmaking subserve the separation of powers or Congress's lawmaking supremacy?

There are further, deeper difficulties. The newest textualists claim to be statutory originalists,[441] seeking to fix the statute's permanent meaning to the time of enactment. The common law, however, is not originalist in nature. The common law *evolves*.[442] For today's statutory originalists, there is some tension between fidelity to a statute's *historical* meaning and appeal to the common law (that is, the common law as it has been articulated at any and all times—including since the statute's date of enactment). Indeed, "Common Law Constitutionalism," which emphasizes the evolving, living, and dynamic nature of the common law, is a competitor of originalism.[443] Moreover, "finding" the common law is a famously tricky activity—and an unpredictable one. For textualists who appeal to simplicity and predictability, infusing interpretation with the common law is not without rule-of-law costs.

Nevertheless, the common law may fill in some of the gaps left by the newest textualists' reluctance to rely on legislative history, statutory precedents, and agency views. Anita Krishnakumar reports that between 2005 and 2019, the uber-textualist Court has frequently turned to the common law in statutory cases.[444] Specifically, Professor Krishnakumar finds that common law is evoked for (1) "derogation-resembling" arguments (e.g., a judicial finding that the statute did not displace the common law); (2) expected-meaning arguments (e.g., assuming that legislators and lawyers would "expect" statutes to reflect common law baselines); (3) arguments that certain legal principles are "well-settled" or that "general principles" support a particular interpretation; (4) other "miscellaneous" arguments that support a certain statutory reading;

441. Nourse, Textualism 3.0, supra note 6, at 676–80.

442. Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 36 (1960) (highlighting the ever-adapting nature of common law doctrine); Julius Stone, Precedent and Law: Dynamics of Common Law Growth 6–7 (1985) (noting that constitutional review, just like common law review, is part of the "dynamic process of legal evolution"); David A. Strauss, Common Law Constitutional Interpretation, 63 U. Chi. L. Rev. 877, 879 (1996) [hereinafter Strauss, Common Law Constitutional Interpretation] (defining the common law tradition as one in which understandings of law evolve over time). For an example of how the common law's evolution played out in a ridiculous originalist debate between Justices William Brennan and William Rehnquist, see Smith v. Wade, 461 U.S. 30 (1983). As O'Connor opined in a dissenting opinion, the evolving common law rules should be applied with an eye on the statutory purposes. Id. at 92–94 (O'Connor, J., dissenting).

443. Strauss, Common Law Constitutional Interpretation, supra note 442, at 879; see also David A. Strauss, The Living Constitution 35–46 (2010) (arguing that constitutional interpretation is best understood as a common law approach).

444. See Krishnakumar, 2005–2019 Data, supra note 111, at 620–55.

and (5) "no reason" arguments that provided no justification for invoking the common law.[445]

Here, again, textualists have choices to make. Which of these five common law arguments (or others) are permissible in textualist interpretation? What is the method to find the "common law"? How should conflicting evidence be reconciled? And here, again, the newest textualists do not always agree. For example, they splintered in *Atlantic Sounding Co. v. Townsend*.[446] Writing for himself and four pragmatic Justices, textualist Justice Thomas ruled that the Jones Act did not supplant admiralty law's remedy of punitive damages for a seaman's maintenance-and-cure claim.[447] The Court's remaining textualists—Roberts, Scalia, Kennedy, and Alito—dissented. They accused Thomas (who finds dynamic interpretation anathema[448]) of imposing a dynamic reading of the common law that was inconsistent with the Jones Act's remedial scheme, in which Congress rejected punitive damages for seamen's maintenance-and-cure claims.[449]

In *Navajo Nation*, a key disagreement between the Gorsuch dissent and Kavanaugh's majority opinion lay in Gorsuch's aggressive deployment of the common law of fiduciary responsibility. The United States conceded that it was the trustee of the tribe's water rights and other rights, and Gorsuch accordingly found that it had violated the good faith and fiduciary responsibilities implicit in the terms of the 1868 treaty.[450] In contrast, Kavanaugh believed the common law of trusts did not impose what he considered affirmative obligations on the United States to take away water rights from the states and bestow them on the Navajo Nation.[451]

(c) *Agency Interpretations: Closeted Influence.* — A significant policy choice for textualists concerns whether judges should defer to agency statutory interpretations. Textualist judges traditionally seek the "best reading" of a statute,[452] but the possibility of deferring to an agency

---

445. Id. at 640.

446. 557 U.S. 404 (2009). For a more detailed discussion of how the new textualists differed in their approach to common law in *Atlantic Sounding Co.*, see Krishnakumar, 2005–2019 Data, supra note 111, at 647–48.

447. *Atl. Sounding Co.*, 557 U.S. at 424.

448. Book Note, Justice Thomas's Inconsistent Originalism, 121 Harv. L. Rev. 1431, 1434–36 (2008) (reviewing Clarence Thomas, My Grandfather's Son: A Memoir (2007)) (discussing Thomas's ostensible commitment to originalism but his failure to apply a consistent methodology).

449. *Atl. Sounding Co.*, 557 U.S. at 429–32 (Alito, J., dissenting).

450. Arizona v. Navajo Nation, 143 S. Ct. 1804, 1829 (Gorsuch, J., dissenting) ("Not even the federal government seriously disputes that it acts 'as a fiduciary' of the Tribes with respect to tribal waters it manages. . . . [T]he United States freely admits that it holds certain water rights for the Tribe 'in trust' [and] . . . [t]hose observations suffice to resolve today's dispute.").

451. Id. at 1813 (majority opinion).

452. See, e.g., Kavanaugh, Fixing Interpretation, supra note 23, at 2121 (explaining that the primary function of courts is to determine the "best reading" of a statute).

interpretation requires redefining the interpretive inquiry. The (in)famous *Chevron* doctrine asks instead whether the statute provides a clear directive ("Step One") and, if not, whether the agency's interpretation is reasonable ("Step Two").[453] The discretion inherent in the traditional inquiry, finding the statute's "best reading," is thus transferred to two separate, discretionary inquiries: determining "ambiguity" and "reasonableness." More troubling for textualists is *Chevron*'s acknowledgment that statutory interpretation is, at least partly, a policy determination.[454] The "ambiguity" determination mediates between Step Two nonlinguistic "construction," or policymaking, and Step One linguistic "interpretation."[455]

Scalia was initially the Court's biggest fan of *Chevron*, based on the institutional view that judges should leave policy balancing to agencies when statutory text is genuinely ambiguous,[456] and he interpreted the doctrine broadly as creating an "across-the-board presumption that, in the case of ambiguity, agency discretion is meant."[457] He also authored *Auer v. Robbins*, which held that courts ought to defer to agency interpretations of their own regulations unless clearly unreasonable.[458] During the Obama Administration, however, Scalia soured on *Auer* and was no longer a big cheerleader for *Chevron*.[459] Likewise, Thomas was for most of his tenure on the *Chevron* bandwagon,[460] but post-Obama, he

---

453. Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 (1984). For a comprehensive study into the Supreme Court's application of the *Chevron* doctrine, see generally William N. Eskridge, Jr. & Lauren E. Baer, The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*, 96 Geo. L.J. 1083 (2008).

454. See *Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (internal quotation marks omitted) (quoting Morton v. Ruiz, 415 U.S. 199, 231 (1974))).

455. See Lawrence B. Solum & Cass R. Sunstein, *Chevron* as Construction, 105 Cornell L. Rev. 1465, 1475 (2020) (arguing that "Step One losses, for agencies, typically involve interpretation rather than construction").

456. Immigr. & Naturalization Serv. v. Cardoza-Fonseca, 480 U.S. 421, 454 (1987) (Scalia, J., concurring) ("This Court has consistently interpreted *Chevron*—which has been an extremely important and frequently cited opinion . . . —as holding that courts must give effect to a reasonable agency interpretation of a statute . . . .").

457. Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L.J. 511, 516.

458. 519 U.S. 452, 459 (1997).

459. See Adrian Vermeule, Professor of Const. L., Harvard L. Sch., Lecture Delivered at Harvard Law School: The Original Scalia (Oct. 19, 2022), *in* Harv. J.L. & Pub. Pol'y Per Curiam, Winter 2023, no. 2, at 2, 12–13, https://journals.law.harvard.edu/jlpp/wp-content/uploads/sites/90/2023/01/Vermeule-The-Original-Scalia-vF.pdf [https://perma.cc/N34V-9H45].

460. See, e.g., Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 980–85 (2005) (Thomas, J.) (explaining that agency construction is almost always entitled to *Chevron* deference, unless it undermines an entirely unambiguous statute).

has asserted that *Chevron* amounts to abdication of judicial power in violation of Article III.[461]

On the current Court, *Chevron* is virtually uncitable, and the Court may soon overrule or narrow *Chevron*.[462] But because statutory interpretations by the Solicitor General or an agency are before the Court in the large majority of its statutory cases, the textualist is endemically confronted with a *Skidmore* choice: How much weight, if any, to give the agency's interpretation?[463] As reflected in *Biden v. Texas*, in which three of the six newest textualists gave President Biden a pass on the merits,[464] any case involving foreign affairs, the armed forces, or immigration law generates a give-the-executive-the-benefit-of-the-doubt impulse among some of the textualist Justices.[465] In domestic regulatory cases, some of the newest textualists quietly go along with agency views, especially if they have generated private or public reliance[466] or coincide with the Justices' ideological or policy preferences.[467]

---

461. E.g., Baldwin v. United States, 140 S. Ct. 690, 690–95 (2020) (Thomas, J., dissenting from the denial of certiorari).

462. See Amy Howe, Supreme Court Will Consider Major Case on Power of Federal Regulatory Agencies, SCOTUSBlog (May 1, 2023), https://www.scotusblog.com/2023/05/supreme-court-will-consider-major-case-on-power-of-federal-regulatory-agencies [https://perma.cc/6LW4-CDNS]; see also Buffington v. McDonough, 143 S. Ct. 14, 18–19, 22 (2022) (Gorsuch, J., dissenting from the denial of certiorari) (providing a detailed critique of *Chevron* and demanding that it be expunged).

463. Cf. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (holding that judges ought to at least give executive branch interpretations their due in light of factual and legal cogency).

464. 142 S. Ct. 2528, 2534, 2548, 2560 (2022).

465. See, e.g., Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 948 (2023) (Kavanaugh, J.) (accepting the executive branch's view of the FSIA); Fed. Bureau of Investigation v. Fazaga, 142 S. Ct. 1051, 1059–60 (2022) (Alito, J.) (holding that the Foreign Intelligence Surveillance Act does not displace the state secrets privilege); Republic of Sudan v. Harrison, 139 S. Ct. 1048, 1057, 1059–62 (2019) (Alito, J.) (following the State Department's interpretation of the Foreign Sovereign Immunities Act, while Thomas dissented on text-based grounds); Jam v. Int'l Fin. Corp., 139 S. Ct. 759, 771–72 (2019) (Roberts, C.J.) (following the State Department's view of immunity for international organizations); Trump v. Hawaii, 138 S. Ct. 2392, 2408–10, 2415 (2018) (Roberts, C.J.) (allowing President Trump broad discretion to exclude immigrants from countries with Muslim-majority populations); Water Splash, Inc. v. Menon, 137 S. Ct. 1504, 1510 & n.3 (2017) (Alito, J.) (following a DOJ amicus brief to interpret the Hague Service Convention).

466. See, e.g., Lorenzo v. Sec. & Exch. Comm'n, 139 S. Ct. 1094, 1099–102 (2019) (Breyer, J.) (adopting a longstanding SEC interpretation of 17 C.F.R. § 240.10b-5 (2022); Securities Exchange Act § 10(b), 15 U.S.C. § 78j (2018); and Securities Act of 1933 § 17(a)(1), 15 U.S.C. § 77q(a)(1)). Roberts and Alito joined Breyer's opinion; Gorsuch joined Thomas's textualist dissent. Id. at 1107–10 (Thomas, J., dissenting).

467. See, e.g., United States v. Tsarnaev, 142 S. Ct. 1024, 1037 (2022) (writing for all six textualists, Thomas adopted the DOJ's interpretation of the Federal Death Penalty Act; the Court's three pragmatists dissented); accord Matt Ford, The Supreme Court Shows No Signs of Slaking Its Thirst for Capital Punishment, New Republic (Oct. 12, 2022), https://newrepublic.com/article/168105/death-penalty-supreme-court-

Recently, the Major Questions Doctrine (MQD) has become a prominent textualist-favored, policy-based exception to *Chevron* and has added layers of interpretive discretion for textualists (e.g., whether an interpretive question is "major"). The MQD started out as a loophole in the *Chevron* doctrine, but it has proven to be much more dynamic and text-bending than the common law. Soon after the *Chevron* decision, then-Judge Breyer argued that the doctrine should be inapplicable in "major" cases.[468] In *Brown & Williamson*, arguably the first MQD case, a 5-4 Court showed no deference to the FDA's regulation of tobacco products as "drugs."[469] O'Connor, joined by the textualists then on the Court, reasoned that *Chevron* rests on the assumption that "a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps. In extraordinary cases, however, there may be reason to hesitate before concluding that Congress has intended such an implicit delegation."[470] Similarly, in *King v. Burwell*, the Court indicated that *Chevron* deference does not apply to "a question of deep 'economic and political significance' that is central to [a] statutory scheme."[471]

Today, there is a consensus among the Court's textualists not only that the MQD can trump *Chevron* deference but also that it acts as a canon of antideference.[472] Gorsuch has made it his mission to revive the nondelegation doctrine and limit Congress's capacity to delegate lawmaking to agencies or the President (except in foreign affairs, etc.). This steroidal version of the MQD is a "super-strong" clear statement rule: If Congress wants to delegate lawmaking authority, the Court will interpret that delegation stingily and will not allow an agency to intervene majorly in the market economy without very specific authorization. How specific? It's hard to say, but in such cases, the traditional textualist conception of a semantically based "best reading" of a statute is undoubtedly changed in some (indeterminate) way.

---

term [https://perma.cc/2J4Q-NWFK] (detailing how textualist Justices have "consistently voted against death row inmates seeking relief in multiple ways, even in extreme and dubious circumstances").

468. Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370, 377, 394 (1986); see also William Eskridge, Jr. & Philip Frickey, Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking, 45 Vand. L. Rev. 593, 606–07 (1992) [hereinafter Eskridge & Frickey, Quasi-Constitutional Law] (noting that after the "nondelegation doctrine" became disfavored as a form of constitutional interpretation, proponents of the doctrine continued to wield it as a form of statutory interpretation).

469. Food & Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 160 (2000) ("[W]e are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power.").

470. Id. at 159 (citation omitted).

471. 576 U.S. 473, 486 (2015) (quoting Util. Air Regul. Grp. v. Env't Prot. Agency, 573 U.S. 302, 324 (2014)).

472. See Mila Sohoni, The Major Questions Quartet, 136 Harv. L. Rev. 262, 293 (2022) ("The new major questions doctrine enables the Court to effectively resurrect the nondelegation doctrine without *saying* it is resurrecting the nondelegation doctrine.").

The MQD has had a decisive role in multiple recent cases. In *Alabama Ass'n of Realtors v. HHS*, the 6-3 Court vetoed a nationwide moratorium on evictions issued by the CDC.[473] Because the CDC's moratorium was an issue of "vast 'economic and political significance'" and represented "a breathtaking amount of authority,"[474] the per curiam opinion, joined only by the Court's newest textualists, was unpersuaded by the broad statutory language authorizing the CDC to "make and enforce such regulations as in [its] judgment are necessary to prevent the introduction, transmission, or spread of communicable diseases," such as COVID-19.[475] The statute was "a wafer-thin reed on which to rest such sweeping power" and was thus insufficiently clear.[476]

The same 6-3 Court also invoked the MQD to antidefer to OSHA's employer mask mandate a year later, in *NFIB v. OSHA*.[477] In a concurring opinion, Gorsuch explicitly tied the major questions canon to nondelegation concerns.[478] The canon guards against the possibility that an "agency may seek to exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond its initial assignment."[479] In *West Virginia v. EPA*, Roberts wrote for the same 6-3 majority to apply the antideference MQD and therefore require a clearer statement from Congress before EPA could issue power plant rules that would reallocate energy production over time.[480] In *Biden v. Nebraska*, the 6-3 majority invalidated the Biden Administration's student loan forgiveness program with reasoning similar to that of the earlier major questions decisions but grounded more in textualist semantics and likely congressional expectations rather than quasi-constitutional law.[481]

This super-strong version of MQD is, in our view, at odds with textualism—and arguably the rule of law—because it rejects the primacy of semantic meaning in favor of a normatively inspired, narrow gloss on broad statutory text. It is also at odds with separation of powers because it burdens Congress's limited agenda.[482] Further, as a discretion-conferring

473. 141 S. Ct. 2485, 2490 (2021).

474. Id. at 2489.

475. Public Health Service Act, ch. 373, § 361(a), 58 Stat. 682, 703 (1944) (codified as amended at 42 U.S.C. § 264(a) (2018)).

476. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

477. 142 S. Ct. 661, 662–63 (2022) (per curiam).

478. Id. at 668 (Gorsuch, J., concurring, joined by Thomas & Alito, JJ.).

479. Id. at 669.

480. See 142 S. Ct. 2587, 2614 (2022).

481. See 143 S. Ct. 2355, 2375 (2023) (deciding that there was insufficient congressional authorization for the Secretary of Education to forgive a large volume of student loans in the wake of the COVID-19 pandemic); cf. id. at 2378–81 (Barrett, J., concurring) ("[T]he major questions doctrine plays a role, because it helps explain the court's conclusion that the agency overreached.").

482. See Chad Squitieri, Who Determines Majorness?, 44 Harv. J.L. & Pub. Pol'y 463, 465 (2021) (arguing that the major questions doctrine is incompatible with the textualist

doctrine, the MQD is in tension with textualism in other ways. For instance, it runs counter to the textualist preference for brightline rules.[483]

It shouldn't be surprising that some textualists are responding to critics' objections by framing the MQD as a linguistic principle rather than a normative one. Barrett's preappointment law review scholarship was skeptical of textualists' use of substantive canons but supported a nondelegation canon.[484] In an obvious effort to becloud the Court's apparent activism, Barrett recently argued in *Biden v. Nebraska* that the MQD is *not* a clear statement requirement or substantive canon. Instead, it merely represents a "common sense" limitation on literal meaning that reflects how a "reasonably informed interpreter" understands how Congress delegates authority.[485]

The linguistic legitimization of the MQD is far from complete, and Barrett's arguments raise a lot of questions. Most crucially, they rest on an unproven empirical claim about "common sense" and the ordinary reader. Do ordinary people understand (ordinary, legal, or congressional) delegations of authority to be limited in scope when applied to issues of "major" significance? For example, parents direct a babysitter to take care of the children. While that directive does not authorize the sitter to fly the kids to visit their grandparents, it surely allows the sitter to deal with immediate medical emergencies.[486] Until empirical evidence is offered, it is natural to ask whether the "reasonably informed interpreter" is merely a mirror of the judge's own policy preferences.

There is great flexibility in textualists' appeal to "common sense" and concerning their identification of a "major question." Textualists have not identified criteria that would make either inquiry substantially more objective or predictable. For example, in *Biden v. Missouri*, the third COVID-19 regulatory case, Roberts, Kavanaugh, and the three pragmatic Justices joined a per curiam opinion upholding HHS's safety mandates for hospital workers; the other four textualists dissented, based upon the MQD.[487] So, in cases where the Court is responding to an agency interpretation of a federal statute, some textualists might now appeal to (extra)textual sources that bear on the "majorness" of the underlying issue. This analysis could include various factors, like whether the agency

---

perspective that members of Congress differ in their understandings of what is politically major).

483. See Scalia, A Matter of Interpretation, supra note 1, at 25 (arguing that textualism is intentionally formalistic to constrain judges from overstepping their authority).

484. See Barrett, Congressional Insiders and Outsiders, supra note 200, at 2205; Barrett, Substantive Canons, supra note 19, at 116 (relying on Eskridge & Frickey, supra note 468, at 606–07).

485. *Biden v. Nebraska*, 143 S. Ct. at 2378, 2380–81 (Barrett, J., concurring) (citing Wayman v. Southard, 23 U.S. (10 Wheat.) 1, 6 (1825)).

486. Id. at 2378–81.

487. See 142 S. Ct. 647, 659–60 (2022).

was making a "major" intervention into the economy, what reliance interests are implicated, and how targeted the judge finds the authorizing statute. These inquiries are chock-full of discretion and the potential for biased judgments.

CHOICE 9: WHICH PRECEDENT(S)

Given our legal tradition, you cannot have a theory of statutory interpretation without a theory of statutory precedents.[488] Indeed, most of the Court's statutory interpretation cases come encumbered with precedents. An initial choice facing the textualist Justice (though one we consider contrary to the rule of law) is whether to ignore or minimize relevant precedents, perhaps because their reasoning was not text based or otherwise clashed with the newest textualists' strict view of separation of powers.[489] In *Bostock*, for example, Title VII precedents relating to gender stereotyping and sexual harassment were relevant to whether job discrimination against LGBT employees was discrimination "because of sex." Justice Gorsuch's majority opinion rested upon the statutory language and structure and failed to cite on-point precedent (*Price Waterhouse v. Hopkins*[490]) for its striking statement that hypothetical employees Bob and Hannah, fired because they did not match assumed gender roles, would have a valid Title VII claim.[491] Like the Gorsuch majority, the Kavanaugh dissent ended with illustrative discussion of some Title VII precedents but ignored *Hopkins*.[492] The Alito dissent, alone, treated *Hopkins* as a relevant precedent and distinguished it.[493]

The debate in *Bostock* tracks the different approaches to precedent largely followed by the newest-textualist Justices in constitutional cases, notably *Ramos v. Louisiana*.[494] Roberts, Alito, Kavanaugh, and Barrett are attentive to precedents and reluctant to overrule ones they

---

488. See Eskridge, Interpreting Law, supra note 283, at 139–90.

489. See, e.g., Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1576–77 (2022) (Kavanaugh, J., concurring, joined by Gorsuch, J.) ("I would reorient the inquiry to focus on a background interpretive principle rooted in the Constitution's separation of powers. Congress, not this Court, creates new causes of action."); see also Anita S. Krishnakumar, Textualism and Statutory Precedents, 104 Va. L. Rev. 157, 165–83 (2018) (describing examples that show a shift away from a heightened presumption of correctness for statutory precedent).

490. 490 U.S. 228, 250 (1989) (holding that denial of partnership based on employee's not conforming to gender stereotypes is actionable sex discrimination under Title VII).

491. Bostock v. Clayton County, 140 S. Ct. 1731, 1741 (2020). Gorsuch later referenced *Hopkins*, but for a routine point of law. Id.

492. See id. at 1832–37 (Kavanaugh, J., dissenting).

493. See id. at 1763–64 (Alito, J., dissenting).

494. See 140 S. Ct. 1390, 1402–05 (2020) (Gorsuch, J.); id. at 1409 (Sotomayor, J., concurring in part); id. at 1411–16 (Kavanaugh, J., concurring in part); id. at 1421–22 (Thomas, J., concurring in the judgment); id. at 1425 (Alito, J., dissenting) (illustrating the various approaches of precedent applied by the several Justices).

disagree with, though they may construe such precedents narrowly.[495] Gorsuch is more willing to overrule, ignore, or recharacterize precedents inconsistent with constitutional or statutory text.[496] Thomas is willing to overrule any precedent not consistent with his reading of statutory and constitutional language.[497] For example, in *Glacier Northwest, Inc. v. International Brotherhood of Teamsters Local Union No. 174*, Barrett's opinion for the Court (joined by Roberts, Sotomayor, Kagan, and Kavanaugh) applied longstanding Supreme Court precedent requiring the union to show that the aggrieved conduct "arguably" fell within the NLRA's ambit (a test the union did not meet).[498] Concurring only in the judgment, Thomas (joined by Gorsuch) would have overruled the preemption approach followed in dozens of Supreme Court cases and hundreds of decisions by the courts of appeals.[499] In contrast, Alito wrote a narrow concurring opinion, carefully following a precedent he believed most on point.[500] The Thomas position strikes us as inconsistent with the rule of law; it would foment uncertainty by undermining longstanding precedent. The Roberts–Alito–Kavanaugh–Barrett position is, in our view, most consistent with the predictability, objectivity, and notice features of the rule of law.

Regardless of their individual views about stare decisis, all the newest-textualist Justices tend to brigade their semantic analyses with supportive precedents, which often involves choosing favorable decisions and distinguishing or ignoring the rest. The lack of a governing framework facilitates debates as to which precedents are most on point, how broadly

---

495. See, e.g., Cummings v. Premier Rehab Keller, P.L.L.C., 142 S. Ct. 1562, 1573–75 (2022) (Roberts, C.J.) (holding that precedent allowing a contract analogy should only be applied to limit available remedies, not to expand them); *Ramos*, 140 S. Ct. at 1432–40 (Alito, J., dissenting, joined by Roberts, C.J. & Kagan, J.) ("There are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision."); id. at 1419–20 (Kavanaugh, J., concurring in part) ("Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law . . . ?"); Amy Coney Barrett, Originalism and Stare Decisis, 92 Notre Dame L. Rev. 1921, 1941–43 (2017) (arguing that the Supreme Court considers stability of the law in determining how broadly or narrowly to construe precedent).

496. See, e.g., *Ramos*, 140 S. Ct. at 1402–05 (Gorsuch, J.) (arguing that a precedent is not entitled to stare decisis because it is either nonbinding or was based in one Justice's now-discredited constitutional theory).

497. See id. at 1421–22 (Thomas, J., concurring in the judgment) (arguing that "demonstrably erroneous decisions," namely "decisions outside the realm of permissible interpretation," are not entitled to stare decisis (internal quotation marks omitted) (quoting Gamble v. United States, 139 S. Ct. 1960, 1981 (2019) (Thomas, J., concurring))).

498. 143 S. Ct. 1404, 1411–14 (2023) (applying the NLRA preemption doctrine developed in San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245–46 (1959)).

499. See id. at 1417 (Thomas, J., concurring in the judgment, joined by Gorsuch, J.).

500. Id. at 1418 (Alito, J., concurring in the judgment, joined by Thomas & Gorsuch, JJ.) (arguing that the Supreme Court's precedents well establish that striking workers may be liable for damage to property, so a *Garmon* preemption analysis is not necessary).

to read relevant precedents, and how to reconcile conflicting lines of cases.[501] In *Oklahoma v. Castro-Huerta*, for example, many precedents were potentially relevant to the issue of whether the state could prosecute non-Indians for crimes committed on Native reservations.[502] Gorsuch anchored his dissent upon Chief Justice John Marshall's famous opinion in *Worcester v. Georgia*,[503] which held that only the federal government or the sovereign tribes could prosecute crimes committed on tribal reservations.[504] Lest non-Indians be subject to prosecution in tribal courts, Congress adopted the General Crimes Act of 1834 to provide for federal prosecution of such crimes.[505] Writing for the Court, Kavanaugh responded that *Worcester* had been superseded by subsequent precedents that established a new baseline: States have plenary authority over all land and people within their borders except where limited by the Supremacy Clause.[506] Gorsuch replied with precedents applying the rule that tribes retain quasi-sovereign status subject to congressional regulation, such as the General Crimes Act.[507]

Another recent case involving textualist disputes about applicable precedent is *Goldman Sachs Group v. Arkansas Teacher Retirement System*, which involved a securities fraud class action.[508] The Court had previously held that plaintiffs could establish the element of reliance based on a rebuttable presumption that they relied on the misrepresentation if it was reflected in the time-of-purchase market price.[509] To rebut the presumption, the defendant would have to "*show* that the misrepresentation *in fact* did not lead to a distortion of price."[510] The issue in *Goldman Sachs* was whether defendants bore the burden of persuasion

---

501. Compare Edwards v. Vannoy, 141 S. Ct. 1547, 1553–60 (2021) (Kavanaugh, J.) (interpreting statutory habeas precedents for the Court), with id. at 1562–66 (Thomas, J. concurring, joined by Gorsuch, J.) (arguing that the Court's habeas precedents were preempted by statute), and id. at 1566–73 (Gorsuch, J., concurring, joined by Thomas, J.) (reading the precedents more narrowly).

502. 142 S. Ct. 2486, 2493–94 (2022) (providing several examples of precedent addressing the issue of state sovereignty over Indian reservations).

503. See id. at 2505–07 (Gorsuch, J., dissenting).

504. Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 561 (1832).

505. *Castro-Huerta*, 142 S. Ct. at 2507 (discussing the enactment of the General Crimes Act of 1834 and noting that the Act remains in force today); see also 18 U.S.C. § 1152 (2018).

506. *Castro-Huerta*, 142 S. Ct. at 2493–94 (invoking Organized Vill. of Kake v. Egan, 369 U.S. 60, 72 (1962), and seven other precedents).

507. Id. at 2513–18 (Gorsuch, J., dissenting).

508. 141 S. Ct. 1951, 1957 (2021).

509. See, e.g., Erica P. John Fund v. Halliburton Co., 563 U.S. 804, 813 (2011) (upholding and following the presumption that an investor relies on a misrepresentation so long as it was reflected in the market price at the time of his transaction); Basic Inc. v. Levinson, 485 U.S. 224, 245–47 (1988) (adopting such rebuttable presumption because it is consistent with the policy of the Securities Exchange Act of 1934 and is supported by common sense and empirical studies).

510. *Basic*, 485 U.S. at 248 (emphasis added); see also *Erica P. John Fund*, 563 U.S. at 813 (applying the holding of *Basic*, 485 U.S. at 248).

on such a "showing" or just the burden of production.[511] Barrett's majority opinion ruled that defendants bore the burden of persuasion.[512] Dissenting in part, Gorsuch, Thomas, and Alito argued that the precedents did not foreclose what they considered the better legal baseline: that the party required to establish a fact (reliance) bore the ultimate burden of persuasion.[513] Barrett responded that, as a practical matter, the dissenters' rule would negate the point of those precedents, which was to force information from the parties best able to provide it.[514] In our view, her opinion is a model for neutral application of precedent.

CHOICE 10: SUBSTANTIVE CANONS

Textualist theory privileges linguistic canons but broadly questions the legitimacy of substantive canons. Barrett, for instance, argues that "substantive canons are designed not to interpret text but rather to advance substantive policies"[515] and are thus "at apparent odds with the central premise from which textualism proceeds."[516] Similarly, in his Tanner Lectures, Scalia complained that textualists should not bother with substantive, "dice-loading" canons because they might lead a judge away from ordinary meaning and, hence, away from the neutrality and objectivity required by the rule of law.[517] He made an exception for the rule of lenity because it was objectively ratified by longstanding tradition.[518] Some nontextualist scholars have even argued that textualism cannot accommodate any substantive canons.[519] Textualist practice, though, is much more equivocal and accepting of substantive canons, even expressing enthusiasm for the new MQD (discussed in Choice 8).[520] In Indian law cases, the ongoing disagreement between Gorsuch and the other textualists is the former's embrace of the longstanding "Indian

511. *Goldman Sachs*, 141 S. Ct. at 1961–62.

512. Id. at 1963.

513. Id. at 1966–69 (Gorsuch, J., concurring in part and dissenting in part, joined by Thomas & Alito, JJ.).

514. See id. at 1962–63 (majority opinion).

515. Barrett, Congressional Insiders and Outsiders, supra note 200, at 2203.

516. Barrett, Substantive Canons, supra note 19, at 110.

517. Scalia, A Matter of Interpretation, supra note 1, at 27–29.

518. Id. at 29 ("The rule of lenity is almost as old as the common law itself, so I suppose that is validated by sheer antiquity." (footnote omitted)).

519. See Benjamin Eidelson & Matthew C. Stephenson, The Incompatibility of Substantive Canons and Textualism, 137 Harv. L. Rev. (forthcoming 2023) (manuscript at 73–74), https://ssrn.com/abstract=4330403 [https://perma.cc/N2G5-AUX2] (arguing that any efforts directed at reconciling substantive canons with textualism fail because they either commit textualists to jurisprudential positions they ordinarily denounce or imply such a narrow scope for substantive canons that nothing resembling their current use would survive).

520. See supra notes 465–478 and accompanying text.

canon," which the Court deployed for decades to read treaties and statutes from the perspective of Native peoples and tribes.[521]

In practice, Scalia authored or signed onto hundreds of opinions relying on dozens of substantive canons, and his 2012 treatise endorsed several substantive canons.[522] Many of the dice-loading canons Scalia supported were clear statement rules, which, according to Barrett, "permit[] a court to *forgo* a statute's most natural interpretation in favor of a less plausible one more protective of a particular value."[523] Such substantive canons arguably enforced constitutional norms that Scalia believed were "underenforced."[524]

In 2010, then-Professor Barrett agreed with the underenforced-constitutional-norms justification as a way to reconcile textualism with clear statement rules like the rule of lenity, avoidance of unconstitutional interpretations, the rule against retroactivity, and the federalism-based, "super-strong" clear statement rules.[525] The Constitution is the ultimate rule of law, as the Supremacy Clause says,[526] and so canons that gently implement constitutional norms might be admissible. Barrett went well beyond the underenforced-constitutional-norms justification, however, when she defended aggressive application of such canons even when they may "overenforce" constitutional norms.[527] Her justification was that Congress frequently responds to aggressive Supreme Court statutory interpretations, so departing from ordinary meaning requires Congress to deliberate more carefully on sensitive constitutional issues.[528] Unfortunately, in 2010, when she published her article, Congress had been gridlocked for a dozen years and was able to enact only a handful of overrides each session; today, there is virtually no chance of congressional overrides for any controversial issue, and the Court has the final word more than ever before.[529]

---

521. See Arizona v. Navajo Nation, 143 S. Ct. 1804, 1826 (2023) (Gorsuch, J., dissenting).

522. See Eskridge, Interpreting Law, supra note 283, at 425–45 (appendix listing hundreds of Supreme Court opinions following dozens of substantive canons, almost all joined by Scalia); Scalia & Garner, supra note 7, at xv–xvi (identifying twenty substantive canons split into four categories: expected meaning, government-structuring, private right, and stabilizing canons).

523. Barrett, Substantive Canons, supra note 19, at 109–10 (emphasis added).

524. Eskridge & Frickey, Quasi-Constitutional Law, supra note 468, at 630–31.

525. Barrett, Substantive Canons, supra note 19, at 168–77; accord John F. Manning, Legal Realism & the Canons' Revival, 5 Green Bag 2d 283, 292 n.42 (2002) (noting that textualists often support canons that reflect constitutionally derived values).

526. See U.S. Const. art. VI, cl. 2.

527. See Barrett, Substantive Canons, supra note 19, at 172–77.

528. Id. at 175.

529. See Matthew R. Christiansen & William N. Eskridge, Jr., Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011, 92 Tex. L. Rev. 1317, 1331–44 (2014).

The underenforced-constitutional-norms justification faces several dilemmas from a rule-of-law perspective. First, many strong clear statement rules—and especially the super-strong ones—lead the textualist away from ordinary meaning.[530] Statutes no longer mean what they seem to say, and We the People must await the Court's selection and application of its favored canons before We can be sure. The first problem is compounded by a second one: The norms justification introduces more choices—and therefore discretion—into cases where a constitutionally inspired canon might apply. Should the judge apply the canon? How specific does that statutory language have to be? (Once launched by the Court, the constitutionally inspired canons have evolved—typically from presumptions to clear statement rules to super-strong clear statement rules.) Should there be an exception to the canon?

The new textualists realize they are under assault for judicial activism and may be refining their justifications for the MQD. In *Biden v. Nebraska*, Barrett abandoned her earlier position that the Court should "overenforce" norms through substantive clear statement rules and took the position that the major questions idea was nothing more than a textual canon. That is, the MQD was normal, ordinary-meaning interpretation.[531] Barrett attempted to support this argument with a familiar, common sense example from ordinary life: Imagine that a parent hires a babysitter to watch the children overnight on the weekend, and the parent hands the babysitter a credit card and instructs the babysitter to use it to make sure the kids have fun. We all understand, says Barrett, that the parents' instruction permits the babysitter to take the children to a movie theater, but it does not permit the babysitter to take the children to an amusement park and stay in a hotel overnight.[532] Similarly, proposes Barrett, the meaning of authorizations from Congress to agencies are limited in scope.

This claim further muddies what the Court considers to be a "major question" and rests upon dubious logic about context and delegated authority. Barrett calls for attention to context, but her reasoning ignores the COVID context of the recent MQD cases. What if the children all became sick and the parents were unreachable? Would the sitter not have an implicit authorization to take the kids to the hospital and seek medical assistance? More broadly, are the ordinary linguistics of babysitter delegation the same as the ordinary linguistics of agency delegation?

---

530. But see Brian G. Slocum & Kevin Tobia, The Linguistic *and* Substantive Canons, 137 Harv. L. Rev. Forum (forthcoming 2023) (manuscript at 23–30), https://ssrn.com/abstract=4186956 [https://perma.cc/4EXD-JWUJ] (arguing that some substantive canons, like the presumption against retroactivity, have a linguistic basis); Ilan Wurman, Importance and Interpretive Questions, 109 Va. L. Rev. (forthcoming 2023) (manuscript at 35–47), https://ssrn.com/abstract=4381708 [https://perma.cc/5PKJ-NZP7] (arguing that the major questions doctrine is a linguistic canon).

531. Biden v. Nebraska, 143 S. Ct. 2355, 2378–81 (2023) (Barrett, J., concurring).

532. Id. at 2378–80.

A final problem is empirical. Even taking Barrett's analogy between babysitting and lawmaking at face value, ordinary Americans do not find the babysitter example to be common sense! An empirical study presented people with the babysitter example and asked whether the babysitter followed or broke the rule. The study found that the vast majority (92%) disagreed with Barrett: The amusement park trip did not violate the instructions.[533]

For another example of the malleability of the substantive canons, the Roberts Court requires a strong clear statement from Congress before it will consider a statutory lawsuit prerequisite "jurisdictional."[534] In *Wilkins v. United States*, the Court applied the rule over the dissent of Thomas (joined by Roberts and Alito), who argued for an exception to the clear statement rule when the defending party is the federal government.[535] The textualist dissenters maintained that any waiver of immunity by the United States should be strictly construed and any preconditions for suit against the sovereign should usually be considered jurisdictional.[536] This turns the jurisdiction clear statement rule on its head.

Finally, commenters have worried that such "power canons" would become a form of "stealth constitutionalism."[537] How do you say, exactly, whether a constitutional rule is "underenforced" to start with, and at what point does it become overenforced through these clear statement rules? There is no objective metric for such judgments.

John Manning objects to the "aggressive construction" of clear statement rules because they "impose a clarity tax on Congress by insisting that Congress legislate exceptionally clearly when it wishes to achieve a statutory outcome that threatens to intrude upon some *judicially identified* constitutional value."[538] Is the post–*West Virginia v. EPA* Court even listening to these rule-of-law concerns—or will it be emboldened by a lack of immediate punishment to engage in ever more activist sabotage of the regulatory state, the rights of marginalized populations, and the liberty protections for criminal defendants?

---

533. See Kevin Tobia, Daniel Walters & Brian G. Slocum, Major Questions, Common Sense? 97 S. Cal. L. Rev. (forthcoming 2023) (manuscript at 41–43), https://ssrn.com/abstract=4520697 [https://perma.cc/WSU4-83A5].

534. E.g., MOAC Mall Holdings LLC v. Transform Holdco LLC, 143 S. Ct. 927, 936 (2023) (summarizing and explaining several Roberts Court precedents imposing a clear statement rule for considering a mandatory statutory requirement to be jurisdictional). Clear statement rules require that Congress legislate clearly when legislation would impose on certain values (e.g., federalism, non-retroactivity). John F. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 401 (2010) [hereinafter Manning, Clear Statement Rules]; see also Barrett, Substantive Canons, supra note 19, at 118; Eskridge & Frickey, Quasi-Constitutional Law, supra note 468, at 597.

535. 143 S. Ct. 870, 876 & n.3 (2023).

536. Id. at 881 (Thomas, J., dissenting).

537. See William N. Eskridge, Jr. & Philip P. Frickey, Foreword: Law as Equilibrium, 108 Harv. L. Rev. 26, 81–87 (1994).

538. Manning, Clear Statement Rules, supra note 534, at 399, 419 (emphasis added).

As to the last point, the long-established rule of lenity—a canon championed by Ruth Bader Ginsburg and Antonin Scalia, the oldest substantive canon of all, and a nondelegation canon on top of all that—is under siege in the Roberts Court. To be sure, the pre-2017 Court applied the rule of lenity mainly to protect corrupt white-collar politicians and businessmen[539] while usually giving the cold shoulder to blue-collar defendants.[540] Ironically, the post-Scalia Court recently overturned criminal convictions of several blue-collar defendants—but without relying on the rule of lenity. One reversal came in *Van Buren v. United States*, in which Barrett narrowly interpreted a broad computer-crime law to absolve a police officer tapping into police databases for a personal business.[541] Her opinion for the Court placed great weight on the word "so" (confirmed by an analysis of the statutory structure) but explicitly abjured reliance on lenity—only to conclude with a warning that the government's broader interpretation would "criminalize[] every violation of a computer-use policy, [making] millions of otherwise law-abiding citizens . . . criminals."[542]

Likewise, in *Wooden v. United States*, Kagan's opinion for the Court reversed the defendant's sentence enhancement because the Government's reading of "occasion" was semantically implausible.[543] Concurring only in the judgment, Gorsuch would simply have invoked the rule of lenity[544]—but Kavanaugh's concurring opinion responded with a plea that the Court retire the venerable canon. He argued that "the rule of lenity has appropriately played only a very limited role in this Court's criminal case law."[545] The reason for its limited role, according to Kavanaugh, is that the traditional textualist sources and canons almost always reach the right answer (in Kavanaugh's terms, the "best reading"), as Kagan did in this case.[546] To satisfy "fair notice" in criminal cases, Kavanaugh suggested that a newer (substantive) canon could do the job just as well—namely, the presumption that the government must prove mens rea in criminal prosecutions.[547]

---

539. See, e.g., Marinello v. United States, 138 S. Ct. 1101, 1106–08 (2018) (using the rule of lenity in favor of company owner convicted of obstructing the administration of tax laws); McDonnell v. United States, 579 U.S. 550, 576–77 (2016) (applying the rule of lenity to overturn former GOP Governor's conviction in major corruption case); Skilling v. United States, 561 U.S. 358, 410–11 (2010) (applying the rule of lenity in favor of Enron CEO after he was convicted of honest-services wire fraud).

540. See, e.g., Muscarello v. United States, 524 U.S. 125, 138 (1998) (refusing to invoke the rule of lenity, despite objections from Ginsburg and Scalia, in matter involving the sentence enhancement of a street-level drug dealer for "carrying" a firearm in his car).

541. 141 S. Ct. 1648, 1652 (2021).

542. Id. at 1661.

543. 142 S. Ct. 1063, 1069–71 (2022).

544. See id. at 1081 (Gorsuch, J., concurring in the judgment).

545. Id. at 1075 (Kavanaugh, J., concurring).

546. Id.

547. Id. at 1076.

Wooden and *Van Buren* leave fair notice and the rule of law in a state of uncertainty in criminal cases. Is the rule of lenity now irrelevant in such cases? Is the mens rea canon relevant? It's unclear. Maybe Kavanaugh is right that a purely textualist Court should just provide its "best reading" of the statute and let the cards fall where they may.[548] But the Roberts Court does not have a coherent, unified, predictable theory of "best reading." For example, why should Van Buren and Wooden not get the benefit of the rule of lenity, which is the oldest of the nondelegation canons,[549] when the MQD—also linked to nondelegation—disrupted "best reading" analyses in high-stakes cases involving human life (the *COVID-19 Cases*) and global warming (*West Virginia v. EPA*)?

Although Barrett declined to invoke the rule of lenity or constitutional avoidance in *Van Buren*, which involved a serious criminal prosecution of a police officer who used his work computer in ways that millions of Americans (including not a few law professors) do, she joined Alito's opinion for the Court in *Sackett v. EPA*.[550] To support his narrow view of "waters of the United States" and "adjacent wetlands," Alito invoked both constitutional avoidance and lenity against vague rules—in a civil case.[551] Dozens of federal statutes impose civil penalties, with the possibility of criminal liability for intentional violations. In a Court where the rule of lenity and due process concerns about vagueness are not openly invoked to protect ordinary criminal defendants like Van Buren and Wooden, might these same concerns now be invoked by civil plaintiffs like the Sacketts when the green police limit their plans for land development?

In short, substantive canons make a big difference in the Roberts Court—especially in its uber-textualist phase, in which legislative materials are suspect, agency views often don't carry much weight, and even the Court's own precedents are ignored, marginalized, or overruled.[552] There are dozens of such canons the Court can use to load the dice, their application is often discretionary and contestable, and the Court's

548. Kavanaugh, Fixing Interpretation, supra note 23, at 2121.

549. See United States v. Davis, 139 S. Ct. 2319, 2333 (2019) ("[The rule of lenity] is 'perhaps not much less old than' the task of statutory 'construction itself.'" (quoting United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820) (Marshall, C.J.))).

550. 143 S. Ct. 1322, 1328 (2023).

551. Id. at 1335–36, 1342.

552. But see Krishnakumar, Reconsidering Substantive Canons, supra note 111, at 847–64 (presenting quantitative data from Roberts Court statutory cases and concluding that the substantive canons are "infrequently invoked"). Professor Krishnakumar's quantitative data is illuminating. It shows that Justices invoke substantive canons in statutory cases on a spectrum—anywhere from 7.7% (Kavanaugh) to 22.6% (Gorsuch), and 15% overall in all opinions. Krishnakumar, 2005–2019 Data, supra note 111, at 625–26. Though a 15% rate of citation to substantive canons is lower than the conventional wisdom, it is also not an insubstantial amount.

textualists do not agree about which ones to privilege or privilege first.[553] Hence, rare is the hard case in which the Justices do not have the option of picking or ignoring or even making up a substantive canon or other new "doctrine."[554]

CHOICE 11: CONFLICTING PROVISIONS OR STATUTES

Just as there may be clashing precedents in Choice 9 or conflicting canons in Choice 10, there might be statutes or provisions that seem to be inconsistent. As there are usually no linguistic principles on which to rely, how do the newest textualists make these choices? Choice 11, resolving conflicts between statutory provisions, often requires extratextual judgment and thereby offers more room for judicial discretion and popular confusion about what the law requires.

A conflict between two sub-sub-subsections was at the center of one of the Biden Administration's few big wins, *Biden v. Texas*.[555] Section 1225(b)(2)(C) of the Immigration and Nationality Act provides that "[i]n the case of an alien . . . who is arriving on land . . . from a foreign territory contiguous to the United States, the [Secretary of Homeland Security] may return the alien to that territory pending a proceeding under [§] 1229a."[556] Reversing a policy of returning to Mexico all undocumented immigrants (including asylum seekers) crossing the Mexican border, the Biden Administration invoked the discretionary language ("may") of § 1225(b)(2)(C) to release many of those immigrants into the country, pending resolution of their petitions.[557] Writing for Kavanaugh and Barrett as well as the three pragmatic Justices, Roberts upheld the presidential policy.

Alito's dissent focused on a different provision, § 1225(b)(2)(A), which provides that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a proceeding

---

553. Compare *Davis*, 139 S. Ct. at 2333 (Gorsuch, J.) (appealing to lenity before avoidance), with id. at 2351–52 (Kavanaugh, J., dissenting) (proposing that lenity should be a last resort).

554. Major questions was not even a fully defined "doctrine" until Gorsuch announced it in *NFIB v. OSHA*. See 142 S. Ct. 661, 667–70 (2022) (Gorsuch, J., concurring).

555. 142 S. Ct. 2528 (2022).

556. 8 U.S.C. § 1225(b)(2)(C) (2018). Though the statute makes the Attorney General responsible for returning the noncitizen to the contiguous territory, in practice, this duty falls to the Secretary of Homeland Security.

557. Brief for the Petitioners at 19–20, *Biden v. Texas*, 142 S. Ct. 2528 (No. 21-954), 2022 WL 815341; see also Opati v. Republic of Sudan, 140 S. Ct. 1601, 1609 (2020) ("[T]he word 'may' *clearly* connotes discretion." (internal quotation marks omitted) (quoting Halo Elecs., Inc. v. Pulse Elecs., Inc., 136 S. Ct. 1923, 1931 (2016))); Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion.").

under section 1229a."[558] Because § 1225(b)(2)(A) makes detention mandatory, Alito, Thomas, and Gorsuch argued that the otherwise discretionary return authority in § 1225(b)(2)(C) becomes mandatory if the Secretary chooses not to detain or parole (the third option) undocumented immigrants.[559] The dissenters arguably have the better textual argument, yet *Biden v. Texas* divided the Court's textualists 3-3—pitting their preference for following the plain meaning of the immigration law (Alito) against their reading of Article II of the Constitution to vest foreign policy and diplomacy largely with the President (Roberts).[560] Resolving this sort of conflict is a matter of policy, not linguistics, and it illustrates the policy-based discretion inherent in textualism.

The same discretionary choice is also present when there is a conflict between statutes. For instance, Gorsuch indicated in *Bostock* that a conflict between Title VII's antidiscrimination provisions and the Religious Freedom Restoration Act of 1993 (RFRA) should be resolved in favor of RFRA because it "operates as a kind of super statute, displacing the normal operation of other federal laws."[561] But how is it determined that RFRA is more of a super-statute than Title VII? Super-statutes have been described as "landmark laws that successfully displace common law norms and entrench new transformational legal rules."[562] Certainly, Title VII has as much of a claim to super-statute status as RFRA, and Title VII already contains detailed religious allowances.[563] Yet the Court asserted that RFRA trumps Title VII without any analysis or acknowledgment of its policy decision.

The recent case *Turkiye Halk Bankasi* involved a similar phenomenon: How does the general criminal law jurisdiction provision interact with the Foreign Sovereign Immunities Act? Does the sovereign immunity defense afforded by the latter statute seep over into the earlier, general one? Kavanaugh's opinion for the Court made a persuasive case for maintaining a formal separation between the two statutory regimes—but Gorsuch's opinion highlighted the fact that as statutes proliferate,

---

558. 8 U.S.C. § 1225(b)(2)(A); see also *Biden v. Texas*, 142 S. Ct. at 2549–50 (Alito, J., dissenting).

559. *Biden v. Texas*, 142 S. Ct. at 2549–50.

560. Id. at 2543 (majority opinion) (noting that Texas's position interferes with the President's management of our frayed relations with Mexico).

561. Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020).

562. Eskridge et al., The Meaning of Sex, supra note 157, at 1507 n.14; see also William N. Eskridge, Jr. & John Ferejohn, Super-Statutes, 50 Duke L.J. 1215, 1230–46 (2001) (providing examples of super-statutes including the Sherman Antitrust Act of 1890, the Civil Rights Act of 1964, and the Endangered Species Act of 1973).

563. See 42 U.S.C. § 2000e-1 (2018) (allowing religious organizations to discriminate because of religion); id. § 2000e-2(e) (allowing religion-based discrimination by colleges and universities substantially controlled by a religious organization).

they will inevitably come into conflict in ways not anticipated by their drafters.[564]

CHOICE 12: TEXTUALIST ESCAPE HATCHES

A textualist judge is not often obligated to select an interpretation deeply objectionable to their politics, faith tradition, or moral intuitions. Textualists privilege semantic meaning, but within the parameters of the newest textualism, judges have plenty of room to find the semantic meaning they like the most.[565] A judge has discretion to choose the statutory term or precedent they consider most on point,[566] which contextual and (con)textual evidence that will be considered,[567] whether the term will be given a narrow or broad meaning,[568] and whether and how to apply both linguistic and substantive canons.[569] With all of these discretionary interpretive choices, a textualist judge can typically construct a "best reading" of the statute that is consistent with the judge's view of desirable or acceptable policy outcomes.[570]

In those situations when an unacceptable public meaning of the text is hard to avoid, the new textualist judge has a choice to apply the absurdity doctrine and revise the language of the statute.[571] Manning indicates that "even the staunchest modern textualists still embrace and apply, even if rarely, at least some version of the absurdity doctrine."[572] To be sure, the newest textualists are reluctant to concede that applying the absurdity doctrine necessarily rejects the text's public meaning. Scalia and Gorsuch give the absurdity doctrine an objective gloss—via what a "reasonable person" would believe to be the "correct" or "fair" meaning of the text—that positions it as just one aspect of the public meaning of a text, rather than a doctrine for deviating from that meaning.[573] But this inquiry—

564. Compare Turkiye Halk Bankasi A.S. v. United States, 143 S. Ct. 940, 946–49 (2023) (Kavanaugh., J.), with id. at 953 (Gorsuch, J., concurring in part and dissenting in part) (arguing that any exception must stand on the text alone, not inferred congressional intention).

565. See, e.g., Tobia et al., Ordinary Meaning, supra note 260, at 417–20 (arguing that courts often find legal rather than ordinary meaning—giving judges discretion to choose between the two).

566. See supra Choice 1.

567. See supra Choice 5.

568. See supra Choice 6.

569. See supra Choice 5, Choice 10.

570. See Kavanaugh, Fixing Interpretation, supra note 23, at 2121 (referring to the judge's obligation to determine the "best reading" of a statute).

571. See Manning, Absurdity Doctrine, supra note 374, at 2388 ("From the earliest days of the Republic, the Supreme Court has subscribed to the idea that judges may deviate from even the clearest statutory text when a given application would otherwise produce 'absurd' results.").

572. Id. at 2391.

573. E.g., Yellen v. Confederated Tribes of the Chehalis Rsrv., 141 S. Ct. 2434, 2460 n.3 (2021) (Gorsuch, J., dissenting) (indicating that "[a]nything more would threaten the

asking what a "reasonable person" would believe is "correct" or "fair"—does not involve an objective standard external to the judge.[574] Scalia and Gorsuch's "reasonable person," like Barrett's "reasonably informed interpreter" for purposes of the MQD,[575] is a normative construct that is subject to the perspectives of the Justices.

Thus, one textualist's plain meaning can be another's absurdity. For example, in *Brown v. Plata*, Justice Anthony Kennedy's uber-textualist opinion for the Court upheld a lower court prison injunction that required the release of prisoners if the authorities could not satisfy minimal Eighth Amendment standards for overcrowding and medical care.[576] Kennedy found the lower court's findings of fact closely tailored to the requirements of the Prison Litigation Reform Act of 1995 (PLRA).[577] In a furious dissent, Scalia (joined by Thomas) denounced the Court's opinion as a "judicial travesty" that violated "common sense."[578] In his pastiche of the absurdity rule, Scalia opined that, "before allowing the decree of a federal district court to release 46,000 convicted felons, this Court [sh]ould *bend every effort* to read the law in such a way as to *avoid that outrageous result*."[579]

Of course, no prisoners had been released, nor were they released after the decree was affirmed. Moreover, in detailed testimony and findings of fact, the record revealed that one prisoner was dying every week because of systemwide noncompliance with agreed-upon consent decrees.[580] From the perspective of human beings whose health and lives were in peril, in serious violation of the Eighth Amendment as construed by the Court, was the judicial insistence on minimal standards a "travesty"? Or did the interpretation merely adhere to ordinary meaning? As before, the methodological debate was peripheral to the policy issue that really

---

separation of powers, undermine fair notice, and risk upsetting hard-earned legislative compromises"); see also Manning, Absurdity Doctrine, supra note 374, at 2392–93 (explaining that strict textualists ask how a reasonable person, familiar with social and linguistic conventions, would interpret the text); id. at 2419–20 (providing examples of Scalia endorsing "some form" of the absurdity doctrine).

574. It may be that ordinary people interpret statutes to avoid absurd results. See Tobia et al., Statutory Interpretation From the Outside, supra note 284, at 284 n.290 (citing evidence that ordinary people rely on purpose (limited by semantic meaning)). The new textualists have not made that claim.

575. See Biden v. Nebraska, 143 S. Ct. 2355, 2380–81 (2023) (Barrett, J., concurring) (invoking the expectations of a "reasonably informed interpreter" to help construe a statute).

576. See 563 U.S. 493, 502 (2011).

577. See id. at 524–45 (concluding that overcrowding was the "primary cause" of the violation, consistent with the text of the PLRA). Alito and Roberts dissented based upon a close analysis of the record, which they found inconsistent with the PLRA requirements. Id. at 564–81 (Alito, J., dissenting).

578. Id. at 550 (Scalia, J., dissenting).

579. Id. (emphasis added).

580. Id. at 507–08 (majority opinion).

divided the Justices: Does the Eighth Amendment protect incarcerated individuals against confinement that puts their lives at great risk?

The newest textualists ought to be ambivalent about the absurdity escape hatch. An interpretive device like the absurdity doctrine is occasionally necessary to mitigate the harsh results of public meaning, and it might be a device for avoiding constitutional boundaries. On the other hand, even beyond its subjectivity, the doctrine is inconsistent with an essential assumption of the new textualism, which is that Congress drafts carefully and should be accountable for the text it adopts under Article I, Section 7. This assumption is at the heart of the new textualist version of the separation of powers. As Manning has observed, "By giving judges broad authority to displace legislative outcomes based on an unstructured identification of background social values, the absurdity doctrine permits judges to make an end run around the constitutional norms that establish those boundaries."[581]

Furthermore, if the absurdity doctrine is accepted, it is difficult to argue against other mitigating doctrines. Why should public meaning not also yield to "unreasonable" outcomes, or even nonoptimal outcomes?[582] Recall *King v. Burwell*.[583] The Court held that the Affordable Care Act (ACA) provided for tax credits to customers of federal insurance exchanges, despite key provisions referencing only state exchanges.[584] The Court reasoned that a literal interpretation would "make little sense" and would undermine the entire ACA but did not invoke the absurdity doctrine.[585] In turn, Scalia found the meaning of the ACA to be rational and free of ambiguity or absurdity despite the powerfully supported claim that the supposedly unambiguous plain meaning would set the ACA to self-destruct.[586] Would a "reasonable person" find a suicidal interpretation of the ACA to be absurd?

In sum, even after working through the eleven foregoing choices, textualists might still jump ship. This choice has focused on the escape hatch of "absurdity," but there are other potential escape hatches. Thus, a textualist alarmed by the apparent plain meaning of a statute can also escape through appeal to constitutional avoidance;[587] bad consequences

581. Manning, Absurdity Doctrine, supra note 374, at 2393.

582. See William N. Eskridge, Jr., Dynamic Statutory Interpretation 45–46 (1994) ("[T]here is no logical reason not to sacrifice plain meaning when it directs an 'unreasonable' result that was probably unintended by Congress.").

583. 576 U.S. 473 (2015).

584. See id. at 498.

585. Id. at 491 (arguing that since the ACA requires all exchanges to submit reports on their health plans, including information that is necessary to determine whether taxpayers have received excess advanced payments, the ACA intended to make tax credits available on federal exchanges).

586. See id. at 500 (Scalia, J., dissenting) (arguing that the Court's interpretation meant that "[w]ords no longer have meaning").

587. See supra notes 542–545 and accompanying text.

and "disruption" of established reliance interests;[588] or lack of jurisdiction and other passive virtues.[589]

CONCLUSION

Textualism, once a seemingly simple, unified, straightforward theory, is now complex and multivocal, even convoluted. The Court's fractures and each Justice's individual inconsistencies reveal that the newest textualists, though a solid majority, have, to paraphrase Kavanaugh, not agreed on the rules of the road.[590] The recent "Text War" cases demonstrate that the Court's broad, unfocused commitment to textualism does not guarantee predictable, transparent, neutral interpretations of federal statutes. The Justices have thus far offered the public no instruction manual for textualism with metarules that could address the numerous interpretive inconsistencies revealed in every recent Term of the Court. It is not clear where the newest-textualist Justices will take the Court methodologically or how they will get there.

How many "textualisms" are there? Back-of-the-envelope calculations suggest *a lot*. There are twelve major choices; supposing that these choices are independent, with two options for each choice, that would suggest over 4,000 versions of textualism! The number could be even larger. Most of the twelve choices involve sub-choices (and some sub-sub-choices), and all the choices have more than two possible answers. Moreover, the order of operations among the twelve choices could matter, leading to even more possibilities.[591]

This rough calculation, though staggering, overestimates the practical or likely possibilities. Perhaps there are some *broader textualist* orientations, which imply a set of crosscutting answers to the choices (i.e., the choices are not independent). For example, "Textualism A" answers all twelve choices in one way (or with one or two variations), while "Textualism B" answers all twelve choices in a different way (or with one or two variations)—and all the Justices are either type A or type B textualists. If so, there is still a predictability problem, but it is less extreme than we have made it out to be.

---

588. See McGirt v. Oklahoma, 140 S. Ct. 2452, 2502 (2020) (Roberts, C.J., dissenting) (objecting to the "potential for cost and conflict" and the "disruption inflicted" by the Court's uber-textualist decision).

589. See, e.g., id. at 2502–04 (Thomas, J., dissenting) (arguing that the Court had no jurisdiction to review the appeal).

590. Kavanaugh, Fixing Interpretation, supra note 23, at 2121.

591. Some choices naturally arise before others: Choice of text (Choice 1) occurs before any whole act or whole-code analysis (Choice 7). But other choices could be made in different orders, leading to different outcomes. For example, should textualists first consider agency interpretations (Choice 7) or substantive canons (Choice 10)? See Kenneth A. Bamberger, Normative Canons in the Review of Administrative Policymaking, 118 Yale L.J. 64, 70–74 (2008) (discussing the conflict between substantive canons and judicial deference to agency interpretations). Thanks to Kart Kandula for suggesting this point.

This is doubtful. Consider, as an example, one of the more influential recent proposals about textualist types. Tara Grove has developed a broad distinction between "formalistic" and "flexible" textualisms.[592] Identification as a formalistic or flexible textualist might imply an answer to one aspect of Choice 7 (a formalist favoring text-based context over social context), but our survey reveals that Gorsuch—a formalist by Professor Grove's typology—is super-flexible and contextual in Indian law cases, while the flexible Roberts and Kavanaugh are quite the formalists in such cases. Nor does the Grove typology fully answer Choice 7: For example, does a formalistic textualist employ the whole act or whole code rules? Both? Nor does the answer entail how one should answer Choices 1, 2, 3, 4, 5, 6, 8, 9, 10, 11, or 12. Of course, other textualists might propose more highly specified, crosscutting types, which imply answers to all the Choices. This Article invites exactly this kind of elaboration: If textualism claims to be more objective and predictable than its competitors, its proponents and practitioners must elaborate on what their theory *is*. But textualists have not yet offered theories of language and interpretation that would create coherent crosscutting methodologies.

As it stands, the Court's textualist hodgepodge facilitates politically oriented judging. In constitutional cases, the six Justices appointed by Republican presidents almost always vote consistently with the 2016 GOP platform,[593] often with insufficient evidence that their activism is required by either constitutional text or original meaning and sometimes with error-filled law office history. In statutory cases, usually involving issues not addressed in the GOP platform, none of the Justices follow an entirely consistent textualist methodology.

In our view, current methodological divisions are more deeply driven by a variety of conservative political ideologies. Alito is basically a Burkean conservative, which reflects his comfort with tradition-based arguments and his particular interest in religious freedom.[594] Roberts and Kavanaugh are legal process conservatives, attentive to precedent, neutral principles,

---

592. See Grove, supra note 23, at 267.

593. The most recent Republican Party Platform, created in 2016, explicitly supported the integrity of "free markets" against the "nanny state"; individual workers against unions and compulsory dues; natural law and "family values" against gay marriage; white people against racial quotas and preferences; "human life" against *Roe v. Wade*; a revival of the nondelegation doctrine against judicial deference to agency interpretations; religious liberty against the siege from antidiscrimination laws; a broad Second Amendment right to own and carry guns against state regulation; and polluters against EPA's "radical environmentalists." See 2016 Republican Party Platform, Am. Presidency Proj. (July 18, 2016), https://www.presidency.ucsb.edu/documents/2016-republican-party-platform [https://perma.cc/4R32-4LW6]. The Roberts Court has faithfully implemented all these partisan stances by creating a new constitutional regime, often overruling or marginalizing constitutional precedents.

594. Burke maintained that religion, including religious diversity, was the foundation for civil society. See Edmund Burke, Reflections on the Revolution in France 90 (L.G. Mitchell ed., Oxford Univ. Press 2009) (1790).

passive virtues, and institutional guardrails. Thomas and Gorsuch are the most strongly Hayekian among the Justices: They valorize the spontaneous generation of unregulated private choices and free markets and seem hostile to centralized, liberty-restricting administration.[595] To make matters more complicated, each jurist has soft spots where they behave differently than expected. Thus, uber-formalist Gorsuch (whose Tenth Circuit experience rendered him especially knowledgeable) becomes a context-sensitive minority rights advocate in Indian law cases. Roberts and Kavanaugh (top executive department officials before their judicial appointments) defer to the White House on matters of national security, foreign affairs, and immigration.

These developments—textualism's increasing complexity and the Justices' tendency to trump precedent (and often statutory text) in favor of political philosophies—are especially worrying alongside another closely related trend: bolder activism. The majority are trying to accomplish more with an undertheorized methodology. For instance, their proliferation of super-strong clear statement rules that override ordinary meaning suggests that the newest-textualist majority are using statutory interpretation to engage in a stealth constitutionalism that corrodes policy choices made by elected legislators and presidents. These patterns—obscurity and inconsistency, political ideology, and activism—are deeply troubling for the Court, country, and rule of law.

Is the newest-textualist Court locked into the unfortunate trajectory outlined above? The media and partisan observers assume that it is.[596] As academics supporting the rule of law and hoping that the Court can pull out of its legitimacy nosedive, we hold out some optimism. We think all six newest textualists support the rule of law, and most of them agree with Roberts that the Court's plunging legitimacy is a matter of concern. And they ought to be open to Kavanaugh's call for clearer "rules of the road."[597]

Of course, textualist rules of the road must necessarily be sophisticated. The theory cannot simultaneously be simple and intuitive yet also significantly constrain judges in cases involving complex statutes and difficult interpretive questions. Careful, text-centric interpretation is unavoidably complex. Consider some of the choices described in the

---

595. See F.A. Hayek, Law, Legislation, and Liberty, *in* 19 The Collected Works of F.A. Hayek 1, 15–21 (Jeremy Shearmur ed., 2021). For an argument that the Roberts Court GOP majority is generally united behind a Hayekian assault on the administrative state, see Gillian E. Metzger, The Supreme Court 2016 Term: Foreword, 1930s Redux: The Administrative State Under Siege, 131 Harv. L. Rev. 1, 2–7 (2017).

596. See, e.g., Ben Olinsky & Grace Oyenubi, The Supreme Court's Extreme Majority Risks Turning Back the Clock on Decades of Progress and Undermining Our Democracy, Ctr. for Am. Progress (June 13, 2022), https://www.americanprogress.org/article/the-supreme-courts-extreme-majority-risks-turning-back-the-clock-on-decades-of-progress/ [https://perma.cc/72W5-SLR5] ("[*Dobbs*] offers a stark preview of the plans the court's radical majority has for the future.").

597. Kavanaugh, Fixing Interpretation, supra note 23, at 2121.

Article: (1) which is the relevant text;[598] (2) whether to apply a presumption of ordinary meaning or one of term-of-art meaning;[599] (3) what linguistic evidence should be considered (e.g., semantic and grammar canons);[600] (4) whether terms should be given broad or narrow meanings;[601] and (5) what (co)text, (con)text, and (extra)text should be considered.[602] These choices and others must be made in text-centric interpretation, even if implicitly. By failing to resolve such issues, textualists foster judicial discretion and interpretive splits (evident in recent Court decisions), thereby undermining the very rule-of-law values textualism promotes.

In a Court split between Democrat-appointed pragmatists and Republican-appointed textualists, the balance of power rests with Roberts, Kavanaugh, and Barrett—precisely those jurists who, in our opinion, would be most amenable to rules of the road that would offer the newest textualism improved rigor but would also iron out some of its least-defensible features. In that spirit, we offer some rules of the road that would, we maintain, make the Court's textualism better conform to its rule-of-law aspirations.

1. *Study the Whole Act Sympathetically.* — Federal statutes usually define their terms, explicitly set forth findings and purposes, and have a logical structure. A textualism faithful to statutory details and structure is good for the rule of law, democracy, and the country. We consider Kavanaugh's majority opinion in *Turkiye Halk Bankasi*, Roberts's majority opinion in *King v. Burwell*, O'Connor's opinion in *Brown & Williamson*, and both Justice John Paul Stevens's majority and Scalia's dissenting opinions in *Sweet Home*, to be splendid examples of deep judicial understanding of statutory schemes.

2. *Textualism, Not Originalism—and Intensional Originalism if You Must.* — Judges are not competent time travelers and should be more cautious and less dogmatic when they rely on historical reconstruction to resolve present-day issues. As Scalia was wont to do, consider historical meaning but do not stop with that. If judges do seek to determine original meaning, it should be intensional (the Gorsuch approach in *Bostock*), not extensional (the Alito approach in *Bostock*).

3. *Neither Myopic Compositional Linguistics Nor Speculative Holism.* — The cut-and-paste methodology associated with Thomas and Gorsuch does not always track the way ordinary people or legislators understand language. And a myopic focus on the semantic meanings of individual words can distort the meanings of the phrases and sentences that constitute the text. Roberts, in cases like *Bond*, and Kavanaugh, in cases

598. See supra Choice 1.
599. See supra Choice 4.
600. See supra Choice 5.
601. See supra Choice 6.
602. See supra Choice 7.

like *Niz-Chavez*, approach language in a more realistic manner, and we recommend their approach for the future. At the same time, we caution against *speculative* holism, which privileges judicial abstraction about what the statutory language is "really" about at the expense of the statute's actual language. Both myopic compositional linguistics and speculative holism run the risk of empowering judges to inject policy preferences into interpretation.

4. *Public > Ordinary Meaning.* — We understand the impulse for the Court to say it is only implementing "ordinary meaning." But the best opinions, such as Barrett's majority opinion in *HollyFrontier* and her *Bittner* dissent, consider legal and technical as well as ordinary meanings. Why not stick with "public meaning," which includes consideration of how regular people understand language, including technical language?

5. *Do Not Be Quick to Insist on a Plain Meaning.* — Kavanaugh aptly criticizes the Court for obsessing about whether a provision is ambiguous. In most of the hard cases discussed in this Article—especially *Bostock* and *Castro-Huerta*—the statutory texts can easily be read more than one way. Kavanaugh argues that judges should focus more on the "best reading" of the text, and not on whether it is completely clear or ambiguous.[603] His *Niz-Chavez* and *Bostock* dissents are good examples, as is his majority opinion in *Turkiye Halk Bankasi*.

6. *Make Good on Textual (Con)text.* — We have learned valuable lessons from the new textualism's appeal to (con)text along the lines of our diagram in Choice 7; *King v. Burwell* is once more a good model, as is *Turkiye Halk Bankasi*. Whole-code analysis should be deployed cautiously and not dogmatically, but Alito and Kavanaugh responsibly deployed that mode of argument in *Bostock*.

7. *Follow Statutory Precedent.* — You cannot have a theory of statutory interpretation without a theory of precedent. The least persuasive theory of precedent is that of Thomas, as it would dramatically unsettle the rule of law and disrupt private, societal, and public reliance on Supreme Court statutory precedents, and often longstanding agency precedents as well. A better theory is that articulated by Kavanaugh in *Ramos*. Barrett's opinion in *Goldman* is a splendid exemplar of careful application of precedent.

8. *Consider Relevant Legislative Evidence.* — Reading statutes consistent with Article I's vesting primacy in Congress requires attention to relevant legislative evidence. To help resolve choice of text, choice of (con)text, broad-versus-narrow interpretation, and the meaning of words, phrases, and clauses, judges should consult the use of language in legislative materials, as well as evidence of Congress's plan or purpose (often found in the statutory text). O'Connor's opinion in *Brown & Williamson* is the best example of careful consideration of legislative evidence. More recent (and shorter) exemplars include Kavanaugh's balanced approach in

603. Kavanaugh, Fixing Interpretation, supra note 23, at 2121.

Sackett v. EPA, Jackson's thoughtful exegesis in *Delaware v. Pennsylvania*, Gorsuch's dissent in *Castro-Huerta*, and Roberts's dissent in *McGirt*. Reading what the statutory authors have to say about their work also enjoys a hermeneutical virtue.

9. *Agency Views About Statutory Purposes and Reliance Interests Are Worth Considering*. — The whole *Chevron* debate has been overstated. As the Court opined in *Skidmore*, the Justices are responsible for statutory interpretation, but agencies can help them understand how statutory words are used, how the statutory scheme is working, and what consequences different interpretations might have in practice.[604] From a sensible textual perspective, Roberts and Kavanaugh were probably right to go along with the Biden Administration's approach to asylum seekers (*Biden v. Texas*) and hospital workers (*Biden v. Missouri*). Kavanaugh's concurring opinion in *Sackett v. EPA* reflects the importance of public and private reliance on longstanding agency interpretations that were ratified by Congress.

10. *Substantive Canons Should Be Used Sparingly*. — Textualists should focus on the time-tested canons like lenity, avoidance, and federalism, but should tone down super-strong clear statement rules such as the MQD. The Court's decision in *NFIB v. OSHA* is antitextual and unwise, as is its less egregious decision in *Sackett v. EPA*. The Justices should be wary of the charge of stealth constitutionalism, as it violates the transparency feature of the rule of law, not to mention the proper separation of powers, when the Court "overenforces" even its aggressive reading of the Constitution.

Of course, the newest textualists on the Court might develop different answers to the questions raised by our Twelve Choices. To develop, publicize, and consistently adhere to a more sophisticated textualist methodology would be a welcome improvement from the perspective of the rule of law.

---

604. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944) (explaining that the weight given to the agency's interpretation will depend on "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control").

NOTES

PHYSICIAN MENS REA: APPLYING *UNITED STATES V. RUAN* TO STATE ABORTION STATUTES

*Mary Claire Bartlett**

In June 2022 the Supreme Court decided two unrelated cases, Dobbs v. Jackson Women's Health Organization *and* Ruan v. United States*, each with significant implications for the criminal regulation of doctors.* Dobbs *removed abortion's constitutional protection; in its wake, many states passed criminal statutes banning the procedure except in medical emergencies. The vagueness of those emergency exceptions, however, has produced a chilling effect among abortion providers who fear criminal exposure from exercising medical judgment. How the mens rea required to convict abortion providers under these statutes is codified and construed will be critical to understanding the scope of their criminal exposure when exercising medical discretion.*

In Ruan*, the Court clarified the mens rea required to convict doctors under the Controlled Substances Act (CSA), adopting a subjective standard over the Government's proposed objective one. Although* Ruan *and* Dobbs *address unrelated areas of medical practice, the common law, constitutional, and pragmatic principles underpinning the Court's adoption of a subjective mens rea standard for the CSA are instructive for state courts interpreting the new abortion bans. After recounting the history of prescription drug regulation and comparing states' efforts to regulate abortion with the federal effort to regulate drugs, this Note argues that state courts interpreting emergency exceptions to state abortion bans should adopt, like the* Ruan *Court, a subjective mens rea standard. This standard will not only curb the bans' chilling effect on lifesaving obstetric care but also mitigate constitutional vagueness concerns and comport with common law's preference for scienter.*

---

* J.D. Candidate 2024, Columbia Law School. I am grateful to Professor Daniel C. Richman for his generous guidance and support on this project. Special thanks also to Jackson Springer, Andrew Straky, Kristin Bergeson McCalpin, Celeste Kearney, and Margaret Hassel for their helpful feedback on earlier drafts, and to the entire staff of the *Columbia Law Review* for their editorial support. All errors are my own.

INTRODUCTION

In June 2022, the United States Supreme Court decided two unrelated cases implicating the use of criminal liability to regulate actions taken by doctors in the ordinary course of their practice. Both cases involved highly charged issues that have lingered for decades. The first and more noteworthy, *Dobbs v. Jackson Women's Health Organization*,[1] dismantled the federal constitutional right to an abortion set out in *Roe v. Wade* and its progeny.[2] The Court's conclusion that there is no constitutionally protected right to an abortion allows individual states to regulate the practice, and there has since been a frenzy of state legislative activity criminalizing abortions in circumstances in which abortions had previously been protected.[3] Those state laws prohibiting abortions vary widely, but all provide an emergency exception in some form to permit abortions "necessary" to protect the life or health of the pregnant

1. 142 S. Ct. 2228 (2022).

2. 410 U.S. 113 (1973) (recognizing a constitutional right to abortion during the first trimester without state interference), overruled by *Dobbs*, 142 S. Ct. 2228; see also Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (reaffirming but reframing the right established in *Roe*), overruled by *Dobbs*, 142 S. Ct. 2228.

3. See Abortion Ruling Prompts Variety of Reactions From States, Associated Press (July 21, 2022), https://apnews.com/article/supreme-court-abortion-ruling-states-a767801145ad01617100e57410a0a21d [https://perma.cc/6KLV-RRY7] (providing an "overview of abortion legislation and the expected impact of the court's decision in every state").

person.[4] The vagueness of that exception and the imprecise judgment required to apply it create considerable concern among abortion providers, who fear criminal exposure from the exercise of their medical discretion.[5] Moving forward, the scope of criminal liability for providers in the abortion context will rest in part on how the mens rea requirements of the various state statutes are codified and construed.

Two days after announcing *Dobbs*, the Supreme Court decided *Ruan v. United States*, which unanimously put to rest conflicting interpretations of the mens rea requirement of § 841 of the Controlled Substances Act (CSA).[6] That federal statute prohibits prescriptions for controlled substances "[e]xcept as authorized";[7] an "authorized" prescription is defined in attendant regulations as one "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[8] After the passage of the CSA in 1970, courts disagreed about whether the mens rea required to impose criminal liability on doctors who prescribe drugs covered by the CSA is an objective or subjective one. In other words, must the Government show only that a doctor's prescription "was *in fact* not authorized, or must the Government prove that the doctor *knew* or *intended* that the prescription was unauthorized"?[9] A unanimous Court adopted the subjective standard, and the majority held that the Government must prove beyond a reasonable doubt that the defendant knew that they were acting in an unauthorized manner.[10] The Court concluded that an objective standard would make a defendant's criminal liability turn on "the mental state of a hypothetical 'reasonable' doctor, not on the mental state of the defendant."[11]

---

4. See, e.g., Ala. Code § 26-23H-4 (2023) (allowing abortions only when deemed "necessary in order to prevent a serious health risk to the unborn child's mother"); see also infra section II.B (discussing the statutory language of state laws criminalizing abortion, which uniformly contain emergency exceptions).

5. See J. David Goodman & Azeen Ghorayshi, Women Face Risks as Doctors Struggle With Medical Exceptions on Abortion, N.Y. Times (July 20, 2022), https://www.nytimes.com/2022/07/20/us/abortion-save-mothers-life.html (on file with the *Columbia Law Review*) (noting doctors' concerns that the decision to terminate a pregnancy in a medical emergency "has become fraught with uncertainty and legal risk").

6. 142 S. Ct. 2370 (2022).

7. 21 U.S.C. § 841(a) (2018).

8. 21 C.F.R. § 1306.04(a) (2023).

9. *Ruan*, 142 S. Ct. at 2375.

10. Id. at 2375 (holding that, once the defendant invokes the authorization exception, "the Government must prove beyond a reasonable doubt that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so"). The concurrence, written by Justice Samuel Alito, joined by Justice Clarence Thomas, and joined in part by Justice Amy Coney Barrett, would have instead held that the authorization exception established an affirmative defense under which the defendant, to avoid conviction, must prove he acted in "subjective good faith" by a preponderance of the evidence. Id. at 2389 (Alito, J., concurring in the judgment).

11. Id. at 2381 (majority opinion).

Although *Ruan* and *Dobbs* address unrelated areas of medical practice, the legal saga that culminated in the adoption of a subjective mens rea standard for the CSA is instructive for state courts as they interpret the new statutes that criminalize abortions. This Note first explores the circumstances that led the federal government to enact the CSA, the vacillating and politically charged history of its enforcement against doctors, and the reasons why the Court concluded that criminal liability for dispensing drugs in this context requires a subjective mens rea standard.

Next, the Note turns to the abortion context, describing the history of therapeutic abortions,[12] the *Dobbs* decision, and the regulatory outburst that followed. It compares the states' efforts to regulate abortion with the federal effort to regulate drugs and explores the challenges in both contexts of using criminal law to regulate medical treatment.[13] It also provides the first comprehensive review of the mens rea language contained in the nation's strictest abortion bans. The Note concludes by arguing that state courts interpreting statutes with emergency exceptions should adopt, as the *Ruan* Court did for the CSA, a subjective mens rea standard. Such a standard is critical for three reasons: (1) It protects patients by preventing overdeterrence of critical, often lifesaving, medical care; (2) it protects medical professionals by shielding them from criminal liability when hazy legal standards and a politically charged environment make it extremely difficult for them to determine the legality of an abortion; and (3) it mitigates the constitutional vagueness concerns presented by the statutes.

I. PHYSICIAN MENS REA UNDER FEDERAL DRUG STATUTES—THE LONG ROAD TO *RUAN*

The CSA supplanted and consolidated into one regulatory regime all preexisting federal criminal statutes regulating drug distribution, including the Harrison Act of 1914, which specifically regulated unlawful prescriptions by doctors.[14] The exercise of federal authority over drug

12. The term "therapeutic abortion" refers to an abortion "induced when pregnancy constitutes a threat to the physical or mental health of the mother." Therapeutic Abortion, Merriam-Webster, https://www.merriam-webster.com/medical/therapeutic%20abortion [https://perma.cc/FX9W-RPJ4] (last visited Aug. 28, 2023).

13. The fact that the CSA is a federal law and that abortion statutes are state laws is not a significant distinction for purposes of this Note. The similarity that makes them comparable for this discussion is the fact that both the CSA and state abortion laws are criminal statutes implicating mens rea requirements for doctors engaged in the ordinary course of their practice.

14. Harrison Act, Pub. L. No. 63-223, § 2(a), 38 Stat. 785, 786 (1914); see also Thomas M. Quinn & Gerald T. McLaughlin, The Evolution of Federal Drug Control Legislation, 22 Cath. U. L. Rev. 586, 593, 605 (1973) ("[The CSA] repealed almost all prior federal drug legislation and created a new and comprehensive scheme for federal drug control . . . [that] governed both narcotics and dangerous drugs.").

prescriptions is unusual, both because the regulation of medical treatments is overwhelmingly left to the states[15] and because criminal liability is so rarely used to regulate treatment falling squarely within the ordinary scope of a doctor's practice.[16] In areas where criminal sanctions are imposed for performing medical procedures, the applicable statutes frequently impose a complete ban on providing the service.[17] An outright prohibition sidesteps most of the mens rea complexities in enforcement because the provider is on clear notice that the procedure is illegal and the prosecution turns on whether the doctor knowingly provided it. Since the passage of the Harrison Act, however, the federal government has criminalized doctors' distribution of drugs in certain circumstances while permitting it in others, thus creating the legal challenge of distinguishing between lawful and unlawful prescriptions.

A. *The Harrison Act of 1914*

The challenge of delineating the boundary of lawful treatment is evident from the federal government's first foray into regulating drugs in 1914 under the Harrison Act.[18] A lack of federal precedent for regulating medical practice raised enough doubts about Congress's constitutional

---

15. See Robert I. Field, Regulation of Health Care in the United States: Complexity, Confrontation and Compromise, 16 Anais do Instituto de Higiene e Medicina Tropical, supp. 3, 2017, at S61, S62 (Port.) (explaining how the states have "jurisdiction over health care" in our federalist government).

16. See Scott J. Schweikart, What's Wrong With Criminalizing Gender-Affirming Care of Transgender Adolescents?, 25 AMA J. Ethics E414, E417 (2023), https://journalofethics.ama-assn.org/sites/journalofethics.ama-assn.org/files/2023-05/hlaw2-2306.pdf [https://perma.cc/7SD5-6284] (noting how the government allows civil tort law to regulate physician practice "in most . . . cases").

17. Complete bans on certain medical treatments, such as those prohibiting medically assisted suicide, the prescription of medical marijuana, or the provision of gender-affirming care, are more common and are not the topic of this Note. See, e.g., id. (describing the recent legislation in Arkansas and Alabama prohibiting physicians from providing gender-affirming care to minors). The key distinction between total bans on medical treatment and the regulations that *are* the topic of this Note—namely, those governing controlled substance prescriptions and emergency abortions—is that the former create a bright-line rule for doctors to follow. In contrast, current criminal regulation of drug prescriptions and abortions carves out circumstances in which the course of treatment *is* legal and leaves it up to doctors to decide whether those circumstances are present.

18. The impetus for the Harrison Act was an unusual combination of domestic concerns over nonmedical uses of opium and a movement to regulate the drug at the international level. See Kurt Hohenstein, Just What the Doctor Ordered: The Harrison Anti-Narcotic Act, the Supreme Court, and the Federal Regulation of Medical Practice, 1915–1919, 26 J. Sup. Ct. Hist. 231, 240 (2001) (noting that "several medical and political professionals were [pushing] opium regulation" domestically while, at the same time, opium "had become a major source of tension" internationally); Rufus G. King, The Narcotics Bureau and the Harrison Act: Jailing the Healers and the Sick, 62 Yale L.J. 736, 736 (1953) (noting that Congress passed the Harrison Act "partly to carry out a treaty obligation, but mainly to aid the states in combatting a local police problem which had gotten somewhat out of hand" (footnote omitted)).

authority to do so that Congress styled the statute as a regulatory tax measure and assigned enforcement responsibility to the Treasury Department.[19] The statute imposed taxes, as well as registration and reporting obligations, on the manufacture, sale, and distribution of opium and other drugs.[20] It allowed a registered physician to lawfully dispense opioids only if prescribed "in good faith" in the "the course of his professional practice."[21] Possession or distribution of opioids by unregistered physicians or those prescribing outside the course of their professional practice was unlawful.[22] The Act imposed a fine of up to $2,000 and a prison sentence of up to five years for violations.[23]

Because it failed to provide clear guidance as to the legal contours of "in the course of [one's] . . . professional practice," the Harrison Act's novel intrusion into local medical practice with threats of felony charges sparked panic and confusion among physicians and druggists nationwide.[24] And the prosecution statistics suggest they were right to be worried. Shortly following enactment, narcotics agents, in partnership with U.S. Attorneys' Offices, began arresting and prosecuting doctors for unlawful prescriptions or for failing to report under the law's provisions.[25] Primarily targeting medical professionals, U.S. Attorneys prosecuted over 77,000 violations in the first fourteen years of the Act, constituting "the most comprehensive general criminal enforcement of any law against medical professionals in U.S. history."[26]

What energized the prosecutors' zeal was arguably less the widespread lawlessness of doctors than political disagreement with the medical profession over how to treat the nation's growing population of people struggling with substance use disorders (SUDs).[27] Many doctors—with

---

19. See Hohenstein, supra note 18, at 232–33 ("In the early 1900s, the regulation of medical practice was exclusively a state function. The issuance of medical licenses and management of disciplinary actions against doctors and druggists was regulated by state boards of examiners, if at all.").

20. See id. at 231–33.

21. Harrison Act, Pub. L. No. 63-223, § 2(a), 38 Stat. 785, 786 (1914) (noting that Harrison Act restrictions do not apply to the distribution of drugs "to a patient by a physician . . . registered under this Act in the course of his professional practice"); id. § 8 (allowing possession of drugs by patients if "prescribed in good faith by a physician . . . registered under this Act").

22. Id. § 1.

23. Id. § 9.

24. See Hohenstein, supra note 18, at 233 (noting that physicians "[a]ll across the country [were] wary of the law and uncertain of the rules of compliance").

25. Id.

26. Id. at 232, 245. By 1928, the average sentence for Harrison Act violations was one year and ten months. See id. at 245.

27. See David F. Musto, The American Disease: Origins of Narcotic Control 122–23 (Oxford Univ. Press 3d ed. 1999) (1973) ("From the first days of the Harrison Act, revenue agents began to arrest physicians and druggists who provided drug supplies to [people with SUDs] via 'prescriptions' . . . ."); Hohenstein, supra note 18, at 244 ("Initially, the Treasury officials attacked maintenance doctors who regularly prescribed doses of narcotics to

support from the medical profession—were engaging in maintenance treatment by prescribing narcotics to people with SUDs to manage, rather than cure, their habit.[28] The federal government and public, however, viewed maintenance treatment as "a convenient and profitable activity by physicians . . . without any pretense of [a] cure."[29] Public opinion had also soured on people with SUDs generally based on the prevailing view that they were not sick patients in need of treatment but rather "dope fiends" predisposed to commit crimes.[30] Eager to use the Harrison Act to eliminate maintenance treatment, the government did not distinguish between doctors prescribing opioids to people with SUDs in good or bad faith. That indiscriminate enforcement agenda was premised on the belief that prescriptions to people with SUDs could not be good-faith medical practice as a matter of law,[31] despite the medical profession's strong belief in the usefulness of maintenance treatment for those struggling with SUDs.[32]

Although some lower courts found that prosecutors' targeting of maintenance treatment exceeded the federal government's constitutional power, the Supreme Court ruled otherwise, reinstating two indictments against doctors accused of prescribing to people with SUDs in *Webb v. United States*[33] and *United States v. Behrman*.[34] Both cases involved flagrant physician abuse,[35] but in *Behrman* the Government specifically asked the Court to hold that, "irrespective of the physician's intent or belief," maintenance treatment violated the Act.[36] The Court upheld the Government's indictment, although its opinion stressed the excessive

addicted patients as a medical regimen to maintain, rather than cure, their habit."); King, supra note 18, at 739–40 (describing the targeting of maintenance doctors).

28. See Hohenstein, supra note 18, at 244 ("In 1915, maintenance as a medical treatment was widely accepted by the medical community.").

29. Musto, supra note 27, at 125.

30. See King, supra note 18, at 737 (noting the "great public hullabaloo about the 'dope menace' [that] swept the country"); A.R. Lindesmith, "Dope Fiend" Mythology, 31 J. Am. Inst. Crim. L. & Criminology 199, 199–208 (1940) (describing the prevalent stereotype of the "dope-crazed killer" or the "dope fiend rapist" that has led to the treatment of people with SUDs as criminals).

31. See Musto, supra note 27, at 129 (suggesting maintenance treatment was not viewed as "compatible with medical practice in good faith").

32. See, e.g., Arthur L. Blunt, Letter to the Editor, The Harrison Drug Law, Day Book (Chi.), Sept. 1, 1915, at 24 (recounting the success of the "gradual reduction method" for treating people with SUDs, through which the author, a doctor, cured 750 people, and lamenting how the "wrong enforcement" of the Harrison Act has made the treatment criminal).

33. 249 U.S. 96 (1919).

34. 258 U.S. 280 (1922).

35. In *Webb*, the defendant indiscriminately sold 4,000 opioid prescriptions to patients with SUDs over eleven months for fifty cents apiece. 249 U.S. at 98. In *Behrman*, the defendant had provided a person with a SUD, in just one sitting, with enough heroin, morphine, and cocaine for 3,000 standard injections. 258 U.S. at 288–89.

36. Brief on Behalf of the United States at 18, *Behrman*, 258 U.S. 280 (No. 582).

quantities prescribed instead of explicitly adopting the Government's proposed legal rule.[37] Nonetheless, the Government viewed the decision as a win, leaving doctors as targets for prosecutors.[38] Narcotics clinics closed, and the medical profession withdrew "totally and irrevocably" from the treatment of people with SUDs.[39]

Just six years later, the Court clarified in *Linder v. United States* that a registered physician *can* act "in the ordinary course" of their professional practice when the physician writes prescriptions to people with SUDs "in good faith."[40] Despite the Court's clarification, the government remained suspicious of physicians prescribing to people with SUDs, and physicians remained fearful of investigation.[41] As legal historian David Musto describes, "The social and economic position of the registered physician was so sensitive, trials so time-consuming, and appeals so long and costly, that hostile agents could make cases against physicians with impunity and nearly ruin them whether charges were warranted or not."[42] Unsurprisingly, even post-*Linder*, doctors remained "in retreat," and untreated people with SUDs turned to the black market for their substances.[43]

The Harrison Act's first few decades thus serve as an example of how aggressive criminal regulation of a medical treatment can chill—or even eliminate—the provision of that treatment even when legal. Few would have disagreed at the time of the Act's passage that there was a legitimate addiction crisis to be addressed, and even the medical profession agreed that unscrupulous physicians were contributing to the problem.[44] The government's response, however, had the unfortunate consequence of "driv[ing] from the field of drug treatment not only the unethical 'script doctor' but the legitimate doctor as well."[45] The chilling effect was strong because the law was vague, which made it hard for physicians to discern where to draw the line between legal and illegal treatment, and because the regulated treatment was highly politicized, which incentivized political

37. *Behrman*, 258 U.S. at 289 (emphasizing the 3,000 doses of narcotics prescribed).

38. King, supra note 18, at 744 (noting the Narcotics Division's perception that the *Behrman* decision broadened its enforcement power).

39. Id.

40. 268 U.S. 5, 18 (1925).

41. See Diane E. Hoffmann, Treating Pain v. Reducing Drug Diversion and Abuse: Recalibrating the Balance in Our Drug Control Laws and Policies, 1 St. Louis U. J. Health L. & Pol'y 231, 262 (2008) ("Despite the ruling in *Linder*, . . . [p]hysicians, even those prescribing within legal bounds, became fearful of narcotics agents."); King, supra note 18, at 748 ("[T]he Federal Narcotics Bureau [remained] undeterred in its own lusty applications of the Act.").

42. Musto, supra note 27, at 185.

43. King, supra note 18, at 748.

44. See Hohenstein, supra note 18, at 248 (noting the "growing movement among the medical profession to clean up its own act" because most recognized that "abuses *were* occurring").

45. Quinn & McLaughlin, supra note 14, at 595.

actors to target individual physicians regardless of the legitimacy of their conduct.

B. *The Controlled Substances Act*

In 1970, Congress repealed the Harrison Act and several other federal drug statutes and replaced them with the CSA.[46] The CSA is a comprehensive statutory scheme that separates controlled substances into five schedules based on their potential for abuse, addictive nature, and medical purpose and provides different prohibitions for prescribing and distributing drugs in each schedule.[47] Like the Harrison Act, the CSA also imposes tracking and registration requirements on all individuals involved in the legal distribution of controlled substances.[48] The statute's enforcement was delegated to the Justice Department's Drug Enforcement Administration (DEA).[49]

The CSA states that, "[e]xcept as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense . . . a controlled substance."[50] According to attendant regulations, authorized distributions include those issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[51] Like the Harrison Act, neither the CSA nor any attendant regulations from a federal agency define "legitimate medical purpose" nor explain what constitutes "the usual course of professional practice."[52]

Almost immediately after the Act's passage, a physician challenged the legality of his prosecution under § 841(a)(1) of the CSA, culminating in the 1975 case of *United States v. Moore*, one of the few Supreme Court decisions addressing physician prosecutions under the CSA before *Ruan*.[53]

---

46. See id. at 605 ("The [CSA] repealed almost all prior federal drug legislation and created a new and comprehensive scheme for drug control."). Between 1922 and 1970, Congress passed additional federal drug statutes to supplement the Harrison Act, such as the Marihuana Tax Act of 1937, the Opium Poppy Control Act of 1942, the Narcotics Manufacturing Act of 1960, and certain amendments to the Federal Food, Drug, and Cosmetic Act regulating depressants, stimulants, and hallucinogens. These statutes were repealed and replaced by the CSA as well. See id. at 599–605.

47. See Hoffmann, supra note 41, at 264.

48. See id.

49. See id.

50. 21 U.S.C. § 841(a)(1) (2018).

51. 21 C.F.R. § 1306.04(a) (2023).

52. See Hoffmann, supra note 41, at 274. Case law in several circuits has clarified that "professional practice" refers to "generally accepted medical practice." See, e.g., United States v. Birbragher, 603 F.3d 478, 485 (8th Cir. 2010); United States v. Vamos, 797 F.2d 1146, 1151 (2d Cir. 1986); United States v. Norris, 780 F.2d 1207, 1209 (5th Cir. 1986).

53. 423 U.S. 122 (1975). The other case was Gonzales v. Oregon, 546 U.S. 243 (2006), in which a physician was prosecuted under the CSA for dispensing drugs for assisted suicide. Physician-assisted suicide was authorized under state law but prohibited as an illegitimate medical purpose by a CSA interpretive rule issued by the U.S. Attorney General.

In that case, the Court rejected Dr. Thomas Moore's argument that he was per se exempted from prosecution under § 841(a)(1) because he was an "authorized" prescriber.[54] Instead, the Court held that "registered physicians can be prosecuted under § 841 when their activities fall outside the usual course of professional practice" and declined to endorse a scheme that allowed a registered physician to act as a "drug 'pusher'" with relative impunity.[55]

The Court likewise rejected Moore's argument that, even if he could be prosecuted under § 841(a)(1), his conduct did not violate the provision.[56] The record showed that Moore had indiscriminately prescribed massive quantities of methadone to people with SUDs without properly examining them.[57] The Court upheld his conviction, not based on its own interpretation of what conduct lies "outside the usual course of professional practice," but rather because Moore's prescriptions did not comport with the regime for treating people with SUDs recently set forth in 1974 by Congress in the Narcotic Addict Treatment Act (NATA).[58] Thus, with the help of NATA, the Court provided some clarity as to what constitutes "legitimate medical purpose" when treating addiction. But outside the addiction context, the contours of "legitimate medical purpose"—and the mens rea required to convict doctors when they strayed from it—remained grievously unclear.[59]

Id. at 252–54. The Court held that the U.S. Attorney General lacked the power to declare illegitimate a medical standard for care and treatment of patients that was specifically authorized under state law. Id. at 258.

54. *Moore*, 423 U.S. at 131 ("We take a different view and hold that only lawful acts of registrants are exempted."). Moore instead contended that registered physicians could only be prosecuted under §§ 842 and 843 of the CSA, which specifically mention "registrants" and carry significantly lesser penalties. See United States v. Moore, 505 F.2d 426, 429 (D.C. Cir. 1974) (noting that violators of § 842 are subject to a $25,000 fine and at most one year in prison, violators of § 843 to a $30,000 fine and at most four years, and violators of § 841 to a $25,000 fine and up to 15 years). The Court of Appeals had agreed with Moore, reasoning that Congress intended to regulate registered physicians through "a system of administrative controls" with only "modest penalt[ies]," and reserved the severest penalties under § 41(a)(1) for those who seek to "avoid regulation entirely by not registering." Id. at 430.

55. *Moore*, 423 U.S. at 124, 136–38.

56. Id. at 143–45.

57. Id. at 126. In just two years, Moore wrote 11,169 prescriptions covering 800,000 methadone tablets. Id.

58. See id. at 144 (noting how the limits of approved practice for methadone treatment are "particularly clear" and Moore was neither authorized to conduct the treatment nor compliant with the relevant procedures); see also Narcotic Addict Treatment Act of 1974, Pub. L. No. 93-281, 88 Stat. 124 (codified at 21 U.S.C. § 802 (2018)) (regulating maintenance treatment).

59. Hoffmann, supra note 41, at 276 ("While [NATA] helped clarify what constituted 'legitimate medical practice' when treating [people with SUDs], the phrase remains undefined outside of that context. Another contentious issue in prosecuting these cases arises in establishing the mens rea necessary to convict under section 841.").

1. *The Rise of Opioids for Long-Term Pain Management and the Opioid Crisis.* — While opioids have long been prescribed to treat addiction and acute pain, they were not employed to combat long-term pain until the 1960s, when doctors discovered they were highly effective for treating terminally ill cancer patients.[60] By the late 1990s, opioids became the standard of care for treating not just severe cancer pain but many other forms of chronic pain.[61] The use of opioids to treat chronic pain became so ingrained that, under the Federation of State Medical Boards' guidelines, doctors could be disciplined for *under*prescribing them to patients in need.[62] As a result, physicians prescribed opioids at higher rates and dosages than ever before;[63] between 1990 and 1995, opioid prescriptions increased by two to three million yearly.[64]

In 1995, the FDA approved OxyContin, a time-release opioid analgesic, which quickly became the most prescribed Schedule II narcotic in the country.[65] Well-meaning and ill-intentioned doctors alike wrote liberal prescriptions for the drug, and the excess supply facilitated the diversion and sale to recreational users and people struggling with SUDs.[66] The increase in people addicted to prescribed opioids soon provoked a rise in illicit heroin trafficking, providing people with SUDs with a significantly cheaper alternative. What resulted was an epidemic of both heroin and opioid abuse and, consequently, increased overdose deaths between 2000 and 2014.[67] And beginning in 2013, other especially potent synthetic opioids, including fentanyl, produced most of the country's

60. Id. at 266.

61. Id. at 267–69.

62. Id. at 269–70 (recounting how the Federation's guidelines left the impression that undertreating pain was substandard care). Over the years, physicians have in fact been held civilly liable for undertreatment of pain. See, e.g., Maria L. La Ganga & Terence Monmaney, Doctor Found Liable in Suit Over Pain, L.A. Times (June 15, 2001), https://www.latimes.com/archives/la-xpm-2001-jun-15-mn-10726-story.html (on file with the *Columbia Law Review*) (detailing a $1.5 million jury verdict against a doctor for the undertreatment of his patient's pain).

63. See Hoffmann, supra note 41, at 270 n.291 (noting how, as of 2008, "[m]ore physicians [we]re prescribing Schedule II narcotics to a larger number of patients, and the dosages prescribed to these patients ha[d] increased markedly" over the preceding decade).

64. Stephen A. Bernard, Paul R. Chelminski, Timothy J. Ives & Shabbar I. Ranapurwala, Management of Pain in the United States—A Brief History and Implications for the Opioid Epidemic, 11 Health Servs. Insights, 2018, at 2, https://doi.org/10.1177/1178632918819440 (on file with the *Columbia Law Review*).

65. Hoffmann, supra note 41, at 234, 273. The DEA defines Schedule II drugs as those "with a high potential for abuse, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous." Drug Scheduling, DEA, https://www.dea.gov/drug-information/drug-scheduling [https://perma.cc/CQ5R-9HPZ] (last visited Oct. 5, 2023).

66. Marcia L. Meldrum, The Ongoing Opioid Prescription Epidemic: Historical Context, 106 Am. J. Pub. Health 1365, 1366 (2016).

67. Between 2000 and 2014, overdoses involving heroin and prescription opioids increased 200%. Id.

overdoses.[68] Over 150 people a day died from overdoses caused by fentanyl and other synthetic opioids between 2015 and 2020.[69]

It is hard to overstate the devastating impact of opioid abuse in this country. The human toll has been staggering—more than 500,000 opioid-involved deaths since 2000[70]—as has the economic one—costing the United States nearly $1.5 trillion in 2020 alone.[71] Unsurprisingly, a crisis of this magnitude has garnered intense desire by both law enforcement and the public to hold accountable those responsible for fueling it.[72] Doing so is challenging because, in addition to unlawful domestic distribution, a large supply of opioids—particularly fentanyl—enters illegally from abroad.[73] While enforcement efforts have taken many forms, unscrupulous doctors have been a central target, much like during the addiction crisis of the early twentieth century.

2. *Enforcement Efforts Against Doctors.* — As OxyContin's popularity skyrocketed in the early 2000s, DEA agents detected widespread "diversion of the drug from legitimate users to [people with SUDs]."[74] They also noticed links between OxyContin and overdose deaths, pharmacy robberies, and other crimes.[75] At the same time, the DEA faced political criticism for not having made a measurable difference in the illegal drug supply in the country and wanted a "new front" for its battle.[76] Consequently, the agency turned its attention to the physicians and pharmacists responsible for the overprescription of OxyContin,[77] targeting

---

68. Fentanyl Facts, CDC, https://www.cdc.gov/stopoverdose/fentanyl/index.html [https://perma.cc/7MNR-NE3H] (last updated June 27, 2023) ("Fentanyl and other synthetic opioids are the most common drugs involved in overdose deaths." (citing Nana Wilson, Mbabazi Kariisa, Puja Seth, Herschel Smith IV & Nicole L. Davis, Drug and Opioid-Involved Overdose Deaths—United States, 2017–2018, 69 Morbidity & Mortality Wkly. Rep. 290, 290–97 (2020))).

69. Id.

70. CBO, The Opioid Crisis and Recent Federal Policy Responses 6 (2022), https://www.cbo.gov/system/files/2022-09/58221-opioid-crisis.pdf [https://perma.cc/E9BZ-YGRX].

71. Joint Econ. Comm. Democrats, The Economic Toll of the Opioid Crisis Reached Nearly $1.5 Trillion in 2020, at 1–2 (2022), https://www.jec.senate.gov/public/_cache/files/67bced7f-4232-40ea-9263-f033d280c567/jec-cost-of-opioids-issue-brief.pdf [https://perma.cc/X29H-WZGT].

72. See infra notes 74–81 and accompanying text (describing law enforcement efforts); infra note 119 (describing desire for increased physician accountability).

73. See Seth Adam Meinero, Danger in Milligrams and Micrograms: United States Attorneys' Offices Confront Illicit Fentanyls, 66 U.S. Att'ys' Bull., July 2018, at 5, 9 (noting that Chinese companies are the primary source of illicit fentanyl in the United States).

74. Hoffmann, supra note 41, at 273.

75. Id.

76. Id. at 234 (internal quotation marks omitted) (quoting Ronald T. Libby, Cato Inst., Pol'y Analysis No. 545, Treating Doctors as Drug Dealers: The DEA's War on Prescription Painkillers 4 (2005), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa545.pdf [https://perma.cc/W8EZ-VZT5]).

77. Id. at 273.

professionals operating "pill mills" that issued excessive opioid prescriptions to people with known SUDs or to sellers for personal profit.[78]

Over the years, the Justice Department has launched a series of enforcement campaigns aimed at those professionals.[79] For example, in 2017, then-Attorney General Jeff Sessions announced the formation of the Opioid Fraud and Abuse Detection Unit, which uses data analytics to identify and prosecute health care professionals diverting or dispensing prescription opioids for illegitimate purposes.[80] The program looks for statistical outliers—pharmacists and physicians that prescribe and dispense at rates far exceeding their peers—because, in the words of Sessions, "[f]raudsters might lie, but the numbers don't."[81] In his announcement, Sessions issued a clear warning to doctors and pharmacists: "If you are a doctor illegally prescribing opioids for profit . . . we are coming after you."[82]

Without a public tracking database, it is difficult to pinpoint the exact number of physicians who have been investigated, arrested, or prosecuted as part of these enforcement campaigns.[83] One recent study, which tried to capture all the opioid-related cases brought against physicians using a comprehensive search of media reports, identified only 372 cases between

78. See, e.g., id. at 242 (recounting an indictment containing fifty drug-related charges against a doctor who allegedly ran a "pill mill" from his office).

79. In 2001, the DEA announced the OxyContin Action Plan, through which it targeted doctors, pharmacists, and dentists by pledging to scrutinize the distribution of prescription opioids as if they were non-prescription street drugs. See id. at 280 (describing the plan); id. at 234 (noting that the plan "raised the level of scrutiny DEA applied to opioid analgesic use to the level applied to non-prescription street drugs such as cocaine, heroin, and marijuana"). In 2004, the agency developed the National Action Plan, targeting "key sources of OxyContin and other opioids, including medical professionals it considers unscrupulous." Id. at 281 (internal quotation marks omitted) (quoting Melina Ammann, The Agony and the Ecstasy: How the OxyContin Crackdown Hurts Patients in Pain, Reason (Apr. 2003), https://reason.com/2003/04/01/the-agony-and-the-ecstasy-2/ [https://perma.cc/6U7D-RPZR]).

80. Press Release, DOJ, Attorney General Sessions Announces Opioid Fraud and Abuse Detection Unit (Aug. 2, 2017), https://www.justice.gov/opa/pr/attorney-general-sessions-announces-opioid-fraud-and-abuse-detection-unit [https://perma.cc/8YMW-MXRU].

81. Jeff Sessions, Att'y Gen., Remarks at "West Virginia on the Rise: Rebuilding the Economy, Rebuilding Lives" (Sept. 21, 2017), https://www.justice.gov/opa/speech/attorney-general-sessions-delivers-remarks-west-virginia-rise-rebuilding-economy [https://perma.cc/P4YY-HU3Q].

82. Press Release, DOJ, supra note 80. Over the years, the media has amplified and encouraged this aggressive enforcement rhetoric against physicians, creating yet "[a]nother [b]out of [d]rug [h]ysteria." Ronald T. Libby, Cato Inst., Pol'y Analysis No. 545, Treating Doctors as Drug Dealers: The DEA's War on Prescription Painkillers 7 (2005), https://www.cato.org/sites/cato.org/files/pubs/pdf/pa545.pdf [https://perma.cc/W8EZ-VZT5].

83. Hoffmann, supra note 41, at 236.

1995 and 2019.[84] The number of DEA investigations over the years has been far larger, however, with 861 DEA investigations of doctors in 2001 alone.[85] While the number of actual prosecutions may seem low, particularly when compared to more than 77,000 medical professionals prosecuted in the early years of the Harrison Act,[86] these prosecutions have sent similar shock waves through the medical profession.[87]

3. *The Chilling Effect and the Supreme Court's Response.* — The volume of prescription opioids has shrunk dramatically in recent years,[88] and the government's highly publicized arrests and prosecutions have been cited as a primary contributor to the declining prescription rates.[89] For a profession otherwise regulated by state medical boards and medical malpractice suits, the threat, however small, of criminal prosecution under the CSA and its punitive sentencing scheme fundamentally changes the risk calculus for doctors involved in the pain management field and those considering entering it.[90]

To the extent that the downturn reflects a reduction in pill mills and unscrupulous prescription activity, it should be lauded as criminal deterrence in action. There is evidence to suggest, however, that the arrests have also chilled the provision of legal pain treatment by frightening physicians out of adequately treating patients with chronic pain or out of the field of pain management entirely.[91] A 2001 study of California primary care doctors found that forty percent felt that fear of investigation affected how they treated chronic pain.[92] In recent years, reports of the "chilling effect" have only proliferated. In some states today, waits to see a pain management specialist have increased to a year or

---

84. Julia B. Berman & Guohua Li, Characteristics of Criminal Cases Against Physicians Charged With Opioid-Related Offenses Reported in the US News Media, 1995–2019, 7 Inj. Epidemiology, no. 50, 2020, at 1, 1–2, https://doi.org/10.1186/s40621-020-00277-8 [https://perma.cc/YC6E-B8BA]. The study does not differentiate between charges brought by state versus federal authorities.

85. Hoffmann, supra note 41, at 236.

86. See supra text accompanying note 26.

87. See Jeffrey A. Singer & Trevor Burrus, Cato Inst., Cops Practicing Medicine: The Parallel Histories of Drug War I and Drug War II, at 2–3 (2022), https://www.cato.org/sites/cato.org/files/2022-11/Singer_Cops%20Practicing%20Medicine_web_0.pdf [https://perma.cc/N3N4-B9LB] (comparing enforcement experiences and reactions under the Harrison Act and the CSA).

88. See id. at 17 ("The [opioid] prescription rate is now below the 2002 rate . . . .").

89. See Libby, supra note 82, at 3 ("[A] significant reason pain is undertreated—and increasingly so—is the government's decision to prosecute pain doctors who it says overprescribe prescription narcotics.").

90. See id. (explaining how the "highly publicized indictments and prosecutions have frightened many physicians out of the field of pain management").

91. See id. (noting there are "only a few thousand doctors in the country who are still willing to risk prosecution and ruin in order to treat patients suffering from severe chronic pain").

92. See id.

longer,[93] causing patients to drive "extraordinary distances to find or continue seeing doctors."[94] Many physicians, "fearful of the financial and legal peril in prescribing opioids," have stopped prescribing them altogether,[95] or they have pawned off their patients to other doctors to write the prescriptions.[96] But the exact scale of any chilling effect is difficult to know. While the significant reduction in opioid prescriptions is clear, it is not clear how much of that decline reflects the correction of past abuses versus the chilling of legitimate medical care.

One of the primary complaints from physicians is the ambiguity of the "legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice" language in the CSA regulation.[97] The Supreme Court's decision in *United States v. Moore*,[98] which relied largely on NATA, provided only modest clarity given the case's flagrant facts, and the Court has not expounded on the issue since.[99] The courts of appeals have likewise provided little help, declining to adopt a "preestablished list of prohibited acts"[100] or "specific guidelines"[101] in favor of a more nebulous "case-by-case approach."[102]

---

93. Josh Bowers & Daniel Abrahamson, Cato Inst., Pol'y Analysis No. 894, Kicking the Habit: The Opioid Crisis and America's Addiction to Prohibition 10 (2020), https://www.cato.org/sites/cato.org/files/2020-06/PA894_doi.pdf [https://perma.cc/H6AA-U3YH].

94. Terrence McCoy, 'Unintended Consequences': Inside the Fallout of America's Crackdown on Opioids, Wash. Post (May 31, 2018), https://www.washingtonpost.com/graphics/2018/local/impact-of-americas-opioid-crackdown (on file with the *Columbia Law Review*).

95. Id.

96. See Ohio State Univ. Moritz Coll. of L., *Ruan v. United States*: Implications for Criminal Law, Health Care, and Beyond, YouTube, at 31:20–32:32 (Sept. 23, 2022), https://www.youtube.com/watch?v=__EGfB0sCDk (on file with the *Columbia Law Review*). This panel discussion features physician Martin Fried, M.D., who recounts receiving many referrals for opioid prescriptions from colleagues who did not want to prescribe them out of fear of legal culpability.

97. See 21 C.F.R. § 1306.04(a) (2023); Hoffmann, supra note 41, at 284 (noting how disagreement over what constitutes "legitimate medical practice" is often "[a]t issue in many of the cases brought against physicians prescribing opioids").

98. 423 U.S. 122 (1975).

99. See supra text accompanying notes 56–59.

100. United States v. Volkman, 797 F.3d 377, 386 (6th Cir. 2015) (citing United States v. Kirk, 584 F.2d 773, 784 (6th Cir. 1978)).

101. United States v. August, 984 F.2d 705, 713 (6th Cir. 1992) (citing *Kirk*, 584 F.2d at 784).

102. *Volkman*, 797 F.3d at 386 (citing *Kirk*, 584 F.2d at 784). In 2005, in response to concerns from stakeholders about the chilling effect of its investigations, the DEA sought to provide clarity to frightened physicians by eliciting questions from them and other interested persons to address in a future policy document. The resulting policy statement, however, simply articulated what the courts had been saying for years: that "it is not possible to expand on the phrase 'legitimate medical purpose in the usual course of professional practice' . . . [to] address all the varied situations physicians might encounter. . . . [O]ne cannot provide an exhaustive and foolproof list of 'do and don'ts.'" Hoffmann, supra note 41, at 282–84 (internal quotation marks omitted) (quoting Dispensing

Another cause for concern for doctors is the mens rea requirement for conviction under § 841(a)(1) of the CSA. When the defendant is a lay person, the mens rea requirement is simply that the violation—the distribution of a controlled substance—must be knowing or intentional.[103] Prosecuting a physician, however, requires proof of an added component: that the prescription was without a legitimate medical purpose or outside the usual course of the doctor's professional practice.[104] Courts of appeals have split on what mens rea attaches to that component, a question that significantly affects the proof required for convicting physicians. In June 2022, however, almost fifty years after the CSA was passed, the Supreme Court in *Ruan* finally clarified the appropriate mens rea for convicting physicians under the statute.

Prior to *Ruan*, the Fourth, Tenth, and Eleventh Circuits had adopted an objective mens rea standard in applying the "usual course of professional practice" language.[105] The Tenth Circuit held that the Government could convict a physician by proving that he "issued a prescription that was objectively not in the usual course of professional practice . . . regardless of whether he [subjectively] believed he was doing so."[106] The Eleventh Circuit agreed, holding that "[w]hether a defendant acts in the usual course of his professional practice must be evaluated based on an objective standard, not a subjective standard."[107] In so holding, the Eleventh Circuit eliminated a physician's subjective good faith as a complete defense to conviction because it "failed to include the objective standard by which to judge the physician's conduct."[108] The Fourth Circuit similarly ruled that the inquiry into the physician's good faith "must be an objective one."[109] Thus, in three circuits, the statute's "knowingly or intentionally" language only attached to the actus reus—the act of writing the prescription—which, as one scholar noted, was easily met "unless the prescriber [wrote it] in their sleep."[110]

Controlled Substances for the Treatment of Pain, 71 Fed. Reg. 52,716, 52,717, 52,719 (Sept. 6, 2006)).

103. See 21 U.S.C. § 841(a) (2018) (specifying the mens rea of "knowingly or intentionally" for CSA violations).

104. See id. (exempting "authorized" drug prescriptions from CSA coverage); 21 C.F.R. § 1306.04(a) (2023) (defining "authorized" prescriptions as those issued "for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice").

105. See United States v. Khan, 989 F.3d 806, 825 (10th Cir. 2021); United States v. Ruan, 966 F.3d 1101, 1166 (11th Cir. 2020); United States v. Hurwitz, 459 F.3d 463, 479 (4th Cir. 2006).

106. *Khan*, 989 F.3d at 825.

107. *Ruan*, 966 F.3d at 1166 (alteration in original) (internal quotation marks omitted) (quoting United States v. Joseph, 709 F.3d 1082, 1097 (11th Cir. 2013)).

108. Id.

109. *Hurwitz*, 459 F.3d at 479.

110. Kelly K. Dineen Gillespie, *Ruan v. United States*: "Bad Doctors," Bad Law, and the Promise of Decriminalizing Medical Care, 2021–2022 Cato Sup. Ct. Rev. 271, 301.

When the Court granted certiorari in *Ruan*, the medical profession responded aggressively, filing numerous amicus briefs outlining the objective standard's chilling effect on legitimate pain treatment. As the National Pain Advocacy Center wrote, "erroneous judicial interpretations of the Controlled Substances Act (CSA) . . . overly deter [physicians] from prescribing [pain] medication[] and keep them from exercising the best medical judgment for their patients."[111] Another organization, Physicians Against Abuse, argued that the objective standard simply created a "war of experts," in which criminal liability depends on who hired the "more believable, more charismatic" expert.[112]

At issue in *Ruan* were two cases from the Tenth and Eleventh Circuits[113] that were consolidated on appeal. Both involved doctors with licenses to prescribe controlled substances who had been convicted of distributing opioids in violation of § 841.[114] The doctors argued that their prescriptions were lawful because they fell within § 841's "as authorized" exception, allowing prescriptions for "a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice."[115] The issue before the Court was whether, in such prosecutions, the Government is required to prove that a defendant subjectively knew that his prescriptions fell outside the scope of his prescribing authority. In a result that surprised many court-watchers, the Court rejected the mens rea standard proposed by the Government, which would have required proof only that the defendant failed to make an "objectively reasonable good-faith effort" to act within his prescribing authority, and instead concluded that the statute requires proof of the defendant's actual knowledge of his lack of authority.[116]

In his opinion for the Court, Justice Stephen Breyer reasoned that the statute's "knowingly or intentionally" language applies to the "except as authorized" clause even though that proviso is not an element of the crime.[117] He concluded that the proviso functioned "sufficiently like an element" to justify requiring the Government to prove the defendant's subjective mens rea for several reasons.[118] Those reasons include the

111. Brief for Amicus Curiae National Pain Advocacy Center in Support of Petitioners at 1, Ruan v. United States, 142 S. Ct. 2370 (2022) (Nos. 20-1410, 21-5261), 2021 WL 6138191.

112. Brief Amicus Curiae for Physicians Against Abuse in Support of Petitioner (Corrected) at 6, *Ruan*, 142 S. Ct. 2370 (No. 20-1410), 2022 WL 478202.

113. See United States v. Khan, 989 F.3d 806 (10th Cir. 2021); *Ruan*, 966 F.3d 1101.

114. Dr. Ruan and Dr. Kahn were sentenced to twenty and twenty-five years in prison, respectively, and Dr. Ruan was ordered to pay millions of dollars in restitution and forfeiture. See *Ruan*, 142 S. Ct. at 2375–76.

115. 21 U.S.C. § 841(a) (2018); 21 C.F.R. § 1306.04(a) (2023).

116. *Ruan*, 142 S. Ct. at 2381.

117. Id. at 2376.

118. Id. at 2380. Justice Alito, in a concurrence joined in full by Justice Thomas and in part by Justice Barrett, concluded that because the "as authorized" language was not an element of the crime, it should be treated as an affirmative defense and that, in accordance

critical role that being authorized plays in distinguishing "morally blameworthy conduct from socially necessary conduct," the seriousness of the crime and its penalties, and the vague and general language contained in the regulation defining a doctor's prescription authority.[119] Justice Breyer thus concluded that to prosecute a doctor for illegal prescriptions under § 841, the Government must prove beyond a reasonable doubt not only that the doctor knowingly or intentionally wrote the prescriptions but also that the doctor did so knowing that they were acting without authorization.[120]

Justice Breyer recognized that the regulation defines the scope of a doctor's authorization using objective criteria, such as "legitimate medical purpose" and "usual course" of a doctor's medical practice.[121] But he concluded that those objective terms do not turn the statute's mens rea requirement into an objective one. According to Justice Breyer, those objective criteria provide a standard against which courts and juries can measure the credibility of the defendant's professed belief that their prescription was authorized, but § 841 nonetheless requires the defendant to have actually known that they lacked authorization.[122] The Court's decision has been widely lauded by doctors and scholars concerned with how the fear of criminal punishment has affected legitimate pain treatment.[123]

---

with common law principles, "the defendant had the burden of production and persuasion." *Ruan*, 142 S. Ct. at 2387 (Alito, J., concurring in the judgment). Notwithstanding their differences about who bears the burden of proving authorization or lack thereof under the CSA, the concurrence and the majority agree that a subjective, rather than an objective, mens rea standard applies to a defendant relying on the authorization exception. See id. at 2389 ("I would thus hold that a doctor who acts in subjective good faith in prescribing drugs is entitled to invoke the CSA's authorization defense.").

119. Id. at 2380 (majority opinion).

120. Id. at 2382 (requiring that a defendant know their conduct was "unauthorized" to sustain a conviction under § 841). Justice Alito argued that the Court should not have addressed the Government's burden of proof with respect to the authorization exception because the Court did not grant certiorari on that question, nor did the parties brief it. Id. at 2383–84 (Alito, J., concurring in the judgment). In keeping with his view that the authorization exception is best treated as an affirmative defense, however, Justice Alito concluded that there was no reason to conclude that Congress "intended to impose a burden on the Government to disprove all assertions of authorization beyond a reasonable doubt." Id. at 2384. He noted that the "usual rule is that affirmative defenses must be proved 'by a preponderance of the evidence.'" Id. at 2387 (quoting Dixon v. United States, 548 U.S. 1, 17 (2006)).

121. Id. at 2382 (majority opinion) (internal quotation marks omitted) (quoting 21 C.F.R. § 1306.04(a) (2021)).

122. Id. ("As we have said before, 'the more unreasonable' a defendant's 'asserted beliefs or misunderstandings are,' especially as measured against objective criteria, 'the more likely the jury . . . will find that the Government has carried its burden of proving knowledge.'" (alteration in original) (quoting Cheek v. United States, 498 U.S. 192, 203–04 (1991))).

123. See, e.g., Maia Szalavitz, A Recent Supreme Court Ruling Will Help People in Pain, Sci. Am. (Sept. 19, 2022), https://www.scientificamerican.com/article/a-recent-

4. Ruan*'s Implications for Abortion Statutes.* — The sensibilities that drove the Court to its conclusion in *Ruan* have implications for abortion statutes in the post-*Dobbs* era. Central to its analysis is the criminal law principle that, with few exceptions, "wrongdoing must be conscious to be criminal."[124] Thus, criminal statutes are presumed to target those with a "culpable mental state"—that is, defendants who know that what they are doing is wrong.[125] According to *Ruan*, the presumption that a criminal statute should include a scienter element is especially applicable to statutes, such as § 841, that carry severe penalties, including life imprisonment and substantial fines.[126]

Other components of *Ruan*'s rationale are also particularly relevant to the abortion context, in which, like the CSA, statutes seek to criminalize conduct that, under different circumstances, would be socially desirable. *Ruan* concluded that when the same conduct by a doctor can either be "socially beneficial" or criminal depending on the circumstances, the mens rea for conviction should be actual knowledge that the charged conduct is wrong.[127] That requirement not only comports with criminal law's intention to target persons of "vicious will" but it also reduces the chilling effect on doctors' legitimate services.[128] The *Ruan* Court observed that the need for a scienter requirement increases when the line dividing

---

supreme-court-ruling-will-help-people-in-pain/ [https://perma.cc/J6MV-SL6X]. Less pleased, however, will be those who believe doctors are underprosecuted relative to their culpability, given that *Ruan* only makes it harder to convict physicians under § 841. Even before the Court's ruling in *Ruan*, some suggested that federal prosecutors had not been aggressive enough in targeting the relatively small group of doctors responsible for significant contributions to the opioid crisis. See Karly Newcomb, Defying "Do No Harm": Doctors Are Fueling the Opioid Crisis With Limited Criminal Repercussions, 11 Crim. L. Prac. 59, 59–60 & n.5 (2021) (noting the "inadequate prosecutorial responses" to the "minority" of doctors "illegally prescribing opioids and contributing to [the] crisis"). Justice Breyer addressed this concern by noting that "the Government, of course, can prove knowledge through circumstantial evidence." *Ruan*, 142 S. Ct. at 2382. Such circumstantial evidence, termed by lower courts as "red flags," might include: patients traveling from geographically distant locations to the doctor's office; incomplete or no medical exams to verify alleged pain; failure to offer alternatives, such as non-opioid-based pain management; the absence of a gradual increase from less addictive pain medications to opioids; patients without medical insurance paying cash for each visit; a high number of pills prescribed; and doctors who write and fill prescriptions themselves for cash. See Bingzi Hu, Physician's Potential Criminal Liability for Prescribing Medications, Law. Monthly (June 30, 2020), https://www.lawyer-monthly.com/2020/06/physicians-potential-criminal-liability-for-prescribing-medications/ [https://perma.cc/7L7Q-JBBY] (citing United States v. Joseph, 709 F.3d 1082, 1104 (11th Cir. 2013); United States v. Katz, 445 F.3d 1023, 1031 (8th Cir. 2006)).

124. *Ruan*, 142 S. Ct. at 2376 (citing Elonis v. United States, 575 U.S. 723, 734 (2015)). The Court acknowledges that there are some strict liability crimes that "fall outside the scope of ordinary scienter requirements." Id. at 2378. Such crimes, however, are generally "regulatory or public welfare offense[s] that carr[y] only minor penalties." Id.

125. Id. at 2377.

126. Id. at 2378.

127. Id. at 2377.

128. Id. at 2376.

wrongful and innocent conduct is not susceptible to clear guidelines—an absence of clarity that is frequently present when potential criminal conduct involves medical judgment.[129]

Though not explicitly, Justice Breyer may have also been motivated by constitutional principles, including a line of cases reading a heightened mens rea requirement into statutes that may otherwise be unconstitutionally vague under the Due Process Clause.[130] In these cases, the Court reasons that requiring evidence of specific intent to violate a statute mitigates any concern that the statute's vagueness deprived defendants of fair warning that their conduct was illegal.[131] In the context of the CSA, requiring physicians to subjectively know that their prescriptions were not for a "legitimate medical purpose" or were not issued in the "usual course of professional practice" ensures that defendants will not be surprised by their criminal exposure, even when precise definitions of the quoted terms are unavailable. As argued below, the same constitutional argument applies in the abortion context, where subjective knowledge could also mitigate the due process concerns posed by the new abortion bans.[132]

In sum, the *Ruan* Court concluded that if a statute seeks to impose severe criminal sanctions on doctors for actions that resemble their lawful professional activity, and if the statute cannot provide a clear line dividing legal from illegal conduct, the mens rea required for conviction should be subjective knowledge that one's behavior is illegal. Nowhere do those factors, which are so instrumental in the *Ruan* Court's decision, present themselves more clearly than in cases regulating doctors providing emergency abortion services.

II. THE NEW ABORTION FRONTIER

In *Ruan*'s same Term, the Supreme Court decided *Dobbs v. Jackson Women's Health Organization*.[133] In *Dobbs*, the Court returned the regulation of abortion to the states without constitutional limitation,[134] thus

129. Id. at 2377.

130. See id. at 2380 (noting that the statute's "vague, highly general language . . . support[s] applying normal scienter principles to the 'except as authorized' clause").

131. See Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) ("Th[e] requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid."); Screws v. United States, 325 U.S. 91, 102 (1945) ("The requirement that the [violative] act must be willful or purposeful . . . does relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware.").

132. See infra section II.B (arguing for subjective mens rea requirements in the abortion context to address vagueness concerns).

133. 142 S. Ct. 2228 (2022).

134. See id. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

beginning another era of criminal regulation of doctors' medical judgments—this time, in the highly politicized realm of abortion. Trigger statutes in several states immediately went into effect, and state legislatures began drafting new statutes significantly curtailing access to abortions.[135] While the new state statutes vary significantly, they all recognize that abortion is legal in one context: medical emergencies to save the life or health of the pregnant person.[136] Thus, in all fifty states, physicians can legally perform abortions in emergency circumstances when the pregnant person's life is at risk.[137] But just as in the drug context, a physician's treatment decision can give rise to criminal liability if the government disputes its necessity.

In many ways, the criminal regulation of drug prescriptions and abortion services presents a similar risk of chilling the provision of legal and efficacious health care to patients. The politicization of the abortion issue, the county-by-county (rather than federal) enforcement scheme, and the desire in some corners to eliminate abortion completely, however, arguably put abortion providers in an even more vulnerable position than their opioid-prescribing colleagues. Despite *Ruan*'s contemporaneous reminder that subjective mens rea standards can diminish the chilling effect on criminalized medical judgments, many of the new abortion statutes do not create such a standard and, on their face, embrace an objective one.[138] This Part argues that, with the guidance provided by *Ruan*, state courts should apply the subjective mens rea requirement that their statutes accord to the actus reus of the crime to the emergency exception as well. Such a construction comports with the longstanding principles of criminal law, accommodates the Fourteenth Amendment's notice requirements, and helps ensure that patients receive the lifesaving care they need.

This Part begins with a brief explanation of how courts construed the mens rea requirement for prosecuting abortion providers in the pre-*Dobbs* era. Like today's post-*Dobbs* era, this period also featured state abortion laws containing life-of-the-mother exceptions. But such laws were passed—and interpreted by courts—against the backdrop of a constitutional right to abortion outlined in *Roe* and *Casey*.

---

135. Abortion Ruling Prompts Variety of Reactions From States, supra note 3 (detailing the legislative activity in each state post-*Dobbs*).

136. Michael Scherer & Rachel Roubein, More Republicans Push for Abortion Bans Without Rape, Incest Exceptions, Wash. Post (July 15, 2022), https://www.washingtonpost.com/politics/2022/07/15/abortion-exceptions-republicans/ (on file with the *Columbia Law Review*) (last updated July 16, 2022) (noting that all abortion bans that have gone into effect since *Dobbs* "include an exception for life of the [pregnant person]").

137. See id.

138. See infra section II.B (describing state abortion statutes that use objective language in their emergency exceptions).

This Part then turns to *Dobbs*, which removed the constitutional protections of *Roe* and *Casey* and prompted the passage of new abortion statutes. Looking at the twenty strictest criminal abortion bans passed in the wake of *Dobbs*, including those banning abortions after fifteen weeks of pregnancy or earlier, this Part examines those statutes' emergency exceptions and any statutory language suggesting that an objective mens rea requirement might apply to them.[139] In this post-*Dobbs* era, these statutes will no longer be scrutinized by courts as regulations of a constitutionally protected right but instead simply as criminal statutes regulating medical judgment. In this new interpretive posture, the constitutional rights of the doctor as a potential criminal defendant and the common-law principles of criminal law espoused in *Ruan* will take center stage. This Part concludes by arguing that both of these considerations should lead state courts to apply statutes' subjective mens rea requirements to their emergency exceptions.

A. *Mens Rea for Abortion Providers Before* Dobbs

Immunity from criminal prosecution for physicians performing abortions to protect the health and life of the pregnant person, also known as therapeutic abortions, has a long history in the common law.[140] As states began to codify abortion bans, they largely incorporated this common-law exception, either through explicit carve-outs for therapeutic abortions or through mens rea provisions requiring that a doctor act "maliciously" in performing an abortion to warrant criminal prosecution.[141] The Model Penal Code, drafted in 1962, also recognized therapeutic exceptions to criminal abortion when there was grave risk to the physical or mental health of the pregnant person, and similar statutes existed in at least twelve states as of the time the Court decided *Roe*.[142]

---

139. See infra Appendix A (providing the relevant statutory language of all twenty state statutes criminally banning abortion after fifteen weeks or earlier, with Oklahoma's statute intentionally excluded because it provides for only civil, rather than criminal, penalties for violations).

140. See Monica E. Eppinger, The Health Exception, 17 Geo. J. Gender & L. 665, 693 (2016) (noting that "therapeutic intent doctrine became the standard statement of the common law on abortion" in seventeenth-century England). This immunity generally came in the form of a therapeutic defense, shielding the good-faith provider from homicide prosecution in the unfortunate event of a patient's death. Id.

141. See id. at 721–22. In the nineteenth and twentieth centuries, the law deferred heavily to medical professionals' judgment of the "medical necessity" of an abortion under these exceptions. While in some ways this reliance narrowed the applicability of the defense to more "technical grounds," it also at times led to its expansion. For example, as sociology and public health experts exposed the link between socioeconomic status and health, doctors began to view a patient's poverty as a social indicator for abortion under statutory health exceptions. With the rise in attention to psychiatry, protecting mental health was similarly invoked to justify abortions under the same exceptions. See id. at 739–40.

142. See Geoffrey R. Stone, The Road to *Roe*, Litigation, Fall 2016, at 43, 45.

The Court's decision in *Roe* fundamentally altered the legal landscape for abortion by recognizing for the first time the fundamental right to an abortion. The case has, however, been characterized as (and criticized for) being more of an ode to physician autonomy than to patient liberty.[143] Specifically, the Court held that during the first trimester of a pregnancy, states must leave physicians "free to determine, without regulation by the State, that, in [their] medical judgment, the patient's pregnancy should be terminated."[144] After the first trimester but before fetal viability, the Court permitted abortion regulations, but only those that "reasonably relate[d] to the preservation and protection of maternal health."[145] After the fetus became viable, however, a state could "go so far as to proscribe abortion" except when "it is necessary, in appropriate medical judgment, for the preservation of the life or health of the [pregnant patient]."[146]

Roe did not preempt all state regulation of abortion; it simply created a constitutional right that state statutes could not disturb within its parameters. As states passed abortion regulations, some of which included criminal penalties for doctors, courts contended with the issue of what mens rea standards state laws could incorporate without running afoul of *Roe*. The Supreme Court's opinions in cases largely written by Justice Harry Blackmun, the author of the *Roe* majority opinion, left a legacy notable for its insistence on mens rea standards that defer to doctors' subjective medical judgment about whether to perform an abortion.

The first example, *Doe v. Bolton*, was decided on the same day as *Roe* in another Justice Blackmun opinion.[147] *Doe* was a void-for-vagueness challenge to a statute making abortion a crime except when it is "based upon [the physician's] best clinical judgment that an abortion is necessary."[148] Far from finding the term "necessary" unconstitutionally vague, the Court instead praised the law for giving physicians room to consider "all factors . . . relevant to the well-being of the patient" and to make their "best medical judgment."[149] The Court effectively concluded that the vagueness of the term "necessary" did not put doctors in unfair jeopardy because the statute deferred to their subjective judgment.

---

143. See, e.g., Andrea Asaro, The Judicial Portrayal of the Physician in Abortion and Sterilization Decisions: The Use and Abuse of Medical Discretion, 6 Harv. Women's L.J. 51, 53 (1983) ("Unfortunately, . . . [Justice] Blackmun subsumed the [pregnant person's] right to privacy within the ambit of the doctor-patient relationship, and ultimately subordinated [their] interest to the physician's.").

144. Roe v. Wade, 410 U.S. 113, 163 (1973), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

145. Id.

146. Id. at 163, 165.

147. 410 U.S. 179 (1973), abrogated in part by *Dobbs*, 142 S. Ct. 2228.

148. Id. at 191 (internal quotation marks omitted) (quoting Ga. Code § 26-1202(a) (1968)).

149. Id. at 192.

Another constitutional challenge to a state statute reached the Supreme Court six years after *Roe*, providing the Court with its first chance to address the specific issue of mens rea in a criminal abortion statute. The provision at issue in *Colautti v. Franklin* was section 5(a) of Pennsylvania's Abortion Control Act, which required every person who performs an abortion to first determine whether the fetus is or "may be" viable.[150] If the answer was yes, the statute then prescribed a standard of care for the abortion procedure.[151] Under section 5(d), a physician who failed to abide by the standard of care when the fetus was viable was subject to the same criminal liability that would have applied had the fetus been murdered.[152] Plaintiffs challenged the viability determination requirement as unconstitutionally vague.[153]

The *Colautti* Court sided with plaintiffs in another opinion written by Justice Blackmun. The Court's concerns were centered on the ambiguity of the statute that could create criminal jeopardy for doctors without scienter.[154] The Court reasoned that the statute's lack of a mens rea requirement was particularly inappropriate here due to the "uncertainty of the viability determination itself"[155] and the likelihood that "experts will disagree over whether a particular fetus . . . has advanced to the stage of viability."[156] Because of this lack of clarity, the Court characterized the statute as "little more than 'a trap for those who act in good faith.'"[157] According to the Court, imposing strict liability for a decision so fraught "could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment."[158] Without articulating a required mens rea standard, the Court's decision in *Colautti* made clear that the mens rea requirement in an abortion law has the ability both to save the statute from a vagueness challenge[159] and to quell the chilling

150. 439 U.S. 379, 380 n.1 (1979) (internal quotation marks omitted) (quoting 35 Pa. Stat. and Cons. Stat. Ann. § 6605(a) (Purdon 1977) (repealed 1982)), abrogated in part by *Dobbs*, 142 S. Ct. 2228.

151. See id. ("[T]he abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive . . . ." (internal quotation marks omitted) (quoting 35 Pa. Stat. and Cons. Stat. Ann. § 6605(a) (repealed 1982))).

152. See id. at 394–95 (describing how section 5(d) made Pennsylvania's criminal homicide law applicable to physicians who failed to comply with section 5(a)).

153. Id. at 389 ("The attack mounted by the plaintiffs-appellees upon § 5(a) . . . [is that it is] unconstitutionally vague because it fails to inform the physician when his duty to the fetus arises, and because it does not make the physician's good-faith determination of viability conclusive.").

154. See id. at 390 (finding the viability determination requirement ambiguous and its uncertainty "aggravated by the absence of a scienter requirement").

155. Id. at 395.

156. Id. at 396.

157. Id. at 395 (quoting United States v. Ragen, 314 U.S. 513, 524 (1942)).

158. Id. at 396.

159. In *Gonzales v. Carhart*, the Court reiterated the importance of mens rea in void-for-vagueness challenges, basing part of its decision to uphold the Partial-Birth Abortion Ban

effect that the law may have on the free exercise of a doctor's medical judgment.[160]

In 1992, the Court revisited the constitutional right to abortion in *Casey*, abandoning *Roe*'s trimester framework in favor of an "undue burden" standard.[161] Under *Casey*, states were free to enact abortion regulations "designed to foster the health of a [pregnant person] seeking an abortion" before fetal viability so long as "they [did] not constitute an undue burden" on abortion access.[162] After fetal viability, the state was free to regulate abortion to the same extent as under *Roe*.[163]

Many states viewed *Casey* as an opportunity to further discourage abortions and passed laws placing a variety of procedural hurdles in the way of obtaining one.[164] Lower courts grappled with how the mens rea provisions of these new laws interacted with the constitutional principles espoused in *Casey* and its antecedents. In 1995, the Eighth Circuit considered a challenge to an abortion law provision that imposed criminal liability on providers without a scienter requirement.[165] Echoing *Colautti*, the Eighth Circuit expressed concern about the chilling effect that such a provision can have on a provider's willingness to perform even lifesaving abortions.[166] It held that that chilling effect created an undue burden on abortion access under *Casey* and struck down the provision.[167] A Michigan appeals court instead relied on *Roe* and *Doe* in reading a subjective mens rea standard into its state's emergency exception provision, reasoning that those cases stood for the need to accord adequate deference to the

---

Act of 2003, 18 U.S.C. § 1531 (2018), against a void-for-vagueness challenge on the "intent that must be proved to impose liability." 550 U.S. 124, 149 (2007).

160. Lower courts have since recognized that the decision that an abortion is necessary to save the life of the pregnant person is as "fraught with uncertainty" as the viability determination, making subjective mens rea equally important in that context. See, e.g., People v. Higuera, 625 N.W.2d 444, 461 (Mich. Ct. App. 2001) (Jansen, J., concurring in part and dissenting in part) (internal quotation marks omitted) (quoting Women's Med. Pro. Corp. v. Voinovich, 130 F.3d 187, 205 (6th Cir. 1997)).

161. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) ("[T]he undue burden standard is the appropriate means of reconciling the State's interest with the [pregnant person's] constitutionally protected liberty."), overruled by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

162. Id. at 878.

163. See id. at 879 (reaffirming *Roe*'s standard for post-viability abortion regulation).

164. See Deepa Shivaram, *Roe* Established Abortion Rights. 20 Years Later, *Casey* Paved the Way for Restrictions, NPR (May 6, 2022), https://www.npr.org/2022/05/06/1096885897/roe-established-abortion-rights-20-years-later-casey-paved-the-way-for-restricti [https://perma.cc/H382-R3FF] (noting that the "grey area" of what was an undue burden "opened the door for states to pass laws" that created procedural hurdles in the abortion-seeking process).

165. See Planned Parenthood, Sioux Falls Clinic v. Miller, 63 F.3d 1452 (8th Cir. 1995).

166. See id. at 1465 (holding that, due to the statute's lack of a scienter requirement, the provision creating criminal liability would impose an undue burden by chilling the willingness of physicians to perform lifesaving abortions).

167. See id.

physician's exercise of their medical judgment.[168] Other state statutes had combined subjective and objective mens rea elements and were struck down as unconstitutionally vague and inhibitory of constitutionally protected rights.[169] In contrast, courts largely upheld statutes that left the determination of a medical emergency necessitating an abortion up to the subjective discretion of the doctor.[170] Taken together, these lower court decisions show a more consistent preference for a subjective mens rea standard for evaluating medical judgments, as well as a greater attention to the chilling effect on doctors, than was evident in the drug prescription context prior to *Ruan*.

B. *Criminal Jeopardy for Doctors After* Dobbs

Dobbs's elimination of abortion's constitutional right status removed what had been the foundation of abortion jurisprudence for almost a half-century. While *Roe* framed abortion as a medical decision in which physician judgment should reign supreme,[171] *Dobbs* embraces it as a political one in which "the people," through their elected representatives, determine the scope of abortion access.[172] And in the absence of a constitutional right, the limits on what can be legislated are few.[173]

---

168. See People v. Higuera, 625 N.W.2d 444, 449 (Mich. Ct. App. 2001) (acknowledging that while the statute does not specify whether the mens rea requirement is subjective or objective, it must conform with *Roe* and *Doe* and "accord adequate deference to the physician's exercise of his medical judgment").

169. See, e.g., Women's Med. Pro. Corp. v. Voinovich, 130 F.3d 187, 203–06 (6th Cir. 1997), abrogated in part by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (finding a medical emergency exception in a statute banning post-viability abortions unconstitutionally vague because it required both that a physician subjectively "believe that the abortion is necessary *and* [that] his belief must be objectively reasonable to other physicians"); Summit Med. Assocs., P.C. v. James, 984 F. Supp. 1404, 1447 (M.D. Ala. 1998) (striking down a medical emergency exception that required a physician to entertain "a subjective belief that the abortion is necessitated by a medical emergency" that was then "assessed under an objective standard of reasonableness" as vague and inhibitory of "constitutionally-protected rights"), rev'd in part on other grounds sub nom. Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326 (11th Cir. 1999).

170. See, e.g., Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 534 (8th Cir. 1994) (upholding North Dakota's definition of medical emergency because it allowed the physician to rely on their own "best clinical judgment" in determining whether an emergency exists and because the statute contained a scienter requirement); Jane L. v. Bangerter, 809 F. Supp. 865, 878–79 (D. Utah 1992) (upholding a statute that "conditions liability upon intentional abortion of a fetus when the physician knew that a serious medical emergency was not present," thus allowing "the subjective good faith judgment of an attending physician . . . [to] constitute a defense to a criminal charge under the Act").

171. See supra notes 143–144 and accompanying text.

172. *Dobbs*, 142 S. Ct. at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives."); id. at 2305 (Kavanaugh, J., concurring) ("The Constitution . . . leaves the [abortion] issue for the people and their elected representatives to resolve . . . .").

173. There is some suggestion, even from conservative jurists, that an abortion ban without an exception for the life of the pregnant person could not pass even the rational

Approached from the perspective of the now-defunct *Casey*, there can be no undue burden on a right that does not exist.

Yet the abortion jurisprudence around *Roe* and *Casey* protected not only abortion rights but also doctors as the administrators of those rights. *Roe* elevated doctors to the center of abortion decisions.[174] *Doe* praised deference to them.[175] *Colautti* protected them from unclear rules, and *Casey* made doctors' concerns part of the undue burden determination.[176] This deference to doctors in their roles as abortion providers now appears to be gone. The doctrinal protections for doctors derived from due process and criminal law principles, however, are independent of abortion's constitutional status and remain intact. This section reviews the statutory language of recent statutes and describes how their lack of clarity creates criminal jeopardy for doctors. It then explains how the reasoning of *Ruan*, as applied to abortion statutes, allows state courts to protect the rights of doctors, mitigate constitutional vagueness concerns, and preserve the foundational principles of our criminal law.

1. *Mens Rea in the Post-*Dobbs *Abortion Legislation*. — Some states, having anticipated *Roe*'s demise, already had abortion statutes on the books that immediately took effect once *Roe* was overturned.[177] *Dobbs* also prompted a flurry of new legislation, with over 100 bills restricting access to abortion introduced in 2022 alone.[178] As of September 2023, fifteen states have outlawed abortions at all stages of pregnancy with limited exceptions, and eleven more have outlawed abortions after a specified gestation period with similarly limited exceptions.[179] The most common

basis test that all statutes must pass to survive constitutional challenge. See Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) ("If the Texas statute were to prohibit an abortion even where the [pregnant person's] life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective . . . ."); see also *Dobbs*, 142 S. Ct. at 2305 n.2 (Kavanaugh, J., concurring) (citing to Justice Rehnquist's dissent in *Roe*).

174. See supra notes 143–144 and accompanying text.

175. See supra notes 147–149 and accompanying text.

176. See supra notes 150–158 and accompanying text.

177. Larissa Jimenez, 60 Days After *Dobbs*: State Legal Developments on Abortion, Brennan Ctr. for Just. (Aug. 24, 2022), https://www.brennancenter.org/our-work/research-reports/60-days-after-dobbs-state-legal-developments-abortion [https://perma.cc/8FZ3-VTZS] (highlighting the trigger bans in effect in Arkansas, Mississippi, Missouri, Oklahoma, and South Dakota).

178. Id. There have also been significant efforts by state legislatures to protect abortion access, with sixteen states passing legislation to that effect before and in response to *Dobbs* as of August 2022. Id.

179. Tracking Abortion Bans Across the Country, N.Y. Times, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (on file with the *Columbia Law Review*) (last visited Aug. 2, 2023) (showing Alabama, Arkansas, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, West Virginia, and Wisconsin banning abortions at any stage of pregnancy; and Arizona, Florida, Georgia, Iowa, Montana, Nebraska, North Carolina, Ohio, South Carolina, Utah, and Wyoming banning abortions after a certain gestational period). A few of these bans are currently being challenged through litigation efforts, and some have been temporarily blocked by courts. See id.

exception, found in even the strictest bans passed since *Dobbs*, are abortions performed in medical emergencies to save the life or health of the pregnant person.[180] To understand the scope of these exceptions, the following section looks to their statutory language rather than case law, given the limited pre-*Dobbs* mens rea doctrine developed in this area.

One of the most daunting types of the recent statutes—from the perspective of both the medical professionals performing emergency abortions and the patients seeking them—are those that, based on their plain language, seem to adopt an objective mens rea standard for assessing the legality of an emergency abortion.[181] Alabama's statute, for example, outlaws "intentional[]" abortions under all circumstances, except if "an attending physician . . . determines that an abortion is necessary in order to prevent a serious health risk to the unborn child's mother."[182] The statute then defines such a health risk as when, "[i]n *reasonable medical judgment*, the child's mother has a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function."[183] In a criminal prosecution of an abortion

180. See infra Appendix A, which provides excerpts from the twenty strictest state abortion statutes, ranging from complete bans to bans after a fifteen-week gestational period, and their medical emergency exceptions. In addition to being the gestational limit upheld in *Dobbs*, the fifteen-week mark roughly represents the middle ground of gestational limits being adopted by states. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (describing Mississippi's law); Tracking Abortion Bans Across the Country, supra note 179 (showing states adopting gestational limits ranging from six to twenty-four weeks). Oklahoma's ban, though one of the nation's strictest, is not included because it provides for only civil, not criminal, liability for physicians. See Okla. Stat. tit. 63, § 1-731.4 (2023).

181. Not all states adopt this approach. The Missouri legislature, for example, crafted its emergency exception explicitly as an affirmative defense that a doctor must raise and prove by a preponderance of the evidence standard to avoid conviction. See Mo. Ann. Stat. § 188.017 (West 2023) ("The defendant shall have the burden of persuasion that the [affirmative] defense is more probably true than not."). Idaho and Tennessee legislatures also originally structured their emergency exceptions as affirmative defenses, but both states have since amended their laws to include explicit exceptions due to outcry from the medical profession. Sheryl Gay Stolberg, As Abortion Laws Drive Obstetricians From Red States, Maternity Care Suffers, N.Y. Times (Sept. 6, 2023), https://www.nytimes.com/2023/09/06/us/politics/abortion-obstetricians-maternity-care.html (on file with the *Columbia Law Review*) (last updated Sept. 7, 2023) (noting that the Idaho legislature "eliminated an affirmative defense provision" to try to "address doctors' concerns" about being prosecuted); Anita Wadhwani, Gov. Bill Lee Signs Law Carving Out Narrow Exceptions to Tennessee Abortion Ban, Tenn. Lookout (Apr. 28, 2023), https://tennesseelookout.com/2023/04/28/gov-bill-lee-signs-law-carving-out-narrow-exceptions-to-tennessee-abortion-ban/ [https://perma.cc/HW6Y-7SUW] (describing Tennessee's switch to an explicit emergency exception after doctors spoke out "about the chilling effect of the [original] law"). While the affirmative defense approach is different from the objective mens rea approach that is the focus of this Note, it has clearly raised similar chilling effect issues among medical providers.

182. Ala. Code § 26-23H-4 (2023).

183. Id. § 26-23H-3(6) (emphasis added).

provider under this statute, there is unlikely to be a dispute about whether the abortion was "intentional[]," which is the statute's specified mens rea for the actus reus; but if the court does not apply that mens rea to the emergency exception as well, the case will instead turn on whether the physician's assessment of the patient's condition was objectively "reasonable," without regard for the physician's subjective intent.

Florida, Georgia, Kentucky, Louisiana, Nebraska, North Carolina, North Dakota, South Carolina, Texas, West Virginia, and Wisconsin employ identical "reasonable medical judgment" language to define the medical emergency exceptions in their statutes.[184] Other statutes—such as the one in Arkansas—provide no indication within their medical-emergency exception as to whether a physician's medical judgment will be assessed objectively or subjectively.[185] While these laws will no longer be evaluated under the standards of *Roe* and *Casey*, which shielded the free exercise of medical judgment from legal liability to protect access to a constitutional right,[186] they certainly run counter to the foundational principles of constitutional and criminal law embodied in *Ruan*, which unanimously rejected an objective mens rea standard for convicting doctors under the CSA.[187]

2. *The Implications of Objective Mens Rea Standards in Abortion Prosecutions.* — The objective mens rea provisions contained in many criminal abortion statutes are curious given the judicial skepticism that such standards have been met with in the past. As the Court noted in *Colautti*, using analogous reasoning to that in *Ruan*, subjective mens rea provisions are particularly important when the criminally regulated decision is itself an uncertain endeavor and presents a high likelihood that even "experts will disagree" on the answer.[188] Since the *Dobbs* decision came down, members of the medical profession have highlighted the ambiguities inherent in determining whether a medical emergency necessitates an abortion. When asked in an *NPR* interview if there is a "very clear line that would define a life in peril when we're talking about ending a pregnancy and preserving the life of the [patient]," Dr. Lisa Harris, a Michigan obstetrician, answered, "There are some situations where it is clear what that means, but in most situations, it's

184. See infra Appendix A.

185. Ark. Code Ann. § 5-61-403(3) (2023) (defining "[m]edical emergency" as "a condition in which an abortion is necessary to preserve the life of a pregnant woman," without any reference to the required mental state of the decisionmaker other than that the abortion itself be "purpose[ly]" performed).

186. See supra notes 143–146 and accompanying text (discussing *Roe*); supra notes 161–163 and accompanying text (discussing *Casey*).

187. See supra note 10 and accompanying text.

188. See Colautti v. Franklin, 439 U.S. 379, 396 (1979) (holding that criminal liability for determinations over which "experts will disagree" could deter doctors from performing medically advisable abortions).

not . . . ."[189] Harris added, "[Many] pregnant [people] who will suffer irreparable harm or die in the context of pregnancy . . . may not be in an acute emergency in [the] very moment" that the doctor sees them but have conditions, such as pregnancy-induced hypertensive disorder, preeclampsia, or eclampsia, that could later result in deadly strokes.[190] Ectopic pregnancies, which are the leading cause of maternal mortality in the first trimester,[191] can seem similarly stable, but in the event of a rupture can turn "catastrophic."[192] All these conditions, while extremely dangerous, do not present a certain risk of immediate death but may well lead to death in the absence of timely medical intervention.[193] In the aftermath of *Dobbs*, anecdotal reports suggest widespread physician hesitancy about the legally permissible time to intervene in these scenarios, and as a result, patients are traveling— sometimes hundreds of miles—to states with more liberal abortion access to receive more immediate care.[194] The burden that this chilling effect places on patients to travel to faraway states for lifesaving abortion care disproportionately impacts low-income patients, especially patients of color, for whom the travel costs can be prohibitive.[195]

---

189. Melissa Block, Some Abortions Are Necessary to Save the Life of a Patient, NPR (July 2, 2022), https://www.npr.org/2022/07/02/1109557947/some-abortions-are-necessary-to-save-the-life-of-a-patient [https://perma.cc/YN59-VTRU].

190. Id.

191. Kellie Mullany, Madeline Minneci, Ryan Monjazeb & Olivia C. Coiado, Overview of Ectopic Pregnancy Diagnosis, Management, and Innovation, 19 Women's Health, 2023, at 1, 1, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC10071153/pdf/10.1177_17455057231160349.pdf [https://perma.cc/5H8Q-QQRF].

192. Block, supra note 189.

193. See id. ("[T]here are a long list of conditions where someone may be OK in the moment, but they might not be later.").

194. See, e.g., Lauren Coleman-Lochner, Carly Wanna & Elaine Chen, Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions, Bloomberg L. (July 12, 2022), https://news.bloomberglaw.com/health-law-and-business/doctors-fearing-legal-blowback-are-denying-life-saving-abortions (on file with the *Columbia Law Review*); Doctors Refusing Potentially Life-Saving Abortion Treatment Over Legal Fears, ABC News (Aug. 24, 2022), https://abcnews.go.com/US/doctors-refusing-potentially-life-saving-abortion-treatment-legal/story?id=88791452 [https://perma.cc/ZY9F-5D3J]; Eleanor Klibanoff, Doctors Report Compromising Care Out of Fear of Texas Abortion Law, Tex. Trib. (June 23, 2022), https://www.texastribune.org/2022/06/23/texas-abortion-law-doctors-delay-care/ [https://perma.cc/CQ5S-WGPV].

195. See Doctors Refusing Potentially Life-Saving Abortion Treatment Over Legal Fears, supra note 194 (interviewing an abortion provider who has experienced an "influx of patients" from neighboring states with abortion bans but only those "that can afford childcare, . . . gas money, . . . [and] to take time off of work"); see also Priya Pandey, A Year After *Dobbs*: People With Low Incomes and Communities of Color Disproportionately Harmed, CLASP (June 23, 2023), https://www.clasp.org/blog/a-year-after-dobbs-people-with-low-incomes-and-communities-of-color-disproportionately-harmed/ [https://perma.cc/R74D-DCT6] (noting how *Dobbs* has "made abortion out of reach for many, especially people of color, people who work low-wage jobs, people who live in rural areas, people with undocumented status, and people with LGBTQIA+ identities").

Our legal system has long deemed objective standards of reasonableness appropriate for civil liability like malpractice, where the goal is to compensate damage to a patient, and where insurance spreads the risk over the entire medical profession.[196] Objective standards also make sense where clear guidance about appropriate conduct is available from the statute itself or from guidelines available to the doctor. Not only do no such guidelines currently exist in the emergency abortion context, but medical professionals also generally oppose writing them out of concern for downplaying the varying risks facing individual patients.[197] Given the range of possible conditions and the specifics of each patient, Harris explained that "there is no one-size-fits-all law or guideline that could possibly meet everybody's needs."[198] As the Court recognized in *Ruan*, conditioning criminal liability—with the possibility of lengthy prison sentences—on an objective reasonableness standard rather than on a physician's subjective good-faith judgment in such ambiguous situations ignores the critical principles that separate criminal and civil law.[199]

The highly politicized—and for some, religious—nature of the abortion issue makes an objective mens rea standard even less tenable in this context. While the moral outrage stemming from the opioid epidemic and the past public anger over treatment of persons with SUDs have certainly influenced the government's drug enforcement agenda, it is hard to imagine a topic more politicized, and one that inflames more passions, than abortion. Unlike a drug prescription, an emergency abortion impacts not only the patient but also a potential life, and for many the performance of an abortion is as morally outrageous as murder.[200] An evaluation—by a local district attorney, juror, or expert—of a doctor's decision that necessarily balanced the risk to the patient's life

196. See B. Sonny Bai, An Introduction to Medical Malpractice in the United States, 467 Clinical Orthopaedics & Related Rsch. 339, 340 (2009) (noting that "the most commonly used standard in tort law," including in medical malpractice, is "that of a so-called 'reasonable person'").

197. For example, in an article by the American College of Obstetricians and Gynecologists seeking to help practitioners understand and navigate medical emergency exceptions in abortion bans post-*Dobbs*, the organization asserts that it is not only "impossible to create an inclusive list of conditions that qualify as 'medical emergencies,'" but also "dangerous" to attempt to do so. Instead, the organization "strongly reaffirms that it is critical for clinicians to be able to use and rely upon their expertise and medical judgment." Understanding and Navigating Medical Emergency Exceptions in Abortion Bans and Restrictions, Am. Coll. of Obstetricians & Gynecologists (Aug. 15, 2022), https://www.acog.org/news/news-articles/2022/08/understanding-medical-emergency-exceptions-in-abortion-bans-restrictions [https://perma.cc/FDV9-MNKM].

198. Block, supra note 189.

199. See Ruan v. United States, 142 S. Ct. 2370, 2377 (2022).

200. See Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2304 (2022) (Kavanaugh, J., concurring) ("On the one side, many pro-choice advocates forcefully argue that the ability to obtain an abortion is critically important for women's personal and professional lives, and for women's health. . . . On the other side, many pro-life advocates forcefully argue that a fetus is a human life.").

against the interest of the fetus cannot avoid the reviewers' preexisting beliefs on abortion, informed by their normative or religious values. Statutes with objective standards that require doctors to conform to how a "reasonable" doctor would weigh the maternal and fetal interests at stake to avoid criminal liability completely ignore the subjectivity inherent in evaluating this highly contentious treatment decision.

Additionally, while doctors' protections that emanated from abortion's status as a constitutional right have now been lost, other constitutional doctrines, such as void for vagueness, remain applicable and counsel against adopting objective standards for emergency exception provisions. Historically, constitutional vagueness challenges in the abortion context have been argued in two ways. First, they have been brought as facial attacks against abortion regulations whose vagueness made abortion providers unsure about how to comply with their requirements; litigants argued, often successfully,[201] that this hesitancy on the part of doctors in turn constituted an undue burden on the constitutional right to terminate one's pregnancy under *Casey*.[202] Given that *Dobbs* overturned *Casey*, however, challenges to vague abortion regulations based on the chilling effect that their ambiguity may have had on a person's right to terminate their pregnancy are now foreclosed.

The second type of void-for-vagueness challenge, however, is unaffected by *Dobbs* and is grounded in the notice requirements of the Fourteenth Amendment's Due Process Clause. The doctrine requires that laws must provide "fair warning" of what conduct is prohibited and sufficient standards to prevent "arbitrary and discriminatory enforcement."[203] To survive a vagueness challenge, a statute must give "relatively clear guidelines" as to wrongful conduct.[204] Courts are least tolerant of vagueness in laws imposing criminal, rather than civil, liability because the "consequences of imprecision are qualitatively [more] severe."[205] They have also recognized that a "scienter requirement may mitigate a law's vagueness."[206]

---

201. See, e.g., Planned Parenthood of Cent. N.J. v. Farmer, 220 F.3d 127, 130 (3d Cir. 2000) ("[T]he vast majority of courts have enjoined the enforcement of [partial-birth abortion bans] because they are unconstitutionally vague and impose an undue burden on women who seek to have an abortion.").

202. See, e.g., Memphis Ctr. for Reprod. Health v. Slatery, 14 F.4th 409, 434 (6th Cir. 2021) (noting that, due to an abortion law's "ambiguity and uncertainty, many abortion providers might well choose to steer clear of anything that could possibly be construed as prohibited conduct," creating an undue burden on a right "deemed fundamental under the Constitution"), vacated, 18 F.4th 550 (6th Cir. 2021) (en banc) (mem.).

203. Vill. of Hoffman Estates v. Flipside, 455 U.S. 489, 498 (1982) (internal quotation marks omitted) (quoting Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972)).

204. Posters 'N' Things, Ltd. v. United States, 511 U.S. 513, 525 (1994).

205. *Flipside*, 455 U.S. at 499.

206. Id. Doctors prosecuted under § 841 of the CSA have brought these void-for-vagueness challenges over the years, arguing that the statute and its attendant regulations, as applied to doctors, fail to provide a "definite standard by which practitioners can measure

Since *Roe*, the Supreme Court has heard only one void-for-vagueness challenge—*Doe v. Bolton*, discussed above—that specifically pertained to the emergency exception to an abortion ban.[207] Under the challenged law, abortion was a crime unless deemed "necessary" based on the doctor's "best clinical judgment."[208] The Court declined to find the word "necessary" unconstitutionally vague, primarily because the text of the statute clearly left its definition up to the doctor's discretion in the moment.[209] The Eighth Circuit similarly upheld a medical emergency exception against challenges to the vagueness of the words "major bodily function," "immediate," and "grave" because the law explicitly allowed physicians to rely on their "best clinical judgment" in determining their meaning.[210] The Eighth Circuit made clear the importance of the subjective standard to its ruling: "[T]he reference to doctor's clinical judgment saves the statute from vagueness."[211] Most recently, the Idaho Supreme Court decided the first void-for-vagueness challenge to an emergency exception in a post-*Dobbs* abortion statute. In upholding the law, the court similarly relied on the fact that the provision uses a "clearly" subjective standard.[212]

In contrast, some lower courts have struck down as unconstitutionally vague medical emergency provisions that impose an objective standard of reasonableness onto emergency determinations.[213] For example, the Sixth

---

their conduct." United States v. Brickhouse, No. 3:14-cr-124, 2016 WL 2654259, at *3 (E.D. Tenn. Mar. 30, 2016). In bringing their challenges, petitioners often tried to analogize to abortion cases, such as *Colautti*, in which statutes were found unconstitutionally vague. See id. at *4. Not a single court, however, has held § 841 to be vague as applied to registered medical professionals. Id. at *5 (citing United States v. Orta-Rosario, 469 F. App'x 140, 143–44 (4th Cir. 2012); United States v. Birbragher, 603 F.3d 478, 488 (8th Cir. 2010); United States v. Lovern, 590 F.3d 1095, 1103 (10th Cir. 2009); United States v. DeBoer, 966 F.2d 1066, 1068–69 (6th Cir. 1992); United States v. Rosenberg, 515 F.2d 190, 197 (9th Cir. 1975); United States v. Collier, 478 F.2d 268, 270–72 (5th Cir. 1973)).

207. 410 U.S. 179 (1973). In one case decided before *Roe*, the Court rejected a void-for-vagueness challenge to the word "health" in an emergency exception of a criminal abortion statute. The Court did not broach the topic of physician mens rea but found that the word "health" did not create jeopardy for doctors because it could be read broadly. See United States v. Vuitch, 402 U.S. 62, 71 (1971).

208. *Doe*, 410 U.S. at 191 (internal quotation marks omitted) (quoting Ga. Code Ann. § 26-1202(a) (1968) (current version at Ga. Code Ann. § 16-12-141 (2023))).

209. Id. at 192.

210. Fargo Women's Health Org. v. Schafer, 18 F.3d 526, 534 (8th Cir. 1994).

211. Id.

212. Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1203 (Idaho 2023).

213. See, e.g., Women's Med. Pro. Corp. v. Voinovich, 130 F.3d 187, 204–05 (6th Cir. 1997) (striking down as vague an abortion statute with subjective and objective elements to its medical emergency definition but no scienter requirement), abrogated in part by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022); Summit Med. Assocs., P.C. v. James, 984 F. Supp. 1404, 1447 (M.D. Ala. 1998) (striking down a medical emergency exception that required a physician to entertain "a subjective belief that the abortion is necessitated by a medical emergency," which was then "assessed under an objective standard of reasonableness" as vague and inhibitory of "constitutionally-protected rights"), rev'd in part

Circuit struck down a statute allowing post-viability abortions only in medical emergencies determined in "good faith and in the exercise of reasonable medical judgment."[214] Due to the objective component of the exception and the fact that the treatment decision is "fraught with uncertainty," the Court held that "[a] physician simply does not know against which standard his conduct will be tested and his liability determined."[215] The inclusion of the mens rea "purposely" elsewhere in the statute did not address the court's concerns, as it "[went] to the performance of the abortion, not to the determination of medical necessity."[216] Though these cases were decided pre-*Dobbs*, some of their elements still apply with equal force today because they rely on constitutional and criminal law principles that were unaffected by the *Dobbs* decision.

Under these precedents, the new abortion statutes employing mixed or purely objective standards in their emergency exceptions are vulnerable to void-for-vagueness challenges, but a subjective mens rea requirement could save them. Given that courts try to read statutes in a way that renders them constitutional if reasonably possible,[217] the vagueness risks associated with these statutes provide a constitutional basis for state courts to apply, as *Ruan* did, the subjective mens rea requirement set out for the actus reus to the emergency exception as well.

3. *Applying* Ruan *to State Abortion Statutes.* — *Ruan* is useful in establishing subjective mens rea standards for abortion prosecutions across the country in three important respects. First, the decision reminds us that when faced with vague criminal laws—whether federal or state—both our constitutional and common law traditions favor scienter. Though *Ruan* is ostensibly a statutory interpretation decision, the common law canons of construction explicitly relied on by the Court in *Ruan* reflect principles very similar to the due process concerns that undergird the void-for-vagueness doctrine. The void-for-vagueness doctrine springs from the Fourteenth Amendment's notice requirement,[218] while the common law

---

on other grounds sub nom. Summit Med. Assocs., P.C. v. Pryor, 180 F.3d 1326 (11th Cir. 1999).

214. *Voinovich*, 130 F.3d at 204 (quoting Ohio Rev. Code Ann. § 2919.16(F) (1995)).

215. Id. at 205–06.

216. Id. at 206 (emphasis omitted).

217. See, e.g., Immigr. & Naturalization Serv. v. St. Cyr, 533 U.S. 289, 299–300 (2001) ("[I]f an otherwise acceptable construction of a statute would raise serious constitutional problems, and where an alternative interpretation of the statute is 'fairly possible,' . . . we are obligated to construe the statute to avoid such problems." (quoting Crowell v. Benson, 285 U.S. 22, 62 (1932))), superseded by statute on other grounds, REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302, as recognized in Nasrallah v. Barr, 140 S. Ct. 1683, 1690 (2020).

218. See, e.g., Welch v. United States, 136 S. Ct. 1257, 1261–62 (2016) ("[T]he void-for-vagueness doctrine[] [is] a doctrine that is mandated by the Due Process Clauses of the Fifth Amendment (with respect to the Federal Government) and the Fourteenth Amendment (with respect to the States).").

principle that a criminal defendant must "know" their conduct is unlawful ensures only those who understand the line between good and bad will suffer prosecution.[219] Whether understood through a common law or constitutional lens, *Ruan* models compliance with both doctrines and provides state courts ample bases to adopt subjective mens rea requirements when interpreting their new abortion bans.

Second, *Ruan*'s analysis is useful because of both contextual and textual similarities between the CSA and state abortion statutes. Contextually, as explained throughout this Note, both operate in situations in which courts have acknowledged that delineating between doctors' lawful and unlawful conduct is neither inherently easy nor susceptible to clear guidelines;[220] in which conduct of doctors that is otherwise permissible under different circumstances is criminalized;[221] in which severe penalties are imposed for conduct determined to be illegal;[222] and in which socially desirable conduct by doctors can be chilled as a result.[223]

Textually, both the CSA and most state abortion statutes are written, broadly speaking, as flat prohibitions followed by exceptions for the circumstances in which the prohibited treatment is allowed. More particularly, both the CSA and many state abortion statutes contain an actus reus, a subjective mens rea that applies to the actus reus, and an exception defined with reference to language typically construed as objective (e.g., "legitimate medical purpose," "reasonable medical

---

219. See, e.g., Morissette v. United States, 342 U.S. 246, 250 (1952) ("[Scienter requirements are] as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

220. Compare Ruan v. United States, 142 S. Ct. 2370, 2378 (2022) (noting that it is "often difficult to distinguish [the issuing of invalid prescriptions] from . . . socially acceptable . . . conduct" (internal quotation marks omitted) (quoting United States v. U.S. Gypsum Co., 438 U.S. 422, 441 (1978))), with *Voinovich*, 130 F.3d at 205 ("The determination of whether a medical emergency or necessity exists . . . is fraught with uncertainty . . . .").

221. Compare 21 U.S.C. § 841(a)(1) (2018) (outlawing the distribution of controlled substances "[e]xcept as authorized"), with Ala. Code § 26-23H-4 (2023) (outlawing abortion "except . . . [if] necessary in order to prevent a serious health risk to the unborn child's mother"). See infra Appendix B for a complete side-by-side comparison of these statutes.

222. Compare *Ruan*, 142 S. Ct. at 2375–76 (noting that both physicians convicted under § 841(a)(1) were sentenced to over twenty years), with Tex. Health & Safety Code Ann. § 170A.004 (West 2023) (making illegal abortion ending in the fetus' death a first-degree felony), and Tex. Penal Code § 12.32 (West 2023) (providing that first-degree felonies are punishable by up to life in prison).

223. Compare *Ruan*, 142 S. Ct. at 2378 (discussing the CSA's risk of "punishing . . . beneficial conduct that lies close to, but on the permissible side of, the criminal line"), with Colautti v. Franklin, 439 U.S. 379, 396 (1979) (discussing how a state abortion law "could have a profound chilling effect on the willingness of physicians to perform abortions near the point of viability in the manner indicated by their best medical judgment").

judgment").[224] Because of the way legislatures wrote both the CSA and state abortion laws, the exception is not technically an element of the crime even though it separates lawful from unlawful behavior. *Ruan* concluded that the exception, while not an element, functions "sufficiently like an element" that it should include the same mens rea requirement as the statute's actus reus, notwithstanding any grammatical awkwardness.[225] *Ruan* also concluded that the objective language found in the provisions defining the exception simply provided the objective professional standards against which a jury can evaluate the credibility of the doctor's professed belief that their conduct was lawful.[226] Because most state abortion statutes follow an almost identical structure to that of the CSA, state courts can apply *Ruan*'s textual analysis to those laws to reach a similar conclusion—that doctors must *knowingly*, *intentionally*, *deliberately* (or whatever subjective standard the statute employs) contravene reasonable medical judgment before facing criminal penalties for performing emergency abortions.

And third, the long road to *Ruan*—a path marked by doctors' fearful retreat from regulated treatments when faced with uncertain criminal exposure[227]—should serve as a cautionary tale as states enter this new phase of abortion regulation. The history of federal drug enforcement against doctors has shown that when guilt depends not on one's subjective intent but on hazy legal standards defined after the fact through expert testimony, doctors pull back on regulated treatments and patients are left behind. If they ignore the historical missteps that led to *Ruan*, states regulating abortion today risk repeating the mistakes of their federal counterparts and causing physicians to fearfully evade therapeutic abortions, with catastrophic consequences for their patients.

CONCLUSION

Medical emergency exceptions in abortion laws to protect the life or health of the pregnant person have been a constant in the abortion history of this country—first, as a matter of common law; next, as a constitutional requirement under *Roe* and *Casey*; and now, as a statutory feature in all fifty states.[228] Despite the long history of these exceptions, however, the post-*Dobbs* era is the first time in fifty years that the existence and scope of therapeutic abortion exceptions depend entirely upon the will of state legislatures.

---

224. See infra Appendix B for a side-by-side comparison of the CSA, 21 U.S.C. § 841 (emphasis added), along with its promulgating regulation, 21 C.F.R. § 1306.04(a) (2023) (emphasis added), and Ala. Code § 26-23H-3 to -4 (emphasis added).

225. *Ruan*, 142 S. Ct. at 2380.

226. Id. at 2382.

227. See supra section I.A.

228. See supra Part II (describing this progression).

Polls show that, in the abstract, carve-outs for therapeutic abortions in abortion bans remain extremely popular among the American public.[229] In practice, however, there is far less consensus about the circumstances under which those exceptions should apply. In fact, since *Dobbs* was decided, conservative lawmakers have expressed concern that the exceptions create loopholes through which illegal abortions occur.[230] While such skepticism is not new,[231] state laws can now reflect that skepticism without fear of running afoul of *Roe* or *Casey*. Whether or not lawmakers actually intend to chill the performance of therapeutic abortions, their statutes will nonetheless have that effect.

The foundational principles—both constitutional and common law—underlying criminal law should remain independent of the whims of abortion politics. Even in a context fraught with political overtones, criminal laws must provide fair warning of the prohibited conduct and, except in rare cases, punish only those with a guilty mind. *Ruan* rose to this challenge, albeit in a political context less charged than the national abortion debate; state abortion laws with vague standards and objective mens rea requirements fall short of the mark. The politics of abortion have polarized the nation and distorted the operation of many of its institutions, but courts should not allow abortion politics to undermine the time-honored meaning of guilt in American criminal law.

229. See Mary Ziegler, Why Exceptions for the Life of the Mother Have Disappeared, The Atlantic (July 25, 2022), https://www.theatlantic.com/ideas/archive/2022/07/abortion-ban-life-of-the-mother-exception/670582/ (on file with the *Columbia Law Review*) (last updated Aug. 2, 2022) ("[A] recent Pew Research Center poll found that 73 percent of Americans favored legal abortion if a woman's life *or health* was *at risk*.").

230. See id. (discussing the skepticism of conservative lawmakers).

231. See id. (noting that the skepticism of therapeutic abortions dates back to the 1960s, when therapeutic abortions based on the pregnant person's mental health proliferated).

APPENDIX A: STATE STATUTES BANNING ABORTION AFTER FIFTEEN WEEKS OR EARLIER

State	**Statute(s)**	**Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)**
Ala.	Ala. Code § 26-23H-4 (2023).	§ 26-23H-4. (a) It shall be unlawful for any person to intentionally perform or attempt to perform an abortion *except as provided for by subsection (b).* (b) An abortion shall be permitted if an attending physician licensed in Alabama determines that an abortion *is necessary in order to prevent a serious health risk to the unborn child's mother.*
	Ala. Code § 26-23H-3(6) (2023).	§ 26-23H-3. (6) *Serious Health Risk to the Unborn Child's Mother.* In reasonable medical judgment, the child's mother has a condition that so complicates her medical condition that it *necessitates the termination of her pregnancy to avert her death* or to avert *serious risk of substantial physical impairment of a major bodily function.*
Ariz.	Ariz. Rev. Stat. Ann. § 13-3603 (2023).	§ 13-3603. A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, *unless it is necessary to save her life*, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.
Ark.	Ark. Code Ann. § 5-61-404 (2023).	§ 5-61-404. (a) A person shall not purposely perform or attempt to perform an abortion *except to save the life of a pregnant woman in a medical emergency.*

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
	Ark. Code Ann. § 5-61-403 (2023).	§ 5-61-403. (3) "*Medical emergency*" means a condition in which an abortion is *necessary to preserve the life of a pregnant woman* whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself . . . .
Fla.	Fla. Stat. Ann. § 390.0111 (West 2023).	§ 390.0111. (1) . . . A physician may not knowingly perform or induce a termination of pregnancy if the physician determines the gestational age of the fetus is more than 6 weeks unless one of the following conditions is met: (a) Two physicians certify in writing that, in reasonable medical judgment, the termination of the pregnancy is *necessary to save the pregnant woman's life* or avert a *serious risk of substantial and irreversible physical impairment of a major bodily function of the pregnant woman* other than a psychological condition. (b) The physician certifies in writing that, in reasonable medical judgment, there is a *medical necessity* for legitimate emergency medical procedures for termination of the pregnancy to *save the pregnant woman's life* or avert a *serious risk of imminent substantial and irreversible physical impairment of a major bodily function of the pregnant woman* other than a psychological condition, and another physician is not available for consultation.

State	**Statute(s)**	**Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)**
Ga.	Ga. Code Ann. § 16-12-141 (2023).	§ 16-12-141. (b) No abortion is authorized or shall be performed if an unborn child has been determined . . . to have a detectable human heartbeat except when: (1) A physician determines, in reasonable medical judgment, that a *medical emergency* exists . . . .
Idaho	Idaho Code § 18-622 (2023).	§ 18-622. (1) Except as provided in subsection (2) of this section, every person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion . . . . (2) The following shall not be considered criminal abortions for purposes of subsection (1) of this section: . . . (i) The physician determined, in his good faith medical judgment and based on the facts known to the physician at the time, that the abortion was *necessary to prevent the death of the pregnant woman.*
Ind.	Ind. Code Ann. § 16-34-2-1 (West 2023).	§ 16-34-2-1. (a) Abortion shall in all instances be a criminal act, except when performed under the following circumstances: . . . (A) for reasons based upon the professional, medical judgment of the pregnant woman's physician, if either: (i) the abortion is necessary when reasonable medical judgment dictates that performing the abortion is *necessary to prevent any serious health risk to the pregnant woman or to save the pregnant woman's life* . . . .

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
Ky.	Ky. Rev. Stat. Ann. § 311.772 (West 2023).	§ 311.772. (3)(a) No person may knowingly: . . . 2. Use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being. (4) The following shall not be a violation of subsection (3) of this section: (a) For a licensed physician to perform a *medical procedure necessary* in reasonable medical judgment *to prevent the death or substantial risk of death* due to a physical condition, or *to prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.*
La.	La. Stat. Ann. § 40:1061 (2023).	§ 40:1061. C. . . . No person may knowingly use or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being. F. It shall not be a violation of Subsection C of this Section for a licensed physician to perform a *medical procedure necessary* in reasonable medical judgment *to prevent the death or substantial risk of death* due to a physical condition, or to *prevent the serious, permanent impairment of a life-sustaining organ of a pregnant woman.*
Miss.	Miss. Code Ann. § 41-41-45 (2023).	§ 41-41-45. (2) No abortion shall be performed or induced in the State of Mississippi, *except in the case where necessary for the preservation of the mother's life* or where the pregnancy was caused by rape.

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
		(4) Any person, except the pregnant woman, who purposefully, knowingly or recklessly performs or attempts to perform or induce an abortion in the State of Mississippi, *except in the case where necessary for the preservation of the mother's life* or where the pregnancy was caused by rape, upon conviction, shall be punished by imprisonment in the custody of the Department of Corrections for not less than one (1) year nor more than ten (10) years.
Mo.	Mo. Ann. Stat. § 188.017 (West 2023).	§ 188.017. 2. . . . [N]o abortion shall be performed or induced upon a woman, *except in cases of medical emergency*. Any person who knowingly performs or induces an abortion of an unborn child in violation of this subsection shall be guilty of a class B felony, as well as subject to suspension or revocation of his or her professional license by his or her professional licensing board. 3. It shall be an affirmative defense for any person alleged to have violated the provisions of subsection 2 of this section that the person performed or induced an abortion because of a *medical emergency*. The defendant shall have the burden of persuasion that the defense is more probably true than not.

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
Neb.	Neb. Rev. Stat. § 71-6915 (2023).	§ 71-6915. (2) Except as provided in subsection (3) of this section, it shall be unlawful for any physician to perform or induce an abortion . . . . (3) It shall not be a violation of subsection (1) or (2) of this section for a physician to perform or induce an abortion in the case of: (a) *Medical emergency* . . . .
	Neb. Rev. Stat. § 71-6914 (2023).	§ 71-6914. (3)(a) *Medical emergency* means any condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to *necessitate the termination of her pregnancy to avert her death* or for which a delay in terminating her pregnancy will create a *serious risk of substantial and irreversible physical impairment of a major bodily function.*
N.C.	Abortion Laws, ch. 14, sec. 1.2, § 90-21.81A, 2023 N.C. Sess. Laws.	§ 90-21.81A. (a) Abortion.—It shall be unlawful after the twelfth week of a woman's pregnancy to advise, procure, or cause a miscarriage or abortion.
	Abortion Laws, ch. 14, sec. 1.2, § 90-21.81B, 2023 N.C. Sess. Laws.	§ 90-21.81B. [I]t shall not be unlawful to advise, procure, or cause a miscarriage or an abortion in the following circumstances: (1) When a qualified physician determines there exists a *medical emergency.*
	Abortion Laws, ch. 14, sec. 1.2, § 90-21.81, 2023 N.C. Sess. Laws.	§ 90-21.81. (5) *Medical emergency.*—A condition which, in reasonable medical judgment, so complicates the medical condition of the pregnant woman as to *necessitate the immediate abortion of her pregnancy to avert her death* or for which a delay will create

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
		serious risk of substantial and irreversible physical impairment of a major bodily function . . . .
N.D.	N.D. Cent. Code § 12.1-19.1-02 (2023).	§ 12.1-19.1-02. It is a class C felony for a person . . . to perform an abortion.
	N.D. Cent. Code § 12.1-19.1-03 (2023).	§ 12.1-19.1-03. This chapter does not apply to: 1. An abortion deemed *necessary* based on reasonable medical judgment which was intended to *prevent the death* or a *serious health risk to the pregnant female.*
	N.D. Cent. Code § 12.1-19.1-01 (2023).	§ 12.1-19.1-01. . . . 4. "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved. 5. "Serious health risk" means a condition that, in reasonable medical judgment, complicates the medical condition of the pregnant woman so that it *necessitates an abortion to prevent substantial physical impairment of a major bodily function*, not including any psychological or emotional condition.
S.C.	S.C. Code Ann. § 44-41-630 (2023).	§ 44-41-630. (B) Except as [otherwise] provided . . . , no person shall perform or induce an abortion on a pregnant woman with the specific intent of causing or abetting an abortion if the unborn child's fetal heartbeat has been detected . . . . A person who violates this subsection is guilty of a felony . . . .

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
	S.C. Code Ann. § 44-41-640 (2023).	§ 44-41-640. (A) It is not a violation of Section 44-41-630 if an abortion is performed or induced on a pregnant woman due to a *medical emergency* or is performed to *prevent the death of the pregnant woman* or to *prevent the serious risk of a substantial and irreversible impairment of a major bodily function . . . .*
	S.C. Code Ann. § 44-41-610 (2023).	§ 44-41-610. (9) "*Medical emergency*" means in reasonable medical judgment, a condition exists that has complicated the pregnant woman's medical condition and *necessitates an abortion to prevent death or serious risk of a substantial and irreversible physical impairment of a major bodily function . . . .* (13) "Reasonable medical judgment" means a medical judgment that would be made by a reasonably prudent physician who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.
S.D.	S.D. Codified Laws § 22-17-5.1 (2023).	§ 22-17-5.1. Any person who administers to any pregnant female or who prescribes or procures for any pregnant female any medicine, drug, or substance or uses or employs any instrument or other means with intent thereby to procure an abortion, unless there is appropriate and reasonable medical judgment that performance of an abortion is *necessary to preserve the life of the pregnant female*, is guilty of a Class 6 felony.

State	**Statute(s)**	**Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)**
Tenn.	Tenn. Code Ann. § 39-15-213 (2023)	§ 39-15-213. (b) A person who performs or attempts to perform an abortion commits the offense of criminal abortion. (1) Notwithstanding subsection (b), a person who performs or attempts to perform an abortion does not commit the offense of criminal abortion if the abortion is performed or attempted by a licensed physician in a licensed hospital . . . [and]: (A) The physician determined, using reasonable medical judgment, based upon the facts known to the physician at the time, that the abortion was *necessary to prevent the death of the pregnant woman* or to *prevent serious risk of substantial and irreversible impairment of a major bodily function of the pregnant woman* . . . .
Tex.	Tex. Health & Safety Code Ann. § 170A.002 (West 2023).	§ 170A.002. (a) A person may not knowingly perform, induce, or attempt an abortion. (b) The prohibition under Subsection (a) does not apply if: . . . (2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced, or attempted has a *life-threatening physical condition* aggravated by, caused by, or arising from a pregnancy that *places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function* unless the abortion is performed or induced . . . .

State	Statute(s)	Relevant Text (*medical emergency exceptions* italicized and mens rea underlined for emphasis)
W. Va.	W. Va. Code Ann. § 16-2R-3 (LexisNexis 2023).	§ 16-2R-3. (a) An abortion may not be performed or induced or be attempted to be performed or induced unless in the reasonable medical judgment of a licensed medical professional: . . . (3) A *medical emergency* exists.
	W. Va. Code Ann. § 16-2R-2 (LexisNexis 2023).	§ 16-2R-2. "Reasonable medical judgment" means a medical judgment that would be made by a licensed medical professional who is knowledgeable about the case and the treatment possibilities with respect to the medical conditions involved.
Wis.	Wis. Stat. & Ann. § 940.15 (2023).	§ 940.15. (2) Whoever intentionally performs an abortion after the fetus or unborn child reaches viability, as determined by reasonable medical judgment of the woman's attending physician, is guilty of a Class I felony. (3) Subsection (2) does not apply if the abortion is *necessary to preserve the life or health of the woman*, as determined by reasonable medical judgment of the woman's attending physician.

APPENDIX B: COMPARISON OF THE CONTROLLED SUBSTANCES ACT AND THE ALABAMA HUMAN LIFE PROTECTION ACT

Controlled Substances Act & Attendant Regulation (*medical emergency exceptions* italicized and <u>mens rea</u> underlined for emphasis)	**Alabama Human Life Protection Act (*medical emergency exceptions* italicized and <u>mens rea</u> underlined for emphasis)**
21 U.S.C. § 841 (2018). (a) *Except as authorized by this subchapter*, it shall be unlawful for any person <u>knowingly or intentionally</u>— (1) to manufacture, distribute, or dispense . . . a controlled substance	Ala. Code § 26-23H-4 (2023). (a) It shall be unlawful for any person to <u>intentionally</u> perform . . . an abortion *except as provided for by subsection (b).* (b) An abortion shall be permitted if an attending physician licensed in Alabama determines that an abortion is *necessary in order to prevent a serious health risk to the unborn child's mother.*
21 C.F.R. § 1306.04(a) (2023). (a) A prescription for a controlled substance to be effective must be issued for a *legitimate medical purpose* by an individual practitioner acting *in the usual course of his professional practice.*	Ala. Code § 26-23H-3 (2023). (6) Serious Health Risk to the Unborn Child's Mother. In <u>reasonable medical judgment</u>, the child's mother has a condition that so complicates her medical condition that it necessitates the termination of her pregnancy to avert her death or to avert serious risk of substantial physical impairment of a major bodily function.

WATERPROOFING STATEHOOD: STRENGTHENING CLAIMS FOR CONTINUED STATEHOOD FOR SINKING STATES USING "E-GOVERNANCE"

*Jonathan Gliboff**

Climate-change–induced sea-level rise threatens the very existence of Small Island Developing States. Not only will this crisis create extreme climate conditions that can physically devastate these states, it also threatens their place in the international legal system. For a country to gain or maintain access to the international legal system, it needs to be classified as a "state." The common understanding is that a state needs to have territory, a population, a government, and independence. For low-lying coastal states, sea-level rise threatens the first two criteria directly and the second two indirectly. This Note explores whether these states can transition their governance system to online and digital platforms and thereby retain their status as states. In doing so, this Note draws on Estonia's development of the "e-state" that has proven that such a digital governance system can exist practically and politically. With the advent of e-identification, e-governance, and e-banking, among other innovations, this Note argues that the "e-statehood" fulfills enough of the holistic goals of territorial statehood to survive in the international legal system.

This Note is the first to explore the legal justifications and ramifications of a digital state, especially when the state no longer fulfills the traditional criteria of statehood. Ultimately this Note hopes to suggest a path forward that respects and maintains the autonomy of these small island states.

* J.D. Candidate 2024, Columbia Law School. I would like to thank my advisor, Professor Monica Hakimi, for her incredible guidance throughout this process, as well as Daniel Stewart and Professor Michael Gerrard for offering me their invaluable insights and encouragement. My sincerest appreciation goes out to both of my Note Editors, Nkechi Erondu and Trevor Rice, who made themselves available whenever I needed their help, and to the staff members of the *Columbia Law Review* who helped me bring this piece to life. I could not have done this without the crucial support of my mother, family, and friends. Finally, I would like to dedicate this Note to the memory of my father—Gary Joseph Gliboff—who taught me how to live in awe of the ocean's beauty and its might.

"Every night, families across my country go to sleep praying that the ocean will be forgiving."

— Lauza Ali, Counsellor of the Permanent Mission of the Republic of Maldives to the United Nations.[1]

INTRODUCTION

At the 2021 United Nations Climate Change Conference, Tuvalu's foreign minister, Simon Kofe, appeared before the world in a full suit and tie, knee-deep in water, and proclaimed, "We are sinking."[2] His video speech—recorded on what once was dry land—was meant not only as a political statement but as a warning and a call to action.[3] If the world does

1. Lauza Ali, Counsellor, Permanent Mission of the Republic of Maldives to the UN, Statement on the Report of the International Law Commission on the Work of Its Seventy-Third Session (Oct. 27, 2022), https://www.un.org/en/ga/sixth/77/pdfs/statements/ilc/28mtg_maldives_2.pdf [https://perma.cc/KM84-F6D8].

2. Guardian News, 'We Are Sinking': Tuvalu Minister Gives COP26 Speech Standing in Water to Highlight Sea Level Rise, YouTube, at 00:42 (Nov. 9, 2021), https://www.youtube.com/watch?v=jBBsv0QyscE (on file with the *Columbia Law Review*).

3. See Josephine Joly, COP26: Why Has a Speech by Tuvalu's Foreign Minister Gone Viral?, Euronews (Nov. 9, 2021), https://www.euronews.com/green/2021/11/09/cop26-tuvalu-s-foreign-minister-urges-world-leaders-to-address-climate-

not combat climate change and rising sea levels, entire countries could be swallowed by the ocean.[4]

Unfortunately, science supports Kofe's assertion. Irreversible damage from climate change has already occurred.[5] Many scientists agree that if the world does not take action in the next six years to limit the increase of the mean global temperature to 1.5 degrees Celsius, large-scale damage to the environment, including the catastrophic rise of sea levels, will be inevitable.[6] If the global emissions trend continues as it has, the global average temperature will surpass a 1.5-degree increase within the next five to ten years.[7] In that scenario, sea-level rise will cause an uptick in natural disasters, a depletion of vital resources, and ultimately the loss of all habitable land in the most vulnerable countries.[8] Whole populations will

---

change [https://perma.cc/K6F5-WPWF] ("[T]he message we are sending to the leaders is for them to look beyond their immediate interests . . . and recognise that we live in an interconnected world." (internal quotation marks omitted) (quoting interview with Kofe)).

4. Joe Phelan, What Countries and Cities Will Disappear Due to Rising Sea Levels?, Live Sci. (Mar. 27, 2022), https://www.livescience.com/what-places-disappear-rising-sea-levels [https://perma.cc/7YX9-BEDM]; see also Joly, supra note 3 ("Where I was standing and filming, . . . there's that concrete base that was actually built by the Americans during World War Two. . . . [T]his base used to be on land and it's now in the middle of the sea, about 20 or 30 metres from the land." (internal quotation marks omitted) (quoting interview with Kofe)).

5. Susan Solomon, Gian-Kasper Plattner, Reto Knutti & Pierre Friedlingstein, Irreversible Climate Change Due to Carbon Dioxide Emissions, 106 Proc. Nat'l Acad. Scis. 1704, 1709 (2009) ("Irreversible climate changes due to carbon dioxide emissions have already taken place, and future carbon dioxide emissions would imply further irreversible effects on the planet, with attendant long legacies for choices made by contemporary society.").

6. See Climate Clock, https://climateclock.world/ [https://perma.cc/U6AD-GM43] (last visited Aug. 11, 2023) (reflecting the approximately six years remaining "to limit global warming to 1.5ºC"); What Is the Climate Clock?, Root the Future, https://rootthefuture.com/climate-clock/ [https://perma.cc/92JA-3L9A] (last visited Aug. 11, 2023) (noting that "a global temperature . . . increase [of] 1.5 degrees Celsius" marks "a dangerous 'point of no return' according to scientists"); see also Ove Hoegh-Guldberg et al., Impacts of 1.5ºC of Global Warming on Natural and Human Systems, *in* Intergovernmental Panel on Climate Change, Global Warming of 1.5ºC, at 175, 178 (Valérie Masson-Delmotte, Panmao Zhai, Hans-Otto Pörtner, Debra Roberts, Jim Skea & Priyadarshi R. Shukla eds., 2019), https://www.ipcc.ch/site/assets/uploads/sites/2/2022/06/SR15_Full_Report_LR.pdf [https://perma.cc/M9RH-Z5HA] (explaining that "[l]imiting global warming to 1.5ºC is expected to substantially reduce the probability of extreme drought, precipitation defects, and risks associated with water availability").

7. Peter Schlosser, After COP27, All Signs Point to World Blowing Past the 1.5 Degrees Global Warming Limit—Here's What We Can Still Do About It, The Conversation (Nov. 22, 2022), https://theconversation.com/after-cop27-all-signs-point-to-world-blowing-past-the-1-5-degrees-global-warming-limit-heres-what-we-can-still-do-about-it-195080 [https://perma.cc/CSR9-XMS4].

8. Mary-Elena Carr, Madeleine Rubenstein, Alice Graff & Diego Villarreal, Sea Level Rise in a Changing Climate: What Do We Know?, *in* Threatened Island Nations: Legal Implications of Rising Seas and a Changing Climate 15, 54 (Michael B. Gerrard & Gregory E. Wannier eds., 2013).

be forced to migrate,[9] as the residents of Papua New Guinea and other island nations have already experienced firsthand.[10]

Beyond its physical dangers, sea-level rise will challenge the very existence of certain Small Island Developing States (SIDS) in the international legal system. Historically, entities could attain statehood only by having a territory and a permanent population.[11] Statehood carries with it several important benefits that can support the well-being of the state's population, including maritime entitlements under the United Nations Convention on the Law of the Sea (UNCLOS), access to international adjudication, and membership in international organizations like the United Nations (UN).[12] While there is a strong presumption against the extinction of states in international law, there is no clear law on whether

---

9. Michael Oppenheimer et al., Sea Level Rise and Implications for Low-Lying Islands, Coasts and Communities (Ayako Abe-Ouchi, Kapil Gupta & Joy Pereira eds.), *in* Intergovernmental Panel on Climate Change, The Ocean and Cryosphere in a Changing Climate 321, 321–445 (Hans-Otto Pörtner, Debra C. Roberts, Valérie Masson-Delmotte & Panmao Zhai eds., 2022), https://www.ipcc.ch/site/assets/uploads/sites/3/2022/03/SROCC_FullReport_FINAL.pdf [https://perma.cc/4Q34-7ZMU] [hereinafter IPCC, Ocean and Cryosphere]; see also Patrícia Galvão Teles & Juan José Ruda Santolaria (Co-Chairs of the Study Grp. on Sea-Level Rise in Rel. to Int'l L.), Sea-Level Rise in Relation to International Law, para. 47(d), Int'l L. Comm'n, U.N. Doc. A/CN.4/752 (Apr. 19, 2022) (citing Nerilie Abram et al., Summary for Policymakers, *in* IPCC, Ocean and Cryosphere, supra, at 3, 3–35) (summarizing the findings of the Intergovernmental Panel on Climate Change).

10. Sharon Brettkelly, Sea Level Rises Forcing Community to Relocate From Carteret Islands in Papua New Guinea, Pasifika Environews (Aug. 29, 2022), https://pasifika.news/2022/08/sea-level-rises-forcing-community-to-relocate-from-carteret-islands-in-papua-new-guinea/ [https://perma.cc/X8RM-86PC]; see also Tristan McConnell, The Maldives Is Being Swallowed by the Sea. Can It Adapt?, Nat'l Geographic (Jan. 20, 2022), https://www.nationalgeographic.com/environment/article/the-maldives-is-being-swallowed-by-the-sea-can-it-adapt (on file with the *Columbia Law Review*) ("The difference between 1.5 degrees and 2 degrees (Celsius) is a death sentence for the Maldives."); Joshua Mcdonald, Rising Sea Levels Threaten Marshall Islands' Status as a Nation, World Bank Report Warns, The Guardian (Oct. 16, 2021), https://www.theguardian.com/world/2021/oct/17/rising-sea-levels-threaten-marshall-islands-status-as-a-nation-world-bank-report-warns [https://perma.cc/RK8U-BP37] (reporting that sea-level rise likely poses an existential threat to the Marshall Islands).

11. See Galvão Teles & Ruda Santolaria, supra note 9, para. 75 ("While there is no generally accepted notion of 'State', the reference is usually the . . . criteria that a State has to meet to be considered a subject . . . of international law in accordance with . . . the 1933 Convention of the Rights and Duties of States: (*a*) permanent population; (*b*) defined territory . . . ."); Jane McAdam, Climate Change, Forced Migration, and International Law 119–60 (2020) (arguing that statehood might be jeopardized by a loss of population before a loss of territory, and exploring mechanisms of continuing the state).

12. See Rosemary Rayfuse, International Law and Disappearing States—Maritime Zones and the Criteria for Statehood, 41 Env't Pol'y & L. 281, 284–85 (2011). Beyond these practical challenges, Melissa Stewart argues that "sinking states serve as a metaphor for international law and the whole of humanity" and that a failure to adequately address this crisis threatens the survival of the international legal system as a whole. Melissa Stewart, Cascading Consequences of Sinking States, 59 Stan. J. Int'l L. (forthcoming 2023) (manuscript at 4), https://ssrn.com/abstract=4321214 [https://perma.cc/3SJF-4WPZ].

the presumption of continuity applies to submerged states.[13] Several contemporary scholars have therefore argued that international law should begin to recognize states that lose the necessary criterion of territory as "deterritorialized states."[14] Likewise, they have explored options for how these nonterritorial states might operate in practice.[15] All of these solutions, however, rely heavily on international cooperation, leaving the fate of at-risk SIDS in the hands of other countries. The goal of this Note, therefore, is to explore a modality of continued statehood that enhances the autonomy and flexibility for at-risk island nations.

At the 2022 UN Climate Change Conference, Tuvalu's foreign minister, Simon Kofe, once more stood before the world to introduce the concept of Tuvalu's digital twin.[16] In a further effort to save the atoll nation, Tuvalu plans to rebuild itself in the Metaverse, preserving itself online for all time.[17] While Tuvalu would be the first nation to use the Metaverse in this way, it will not be the first country to "digitize" itself into an "e-state." Dubbing itself "e-Estonia," the Northern European state provides most public goods and services online, including a digital ID system, digital banking, digital voting, e-residency for businesses, and digital governance.[18] One reason for this reform was to ensure Estonia's survival: If an expansionist state occupied Estonian territory and displaced its government, Estonia could continue to operate unimpeded through its digital platforms.[19] Where it is all but certain that the peoples of sinking states will be displaced from their territories, adoption of "e-statehood"

---

13. Sumudu Atapattu, Climate Change: Disappearing States, Migration, and Challenges for International Law, 4 Wash. J. Env't L. & Pol'y 1, 18 (2014) ("International law does not envision a situation where states disappear altogether . . . .").

14. Rayfuse, supra note 12, at 284–85.

15. Id. at 286–87.

16. Tory Shepherd, Could a Digital Twin of Tuvalu Preserve the Island Nation Before It's Lost to the Collapsing Climate?, The Guardian (Sept. 29, 2022), https://www.theguardian.com/world/2022/sep/29/could-a-digital-twin-of-tuvalu-preserve-the-island-nation-before-its-lost-to-the-collapsing-climate (on file with the *Columbia Law Review*).

17. Lucy Craymer, Tuvalu Turns to the Metaverse as Rising Seas Threaten Existence, Reuters (Nov. 15, 2022), https://www.reuters.com/business/cop/tuvalu-turns-metaverse-rising-seas-threaten-existence-2022-11-15/ (on file with the *Columbia Law Review*).

18. Story, e-Estonia, https://e-estonia.com/story/ (on file with the *Columbia Law Review*) [hereinafter e-Estonia, Story] (last visited Aug. 29, 2023). Tuvalu also has announced its Future Now Project, which seeks similar ends as the Estonian e-state. See Future Now Project, Dep't of Foreign Affs., Gov't of Tuvalu, https://dfa.gov.tv/index.php/future-now-project/ [https://perma.cc/TZ97-8JMH] (last visited Aug. 29, 2023) (detailing one of its goals as "[c]onducting digitization activities on appropriate platforms to create a digital Government administrative system" so that if "mass migration becomes necessary, digitized Government services would ensure that Tuvalu could ostensibly shift to another location and continue to fully function as a sovereign nation").

19. Nikolai F. Rice, Estonia's Digital Embassies and the Concept of Sovereignty, Geo. Sec. Stud. Rev. (Oct. 10, 2019), https://georgetownsecuritystudiesreview.org/2019/10/10/estonias-digital-embassies-and-the-concept-of-sovereignty/ [https://perma.cc/C74X-AF6X].

similar to Estonia's might strengthen states' ability to preserve their international legal personality.

While the impacts of sea-level rise on the continuity of at-risk SIDS have been previously explored at length, this Note is the first to argue that e-statehood should be recognized as a form of deterritorialized statehood that is strong enough to carry forward the presumption of continuity. In doing so, this Note uses the conceptual innovation of an e-state from Estonia as a framework and advocates that SIDS adopt versions of e-statehood that meet their particular needs. Part I of this Note provides a background on the physical threats sea-level rise poses to SIDS as well as a background on the international law of statehood and continuity. It details several modalities that have been proposed as forms of continued statehood. Part II explains the dangers associated with the loss of statehood in international law, specifically as it relates to the preservation of maritime entitlements, diplomatic protection, other treaty-based protections, and participation in international organizations. This Part further explores why the presumption of continuity might not apply to the case of SIDS. Finally, Part III argues that e-states could provide SIDS a viable pathway toward transitioning into deterritorialized statehood, be developed unilaterally, and create greater legitimacy in the international arena than other options for continued statehood.

I. THE SCIENCE, THE LAW, AND THE FUTURE OF SMALL ISLAND STATEHOOD

In the summer of 2022, the International Law Commission (ILC) released its Second Issues Paper on the impacts of sea-level rise on statehood.[20] Reviewing the applicable law, the ILC noted that statehood generally is contingent on a country having territory and a permanent population.[21] Low-lying SIDS are at a great risk of losing both due to rising sea levels.[22] The ILC noted that many states and scholars believe that the statehood of submerged island nations will continue despite their territory becoming uninhabitable.[23] But international law has yet to be definitively

20. See Galvão Teles & Ruda Santolaria, supra note 9, paras. 72–226. The ILC is a UN entity dedicated to the codification and progressive development of international law. Codification has been defined as "the precise formulation and systematization of rules of international law in fields where there already has been extensive State practice, precedent, and doctrine," while progressive development refers to "the preparation of draft conventions on subjects which have not yet been regulated by international law or in regard to which the law has not yet been sufficiently developed in the practice of States." G.A. Res. 174 (II), art. 15, Statute of the International Law Commission (Nov. 12, 1947). In engaging with contemporary issues in international law, the ILC will sometimes produce study papers that might inform the future work of the UN. Such is the case with the Galvão Teles and Ruda Santolaria paper on sea-level rise.

21. Galvão Teles & Ruda Santolaria, supra note 9, para. 75.

22. See Rayfuse, supra note 12, at 284 ("The traditional international law criteria for statehood include the fundamental requirements of territory and a permanent population.").

23. Galvão Teles & Ruda Santolaria, supra note 9, paras. 183–196.

established in this area, and several scholars are unconvinced that small island statehood will survive.[24] The fate of the most vulnerable small island nations is therefore left uncertain.

Before exploring what e-statehood would entail for the international law of statehood in Part III, this Part will begin with a brief review of the physical threats sea-level rise poses to SIDS that are pertinent to their maintenance of statehood. It will then detail the law of statehood and state continuation before exploring possible modalities of continued statehood.

A. *An Unforgiving Ocean*

The impending crisis of sea-level rise has been well studied and documented by scientific bodies,[25] including in the recent 2021 report of the Intergovernmental Panel on Climate Change (IPCC).[26] Due to industrial activities over the last few decades by developed nations,[27]

---

24. See, e.g., Michel Rouleau-Dick, Competing Continuities: What Role for the Presumption of Continuity in the Claim to Continued Statehood of Small Island States?, 22 Melbourne J. Int'l L. 357 (2021) [hereinafter Rouleau-Dick, Competing Continuities] (detailing different theories of continuity that might not support the continuation of statehood for submerged island nations); Ori Sharon, To Be or Not To Be: State Extinction Through Climate Change, 51 Env't L. 1041 (2021) [hereinafter Sharon, To Be or Not To Be] (arguing that the continuation of statehood would lead to a sovereignty clash that will make it more difficult for migrants of a sinking state to find a host state willing to grant them entry).

25. For a short list of organizations that have considered the topic, see Press Release, NASA, NASA-Led Study Reveals the Causes of Sea Level Rise Since 1900 (Aug. 21, 2020), https://climate.nasa.gov/news/3012/nasa-led-study-reveals-the-causes-of-sea-level-rise-since-1900/ [https://perma.cc/6QFB-ZLPJ] (identifying glacial melting and thermal expansion as the primary drivers of sea-level rise); Global Sea Level Rise Is Accelerating—Study, UN Framework Convention on Climate Change (Feb. 13, 2018), https://unfccc.int/news/global-sea-level-rise-is-accelerating-study [https://perma.cc/2EXK-3QGN] (describing recent data indicating that melting ice sheets are causing sea-level rise to accelerate at a rate that could exceed threefold per year); Rebecca Lindsey, Climate Change: Global Sea Level, Climate.gov (Apr. 19, 2022), https://www.climate.gov/news-features/understanding-climate/climate-change-global-sea-level [https://perma.cc/99D4-YMPJ] (highlighting changes in sea level over more than a century and the phenomenon's future effects).

26. See Baylor Fox-Kemper et al., Ocean, Cryosphere and Sea Level Change, *in* Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis 1211, 1211–363 (Valérie Masson-Delmotte & Panmao Zhai eds., 2021), https://report.ipcc.ch/ar6/wg1/IPCC_AR6_WGI_FullReport.pdf [https://perma.cc/4WYR-K75E] (reporting large-scale changes in the climate system).

27. See Nadja Popovich & Brad Plumer, Who Has the Most Historical Responsibility for Climate Change?, N.Y. Times (Nov. 12, 2021), https://www.nytimes.com/interactive/2021/11/12/climate/cop26-emissions-compensation.html (on file with the *Columbia Law Review*) ("Rich countries, including the United States, Canada, Japan and much of western Europe, account for just 12 percent of the global population today but are responsible for 50 percent of all the planet-warming greenhouse gases released from fossil fuels and industry over the past 170 years."). Notably, less than one percent of all greenhouse gas emissions have come from SIDS. Leila Mead, Small Islands,

carbon dioxide levels and atmospheric temperatures have risen, contributing to the melting of ocean ice.[28] This, in turn, will cause sea levels to rise to a degree that will devastate low-lying zones,[29] which are home to 680 million people.[30] According to the IPCC, it is "*virtually certain*" that the global mean sea level will continue to rise until 2100,[31] and even if states hit their emission targets, climate changes would "continue in their current direction for decades to millennia."[32]

Sea-level rise has the capacity to render SIDS uninhabitable.[33] At a minimum, it will "increase the likelihood of erosion, saline intrusions into groundwater, and risk of flooding."[34] Atoll islands—ring shaped islands—are at particular risk due to their central lagoons.[35] The width of these islands is often in the "tens of feet," and therefore erosion can impact permanent dwellings, infrastructure, beaches, and agricultural lands.[36] With limited capacities to respond to this crisis,[37] low-lying coastal states might not be able to sustain a population when their drinking water becomes contaminated, their agriculture spoils, their infrastructure crumbles, and their land floods.[38] Although this is a slow-

---

Large Oceans: Voices on the Frontlines of Climate Change 2 (2021), https://www.iisd.org/system/files/2021-03/still-one-earth-SIDS.pdf [https://perma.cc/2ANE-2ATU].

28. See Fox-Kemper et al., supra note 26, at 1218.

29. See Carr et al., supra note 8, at 54 ("The implications for small island States of rising sea level and other changes in the climate system will be particularly acute . . . .").

30. Galvão Teles & Ruda Santolaria, supra note 9, para. 47(b).

31. Fox-Kemper et al., supra note 26, at 1216.

32. Galvão Teles & Ruda Santolaria, supra note 9, para. 50(f).

33. Amélie Bottollier-Depois, As Oceans Rise, Are Some Nations Doomed to Vanish?, Phys.org (Oct. 10, 2022), https://phys.org/news/2022-10-oceans-nations-doomed.html [https://perma.cc/GG4Q-7JF4] (noting that the most threatened nations are the Maldives, Kiribati, the Marshall Islands, Nauru, and Tuvalu); Stewart, supra note 12 (manuscript at 3) ("For Tuvalu and three other atoll states—Kiribati, the Maldives, and the Marshall Islands—the threat is nothing short of existential." (citing Alejandra Torres Camprubi, Statehood Under Water: Challenges of Sea-Level Rise to the Continuity of Pacific Island States 103 (2016))).

34. Carr et al., supra note 8, at 42.

35. See Atoll, Nat'l Geographic, https://education.nationalgeographic.org/resource/atoll [https://perma.cc/3W6H-MCW6] (last updated May 20, 2022) ("Atolls, along with sandbars, are among islands with the lowest elevation. They are constantly, naturally at risk from erosion due to wind and waves. Atolls are also at risk from sea-level rise."); see also What Is a Lagoon?, Nat'l Ocean Serv., https://oceanservice.noaa.gov/facts/lagoon.html [https://perma.cc/HF4V-KDFN] (last visited Aug. 12, 2023) ("A lagoon is a body of water separated from larger bodies of water by a natural barrier.").

36. Carr et al., supra note 8, at 42.

37. Galvão Teles & Ruda Santolaria, supra note 9, para. 47(h).

38. See Carr et al., supra note 8, at 42–43 (noting that sea-level rise can contaminate water supplies, increase flooding, and harm ecosystems).

onset crisis, it inevitably will lead to a complete submergence of livable territory and the forced migration of whole populations.[39]

B. *International Law of Statehood*

States are the primary subjects of the international legal system, in which they can shape law, acquire benefits, and incur obligations.[40] Specifically, statehood entails the right to maritime entitlements,[41] access to international adjudication,[42] and full membership in international organizations,[43] which can be vital to the well-being of the migrating nationals of at-risk SIDS.[44] While some international entities that lack state status have an international legal personality that grants them access to some of those rights and benefits, the scope of that access is limited.[45] Over time, international law has developed criteria to determine which entities qualify as states that have full access to the international legal system.

The law of statehood draws its primary influence from a treaty and customary international law (CIL).[46] Treaties are "international

39. See McAdam, supra note 11, at 123.

40. Abhimanyu George Jain, The 21st Century Atlantis: The International Law of Statehood and Climate Change–Induced Loss of Territory, 50 Stan. J. Int'l L. 1, 9 (2014) (noting that while non-state entities have gained some standing in the international legal system, "states are still the primary actors" within it); Ben Juvelier, When the Levee Breaks: Climate Change, Rising Seas, and the Loss of Island Nation Statehood, 46 Denv. J. Int'l L. & Pol'y 21, 38–39 (2017) ("[T]raditional international law asserts that such [territorialized] states are the primary subjects of and makers of international law . . . .").

41. Rayfuse, supra note 12, at 284 ("Only States are entitled to claim maritime zones.").

42. Jessica L. Noto, Comment, Creating a Modern Atlantis: Recognizing Submerging States and Their People, 62 Buff. L. Rev. 747, 750 (2014) ("[T]he Statute of the International Court of Justice requires parties to be states before they can bring a claim before the court.").

43. Jain, supra note 40, at 9 (noting that while observer states in the UN have some "state-like rights," they lack the right to vote).

44. See infra section II.A. The continued protection of the state is particularly important for this group because they do not qualify as refugees under international law and therefore cannot access the assistance normally afforded to refugees. For a detailed discussion on the lack of refugee protection for this population, see Shaun McCullough, In a Rising Sea of Uncertainty: A Call for a New International Convention to Safeguard the Human Rights of Citizens of Deterritorialized Asia-Pacific Small Island-States, 26 Colo. Nat. Res. Energy & Env't L. Rev. 109, 120–28 (2015).

45. For example, the Sovereign Order of Malta can issue diplomatic passports, ensure diplomatic immunity for its officials, and enter into international agreements related to its humanitarian relief mission. Its existence, however, relies on the recognition of states, and its ability to act is limited to its mission. Michel Rouleau-Dick, A Blueprint for Survival: Low-Lying Island States, Climate Change, and the Sovereign Military Order of Malta, 63 German Y.B. Int'l L. 621, 628–30 (2020) [hereinafter Rouleau-Dick, A Blueprint for Survival].

46. Treaty law and CIL are two of the four commonly accepted sources of international law. Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055 [hereinafter ICJ Statute]. The other two are general principles of law recognized by "civilized" nations—including doctrines like estoppel and good faith—and judicial decisions and the writings of the most highly qualified publicists. Id.; Public

agreement[s] concluded between States in written form . . . whether embodied in a single instrument or in two or more related instruments."[47] In contrast, CIL is determined by general and consistent state practice followed out of a sense of obligation (opinio juris).[48] Whereas treaties are created through diplomacy, CIL is created over time through state practice.[49] Once identified, CIL is as binding on states as written treaties.[50] These two sources of international law can also influence each other, as was the case with the law of statehood.[51]

1. *The Montevideo Convention and Its Influence.* — The 1933 Convention on the Rights and Duties of States, better known as the Montevideo Convention, has significantly influenced the modern conception of statehood in international law.[52] Article 1 sets out four criteria for statehood: (1) a permanent population, (2) a defined territory, (3) a government, and (4) the capacity to enter into relations with other states.[53] The Convention was a regional agreement with only fifteen

---

International Law: A Beginner's Guide—General Principles, Libr. of Cong., https://guides.loc.gov/public-international-law/general-principles [https://perma.cc/TQ86-8KSR] (last visited Aug. 29, 2023). For a critique of the use of the term "civilized nations" in this provision, see Sué González Hauck, 'All Nations Must Be Considered to Be Civilized': General Principles of Law Between Cosmetic Adjustments and Decolonization, Verfassungsblog (July 21, 2020), https://verfassungsblog.de/all-nations-must-be-considered-to-be-civilized/ [https://perma.cc/3WC7-GACM] ("The [UN] report acknowledges that the term 'civilized nations' was 'intended to exclude from consideration the legal systems of the countries not considered to be civilized' . . . . However, it considers this exclusionary effect to be irrelevant to present-day international law.").

47. Vienna Convention on the Law of Treaties art. 2, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]. This convention is the instrument that codified the international law of treaties. Id. pmbl.

48. Customary International Law, Cornell L. Sch., https://www.law.cornell.edu/wex/customary_international_law [https://perma.cc/UFN2-YMGJ] (last updated July 2022).

49. See, e.g., The Paquete Habana, 175 U.S. 677, 686 (1900) (explaining that historical analysis was necessary to evaluate whether a specific maritime fishing practice was indeed CIL); see also Int'l L. Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc. A/73/10, at 119–22 (2018) (specifying the accepted means of identifying CIL).

50. See ICJ Statute, supra note 46, art. 38 (establishing that both CIL and treaty law are sources of law the ICJ must draw on); Customary International Humanitarian Law: Questions & Answers, Int'l Comm. of the Red Cross (Aug. 15, 2005), https://www.icrc.org/en/doc/resources/documents/misc/customary-law-q-and-a-150805.htm [https://perma.cc/YLU7-G77H] ("In principle, there is no difference in the enforcement of treaty law and customary international law, as both are sources of the same body of law.").

51. Gary L. Scott & Craig L. Carr, Multilateral Treaties and the Formation of Customary International Law, 25 Denv. J. Int'l L. & Pol'y 71, 72 (1996) (noting that under certain circumstances, treaty law can become customary international law over time).

52. Convention on Rights and Duties of States, Dec. 26, 1933, 49 Stat. 3097, 165 L.N.T.S. 19 (entered into force Dec. 26, 1934) [hereinafter Montevideo Convention].

53. Id. art. 1.

members[54] and so is not itself binding on the world.[55] The Convention-codified criteria, however, "are widely quoted as" codifying "the customary international law requirements of statehood."[56] Although there are critiques of this paradigm,[57] there is overwhelming agreement that these criteria are the operative indicia of statehood in international law.[58] This is so even though many entities recognized as states do not perfectly satisfy all the indicia.

Under this set of criteria, one of the biggest threats to the statehood of sinking SIDS is the vulnerability of their territory. Territory has long been considered a requirement for statehood,[59] and to some scholars it is almost inconceivable to have a state without it.[60] Tracing its roots to the treaties of Westphalia, the concept of state sovereignty was historically understood in reference to authority over territorial boundaries.[61] The

54. The signatories to the convention were Brazil, Chile, Costa Rica, Cuba, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, the United States, and Venezuela. Convention on Rights and Duties of States Adopted by the Seventh International Conference of American States, UN, https://treaties.un.org/pages/showdetails.aspx?objid=0800000280166aef [https://perma.cc/S9PQ-ZMPV] (last visited Aug. 12, 2023).

55. Indeed, the treaty itself uses the language "*should* possess the following qualifications," signaling that the Convention's criteria might not have the mandatory force a provision could have when the word "shall" is used. Montevideo Convention, supra note 52, art. 1 (emphasis added).

56. Jain, supra note 40, at 15 & n.85 ("Most modern publicists discussing the criteria of statehood restrict their discussion to quoting the Montevideo Convention criteria."). But there is some pushback on the notion that these criteria are the be-all and end-all of statehood in international law. Small island nations argue that these criteria at most signal what is required for the *creation* of a state as opposed to its *continued existence*. See infra note 101 and accompanying text; see also Stewart, supra note 12 (manuscript at 12) ("[W]hile there is a traditional conception of what constitutes a state under international law, there is no legally binding definition.").

57. See Jain, supra note 40, at 16 ("Louis Henkin, a noted authority on international law . . . criticises these criteria on the grounds that they are 'not requisite qualifications but descriptions of states as we know them.'" (quoting Louis Henkin, International Law: Politics and Values 13 (1995))).

58. Id. at 15 ("[T]he Article 1 criteria are widely quoted as representing a codification of the customary international law requirements of statehood." (citing, e.g., Thomas D. Grant, Defining Statehood: The Montevideo Convention and Its Discontents, 37 Colum. J. Transnat'l L. 403, 415 n.51 (1999))). Notably, "state" has never been defined in international law. The ILC considered defining the term in its Draft Declaration of the Rights and Duties of States but decided against it. See Jain, supra note 40, at 16 & nn.91–92; see also James Crawford, The Creation of States in International Law 38–40 (2d ed. 2006) (detailing several failed attempts at defining "state"). Thus, the concept of statehood might allow for some flexibility in certain circumstances. Maxine A. Burkett, The Nation Ex-Situ, *in* Threatened Island Nations, supra note 8, at 89, 94–95.

59. Jain, supra note 40, at 15 ("The importance of territory as a criterion of statehood, in particular, was recognised in the writings of publicists well before the Montevideo Convention . . . .").

60. See, e.g., Antonio Cassese, International Law 81 (2d ed. 2005).

61. Derek Wong, Sovereignty Sunk? The Position of 'Sinking States' at International Law, 14 Melbourne J. Int'l L. 346, 352 (2013) ("Modern international law dates from the

Montevideo Convention and its subsequent evolution into CIL have upheld the requirement of territory.[62] Not everyone agrees that territory is absolutely necessary; for example, one scholar argued that territory was a consequence of statehood, not a prerequisite.[63] Yet there are many who argue that territory serves a fundamental purpose that statehood could not exist without.[64]

In that regard, several core functions have been ascribed to the purpose of territory. One view is that territory is essential to physically demarcate the competence and jurisdiction of the central authority of the state, including both its coercive power and its claim to entitlements within its borders.[65] It can also facilitate the effective exercise of jurisdiction and serve as a source of security, economic resources,[66] and historical and cultural resources.[67] Alternatively, one scholar argued that territory is not "an end in itself, but . . . a means to an end" and is predominantly linked to its ability to serve as a "physical basis that ensures that people can live together as organized communities."[68]

To fulfill the population requirement for statehood, there is no set minimum population size;[69] the population merely must exhibit some communal activity.[70] After World War II, a group of individuals attempted to claim that they had created a new sovereign state—named the Principality of Sealand—on a former World War II sea fort located on

---

Peace of Westphalia of 1648, where unity was established by nation states exercising sovereignty over certain territories." (footnote omitted)).

62. Montevideo Convention, supra note 52, art. 1.

63. Jain, supra note 40, at 16 ("Kelsen defined a state by reference to the establishment of a legal order and referred to territory as the space of operation of that legal order. Thus, territory for Kelsen was a consequence of statehood and not a prerequisite." (citing Hans Kelsen, The Pure Theory of Law and Analytical Jurisprudence, 55 Harv. L. Rev. 44, 69–70 (1941))); see also Veronika Bílková, A State Without Territory?, *in* Netherlands Yearbook of International Law 2016: The Changing Nature of Territoriality in International Law 19, 20 (Martin Kuijer & Wouter Werner eds., 2017) ("If we accept that territory has merely a functional value, providing simply and solely a space in which members of a political community live together, . . . then once this function is assumed in another way, territory loses its centrality.").

64. See, e.g., Krystyna Marek, Identity and Continuity of States in Public International Law 15–24 (2d ed. 1968) (reviewing different theories of the relationship between territory and states, with the underlying assumption that territory is essential for statehood).

65. Id. at 19–20.

66. Some have argued that the territory needs to be capable of supporting economic activity. E.g., Juvelier, supra note 40, at 26.

67. Jain, supra note 40, at 22–23 (using the writings of political geographers, conflict theorists, sociologists, and philosophers to assemble this list).

68. Jenny Grote Stoutenburg, When Do States Disappear?, *in* Threatened Island Nations, supra note 8, at 57, 61.

69. The smallest group of people that the UN recognized as having a right to self-determination—and therefore a right to statehood—was the Pitcairn Islands, with a population size of around fifty. It therefore stands to reason that populations at least that small are acceptable. Id. at 63.

70. Id. at 64.

international waters.[71] The German Administrative Court determined that the Principality was not a valid state in international law because the population lacked a "will to live together as a community that jointly masters all aspects of communal existence."[72] The Vatican City, however, might prove to be a counterexample to the German court's interpretation.[73] Currently, Vatican City has a "caretaker population" and "does not possess a human society stably united in its territory."[74] Yet despite its non-communal nature, the international community continues to recognize it as a state.[75] Thus, the presence of a communal nature might not be required but would likely make the case for statehood stronger.

The government criterion can be viewed as closely related to the criteria of territory and population.[76] First, it is important to distinguish between the government and the state; whereas the government is the body that is capable of "prescribing, implementing, and enforcing its authority on a population,"[77] the state is the international legal personality that exists in the international community.[78] Within the international legal system, the government is the "agent of the state that legitimately represents and acts on behalf of the state."[79] Second, some have regarded government as the central criterion of statehood, seeing territory as defined "by reference to the extent of governmental power exercised or capable of being exercised; and population connot[ing] a stable political community that is best evidenced with the existence of government."[80]

Further, some authors have argued that the government criterion is better understood as an "entitlement belonging to the people," in which

---

71. History of a Nation, Sealand, https://sealandgov.org/en-us/pages/the-story [https://perma.cc/SS9X-VQRP] (last visited Sept. 4, 2023).

72. Stoutenburg, supra note 68, at 64.

73. Id. at 66.

74. Id.; see also The Vatican City & Holy See, Rome.us, https://rome.us/the-vatican-city/ [https://perma.cc/BVZ6-AZ36] (last visited Aug. 12, 2023) ("Citizenship [in Vatican City] is acquired only by special kinds of people [such] as high-ranking hierarchy and staff living here.").

75. Stoutenburg, supra note 68, at 66. It must be noted, however, that recognition granted to Vatican City might be specifically tied to its connection with the Holy See, therefore rendering this an imperfect example. The Holy See is the sovereign entity with an international legal personality that holds the Vatican City enclave in Rome, with its main responsibility being to maintain diplomatic relations with other States. The Vatican & Holy See, supra note 74.

76. Yejoon Rim, State Continuity in the Absence of Government: The Underlying Rationale in International Law, 32 Eur. J. Int'l L. 485, 495 (2021) (describing how the other two criteria rely on the government criterion).

77. Stoutenburg, supra note 68, at 66.

78. Rim, supra note 76, at 491; see also Jain, supra note 40, at 6 ("[The] loss of statehood implies substantial loss of international legal personality . . . .").

79. Rim, supra note 76, at 495.

80. Id. (footnotes omitted).

what matters most is the ability of the population to organize a government.[81] Thus, while other states might not recognize a new state that does not have a government,[82] there might be a great degree of flexibility in the structure of a government once the state is established.[83]

In the original convention, the fourth criterion is the "capacity to enter into relations with the other states."[84] This criterion has been criticized because the "*legal* capacity to this effect depends precisely on recognition of an entity as a State, rendering the criterion circular, whereas the *factual* capacity is already covered by the external dimension of governmental effectiveness."[85] Therefore, the modern interpretation of this criterion is that a state needs to be independent.[86] Most authors hold that this criterion refers to legal independence, meaning that "a State is not subject to the legal authority of another State."[87] Some, however, also believe a state requires factual independence—that is, self-sufficiency.[88]

Whether an entity that meets all four of the Montevideo criteria automatically becomes a state depends on the role of recognition in determining statehood. Recognition is the "process of formally acknowledging the legal existence of a state or government,"[89] and there are two dominant theories of how it impacts statehood.[90] First, the Constitutive Theory holds that a state's existence in international law is entirely dependent on recognition from other states in the system.[91] Holders of this view argue that since states are the primary subject of international law, the task of identifying new subjects should be exclusively in their purview.[92] This theory, however, generally has been critiqued and

---

81. Rim, supra note 76, at 497–98.

82. For a discussion of the importance of recognition in the law of statehood, see infra notes 89–95 and accompanying text.

83. See G.A. Res. 2625 (XXV), at 123, Declaration on Principles of International Law Concerning Friendly Relations and Co-Operation Among States in Accordance With the Charter of the United Nations (Oct. 24, 1970) ("Every State has an inalienable right to choose its political, economic, social and cultural systems, without interference in any form by another State.").

84. Montevideo Convention, supra note 52, art. 1.

85. Stoutenburg, supra note 68, at 70.

86. Id. ("[M]ost authors and international jurisprudence rely not on the formulation employed by the Montevideo Convention, but require an entity's independence as proof of its statehood.").

87. Id. at 71.

88. Id.

89. Christopher C. Joyner, International Law in the 21st Century: Rules for Global Governance 47 (2005).

90. Rowan Nicholson & Thomas D. Grant, Theories of State Recognition, *in* Routledge Handbook of State Recognition 25, 25 (Gëzim Visoka, John Doyle & Edward Newman eds., 2020); see also Crawford, supra note 58, at 19–26 (describing the constitutive and declaratory theories of recognition).

91. Crawford, supra note 58, at 14–15, 19–20.

92. Id. at 20.

has fallen out of favor, supplanted by the Declarative Theory.[93] Here, recognition is merely a political act and does not carry its own legal force.[94] Despite the dominance of this latter theory, there are entities that satisfy the Montevideo Convention and yet still are not recognized by the international community.[95] This discrepancy signals that in practice, recognition does carry some consequential weight.

As sea-level rise has a high likelihood of submerging all livable territory and forcing the entire population of a state to emigrate, the international legal personalities of at-risk SIDS will be challenged. If the Montevideo Convention is read strictly as a marker of "minimum thresholds" that a state needs to satisfy to retain its statehood,[96] at-risk SIDS will cease to be states when their territories can no longer support populations and governments[97] and their dispersed populations are no longer "communal."[98] Diasporic states might struggle to sustain an effective government,[99] and under the factual understanding of independence, submerged states might fail to be self-sufficient.[100] Some states and scholars, however, have differentiated between the *creation* of the state in international law and its *continuity*.[101] The next section

93. See Jure Vidmar, Explaining the Legal Effects of Recognition, 61 Int'l & Compar. L.Q. 361, 361 (2012) ("Most contemporary writers have therefore adopted a view that recognition is declaratory."); see also William Worster, Two Competing Theories of State Recognition, Exploring Geopolitics, https://exploringgeopolitics.org/publication_worster_willliam_sovereignty_constitutive_declatory_statehood_recognition_legal_view_international_law_court_justice_montevideo_genocide_convention/ [https://perma.cc/W9TQ-FHEW] (last visited Aug. 29, 2023).

94. Crawford, supra note 58, at 25.

95. See Lung-Chu Chen, The Evolution of Taiwan Statehood, Oxford Univ. Press: OUPblog (Apr. 27, 2015), https://blog.oup.com/2015/04/taiwan-statehood-international-law/ [https://perma.cc/H4SF-XCRX] (explaining that while Taiwan satisfies the traditional requirements for statehood, "global power politics have kept Taiwan from being recognized as such").

96. Susannah Willcox, Climate Change and Atoll Island States: Pursuing a 'Family Resemblance' Account of Statehood, 30 Leiden J. Int'l L. 117, 119–23 (2017) (describing a view of the Montevideo Convention as minimum thresholds required to retain statehood).

97. Stoutenburg, supra note 68, at 57.

98. Id. at 64.

99. Practically, government failure might be the smallest challenge for small island statehood, as history is replete with examples of international law tolerating failed states and governments operating outside of their territories. See infra notes 118–121 and accompanying text. Regardless, a dissolution of government—compounded with the other challenges—can only hurt at-risk SIDS.

100. Stoutenburg, supra note 68, at 71. Specifically, sunken states might cease to be independent if their people must rely on their host states for subsistence and their governments cannot carry out their essential functions without the international community's generosity. But see infra section II.A.2 for a discussion of marine entitlements providing a source of revenue for at-risk SIDS.

101. Galvão Teles & Ruda Santolaria, supra note 9, para. 187 ("[T]he argument is growing [that] the criteria provided by the Montevideo Convention [apply] only for the determination of the birth of a State rather than [for the determination of] a State's

therefore details the laws of state continuity, which might provide a source of hope for these at-risk SIDS.

2. *The Strong Presumption of Continuity in International Law.* — While international law has defined ways for new states to enter into the legal system, there is no international legal paradigm surrounding state extinction when there is an absence of successors.[102] States are the primary subject of international law;[103] they define its system through treaties and practice, which in turn increase reliance on each individual state's continued existence.[104] The easy removal of a state from the system would therefore disrupt the system's stability.[105] One scholar noted that since the UN Charter was signed, only eight states have gone extinct,[106] which supports the notion that there is a strong presumption of the continuity of statehood once it has been established, even if there is a change to one of the four Montevideo indicia.[107] Although many subsequent authors

---

[continued existence]." (alterations in original) (internal quotation marks omitted) (quoting Permanent Mission of Tuvalu to the UN, Statement on the Report of the International Law Commission on the Work of Its Seventy-Second Session (Oct. 28, 2021), https://www.un.org/en/ga/sixth/76/pdfs/statements/ilc/23mtg_tuvalu_2.pdf [https://perma.cc/9N73-64B4])); Wong, supra note 61, at 348 ("International law has assumed territory will always exist and focused on state creation and succession, rather than continuity or extinction.").

102. Sharon, To Be or Not To Be, supra note 24, at 1055 (citing Crawford, supra note 58, at 715; Atapattu, supra note 13, at 18–19); Elizabeth Thomas, Protecting Cultural Rights in the South Pacific Islands: Using UNESCO and Marine Protected Areas to Plan for Climate Change, 29 Fordham Env't L. Rev. 413, 426 (2018) ("Currently, there are no international laws governing circumstances when a state's territory simply disappears.").

103. See VCLT, supra note 47, art. 1 ("The present Convention applies to treaties between States."); Malcolm N. Shaw, International Law 197 (6th ed. 2008) ("Despite the increasing range of . . . participants in the international legal system, . . . states retain their attraction as the primary focus . . . for international law."); see also Jain, supra note 40, at 7 ("[T]he primary sources of international law—treaties and customary international law—can only be created by states." (citing ICJ Statute, supra note 46, art. 38(1)(a))).

104. See Wong, supra note 61, at 362 ("The rationale of this presumption [of continuity] is one of stability: one of the functions of international law is to maintain order which in turn, rests on the stability of international relations and . . . the preservation of the status quo.").

105. See Rouleau-Dick, Competing Continuities, supra note 24, at 363 ("The aim of such a presumption is to increase stability and reduce uncertainty."); Wong, supra note 61, at 362.

106. These eight states are Hyderabad, Somaliland, Tanganyika, Republic of Vietnam, Yemen Arab Republic, German Democratic Republic, Yugoslavia, and Czechoslovakia. Crawford, supra note 58, at 716 tbl.7.

107. See id. at 701 ("[There is] a strong presumption [that] favours the continuity and disfavours the extinction of an established State. Extinction is not effected by more-or-less prolonged anarchy within the State nor . . . by loss of substantial independence, provided that the original organs . . . retain at least some semblance of control.").

agree,[108] the full scope of the presumption is not yet settled by treaty or custom.[109]

There are at least two theories for how the presumption of continuity works.[110] The Ratchet Theory holds that once a state is established in international law, it is exceedingly difficult for it to go extinct.[111] This approach upholds the stability of the system and, in the case of climate change, might also reflect countries' "reluctance to 'tarnish [their] own reputation[s] by being seen as lacking any compassion for the dire fate of such island states by asking for their exclusion' from the international community."[112]

The Sameness Doctrine, on the other hand, allows states to retain statehood unless internal changes in the state—such as shifting borders and alteration of the government structure—are substantial enough to trigger the laws of state succession.[113] This theory therefore focuses on "the identity of the state rather than on its claim to statehood,"[114] and its goal is to prevent the creation of a new state where a state already exists.[115]

---

108. See, e.g., Galvão Teles & Ruda Santolaria, supra note 9, paras. 183–196; Burkett, supra note 58, at 94 ("Notably, substantial changes in territory, population, or government, or even a combination of all three, do not necessarily extinguish a state."); Lilian Yamamoto & Miguel Esteban, Atoll Island States and International Law: Climate Change Displacement and Sovereignty 176 (2014) ("[I]t is not clear to what extent statehood can be extinguished because of the lack of territory or even government, since once statehood is established there is a presumption of continuity."); Wong, supra note 61, at 362; Nathan Jon Ross, Low-Lying States, Climate Change–Induced Relocation, and the Collective Right to Self-Determination 153–54 (2019) (Ph.D. dissertation, Victoria University of Wellington) (on file with the *Columbia Law Review*).

109. See Rouleau-Dick, Competing Continuities, supra note 24, at 379 ("As we do not know if Schrödinger's unfortunate cat is alive or dead until we open the box, it is impossible to accurately assess the nature of continuity in the context of small island nations without an adequate body of state practice.").

110. See id. at 360–65 (describing the "ratchet" and "sameness" theories of continuity).

111. See id. at 362–63 ("[A]ccording to the ratchet effect understanding of continuity, states do not die easily. [A low-lying island State] could thus maintain its claim to statehood longer than what a strict assessment of statehood according to the minimum threshold contained in the [Montevideo Convention] definition would seem to permit prima facie.").

112. Willcox, supra note 96, at 122 (Walter Kälin, Conceptualising Climate-Induced Displacement, *in* Climate Change and Displacement: Multidisciplinary Perspectives 81, 102 (Jane McAdam ed., 2010)). Susannah Willcox has also noted that there are other motivations that could be at play, including "a reluctance to acknowledge a void in international relations within which it would be difficult for states to carry out transactions or rely on the fulfilment of international legal obligations" or an unwillingness to "interfere in the domestic affairs of state by recognizing its dissolution." Id.

113. See Rouleau-Dick, Competing Continuities, supra note 24, at 363–64 ("The presumption of continuity, according to the sameness assessment doctrine, consists primarily of a presumption against the creation of a new state where a state already exists, notwithstanding cases of self-determination such as the inception of a state through secession.").

114. Id. at 364 (citing Crawford, supra note 58, at 669).

115. Id. (citing Heather Alexander & Jonathan Simon, Sinking Into Statelessness, 19 Tilburg L. Rev. 20, 20–23 (2014)).

The presumption of continuity has roots in practice as well.[116] Historically, both the Holy See and the Sovereign Order of Malta were able to establish an international legal personality in connection with territorial jurisdiction and were successful in maintaining this status even when they were deprived of their territory.[117] Another class of examples includes situations in which a state's government is displaced from its territory and forced to seek refuge in a third state due to the occupation of a foreign power.[118] These governments in exile generally are viewed as maintaining their statehood despite lacking control over their territory.[119] Additionally, statehood has survived even through complete state failure.[120] An extreme example of this is the case of Somalia, which remained an unchanged state in the international legal system despite lacking a functioning government for more than ten years.[121]

Ultimately, these examples do not align perfectly with the case of SIDS, as there has never been a situation in which the entire territory of a state has "disappeared."[122] Therefore, scholars have offered additional arguments for why the presumption of continuity should appropriately be applied to at-risk SIDS. One argument is that climate change will so

---

116. See Galvão Teles & Ruda Santolaria, supra note 9, paras. 112–154 (detailing several examples of states and international organizations that retained their international legal personality despite losing the effectiveness of one of the Montevideo criteria). The examples given in the Galvão Teles and Ruda Santolaria paper have been cited frequently in the statehood literature. See e.g., Burkett, supra note 58, at 96–98; Rouleau-Dick, Competing Continuities, supra note 24, at 365–72; Shaina Stahl, Unprotected Ground: The Plight of Vanishing Island Nations, 23 N.Y. Int'l L. Rev. 1, 15–21 (2010). While these precedents are helpful, the existence of territory in all of those cases render them of limited value to the discussion of at-risk SIDS. See infra section II.B.

117. Galvão Teles & Ruda Santolaria, supra note 9, para. 112.

118. Id. Notably for this Note, Estonia was considered a government in exile during Soviet occupation from 1940 to 1991, after which the independent State of Estonia was reconstituted to the same position in international law as it occupied before. For a discussion of the history and workings of Estonia's government in exile, see Vahur Made, The Estonian Government-in-Exile: A Controversial Project of State Continuation, *in* The Baltic Question During the Cold War 134 (John Hidden, Vahur Made & David J. Smith eds., 2008).

119. Galvão Teles & Ruda Santolaria, supra note 9, para. 112.

120. See Rim, supra note 76, at 488–91 (detailing that states do not go extinct even though there is a lack of a functioning government).

121. See id. at 489 & n.21 (explaining that Somalia lacked an "effective government" from 1991 until at least 2004). Somalia's retention of statehood is particularly important in analyzing the durability of failed states because the absence of government "was not brought about forcefully or involuntarily in violation of international law by acts of other states, being instead derived from internal disintegration." Id. at 489. If it were brought about by violation of international law, there would be superseding obligations on states not to recognize the result of the violation, see Stoutenburg, supra note 68, at 72–73, which in this case would be the extinction of the state. In the case of SIDS, government failure would be caused by climate change and potentially not caused by a violation of international law.

122. See Lilian Yamamoto & Miguel Esteban, Vanishing Island States and Sovereignty, 53 Ocean & Coastal Mgmt. 1, 6 (2010) ("If an Island State were to physically lose all the islands that make its territory, it would find itself in a situation that has certainly not occurred in modern history.").

fundamentally alter our world that it will challenge the assumptions undergirding international law, and the exigent circumstances created by sea-level rise should therefore militate in favor of small island statehood being retained.[123] Another suggestion proposes that the statehood criteria should be viewed as a set of overlapping similarities between "state-like" entities.[124] Under this "family resemblance approach," entities that can be recognized as possessing different defining elements of a state could retain their statehood.[125] The author proposing this paradigm used the relationship between poker and monopoly as an example of the family resemblance theory; although drastically different, both can accurately be considered "games."[126] Likewise, when an entity can strongly indicate the presence of government and independence,[127] they might still be "state-like" enough to retain their legal personality.

Whether statehood will continue for SIDS is uncertain. Until there is a treaty or some state practice,[128] the above discussion is a review of the law as it stands today and the theories of how the law should be applied when sea levels do rise. Regardless, assuming the presumption of continuity is applicable, the state would still need to live on in some tangible form. That is the focus of the next section.

C. *The Possible Future Modalities of At-Risk SIDS*

Several solutions have been proposed for how SIDS should continue, each of them with their own benefits and flaws. The prevailing flaw that permeates these solutions is that all rely not only on the acceptance of the international community but also on its full cooperation at all stages of transition. This Note argues that e-statehood is a modality that solves this

---

123. See Burkett, supra note 58, at 93–96 ("Th[e] possibility for flexibility coupled with the strong presumption that favors the continuity and disfavors the extinction of an established State suggests that acceptance of creative interpretations of law to recognize the continued existence of a State—particularly in this 'unusual situation'—is plausible . . . .").

124. See Willcox, supra note 96, at 119 (arguing that "overlapping similarities between states" should be used to create the "legal definition of statehood").

125. Id. at 128–30 ("The category of things that we call 'states' is identifiable not by some fixed set of characteristics, but an overlapping series of family resemblances that continue to evolve across time and space, shaped by processes of industrialization, decolonization, urbanization, globalization, migration, fragmentation, secession, and, now, climate change.").

126. See id. at 127 ("[W]e recognize poker or monopoly as games, not because of the presence of some defining characteristic common to all games, but because they share some (though not all) features with other games, which in turn share some (though not all) features with still other games." (alteration in original) (internal quotation marks omitted) (quoting R.W. Beardsmore, The Theory of Family Resemblances, 15 Phil. Investigations 131, 132 (1992))).

127. This Note argues that a small island "e-state" will be able to show both. See infra Part III.

128. There will be state practice only once when the first SIDS is submerged.

crisis and that can be unilaterally developed to grant these states the strongest chance to legally invoke the presumption of continuity.

The first solution often considered—and likely the quickest solution—is the purchase of habitable territory from another country where some portion of the migrating population could reside.[129] If the host state cedes jurisdiction of the land to the sinking state and a communal population with a functioning government inhabits that land, the Montevideo criteria would be met, and statehood would likely continue.[130] Yet this proposal is unlikely to be fruitful, as sinking states may have trouble finding a willing seller of territory, and establishing a working government body on what could be a tiny and remote parcel of land would be difficult.[131]

A second solution that is similar to the first is resorting to various forms of state merger.[132] This can include forming a federation or confederation with another state, entering into a free association, or fully unifying into a single state.[133] Statehood would then be retained through the existence of the territorial state.[134] These options are also untenable, as they require all parties to cede a portion or all of their sovereignty, which states find undesirable.[135]

Third, states can try to preserve themselves through internationally binding agreements.[136] While this approach allows for some flexibility, it

---

129. See Rayfuse, supra note 12, at 284 ("One possible resolution . . . is for the disappearing State to acquire new territory from a distant State by treaty of cession. Sovereignty over the ceded land would transfer in its entirety to the disappearing State which would then relocate its population to the new territorial location." (footnote omitted)).

130. See id. ("The continued existence of the State would now be secured in accordance with traditional rules of international law.").

131. See id. at 284–85 ("However . . . it is difficult to envisage any State now agreeing, no matter what the price, to cede a portion of its territory to another State unless that territory is uninhabited, uninhabitable, . . . and devoid of all resources and any value whatsoever to the ceding State."); see also Stewart, supra note 12 (manuscript at 18) ("Aside from traditional objections, the purchase of territory is an unlikely solution to the preservation of a state as it does not guarantee the acquisition of sovereignty over the territory.").

132. See Rayfuse, supra note 12, at 285 (discussing state merger as an alternative solution).

133. See Galvão Teles & Ruda Santolaria, supra note 9, paras. 198–216.

134. See Rayfuse, supra note 12, at 285.

135. See Sharon, To Be or Not To Be, supra note 24, at 1068 ("Unfortunately, although federation is an ideal solution for SIDS, it is not realistic. A merger of this type requires the non-threatened state to give up more than it has bargained for . . . [as they] must give up a measure of sovereignty when they enter the union."); see also Stewart, supra note 12 (manuscript at 19) ("As observed by James Crawford, associated statehood is often not dissimilar to protectorates, thus limiting—to greater or lesser degrees—the independence of the state.").

136. Scholars have suggested new conventions to address this issue. See, e.g., Jacquelynn Kittel, The Global "Disappearing Act": How Island States Can Maintain Statehood in the Face of Disappearing Territory, 2014 Mich. St. L. Rev. 1207, 1237–41 ("[T]he UN should

requires a great deal of international cooperation, and it must be palatable to a majority of states.[137] It is also uncertain whether other states would be willing to codify the preservation of statehood outright.[138]

Lastly, scholars in the last decade have proposed the concept of the "deterritorialized" state, which would be a new entity in international law.[139] At its core, this proposal argues that the circumstances of climate change militate in favor of continuing the state without territory.[140] One prominent suggestion for this modality is the "Nation Ex-Situ,"[141] by which the UN Trusteeship Council would be repurposed to create a trusteeship-like body that represents sinking states.[142] Composed of nationals of the state, the UN entity would work alongside the current government until the state loses its normal indicia of statehood.[143] The UN entity would then retain the state's sovereignty post-submergence, primarily to maintain maritime rights and protect its migrated nationals.[144]

While this solution is promising, it still requires the consent and engagement of other states, placing the survival of these island states in the discretion of the international community. The e-state is a form of "deterritorialized statehood" that is less reliant on other nations. It is a collection of digital platforms under the auspices of one e-government,

---

create a treaty that addresses . . . the threat to statehood of disappearing islands . . . ."). Small island states have also begun to call for political declarations to the effect of preserving their statehood. See infra section II.A.

137. For a detailed review of the challenges of the treaty system, see generally Akmal Elmurodov, International Treaties—The Challenges of the Multilateral Treaty System (Jan. 6, 2022), https://ssrn.com/abstract=4002562 [https://perma.cc/8LHB-3M2C] (unpublished manuscript) (discussing issues of implementation, consent, and ratification in the treaty process).

138. One potential reason is that states might wish to avoid a potential "sovereignty clash," in which nationals of the submerged state attempt to reconstitute their state in whichever country they have congregated in. See Sharon, To Be or Not To Be, supra note 24, at 1046 ("The risk of a sovereignty clash between the host state and refugee communities from SIDS will reduce the willingness of states to accept migrants from SIDS . . . .").

139. See, e.g., Rayfuse, supra note 12, at 285–86 (introducing the concept of a deterritorialized state as a solution for sinking states); see also Burkett, supra note 58, at 89–96 (building off of Rayfuse's proposal and describing the "nation ex-situ").

140. See Burkett, supra note 58, at 95.

141. See, e.g., Atapattu, supra note 13, at 20–21; James L. Johnsen, Protecting the Maritime Rights of States Threatened by Rising Sea Levels: Preserve Legacy Exclusive Economic Zones, 36 Berkeley J. Int'l L. 166, 169 n.16 (2018); Sharon, To Be or Not To Be, supra note 24, at 1052; Erik Woodward, Promoting the Continued Sovereign Status of Deterritorialized Island Nations, 14 Yale J. Int'l Affs. 48, 54–56 (2019).

142. Burkett, supra note 58, at 108–14.

143. Id. at 111–12. Before submergence, Burkett suggests that the UN organization works as an interim body that could (1) determine appropriate modifications to the current in-situ political and economic institutions; (2) enact legislation for continued citizenship as well as distribution of monies from resource rents, adaptation funding, or compensation; (3) resolve resource rents; and (4) develop mechanisms for determining what is in the best interest of the dispersed population. Id. at 111.

144. Id. at 112.

which includes services such as e-banking, e-taxes, digital ID, and e-residency. Further, the development of this system is entirely at the discretion of at-risk SIDS, although its ability to retain the status of statehood would still require the acceptance of the international community. Because the e-state can accomplish many functions traditionally ascribed to territorial states, however, this modality has the highest likelihood of being accepted by international law. Before exploring the e-state in detail in Part III, Part II highlights the value of statehood for SIDS.

II. THE VALUE OF STATEHOOD AND ITS UNCERTAIN FUTURE

This Part begins by exploring what is at stake for small island nations and their migrating populations.[145] Second, it details why the presumption of continuity of statehood might not be applicable to SIDS given the presumption's uncertain state in international law.

A. *A Legal Personality Worth Saving*

Only states have access to the international legal system with all of its rights, remedies, and obligations.[146] The loss of statehood is particularly important for a vulnerable population of migrants, as such a loss would curtail their right to self-determination. Loss of statehood would also entail a loss of maritime entitlements, voice in international organizations, access to international adjudication, and other treaty-based rights.

1. *Statehood as a Desire of At-Risk SIDS.* — One of the strongest arguments in favor of retaining statehood is that this is what SIDS want. The right of self-determination not only ensures that recognized peoples can organize themselves as they wish and be represented in the international community but also safeguards "the cultural, ethnic and/or historical identity or individuality (the 'self') of [the] collectivity, that is, of [the] 'people.'"[147] Notably, the right to self-determination does not

145. While this Note references climate migration frequently, it does so with an emphasis on the implications of mass migration for statehood and on what the home state can provide for its population. A discussion of the international human rights and protections afforded to those migrants in their own travels is its own distinct topic. For articles discussing this aspect of the climate crisis, see generally McAdam, supra note 11 (determining the legal status of people displaced from "disappearing States"); Atapattu, supra note 13 (detailing how international law does not protect people forced to migrate due to climate change).

146. Wong, supra note 61, at 347–48 (citing Karen Knop, Statehood: Territory, People, Government, *in* The Cambridge Companion to International Law 95 (James Crawford & Martti Koskenniemi eds., 2012); Inger Österdahl, Relatively Failed. Troubled Statehood and International Law, 14 Finnish Y.B. Int'l L. 49, 49 (2003)).

147. Ori Sharon, Tides of Climate Change: Protecting the Natural Wealth Rights of Disappearing States, 60 Harv. Int'l L.J. 95, 123–24 (2019) [hereinafter Sharon, Tides of Climate Change] (alterations in original) (internal quotation marks omitted) (quoting David Raic, Statehood and the Law of Self-Determination 223 (2002)).

disappear with territory,[148] and in this particular case, SIDS have made it abundantly clear that they would like to retain statehood.[149]

At the UN General Assembly in September 2022, the Prime Minister of Vanuatu, together with the President of the Marshall Islands, called for support for their new Rising Nations Initiative.[150] The four-part initiative starts with a call for the international community to reaffirm its commitment to preserving the states' sovereignty.[151] While it is unclear if this alone will preserve statehood, this is a clear signal from these nations that they are determined to maintain their own legal personality.[152]

2. *Impact on Maritime Entitlements.* — SIDS will also want to retain their maritime entitlements as a way of securing resources for their diasporic population. The law of maritime entitlements is sourced in UNCLOS,[153] which delineates the waters both in and around coastal states in five different categories: (1) internal waters,[154] (2) territorial waters,[155]

---

148. Kathleen McVay, Self-Determination in New Contexts: The Self-Determination of Refugees and Forced Migrants in International Law, 28 Utrecht J. Int'l & Eur. L. 36, 46 (2012).

149. Other states have also stressed the importance of self-determination in settling this issue. See, e.g., Submission by the Principality of Liechtenstein to the International Law Commission on the Topic "Sea Level Rise in Relation to International Law" 1–3 (June 29, 2023), https://legal.un.org/ilc/sessions/75/pdfs/english/slr_liechtenstein.pdf [https://perma.cc/7GXM-P5JT] ("Liechtenstein sees a fundamental role for the right of self-determination in addressing the issues raised by sea-level rise for the protection of persons affected by sea-level rise and for statehood.").

150. Rising Nations Initiative, Glob. Ctr. for Climate Mobility, https://climatemobility.org/rising-nations-initiative/ [https://perma.cc/L57N-8K8R] (last visited Aug. 12, 2023).

151. Pacific Atoll Nations Launch Global Plan to Preserve Heritage, Fr. 24 (Sept. 21, 2022), https://www.france24.com/en/live-news/20220921-pacific-atoll-nations-launch-global-plan-to-preserve-heritage [https://perma.cc/344C-XXAJ]. The other three requests are for an adaptation program to increase resilience and protect livelihoods, a repository of the Islands' cultural heritage, and the acquisition of UNESCO World Heritage Status. Id. Canada, Germany, South Korea, and the United States have all signaled support for this initiative. Id. This is not the first time island nations have expressed this interest, as Tuvalu's Foreign Minister has said that Tuvalu is "looking at legal avenues where [they] can . . . retain [their] recognition as a state under international law." Stefica Nicol Bikes, Tuvalu Looking at Legal Ways to Be a State if It Is Submerged, Reuters (Nov. 9, 2021), https://www.reuters.com/business/cop/tuvalu-looking-legal-ways-be-state-if-it-is-submerged-2021-11-09/ (on file with the *Columbia Law Review*).

152. As part of its Future Now Project, Tuvalu will aim to establish new diplomatic relations only with those that recognize Tuvalu's statehood as permanent. Future Now Project, supra note 18.

153. U.N. Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

154. Id. art. 8. Internal waters include all bodies of water that are inland, such as lakes, bays, and rivers, and are considered no different than domestic territory. See id. (defining internal waters generally as waters on the landward side of the baseline of the territorial sea).

155. Id. arts. 2, 3. The territorial sea extends twelve nautical miles out from the baseline, and here, too, the coastal state retains most of its sovereignty. Id.

(3) the contiguous zone,[156] (4) the exclusive economic zone,[157] and (5) the high seas,[158] all of which are established from a coastal state's baseline.[159] While sovereign rights vary between these maritime zones, the state always has rights over natural resources in the water as well as the seabed and subsoil up to the outer bound of the Exclusive Economic Zone. The state can also regulate marine scientific research, preserve the marine environment, and establish artificial islands.[160] Unfortunately, island nations would lose these entitlements if they are no longer states.[161]

Losing maritime entitlements would have drastic consequences because coastal states heavily rely on the sea.[162] Retaining these entitlements, however, would empower coastal states and their citizens to at least maintain the status quo. Residents could continue their livelihoods with unimpeded access to these zones. The state could also monetize their maritime zones and redistribute the resources collected from these entitlements to the diasporic population.[163] Because the ocean is

---

156. Id. art. 33. The contiguous zone extends from the territorial sea out another twelve to twenty-four nautical miles, over which states can "exercise the control necessary to prevent or punish certain legal violations that occurred or may occur in its territory." Ann Powers & Christopher Stucko, Introducing the Law of the Sea and the Legal Implications of Rising Sea Levels, *in* Threatened Island Nations, supra note 8, at 123, 126–27.

157. UNCLOS, supra note 153, art. 57. Also starting from the territorial sea, the exclusive economic zone (EEZ) extends out 200 nautical miles. See Powers & Stucko, supra note 156, at 127.

158. The high seas are everything not covered by UNCLOS. Fae Sapsford, What Is High Seas Governance?, Ocean Expl. (July 20, 2022), https://oceanexplorer.noaa.gov/facts/high-seas-governance.html [https://perma.cc/5PAG-2T2B].

159. UNCLOS, supra note 153, art. 5. A state's baseline is determined by its low-water mark. Id.

160. See id. art. 56 (outlining the rights and duties of the coastal state in the EEZ).

161. Rayfuse, supra note 12, at 281 (explaining that only states are entitled to maritime zones). But see Sharon, Tides of Climate Change, supra note 147, at 122–25 (arguing that states hold maritime entitlements as a trust for their populations and that therefore the dissipation of statehood does not necessarily imply the loss of these entitlements so long as there is an identifiable population).

162. See About Small Island Developing States, UN Off. High Representative for Least Developed Countries, Landlocked Developing Countries & Small Island Developing States, https://www.un.org/ohrlls/content/about-small-island-developing-states [https://perma.cc/V8RW-P4UM] (last visited Aug. 12, 2023) (noting that for SIDS, the EEZ is "on average, 28 times the country's land mass," and thus small island states are often dependent on the ocean within the EEZ for industry, resources, and economic health).

163. For example, SIDS can offer fishing licenses in their territory for a fee to countries like the United States and Japan. See UNCLOS, supra note 153, art. 62, ¶ 4 ("Nationals of other States fishing in the [EEZ] shall comply with . . . terms and conditions established . . . [by] the coastal State. These . . . may relate . . . to the following: (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration . . . ."); Powers & Stucko, supra note 156, at 140 ("Coastal States will lose their legal authority to collect fishing licensing fees, which means that ships from major fishing countries such as the United States and Japan will no longer need to pay to fish in the former EEZs."). The concept of a state that collects resources through rent for the purpose of

intricately tied to the heritage of island nations, retaining these zones would also help island nations preserve access to their culture.[164]

3. *Voice in International Organizations.* — Statehood is a prerequisite for full membership in international organizations such as the UN.[165] The UN is a forum where states can collaborate to tackle the most pressing global issues, including climate change and the law of the sea.[166] While some non-state entities have been granted observer status in the UN,[167] voting rights are reserved for state parties to the UN.[168] States also have the ability to leave comments and clarify their state practice, which might aid the development of CIL.[169]

---

redistribution is not a new one. The rentier State was a form of governance prominent in oil-bearing Middle Eastern countries that accumulated wealth by leasing their oil resources. See Hazem Beblawi, The Rentier State in the Arab World, 9 Arab Stud. Q. 383, 386 (1987). The government would then redistribute that wealth to remain in power. See id.

164. See Thomas, supra note 102, at 417 ("[E]ach of the [Pacific Island] cultures fundamentally relies on the peoples' connections to the islands and ocean where they live.").

165. See About UN Membership: How Does a Country Become a Member of the United Nations?, UN, https://www.un.org/en/about-us/about-un-membership [https://perma.cc/SXY3-U34Q] (last visited Aug. 13, 2023) (noting "[m]embership . . . is open to all . . . *states* that accept the obligations contained in the United Nations Charter" (emphasis added) (internal quotation marks omitted) (quoting U.N. Charter art. 4, ¶ 1)).

166. See, e.g., U.N. Charter art. 1, ¶ 3 ("The Purposes of the United Nations are . . . solving international problems of an economic social, cultural, or humanitarian character . . . ."); Kahlil Hassanali, Participating in Negotiation of a New Ocean Treaty Under the Law of the Sea Convention—Experiences of and Lessons From a Group of Small-Island Developing States, 9 Frontiers Marine Sci., no. 90274, 2022, at 1, 2–3 (explaining the development of negotiations for a new treaty under UNCLOS on managing marine resources in the high seas).

167. See, e.g., About Permanent Observers, UN, https://www.un.org/en/about-us/about-permanent-observers [https://perma.cc/5CT5-4FFA] (last visited Aug. 29, 2023) (defining permanent observer and specifying they "have free access to most meetings and relevant documentation"); The Permanent Observer, Permanent Observer Mission of the Holy See to the UN, https://holyseemission.org/contents/mission/the-permanent-observer.php [https://perma.cc/44U9-PWXQ] (last visited Aug. 13, 2023).

168. See U.N. Charter art. 18, ¶ 1 ("Each *member* of the General Assembly shall have one vote." (emphasis added)); General Assembly, UN, https://www.un.org/en/model-united-nations/general-assembly [https://perma.cc/8M5Q-ZQGW] (last visited Aug. 13, 2023) ("The Assembly adopts its resolutions and decisions by a majority of *members* present and voting." (emphasis added)); UN Voting, Dan Hammarskjöld Libr., https://www.un.org/en/library/page/voting-information [https://perma.cc/BNL7-UHUA] (last visited Sept. 4, 2023). The loss of statehood may deprive SIDS of not only voting rights but also a seat on the Security Council, a central body in the UN that possesses more binding power than the General Assembly. See U.N. Charter art. 23, ¶ 1 ("The Security Council shall consist of fifteen *Members* of the United Nations." (emphasis added)); Security Council Membership, Dan Hammarskjöld Libr., https://research.un.org/en/unmembers/scmembers [https://perma.cc/82D2-9R8K] (last visited Aug. 29, 2023) (detailing membership of the UN Security Council).

169. Int'l L. Comm'n, Draft Conclusions on Identification of Customary International Law, U.N. Doc. A/73/10, at 120 (2018), reprinted in [2018] 2 Y.B. Int'l L. Comm'n 91, U.N. Doc A/73/10 ("Forms of evidence of acceptance as law (*opino juris*) include, but are not

While SIDS might not exert the influence that larger states do in the UN, they can still work together to counteract the influence of developed states.[170] SIDS constitute an important portion of the G77, a group of 131 small and developing states in the UN that coordinates common positions.[171] SIDS also have their own regional organization in the Alliance of Small Island States (AOSIS).[172] The aggregation of every coordinated vote is critical in advancing important issues for small island nations, as evidenced by Vanuatu's UN General Assembly (UNGA) resolution requesting an advisory opinion from the International Court of Justice (ICJ).[173] The resolution asks the ICJ to clarify states' climate protection obligations and to define the consequences for states that have harmed the climate system.[174] For the ICJ to even consider the question, the resolution needed to pass by a simple majority vote.[175] Although this resolution ultimately passed by consensus,[176] it required a concerted effort from this bloc of small island states.[177]

---

limited to: public statements made on behalf of States . . . ."). On this very issue, the ILC has welcomed comments on their practice regarding sea-level rise in relation to international law. See Galvão Teles & Ruda Santolaria, supra note 9, para. 22.

170. Groups of Member States, UN, https://www.un.org/fr/node/44631 [https://perma.cc/ZT57-APBW] (last visited Aug. 29, 2023) ("The regional groups were formed to facilitate the equitable geographical distribution of seats among the Member States in different UN bodies."); see also, e.g., Erica Yunyi Huang, Deadlock in the Negotiation Rooms to Protect Global Oceans, New Sec. Beat (Nov. 10, 2022), https://www.newsecuritybeat.org/2022/11/deadlock-negotiation-rooms-protect-global-oceans/ [https://perma.cc/2K4T-HEGZ] (reporting that the G77 took common positions counter to that of Western States in negotiations regarding the usage of marine genetic resources).

171. The Member States of the Group of 77, G77, https://www.g77.org/doc/members.html (on file with the *Columbia Law Review*) (last visited Aug. 16, 2023) (listing the states that are members of the G77).

172. About Us: Member States, All. of Small Island States, https://www.aosis.org/about/member-states/ [https://perma.cc/ND4E-74CY] (last visited Aug. 13, 2023).

173. The Republic of Vanuatu Succeeded in the Adoption of a UNGA Resolution Calling for an Advisory Opinion on Climate Change From the International Court of Justice, Vanuatu ICJ Initiative, https://www.vanuatuicj.com/ [https://perma.cc/4GLT-FN5J] (last visited Aug. 29, 2023) ("Vanuatu successfully led a coalition of 132 nations in Adopting by Consensus a UNGA Resolution calling for a non-binding Advisory Opinion from the International Court of Justice to gain clarity how existing International Laws can be applied to strengthen action on climate change . . . .").

174. See Valerie Volcovici, Island Nation Vanuatu Sends Climate Resolution to UN for Court Opinion, Reuters (Nov. 30, 2022), https://www.reuters.com/business/cop/island-nation-vanuatu-sends-climate-resolution-un-court-opinion-2022-11-30/ [https://perma.cc/QV7A-PZFF] (reporting on Vanuatu's request for legal clarification from the ICJ on climate change accountability).

175. See id.

176. General Assembly Votes to Seek World Court's Opinion, in Quest for 'Bolder' Climate Action, United Nations: UN News (Mar. 29, 2023), https://news.un.org/en/story/2023/03/1135142 [https://perma.cc/KJH8-4DM6].

177. Palau attempted to seek an advisory opinion from the ICJ in 2011 but never introduced the resolution due to pressure from the United States. Climate Desk,

4. *Access to International Adjudication, Rights, and Benefits.* — In a similar vein, statehood allows a state to negotiate agreements for the protection of its citizens.[178] Given that sea-level rise is a slow-onset event that will take decades to come to fruition, it is possible that states will negotiate treaties for planned migrations and establish obligations for host states to accept migrants.[179] Generally, when a state is replaced by a successor state, the first state's rights and obligations are either transmitted to the successor state or terminated according to the laws of state succession.[180] When a small island developing state's statehood is terminated with no successor state, its rights and obligations might automatically terminate as well.[181]

The termination of statehood might additionally limit SIDS' access to international adjudication. First, these states would lose their right to pursue diplomatic protection, which allows a state to bring an action against another state that has harmed one of the first state's nationals.[182] Since individuals generally cannot sue states directly, this tool would be important in adjudicating harms caused by a host state.[183] The loss of statehood would also preclude submerged states from accessing the ICJ—the main adjudicatory body in international law—as the Statute of the ICJ only permits states to bring claims before them.[184]

Can a Pacific Island Nation Use Old Industrial Law to Stop Climate Change?, The Atlantic (Aug. 22, 2012), https://www.theatlantic.com/technology/archive/2012/08/can-a-pacific-island-nation-use-old-industrial-law-to-stop-climate-change/261455/ (on file with the *Columbia Law Review*).

178. See VCLT, supra note 47, art. 6 ("Every State possesses capacity to conclude treaties.").

179. See Kittel, supra note 136, at 1237–38 (proposing a treaty under which countries that significantly contributed to climate change should accept displaced migrants).

180. See Vienna Convention on Succession of States in Respect of Treaties, Aug. 23, 1978, 1946 U.N.T.S. 3 (detailing how and when a succeeding state inherits the rights and obligations of the preceding state).

181. See Atapattu, supra note 13, at 19 ("In this situation, which seems to be the most likely (and realistic) scenario, the state could disappear when the territory disappears, along with its territorial sea . . . . the population would lose its nationality, diplomatic protection (unless the recipient state extends citizenship) and other rights associated with nationality.").

182. See Restatement (Third) of the Foreign Relations Law of the United States § 711 (Am. L. Inst. 1987) ("A state is responsible under international law for injury to a national of another state caused by [certain] official act[s] or omission[s] . . . .").

183. See How Do You Go About Suing a Country?, NPR (Oct. 8, 2016), https://www.npr.org/2016/10/08/497164736/how-do-you-go-about-suing-a-country [https://perma.cc/N44Q-HUEQ] (discussing sovereign immunity for nations).

184. ICJ Statute, supra note 46, art. 34; Noto, supra note 42, at 750 ("If states no longer qualify under the traditional Declarative or Constitutive Theories of statehood, then they may be foreclosed from bringing claims before the International Court of Justice and other international courts.").

B. *The Problem With the Presumption of Continuity*

As noted in Part I, the general consensus in international law is that it is exceedingly difficult for states to go extinct.[185] States and scholars have argued that the strong presumption of continuity could apply to SIDS that will lose their territory or become uninhabitable due to sea-level rise.[186] Several small states left comments in both the 2021 and 2022 meetings of the UNGA Sixth Committee, the UN's primary legal body, indicating their support for this presumption.[187]

There is no guarantee, however, that this presumption will apply to the case of sinking states without applicable state practice. Customary international law is built off of state practice, but there is no such practice on this issue given the unprecedented nature of the sea-level-rise crisis.[188] Scholars have long held that the requirement of territory is fundamental to statehood, with one writer contending "that a State would cease to exist if for instance the whole of its population were to perish or to emigrate, or if its territory were to disappear (e.g. an island which would become submerged)."[189] Although that author wrote long before the world was aware of emissions-induced sea-level rise, others have echoed their view, arguing that all four Montevideo criteria "are necessary attributes of the state."[190] They likewise argue that as a matter of practicality, "[o]ne cannot contemplate a State as kind of a disembodied spirit[;] . . . there must be some portion of the earth's surface which its people inhabit and over which its Government exercises authority."[191]

Additionally, while there is some precedent for the presumption of continuity, SIDS face different circumstances than those entities to which the principle has historically been applied. First, the Sovereign Order of Malta and the Holy See are not states; although they do possess an international legal personality, they do not have all the privileges of full

---

185. See supra section I.B.2; see also Crawford, supra note 58, at 715 (demonstrating the rarity of states going extinct); Burkett, supra note 58, at 94 (discussing the history of international law's presumption of continuity and disfavor toward extinction); Jain, supra note 40, at 31 ("Both the possible categories of involuntary extinction of statehood are extremely limited.").

186. E.g., Galvão Teles & Ruda Santolaria, supra note 9, para. 194 ("With regard to small island developing States whose territory could be covered by the sea or become uninhabitable . . . a strong presumption in favour of continuing statehood should be considered. Such States have the right to provide for their preservation . . . .").

187. Id. paras. 184–191.

188. See supra note 109 and accompanying text.

189. Marek, supra note 64, at 7; see also Matthew C.R. Craven, The Problem of State Succession and the Identity of States Under International Law, 9 Eur. J. Int'l L. 142, 159 (1998) ("[W]here the territory of a state becomes submerged by the sea . . . it should be possible to conclude that the state has ceased to exist.").

190. Sharon, To Be or Not To Be, supra note 24, at 1054.

191. Id. (alternation in original) (quoting U.N. SCOR, 3d Sess., 383d mtg. at 11, U.N. Doc. S/PV.383 (Dec. 2, 1948)).

statehood.[192] Second, while governments in exile are separated from their territory, the separation is presumed to be temporary because the territory of the state still *exists*, which will not be the case for SIDS.[193] Moreover, the government's exile was likely caused by the illicit use of force, meaning that states have an obligation not to recognize the loss of statehood; they would likely have no such obligation for sinking states.[194] Lastly, while international law tolerates failed states, those states still have territory and a population that can support a future government.[195]

It is also unclear whether the theoretical underpinnings of the presumption of continuity support the presumption's application to SIDS. The strongest case for SIDS' statehood can be made if the Ratchet Theory were the operative interpretation of continuation. That interpretation holds that statehood is extremely hard to extinguish once it is established.[196] But under the Sameness Doctrine, the presumption exists to ensure that states that are fundamentally the same can continue their involvement in the international community without triggering the laws of state succession despite changes to population, borders, and governance.[197] When a state's territory is unrecognizable and its population dispersed, it might be difficult to argue that state is indeed the "same."

Ultimately, while a presumption of continuity exists in international law, it does not necessarily apply to the case of sinking states. But if a deterritorialized entity were to assume enough of the characteristics of the state such that it would be recognizable as the territorial state, there is a higher likelihood that international law would continue to recognize its statehood. The proposition of an e-state is meant to fulfill that very purpose.

---

192. See Int'l L. Comm'n, Rep. on the Study Group on Sea-Level Rise in Relation to International Law, U.N. Doc. A/CN.4/L.972, para. 53 (July 15, 2022) ("[I]t was notably emphasized that context . . . in which [the Holy See and Sovereign Order of Malta] appeared not to be truly regarded as . . . States, was fundamentally different to the context of a territory becoming unavailable . . . .").

193. Id.; Rouleau-Dick, Competing Continuities, supra note 24, at 376 (explaining that the existence of governments in exile is dependent on their connection to the territory from which they are temporarily separated).

194. Id. at 369 ("The principle of *ex injuria jus non oritur* . . . [ensures] that the claim of governments in exile, displaced by illegal occupation, is recognized as legitimate by other members of the international community.").

195. See Rim, supra note 76, at 504–05 ("[T]he government is no longer located as the central and indispensable element for statehood; it is instead the people that are centrally positioned.").

196. See Rouleau-Dick, Competing Continuities, supra note 24, at 360–61.

197. See id. at 363–64.

III. THE EMERGENCE OF THE E-STATE AS AN INTERNATIONAL LEGAL ENTITY

The phrase "digital sovereignty" has taken on a variety of meanings in academic literature. In one author's view, digital statehood is based on data sovereignty, in which data controllers wield a level of power similar to those once wielded by states.[198] New "digital states" can harvest data en masse through surveillance, enabling the power wielders to determine who has access to public and private services and goods and to monetize the harvested data.[199] Another author has written that the emergence of a digitized state should be received and considered in the international law of statehood;[200] however, that author stops short of applying the concept of digital statehood to the climate crisis or to laws of continuity.[201]

This Part is therefore the first scholarship to engage in this analysis. First, it briefly reviews Estonia as a model of e-statehood and its place in international law. Second, it details what e-statehood could look like for at-risk SIDS (hereinafter referred to as e-SIDS) and argues that this modality of statehood is the most likely to be accepted by international law. Lastly, it considers the limitations of the e-SIDS model and concludes by highlighting some of the auxiliary benefits this modality entails aside from preserving statehood.

A. *The Estonian Model of e-Statehood*

After regaining its independence from the USSR in 1991,[202] Estonia began its transition to a system based on Information and Communication Technology (ICT) by adopting an action plan for its establishment of an "information society," called the Principles of Estonian Information Policy.[203] Quickly building on the plan, Estonia launched the Tiger Leap

198. Katharina Pistor, Statehood in the Digital Age, 27 Constellations 3, 3 (2020).

199. See Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 242 (2019) (reasoning that the vast amount of data created by surveillance entangles private and public goods, and therefore power). Other scholars have explored the impact of digital technologies on power in a variety of ways, including how modern uses of data can be seen as a modern version of colonization. See, e.g., Nick Couldry & Ulises A. Mejias, The Costs of Connection: How Data Is Colonizing Human Life and Appropriating It for Capitalism, at xi (2019) (arguing that the purpose of modern data collection is the same as historical colonialism: value extraction).

200. Yeap Yee Lin, Digital States: The Case for Statehood Under International Law, U. Malaya L. Rev. Lex; In Breve (Aug. 30, 2019), https://umlawreview.com/lex-in-breve/digital-states-the-case-for-statehood-under-international-law [https://perma.cc/M6EE-9YNQ].

201. Id.

202. E-Estonia, Story, supra note 18.

203. Estonian Council of Informatics, Principles of Estonian Information Policy ¶ 2 (1998). The action plan also sought to describe the "shared societal values that serve as the basis for making public policy decisions to support the rise of the information society," rooting this transition in ideological grounds. Id. ¶ 3.

Initiative in 1996, which sought to bring ICT to schools.[204] This proved to be a resounding success, as it began the proliferation of internet usage in the country. Today, ninety-nine percent of the country uses the internet regularly.[205] In the same year as the Tiger Leap Initiative, Estonia launched its e-banking system, which now accounts for ninety-nine percent of all banking transactions.[206] In a society that is largely rural with sometimes-extreme climate conditions, this gave people easier and safer access to banking.[207] Realizing it could expand its digital platforms for public services, Estonia moved its tax system online.[208]

Of particular import, Estonia has been using digital ID systems for two decades.[209] Digital IDs—which can be both physical cards and digital applications—allow people to easily authenticate their identity online and access digital services such as e-banking anywhere in the world.[210] During the COVID-19 crisis, Estonia partnered with the UN Refugee Agency to provide insights into further developing digital ID technology for refugee protection, since digital platforms can be used to provide updates on

---

204. How It All Began? From Tiger Leap to Digital Society, Educ. Est., https://www.educationestonia.org/tiger-leap [https://perma.cc/7FH2-4CDH] (last visited Aug. 15, 2023). The Tiger Leap Program was built on three pillars: computers and the internet, basic teacher training, and native-language electronic courseware for general education institutions. Id. This program has since been updated in the ProgeTiger Programme and Lifelong Learning Strategy. Id.

205. E-Estonia, Story, supra note 18; Ease of Doing Business: E-Banking, E-Estonia, https://e-estonia.com/solutions/ease_of_doing_business/e-banking/ (on file with the *Columbia Law Review*) [hereinafter, E-Estonia, E-Banking] (last visited Aug. 29, 2023).

206. See E-Estonia, E-Banking, supra note 205. For clarity, e-banking refers to access to both private and government banks online. See Fed. Fin. Insts. Examination Council, E-Banking Handbook 1 (2003). Estonia also boasts that this system is open twenty-four seven and is nearly instantaneous. See E-Estonia, E-Banking, supra note 205. Access is granted through a citizen's digital ID. Id.

207. See E-Estonia, Story, supra note 18 (asserting that e-banking is valuable to Estonia because of its sometimes-extreme climate and rural character).

208. See Ease of Doing Business: E-Tax, E-Estonia, https://e-estonia.com/solutions/ease_of_doing_business/e-tax/ (on file with the *Columbia Law Review*) (last visited Aug. 13, 2023). This includes declarations for income tax, social tax, and unemployment insurance and also allows Estonians to request tax returns. Id.

209. See E-Identity, E-Estonia, https://e-estonia.com/solutions/e-identity/id-card/ (on file with the *Columbia Law Review*) (last visited Aug. 13, 2023). Since Estonia's adoption of the program nearly twenty years ago, the EU is also considering the transition into digital identification. Leonie Cater, What Estonia's Digital ID Scheme Can Teach Europe, Politico (Mar. 12, 2021), https://www.politico.eu/article/estonia-digital-id-scheme-europe/ [https://perma.cc/UZ4M-NNJX].

210. See E-Identity, supra note 209. E-ID can be used for public and private organizations. See Rob Pegoraro, This Country Moved Its Government Online. Here's Why That Wouldn't Fly in the U.S., Fast Co. (Sept. 10, 2021), https://www.fastcompany.com/90671437/estonia-digital-citizenry-evoting (on file with the *Columbia Law Review*). Digital ID is also quite durable, as it is granted to a person at birth and stays with them until death. See E-Identity, supra note 209.

asylum cases and increase access to healthcare services and direct financial assistance.[211]

Estonia has also pioneered e-residency for businesses by allowing non-Estonians to incorporate, which grants business owners government-issued digital IDs and access to much of Estonia's business environment.[212] Although the current conception of e-residency does not grant full citizenship rights,[213] e-residency in Estonia is a proof of concept that a state can retain some connection to a community even if it does not exist on a state's territory.

Estonia has also made strides in digitizing its traditional government and political processes by adopting "e-cabinet" meetings.[214] Cabinet members are able to complete most of the meeting's work in advance, as they can view agenda items, formulate their opinions, and signal their objections before the meeting begins.[215] While there is sometimes still an in-person element, e-cabinet meetings have reduced time spent on meetings by eighty percent.[216]

On the citizen side, Estonians with a digital ID can vote online.[217] There are several security measures in place to ensure both the integrity

---

211. See Nannie Sköld, UNHCR Strengthens Efforts on Digital Identity for Refugees With Estonian Support, UN High Comm'r for Refugees (June 12, 2021), https://www.unhcr.org/neu/70493-unhcr-strengthens-efforts-on-digital-identity-for-refugees-with-estonian-support.html [https://perma.cc/EK9K-FB58] (describing Estonia's increased use of digital solutions in aiding refugees).

212. See The New Digital Nation, Republic of Est.: E-Residency, https://web.archive.org/web/20230102125753/https://www.e-resident.gov.ee/ [https://perma.cc/Q2DU-8X2P] (last visited Sept. 20, 2023). The government website boasts having the world record for the fastest incorporation time: fifteen minutes and thirty-three seconds. Id.

213. Since Estonian e-residency is still in its early days, it currently provides access to only a limited number of banks and does not grant European Union citizenship. See E-Residency of Estonia: The Definitive Guide, Go Visa Free, https://govisafree.com/e-residency-estonia/ [https://perma.cc/N52S-DJUA] (last updated July 26, 2022).

214. See E-Estonia, Story, supra note 18; Herman van den Bosch, E-Estonia: A Great Example of E-Government, Amsterdam Smart City (Aug. 28, 2021), https://amsterdamsmartcity.com/updates/news/e-estonia-a-great-example-of-e-government (on file with the *Columbia Law Review*) ("Governmental bodies at all levels use a paperless information system—e-cabinet—that has streamlined decision making and reduced the time spent on meetings [by] 80%.").

215. Van den Bosch, supra note 214.

216. Id.

217. See Case Study 8: Estonia E-Government and the Creation of a Comprehensive Data Infrastructure for Public Services and Agriculture Policies Implementation, *in* Org. for Econ. Coop. & Dev., Digital Opportunities for Better Agricultural Policies 207 (2019) (discussing Estonia's use of internet voting as a proof of concept for e-ID cards). Digital voting is available in local, parliamentary, presidential, and EU elections. Internet Voting in Estonia, Nat'l Democratic Inst., https://www.ndi.org/e-voting-guide/examples/internet-voting-in-estonia [https://perma.cc/A4NP-Y9F9] (last visited Aug. 29, 2023); see also Statistics About Internet Voting in Estonia, Valimised, https://www.valimised.ee/en/archive/statistics-about-internet-voting-estonia

of the election and the anonymity of the voters themselves.[218] This system has seen great success, with 27.9% of eligible voters and 43.9% of participating voters in the 2019 election voting online.[219]

There are, of course, crucial questions regarding the safety of this system. In 2007, Estonia was the subject of a cyberattack, and since then the e-government has done its best to ensure the utmost protection of its data and services.[220] It responded by decentralizing its digital services management system to limit the amount of data stored in one location.[221] Estonia also opened a "Data Embassy" in Luxembourg, a cloud storage system that has a backup of its services in case anyone tampers with any of its main domestic servers.[222] Like a regular embassy, the Data Embassy is the diplomatic property of Estonia and is afforded the same level of protection in international law as a regular embassy under the Vienna Convention on Diplomatic Relations.[223] Functionally, this means that if Estonia is ever invaded, the government of Estonia can continue to administer the services that it was providing while it held power in its territory.[224]

The lack of scholarship evaluating e-Estonia under the international law of statehood is likely due to Estonia's qualification as a traditional state under the Montevideo Convention. Even were the Estonian government once more displaced from its territory, it could still fall under the well-

---

[https://perma.cc/4TH8-ZHQS] (last visited Aug. 13, 2023) (listing voter participation and demographic statistics from 2005 to the present).

218. See Internet Voting in Estonia, supra note 217. This system includes the ability to recast a vote multiple times, with only the last one counting, so that people can avoid casting a vote by coercion. Id. These votes are backed up by blockchain and are fully anonymous to everyone but the government officials in charge of the election. See Michelle Mount, Innovations in Internet Voting Systems, 4 Geo. L. Tech. Rev. 699, 704 (2020) (noting that Estonia's use of its KSI blockchain for internet voting lacks transparency because key monitoring and authentication activities are managed on government servers).

219. Case Study 8, supra note 217. This represented votes from Estonians located in 143 countries. Id.

220. See Rice, supra note 19 (explaining protective measures taken by the Estonian e-government).

221. See Interoperability Services: X-Road, E-Estonia, https://e-estonia.com/solutions/interoperability-services/x-road/ (on file with the *Columbia Law Review*) (last visited Aug. 13, 2023) (describing how X-Road, e-Estonia's open-source software solution, connects the nation's various public and private sector e-information systems).

222. Rice, supra note 19.

223. E-Governance: Data Embassy, E-Estonia, https://e-estonia.com/solutions/e-governance/data-embassy/ (on file with the *Columbia Law Review*) (last visited Jan. 2, 2022) (describing the Data Embassy as "an extension in the cloud of the Estonian government"); cf. Nick Robinson, Laura Kask & Robert Krimmer, The Estonian Data Embassy and the Applicability of the Vienna Convention: An Exploratory Analysis, *in* Proceedings of the 12th International Conference on Theory and Practice of Electronic Governance 391, 395 (Soymaya Ben Dhaou, Lemuria Carter & Mark Gregoy eds., 2019) (finding that general international law does not protect entities like the Estonian Data Embassy but that a bilateral treaty with Luxembourg extends those protections).

224. Rice, supra note 19.

accepted form of a government in exile.[225] While an e-state's connection to statehood is limited, there is extensive scholarship on the relationship between cyberspace and sovereignty.[226] Although there still are ongoing debates in that field, one general consensus is that a state's sovereignty does apply to its digital apparatus.[227] Thus, there is support for the view that the e-state is more than just a *tool* of the state and can be recognized as an integral *part* of the state.

B. *Troubleshooting Statehood: e-SIDS*

Based on the e-Estonia Model, this Note envisions e-SIDS as a collective set of digital platforms (online websites and services) utilized for fulfilling the central functions of a state to the degree that it can retain the state's identity on its own. Much like Maxine A. Burkett's Nation Ex-Situ, e-SIDS would take advantage of the slow-onset nature of sea-level rise and use the time pre-inundation to fully transition into this system.[228] Before submergence, the e-SIDS would operate similarly to e-Estonia domestically. Post-submergence, however, the e-SIDS' primary functions would be to manage state resources, offer legal protections, and create a venue that can maintain a sense of connectedness.[229]

1. *e-SIDS in Practice.* — The Estonia model of e-statehood provides a strong blueprint and baseline for what e-SIDS could entail. Like the Estonian e-state, e-SIDS could use digital technology to organize government, as well as provide citizens with public good and services, digital IDs, and some form of digital residency. The diasporic nature of the populations of these sunken states, however, as well as their undetermined legal status in international law, necessitates several core differences from the Estonian model; in those instances, this Note takes inspiration from Estonia's efforts and expands upon them in a way that addresses the specific needs of e-SIDS and their people.

The element of e-SIDS that likely will be most similar to Estonia's e-state is the development of a digital government.[230] Estonia's e-cabinet

225. See supra note 118 and accompanying text.

226. See, e.g., Harriet Moynihan, Chatham House Int'l L. Programme, The Application of International Law to State Cyberattacks: Sovereignty and Non-intervention (2019), https://www.chathamhouse.org/sites/default/files/publications/research/2019-11-29-Intl-Law-Cyberattacks.pdf [https://perma.cc/GW4W-RR3F].

227. Id. at 8 ("While there was formerly some dispute about whether the existing rules of international law were applicable to cyberspace at all, states agreed at the UN GGE in 2013 and 2015 that international law, including the principles of sovereignty and non-intervention, does apply to states' activities in cyberspace . . . ").

228. Burkett, supra note 58, at 112–13.

229. Id.

230. This is also one of the most important elements of e-SIDS both practically and legally: practically because the e-SIDS will exist to provide services, goods, and international representation to its population, and that can only be accomplished through a functional administrative body; legally because the presence of a government is one of the four criteria of statehood. See supra notes 74–81 and accompanying text.

system can be readily adapted here, enabling political representatives to view all agenda items online before their meetings and decide their positions in advance,[231] wherever in the world they are.[232] Beyond pre-meeting planning, the e-SIDS' politicians can use video conferencing technology to conduct meetings virtually.[233] Since COVID-19, use of video conferencing technology has increased drastically,[234] and platforms have adapted their commercial products to meet governmental needs.[235] Any state that desires at least some in-person component to governance can explore holding meetings in the Metaverse.[236] Meetings held over Zoom or similar technologies could be recorded or allow for citizens to join the call as well to observe the proceedings[237]—similar to the function of C-SPAN[238]—to encourage virtual civic engagement and accountability. Likewise, virtual technology could help facilitate direct out-of-session communication both between government officials and between officials and citizens. Finally, e-SIDS governments can create a repository of all relevant information for their citizens, including any relevant government sessions, decisions, developments, and generally helpful resources.[239]

---

231. Van den Bosch, supra note 214.

232. For pre-meeting discussions, e-SIDS can likely work toward developing or adapting instant messaging platforms designed for organizational communication, such as Slack, which is a messaging platform that already has been adapted by several government agencies around the world. See, e.g., The Value of Slack for Government, Slack, https://slack.com/resources/why-use-slack/the-value-of-slack-for-government [https://perma.cc/M48N-B7PA] (last visited Aug. 13, 2023) (demonstrating that governments are currently using Slack as a tool for government communication).

233. For an example of a video conference platform that has been adapted for government use, see Zoom for Government, https://www.zoomgov.com/ [https://perma.cc/269G-SMG4] (last visited Aug. 13, 2023).

234. Bob Evans, The Zoom Revolution: 10 Eye-Popping Stats From Tech's New Superstar, Acceleration Econ. (Nov. 8, 2022), https://accelerationeconomy.com/cloud/the-zoom-revolution-10-eye-popping-stats-from-techs-new-superstar/ [https://perma.cc/DC4J-R8TN] (explaining that Zoom experienced a 169% revenue increase and 354% customer growth year-over-year in Q1 2020).

235. See, e.g., Zoom for Government, supra note 233.

236. See Bill Gates, Reasons for Optimism After a Difficult Year, GatesNotes (Dec. 7, 2021), https://www.gatesnotes.com/Year-in-Review-2021 [https://perma.cc/J5UM-LWC9] ("Within the next two or three years, I predict most virtual meetings will move from 2D camera image grids . . . to the metaverse, a 3D space with digital avatars.").

237. See Zoom for Government, supra note 233 (describing Zoom for Government's recording functionality and ability to support up to 1,000 meeting participants).

238. Our History, C-SPAN, https://c-span.org/about/history/ [https://perma.cc/XCT5-ETJL] (last visited Aug. 29, 2023) ("We are a non-profit created in 1979 by a then-new industry called cable television, and today we remain true to our founding principles, providing gavel-to-gavel coverage of the workings of the U.S. Congress, both the House and Senate, all without editing, commentary or analysis.").

239. Recently, the co-chairs of the UN Intergovernmental Negotiations (IGN) framework, which convenes meetings on reform of the UN Security Council, decided to create a repository of all relevant documents to come from the negotiations. This was lauded by many states as a helpful mechanism that will allow the negotiating members to keep track of the varying positions and remain involved members. See, e.g., (Part 1) General

States that adopt the e-SIDS model can design an online voting system to encourage active engagement and help maintain democratic legitimacy.[240] With Estonians voting online from over 140 different countries as of 2019,[241] citizens of e-SIDS can likewise vote no matter where they are, better ensuring that the will of the people is best represented in their e-government. Voting systems could also be used to survey citizens on how the state is working in practice, which may allow e-SIDS to dynamically adapt to unforeseen circumstances.

Of course, there are several specific issues that would need to be resolved to ensure that this system works.[242] First, the voting system itself would need to be secure from outside influence and tampering.[243] Second, the dispersed population would need to be aware that the vote was taking place.[244] While these are challenging issues, the period before submergence could help sinking states design and test a system that would work for them. The Estonian e-voting model may have been groundbreaking, and there are several different models that e-SIDS could explore.[245] Additionally, at-risk SIDS could set fixed election dates, practices, and norms while they still possess territory so that even if a

---

Assembly: Informal Meeting of the Plenary on the Intergovernmental Negotiations on the Question of Equitable Representation on and Increase in the Membership of the Security Council and Other Matters Related to the Council, 77th Session, UN, at 1:04:25 (Mar. 9, 2023), http://media.un.org/en/asset/k19/k19mlf0tfw (on file with the *Columbia Law Review*) (showing the representative of the Netherlands thanking the co-chairs for their decision to webcast the meeting); see also First Segment of UN Intergovernmental Negotiations Framework Meetings Now Webcast: UNGA President, ANI News (June 30, 2023), https://www.aninews.in/news/world/us/first-segment-of-un-intergovernmental-negotiations-framework-meetings-now-webcast-unga-president20230630055304/ [https://perma.cc/ZX5Z-BTJF].

240. Alberto Grillo, Voter Turnout and Government's Legitimate Mandate, 59 Eur. J. Pol. Econ. 252, 252 (2019) ("[I]n line with a view of elections as a mechanism for the generation of popular support for the government and its policies, scholars have often referred to the legitimizing function of electoral participation." (citations omitted)).

241. Case Study 8, supra note 217.

242. See Mount, supra note 218, at 700–01 (describing the "inherent challenges" of internet voting systems); Bill Hewitt, Online Voting and Democracy in the Digital Age, Consumer Reps. (May 17, 2016), https://www.consumerreports.org/online-voting/online-voting-democracy-in-the-digital-age/ [https://perma.cc/24MA-JA4C] ("[E]fforts to introduce Internet voting face the same overriding issue: how to make sure ballots aren't subject to manipulation or fraud by hackers or compromised by a system failure.").

243. See Case Study 8, supra note 217 ("Data security is taken very seriously in Estonia and is considered to be the most important feature allowing the Estonian digital society to function.").

244. See, e.g., id. ("In order to support the shift from paper to digital, the government launched different advertising campaigns to communicate its advantages to farmers, including a more rapid identification and treatment of errors."). See generally Mount, supra note 218, at 700 ("The systems vary widely because the feasibility of each system depends on each jurisdiction's Internet access, priorities, budget, laws, and election risk, as well as the digital literacy of its voters.").

245. See Mount, supra note 218, at 702–10 (explaining that Estonia was the first country to use internet voting nationally and describing three other online voting systems).

citizen were to miss a notification, they would still know when and how elections proceed. Setting clear election norms, communications, and expectations now could help ensure that democratic participation remains stable later—even if citizens become displaced or notifications occasionally falter.

Digital IDs could also be used to define and keep track of the population and to grant access to e-SIDS protections, resources, and voting rights, as in e-Estonia.[246] Since digital IDs can exist virtually and migrate with their user,[247] they have the potential to prove ideal for scenarios of mass migration.[248] This system also may help make citizenship less abstract, as individuals could tangibly link to their e-SIDS of origin through their digital ID. Here, Estonia's e-residency—although limited to business[249]—may serve as a proof of concept that e-citizenship is possible and has the potential to be adapted to the specific needs of the SIDS populations. The laws of nationality generally are within the purview of a state's domestic law,[250] and e-SIDS could decide who can join. At a minimum, e-citizenship should apply to all existing members of the territorial state and their offspring.[251] While e-SIDS would want to exercise discretion in choosing new nationals for fear of people abusing e-SIDS resources, there might be avenues to join the e-state for limited purposes, like with the Vatican City's

246. See E-Identity, supra note 209 ("People use their e-IDs to pay bills, vote online, sign contracts, shop, access their health information, and much more.").

247. See generally Abhishek Sinha, Amar Shama & Sam Nazari, The Great Convergence: Portable Digital Identity, EY (Sept. 21, 2022), https://www.ey.com/en_ca/financial-services/the-great-convergence-portable-digital-identity [https://perma.cc/RDT2-GDUC] ("Policy interventions to promote enhanced privacy and data portability, technology advancement and a strong consumer demand for better experience and trust have resulted in the rampant growth of [self-sovereign identity model] adoption across the globe.").

248. See Sköld, supra note 211 (describing efforts by the UN High Commissioner for Refugees to provide digital identities to stateless persons).

249. See E-Residency of Estonia, supra note 213 ("E-residency of Estonia is the most proficient way out for anyone who wishes to run a business internationally but wants to work remotely.").

250. See Marilyn Achiron & Radha Govil, Nationality and Statelessness: Handbook for Parliamentarians N° 22, at 8 (2d ed. 2014), https://www.refworld.org/pdfid/53d0a0974.pdf [https://perma.cc/7BBJ-H3ZR] ("In principle, questions of nationality fall within the domestic jurisdiction of each State. However, the applicability of a State's internal decisions can be limited by the similar actions of other States and by international law."); Satvinder S. Juss, Nationality Law, Sovereignty, and the Doctrine of Exclusive Domestic Jurisdiction, 9 Fla. J. Int'l L. 219, 229 (1994) (describing how states have domestic jurisdiction over their own nationality laws).

251. If only members of the territorial state and their offspring were granted nationality, then the state would likely dissipate after a few generations. While the e-state might not need to last indefinitely, its termination should be at its own discretion. See Burkett, supra note 58, at 113 n.86 ("[A] decision to dissolve is integral to the exercise of [a nation ex-situ]'s sovereignty. Therefore, the State and its nationals are the only ones that can legitimately make this decision."). There are also practical questions to consider regarding which offspring would qualify in cases in which there is a non-e-SIDS parent. Ultimately, this too is for the state to decide. See Juss, supra note 251, at 229.

caretaker population.[252] e-SIDS likewise could admit new members who are dedicated to preserving and managing the state—its maritime zones and physical data centers, for example—or those who are dedicated to combating climate change.[253] Relevant considerations as to who to admit to the state might also include technical skills and qualifications that might be of use to the state so as to ensure that the technological expertise of the state is not limited to those already within it.

While e-SIDS and e-Estonia might serve similar functions, their ultimate goal is different, as the primary purpose of e-SIDS is to protect their dispersed populations by providing both legal and financial support. Although citizens of SIDS will be forced away from their islands due to extreme climate conditions and lack of habitable territory, they do not qualify as refugees under international law and therefore are not afforded any legal protections associated with refugee status.[254] To that end, these populations will enter foreign countries simply as non-citizens.[255] While there are certain rights that receiving states must respect, states can nevertheless "draw distinctions between citizens and non-citizens with respect to political rights explicitly guaranteed to citizens and freedom of movement."[256] Practically, "there is . . . a large gap between the rights that international human rights law guarantees to [non-citizens] and the realties that they face . . . . Nearly all categories of non-citizens face official and non-official discrimination."[257] These migrants could struggle to find adequate livelihoods and integrate into host-state populations,[258] and they may face detention and deportation.

---

252. See Stoutenburg, supra note 68, at 66 ("The inhabitants of the Vatican City live there only because and as long as they hold office with the Holy See . . . . Yet . . . [the Holy See] is recognized by other States as a State.").

253. The Sovereign Order of Malta, whose sole aim is to further humanitarian goals, is a good analogue. See About the Sovereign Order of Malta, Sovereign Ord. of Malta (Apr. 12, 2017), https://www.orderofmalta.int/news/what-is-the-sovereign-order-of-malta/ [https://perma.cc/J9RL-UZ4L] ("[T]he Sovereign Order of Malta has diplomatic relations with over 100 states and the European Union, and permanent observer status at the United Nations. . . . [T]he Order of Malta is active in 120 countries caring for people in need through its medical, social and humanitarian works.").

254. See Atapattu, supra note 13, at 22 ("International law recognizes several categories of people and the legal protection accorded to them varies according to each category. Climate migrants do not fit within any of these categories."); McAdam, supra note 11, at 15 ("Few States even have a status determination procedure to identify stateless persons, by contrast to refugees.").

255. UN Off. of the UN High Comm'r for Hum. Rts., The Rights of Non-Citizens 5 (2006), https://www.ohchr.org/sites/default/files/Documents/Publications/noncitizensen.pdf [https://perma.cc/VN2E-FM3K].

256. Id.

257. Id.

258. See, e.g., Magdalena Szaflarski & Shawn Bauldry, The Effects of Perceived Discrimination on Immigrant and Refugee Physical and Mental Health, 19 Advances in Med. Socio. 173, 175 (2019); Christina Nuñez, 7 of the Biggest Challenges Immigrants and Refugees Face in the US, Glob. Citizen (Dec. 12, 2014),

To combat those difficulties, e-SIDS can use their international legal personalities to negotiate treaties that govern how their nationals are treated in host states.[259] Such a treaty might help direct how migration efforts could proceed, what specific obligations the host state has to the migrants, and how the migrants can integrate into the host state, including via the acquisition of dual citizenship. Ultimately, the contours of such a treaty are outside the scope of this Note; the existence of a functioning e-government, however, ensures that a treaty can be negotiated at all. Even without a treaty, the e-SIDS can provide citizens the ability to register complaints online about their treatment in a host state, and the state can pursue diplomatic protection actions whenever deemed appropriate or advocate on behalf of its people in the international arena.[260]

Similarly, e-SIDS can use the resources they accrue through their maintained maritime zones to financially assist their populations. The e-SIDS might be able to extract resources from their exclusive economic zone or leverage their ownership to seek rent from foreign use of their zones. Those funds then can be used to pursue the prerogatives of the e-SIDS or be directly redistributed to the population through digital platforms similar to Estonia's e-banking system.[261] Digital currencies and the cashless economy have grown substantially over the last few years,[262] and SIDS can begin developing a digital cash system before their territory is submerged.[263]

Furthermore, e-SIDS can use digital platforms to address a host of other possible issues. e-SIDS' digital systems can increase access to

---

https://www.globalcitizen.org/en/content/the-7-biggest-challenges-facing-refugees-and-immig/ [https://perma.cc/Z66J-J7KD]; Settlement Challenges, Roads to Refuge (2020), https://www.roads-to-refuge.com.au/settlement/settlement-challenges.html [https://perma.cc/7RM8-KG3Z]; Understanding the Employment Barriers for Refugees, Oyster (June 10, 2022), https://www.oysterhr.com/library/understanding-the-employment-barriers-for-refugees [https://perma.cc/AR4P-ZFFQ].

259. These treaties can be either bilateral or multilateral. For a discussion of a potential treaty, see McCullough, supra note 44, at 128–36.

260. While it would be at the discretion of the state to pursue diplomatic protection, this also would help e-SIDS aggregate data about repeated harms caused to their nationals by host states.

261. E-Estonia, E-Banking, supra note 205; Ceyla Pazarbasioglu & Alfonso Garcia Mora, Expanding Digital Financial Services Can Help Developing Economies Cope with Crisis Now and Boost Growth Later, World Bank (Apr. 29, 2020), https://blogs.worldbank.org/voices/expanding-digital-financial-services-can-help-developing-economies-cope-crisis-now-and-boost-growth-later [https://perma.cc/PHS4-9XQT] (explaining how digital financial services can help developing countries).

262. COVID-19 Drives Global Surge in Use of Digital Payments, World Bank (June 29, 2022), https://www.worldbank.org/en/news/press-release/2022/06/29/covid-19-drives-global-surge-in-use-of-digital-payments [https://perma.cc/P8QJ-VAYX].

263. See Karlis Salna & Jacki Range, Vanuatu a Step Closer to Becoming a Cashless Paradise, Int'l Fin. Corp. (Oct. 2022), https://www.ifc.org/wps/wcm/connect/news_ext_content/ifc_external_corporate_site/news+and+events/news/vanuatu-cashless-paradise [https://perma.cc/3U9Y-6TEK] (detailing Vanuatu's efforts to transition to a cashless economy).

healthcare by offering telehealth services, guiding users to nearby clinics and services, and keeping health records of citizens in a centralized location.[264] Likewise, the e-SIDS platform can serve as a job directory board, highlighting remote jobs or open opportunities within the host state, potentially posted by other citizens of the migrating state who have found more success in the job market. The platform also can have other relevant information about the host state, including how and where to find affordable housing.[265] Ultimately, such a platform can both aid in migrant integration and continue to serve as a general resource for the population's well-being.

The digital platforms can also serve a limited judicial function, resolving relevant disputes between e-SIDS citizens.[266] With limited enforcement power and potential practical challenges for collecting and retaining evidence, the type of cases an online court could adjudicate would inherently be limited. The cases might pertain to dealings between e-SIDS citizens, such as contract disputes. Failure to comply with a ruling could be enforced by withholding some of the state's resources from the non-complying party. e-SIDS might also find it expedient to establish laws that dictate how their citizens interact with the e-state. For example, e-SIDS might require voting or checking in to the digital platform at periodic intervals. An e-court could adjudicate violations of those laws and potentially threaten withholding some benefit as a form of enforcement. Of course, these benefits are meant to maintain the people's well-being, so such punishment should be meted out sparingly. Other legal issues arising out of the citizens' affairs in the host state likely would fall within the jurisdiction of the host state's courts.

On the social side of statehood, the e-SIDS platforms can be used to preserve a sense of community and culture. Websites could be used to coordinate social events and gatherings or keep track of residential groupings of islanders so that they know where to find others from their homeland.[267] e-SIDS might also develop their own social media platforms that allow people to keep up with their communities and engage in long-

264. See Laura Lovett, Emily Olsen & Mallory Hackett, How Digital Health Can Help Refugees Access Medical Care, Mobi Health News (Sept. 3, 2021), https://www.mobihealthnews.com/news/how-digital-health-can-help-refugees-access-medical-care [https://perma.cc/G57K-29UR] (describing digital health initiatives developed in response to refugee crises in Afghanistan and Syria).

265. See id.

266. See Brandon Moss, Courts Continue to Embrace Remote Proceedings, Thomson Reuters (Nov. 30, 2022) https://www.thomsonreuters.com/en-us/posts/news-and-media/courts-remote-proceedings/ [https://perma.cc/MQE5-Z39N] (describing remote proceedings in U.S. courts during the COVID-19 pandemic).

267. While not scaled for government, online community building has been developing for years and can take a variety of different forms. See, e.g., Maddie Martin, The Top 17 Best Online Community Platforms in 2023, Thinkific (June 2022), https://www.thinkific.com/blog/best-online-community-platforms/ [https://perma.cc/SB98-YUXL].

distance online communication.[268] Likewise, Tuvalu's exploration of using the Metaverse to connect people demonstrates another way people can maintain a connection to their community.[269] Tuvalu's attempt to replicate their island state in the Metaverse will shed light on whether e-SIDS could preserve important cultural sites that are now submerged.

To make this possible, the e-SIDS would need to establish data centers abroad, similar to Estonia's Data Embassy. First, this step would ensure the continued survival of the digital platforms—as they rely on physical servers—as well as create backup systems in case of a cyberattack.[270] Second, it would increase the e-state's exposure to foreign powers. As such exposure would extend over decades, data center establishment might normalize the concept of an e-state in international affairs and in turn increase e-SIDS' legitimacy as a modality capable of retaining statehood.

2. *e-SIDS in the Law.* — While the concept of e-SIDS might provide practical solutions for addressing migration-related issues, it also gives SIDS the chance to retain their international legal personalities as states. There is likely enough flexibility in the law of statehood to accept e-SIDS as a modality of continued statehood.[271] e-SIDS serve the same holistic purposes as territorial states and would operate like any other nation in international affairs. This iteration of "deterritorialized statehood" would therefore bolster SIDS' claims for their continuation with their own unilateral action.

At the outset, the concept of e-SIDS is premised on the presumption of continuity in international law.[272] This Note is not arguing that nonterritorial entities can gain access to the international legal system by creating a cohesive e-governance system but rather that the organization and functionality of e-SIDS would permit preexisting states to invoke continuity. This argument therefore relies on distinguishing between

---

268. Reddit is one successful community platform that has allowed individual groups to form their own sub-communities built around interests, identities, and locations. While this Note is not advocating for Reddit-based community building, it serves as a proof of concept. See Dive Into Anything, Reddit, https://www.redditinc.com [https://perma.cc/MQV2-4LTW] (last visited Sept. 20, 2023) ("Reddit is home to thousands of communities, endless conversation, and authentic human connection. Whether you're into breaking news, sports, TV fan theories, or a never-ending stream of the internet's cutest animals, there's a community on Reddit for you."); see also Madison Malone Kircher, What's Going on With Reddit?, N.Y. Times (June 16, 2023), https://www.nytimes.com/2023/06/16/style/whats-going-on-with-reddit.html (on file with the *Columbia Law Review*) ("Thousands of subreddits—the individualized communities where people discuss dog breeds, allergies, influencers, dating, and extremely NSFW topics . . . ha[ve] long been bolstered and operated by a network of unpaid moderators who keep subreddits from disintegrating into chaos.").

269. See Shepherd, supra note 16.

270. See Rice, supra note 19.

271. Burkett, supra note 58, at 94 ("[A]lthough statehood is a legal concept with a determinate content, it is flexible.").

272. See supra section I.B.2.

creation of a state—dictated by the Montevideo Convention criteria—and the *continuity* of an existing state.[273]

e-SIDS would likely find greatest support for their introduction into international law under the Ratchet Theory of state continuity. If the bar for state extinction is high,[274] it is likely that SIDS could survive in the form of a tangible e-state that carries out state functions. Despite their lack of physical territory, such states would have functioning governments that carry out services to defined—potentially communal—populations. e-SIDS therefore are continued tangible entities in which the status of statehood could inhere, and with the "ratchet" set, the presumption against extinction could control.

This argument is all the stronger when considering the expanded notions of statehood put forward by various scholars. These e-SIDS would be consistent with the existing concept of "deterritorialized statehood," in which the exigent circumstances of climate change militate in favor of accepting statehood without territory.[275] Likewise, e-SIDS fit neatly into the family resemblance theory of continued statehood,[276] under which e-SIDS would carry on enough "state-like" characteristics that international law could accept them into the family of statehood. This might also be a moment to conceptualize statehood as a "bundle of sticks" composed of various essential and nonessential elements so that states can differ in exact form while still retaining statehood.[277] One author broke down what the statehood bundle might look like, and although they considered physical territory as one of the required "sticks," they noted that the world might see the day when a state could exist in cyberspace.[278] Written over twenty-five years ago, this aside in a footnote is exactly what this Note is advocating for in the limited context of sinking states.

Even under traditional paradigms of statehood, there is still an argument that e-SIDS fulfill the sameness approach to continuity: e-SIDS accomplish many of the same holistic goals of the territorial state, and they therefore might be capable of preserving a state's identity. First, if territory is a "means to an end" in hosting a population that can politically organize itself,[279] then e-SIDS satisfy that mission, as their digital IDs define a

---

273. See supra note 101 and accompanying text. Otherwise, any Big Tech corporation or other institution that manages vast amounts of data and can exhibit a "population" in its userbase and "government" in its structure might be able to access the international legal system. See concerns of this nature in Pistor, supra note 198, at 3–4.

274. Atapattu, supra note 13, at 19.

275. See Burkett, supra note 58, at 93–96.

276. See Willcox, supra note 96, at 127–29.

277. See Celia R. Taylor, A Modest Proposal: Statehood and Sovereignty in a Global Age, 18 U. Pa. J. Int'l Econ. L. 745, 754–55 (1997).

278. Id. at 758 n.43 ("It is, I suppose, possible to imagine a State without physical boundaries existing in cyberspace, but despite technological advances, this eventuality remains far in the future.").

279. Stoutenburg, supra note 68, at 61.

population that can vote for governmental representation and services. If the goal is to provide a source of security,[280] e-SIDS can provide legal security to their nationals abroad.[281] If the goal is to serve as a source of economic activity,[282] they can use their digital platforms to provide financial assistance to their people or potentially highlight remote job opportunities for them to pursue. If the goal is to facilitate the effective exercise of jurisdiction,[283] that too can be accomplished through digital IDs, by which the state's jurisdiction applies to all its registered nationals abroad.[284] Lastly, if the goal is to demarcate the physical boundaries of the state,[285] then the e-SIDS retention of their respective maritime zones means that there still are physical zones over which the e-SIDS exercise control.

Second, e-SIDS can help satisfy the population requirement. Here, the population is not determined by people in a given territory but instead set by the digital ID system.[286] Further, while this does not promote "communal activity" in our traditional understanding of that concept, SIDS can readily maintain a venue for community building and community preservation.[287]

Third, the government criterion would certainly be fulfilled even under traditional understandings of statehood, as an e-government could work the same before and after submergence, with an equal level of legitimacy.[288] Additionally, if government is the criterion that matters most in statehood,[289] then this factor alone might sway in favor of recognizing the continued statehood of e-SIDS.

Similarly, e-SIDS also likely fulfill the requirement of independence. The potential risk of foreign influence on a government's operation might raise concern for the independence of e-SIDS. But while the laws of continuity recognize governments in exile,[290] which are centered in a singular host state, the ability of e-governments to be constituted by people from all over the world makes them less likely to fall under the coercion of any single foreign host state.

---

280. Jain, supra note 40, at 23.

281. See supra notes 251–257 and accompanying text.

282. Jain, supra note 40, at 23.

283. Id.

284. Id. at 24 ("It is technologically possible to exercise jurisdiction over persons outside the territorial frontiers of a state.").

285. See id.

286. See supra note 82.

287. See supra notes 69–75 and accompanying text.

288. Given the great flexibility states have in deciding how their government is structured, the e-government is likely in line with what international law would accept. See supra notes 81–83 and accompanying text.

289. Rim, supra note 76, at 494–95.

290. Galvão Teles & Ruda Santolaria, supra note 9, para. 140.

Lastly, developing diplomatic relations with and data embassies in other nations means that the international community might normalize the concept of the e-state, making it more likely that it recognizes e-SIDS as a valid modality of statehood. It is possible that engaging with the e-state before submergence might build a "habit" of acknowledging the legal dimension of the e-state.[291] Given the slow-onset nature of sea-level rise, there are decades for states to build these habits.

Ultimately, e-SIDS provide a modality of statehood that adheres closely to our traditional understanding of state functions, and thus it is more likely that the e-SIDS model can carry forward the presumption of continuity. While there are other solutions that can help SIDS retain their statehood, this is a path forward that can be taken by SIDS through unilateral decisionmaking. This option does not require a treaty; the purchase of a large, habitable land mass; or the merging or ceding of sovereignty. While it ultimately will hinge on eventual acceptance by the international community, this approach provides SIDS with the strongest argument for the international community to offer that acceptance. Ultimately, this Note is not arguing that e-SIDS fulfill the Montevideo criteria per se, but where international law is meant to create a consistent and stable system, it might not be anathema for the international community to accept a digital state under these circumstances.

3. *Technical Difficulties.* — Of course, this solution is not without its limitations. Even in this unilaterally developed modality, the e-state still introduces the potential for what one author called a "sovereignty clash," in which SIDS nationals decide to reconstitute their home state in a host state.[292] This, in turn, might dissuade other nations from accepting these nations into their borders.[293] This issue applies to e-SIDS as much as it does to any form of deterritorialized state, but it might be less pronounced in the e-SIDS context. While in other systems there is no tangible "state" with which migrants can interact, e-SIDS might invoke a strong enough sense of community for migrants that they would not feel the need to recreate their state physically in their current locale. Further, citizens of the e-SIDS could seek out dual citizenship, retaining their old connection while planting new roots in their new host state.

There might also be a concern as to how far "digital statehood" could extend. Technically, large corporations, rebel groups, secessionist movements, and potentially any group of individuals might try to claim statehood as long as they have a website or digital platform. If a company develops a virtual state in a virtual reality platform with a working government, population, and supposed independence, does it have a

---

291. See Ted Hopf, The Logic of Habit in International Relations., 16 Eur. J. Int'l Rels. 539, 554–55 (2010) (explaining how the logic of habit stabilizes longstanding relationships of cooperation and conflict between states).

292. Sharon, To Be or Not To Be, supra note 24, at 1046.

293. Id.

strong claim to statehood? This Note neither advocates for nor allows for such claims. Instead, the e-SIDS concept relies heavily on the distinction between the criteria for the *creation* of a state and the *continuity* of a state.[294] Namely, habitable territory would still be a requirement to properly create a state but would not be a requirement to continue its existence when a state is subject to extinction because of climate-change–induced sea-level rise.

Lastly, states would need to address a series of technical issues for this approach to work. First, the state would need to establish a safe and secure data embassy or a series of data embassies to keep the state running. While one of the primary benefits of e-SIDS is that they do not require the large-scale cooperation of the international community, this is an area that likely would require some assistance. While it is possible that a data server could exist underwater, it is unlikely that such a server would remain fully secure from malicious actions. Here, however, SIDS could reach out to a variety of potential partners, including sympathetic neighboring island states or Luxembourg, which already has displayed its willingness to house Estonia's data embassy.[295] Unlike attempting to purchase land from another state, establishing a data embassy would require only a limited amount of space and would not be used to host an entire community. The safest option would be housing the embassy in an international organization, such as the UN headquarters; of course, that would then require the widescale cooperation that this Note is seeking to avoid.

Another potential drawback is lack of access to travel documents such as passports. While everyone currently living on the islands theoretically could get passports from their state, those passports might expire, and newer generations certainly will not have them. One solution that fits nicely in the e-SIDS model is the development of digital passports.[296] More likely, however, is that e-SIDS will need to facilitate agreements with host states to allow their migrants to print travel documents locally. Regardless of the specific solution, this issue will also likely require some level of international cooperation, at least with the potential host states.

Lastly, and potentially most importantly, the development of e-SIDS will require a concerted effort and concentration of resources. While the goal of this Note is to explore the legal feasibility of this model, it is informative only if the e-SIDS model is practically possible. That said, there is reason to believe that it can escape the status of being purely theoretical. First, over the course of decades, Estonia was successful in developing an e-state despite its rough economic beginnings post-independence.[297]

294. See supra note 100 and accompanying text.

295. Rice, supra note 19.

296. See Virtual Passport: Your Passport in the Cloud?, Thales, https://www.thalesgroup.com/en/markets/digital-identity-and-security/government/passport/virtual-passport [https://perma.cc/DM5Q-BPYU] (last visited Aug. 11, 2023).

297. See Amedeo Gasparini, From State to Market: Thirty Years of Economic Success in Estonia, Friedrich Naumann Found. (June 8, 2021), https://www.freiheit.org/

Here, the slow-onset nature of sea-level rise is an advantage, as it gives SIDS time to develop these systems and adapt them to their specific needs. Second, these changes might have broader benefits beyond just retaining statehood, as they might be useful during harsh climate events. Third and finally, there is generally a push in the international community to support SIDS in developing their technological and digital capabilities, and if SIDS decided this was an avenue they wanted to pursue, resources might be available through those avenues.[298]

Ultimately, these difficulties are important to acknowledge because a decision to develop these systems is entirely within the discretion of the SIDS, and it is vital that they understand the risks and costs involved. However, exploring this issue is worthwhile so long as the e-SIDS model remains a viable option and one that has a strong chance of retaining statehood without territory.

C. *Benefits Beyond Statehood*

Although statehood might still elude SIDS if the international community rejects their claims, the e-SIDS system can still be helpful in addressing the practical challenges of climate change and in enabling SIDS to retain some level of international legal personality. Climate change and sea-level rise will lead to extreme weather events and cause an increase in internal migration.[299] Transitioning to a digital governance system can make those migrations easier, as government and monetary systems would not be tied to any one location.

---

central-europe-and-baltic-states/state-market-thirty-years-economic-success-estonia [https://perma.cc/ASY6-BS9N] (noting the history of Estonia's independence in 1991, economic collapse in 1993, and subsequent successes in implementing an e-state since 2000).

298. See UN Dep't of Econ. & Soc. Affs., Interagency Task Team on STI for the SDGs, Policy Brief #5: Financial Flows to Promote Technology Transfers and Gender Inclusiveness for Small Island Developing States (SIDS) 1 (2022), https://sdgs.un.org/sites/default/files/2022-04/5th%20UN%20Policy%20Brief%20on%20STI%20roadmaps%20-%20SIDS%20finance_0.pdf [https://perma.cc/HF5S-APRH] ("In the past three decades, international society has been striving hard to mobilize financial resources to promote technology transfers to SIDS and facilitate its sustainable development."); Mariam Abdelaty, How SIDS Are Leveraging the Potential of Their Digital Economy, SparkBlue (Sept. 14, 2022), https://www.sparkblue.org/content/how-sids-are-leveraging-potential-their-digital-economy [https://perma.cc/5DKS-FJGP] (noting SIDS' leadership in implementing digital solutions in the SAMOA Pathway, the Sustainable Development Goals, and the Paris Agreement).

299. Climate Change and Security—The Challenge of Internal Displacement in Small Island Developing States, UN (Nov. 11, 2020), https://www.un.org/ohrlls/news/climate-change-and-security-challenge-internal-displacement-small-island-developing-states/ [https://perma.cc/6TLB-Q8M9].

e-SIDS might also be a means for island nations to retain some level of international legal personality if not full statehood.[300] One author argues that for at-risk SIDS to maintain an international legal personality, they would need to create a separate entity with that personality that represents certain interests of the state, similar to the Sovereign Order of Malta.[301] When the territory submerges, the separate entity can continue to exist with the limited rights that are granted to it by the international legal community.[302] The digital platforms of e-SIDS could be that separate entity. While not ideal, this provides a viable backup that has more precedent in current international law.

Finally, adopting an e-SIDS modality leaves every other option open. If the e-SIDS want to simultaneously try to negotiate treaties or rework the UN trusteeship program, that is within their power. The resources expended on this project would not be wasted, as the adoption of digital infrastructure has practical benefits beyond legal ones. The degree of flexibility of this modality therefore maximizes SIDS' autonomy in shaping their post-territory future.

CONCLUSION

A review of the literature on this topic reveals a proclivity to compare these small island nations to Atlantis.[303] This Note has avoided any such reference because the story of these states does not need to end underwater. Ultimately, the willingness of the international legal system to accept the continuity of these states will be determinative of their future. The goal of this Note, therefore, is to detail a modality of statehood that fits well within the ambit of the contemporary international law of statehood while reducing reliance on the discretion of the international community. This solution also benefits from the slow-onset nature of this crisis; if the e-SIDS system is adopted within the next few years, there are decades for the international community to warm to the idea. e-SIDS will provide an opportunity for threatened small island nations to preserve their resources, their polity, and at some level, their community. Most

300. See Rouleau-Dick, A Blueprint for Survival, supra note 45, at 624–26 (discussing a possibility of at-risk SIDS "secur[ing] some level of legal personality even beyond the possible loss of its statehood").

301. Id. at 629, 638–39 (alluding to the "progressive dissociation" between the legal entity and the physical elements of a state as seen in the Sovereign Military Order of Malta until the loss of Malta).

302. Id. at 637–38, 644. These rights can include treatymaking rights and diplomatic protections for the state's nationals.

303. See, e.g., Jain, supra note 40, at 1 (referencing a "21st Century Atlantis" in the title); Johnsen, supra note 141, at 167 ("Whether these countries are lost like Atlantis is a matter for urgent consideration."); Juvelier, supra note 40, at 29 ("[T]he phrase 'modern day Atlantis' summons a striking image."); Noto, supra note 42, at 747 (referencing a "Modern Atlantis" in the title).

importantly, it returns to small island nations autonomy stripped by a crisis that they took no part in creating.

ESSAY

PARTICIPATORY LAW SCHOLARSHIP

*Rachel López**

Drawing from the experience of coauthoring scholarship with two activists who were sentenced to life without parole over three decades ago, this piece outlines the theory and practice of Participatory Law Scholarship (PLS). PLS is legal scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. By foregrounding lived experience in law's injustice, PLS unearths and disrupts the prevailing narratives undergirding the law. Through amplifying counternarratives to the law's dominant discourse, this methodology creates more space for social and legal change. By design, PLS also reminds us of the humanity behind the law, acting as a moral check and balance. Building from the tradition of Critical Race Studies and an emerging body of Movement Law Scholarship, PLS thus aims to press the boundaries of what legal scholarship traditionally looks like by evoking lived experience as evidence and developing legal meaning alongside social movements. Its methodology raises critical questions about how

---

* Associate Professor, Thomas R. Kline School of Law, Drexel University. My sincere gratitude to the organizers and participants of the Mid-Atlantic People of Color/Northeastern People of Color 2022 Conference, the Clinical Legal Education Association Teaching Justice Series, the American Association of Law Schools 2023 Annual Meeting panel on "The Transformative Power of Humanistic and Holistic Legal Knowledge," and workshops at University of Baltimore School of Law, Tulane Law School, and Pepperdine Caruso School of Law for the opportunity to present and benefit from feedback on earlier versions of this Piece. In particular, I am deeply appreciative to Amna Akbar, Paulina Arnold, Sheila Bedi, Alison Corn, Rose Cuison-Villazor, Adam Feibelman, Brian Frye, Michele Gilman, Valeria Gomez, Nienke Grossman, Laila Hlass, Renée Hutchins, Carrie Hutnick, Jennifer Koh, Emile Loza de Siles, Jamelia Morgan, Kimberly Mutcherson, Maybell Romero, Jocelyn Simonson, Shanta Trivedi, Sheila Vélez Martínez, and Patricia Winograd for their generous engagement in these forums. I am also grateful to the editors of the *Northwestern University Law Review* and the *Drexel Law Review*, especially Sophia Agostini, Emily Krotman, Bradford McGann, and Sarah Wolf-Knight, for organizing "Redeeming Legal Scholarship: Centering the Lived Experience of Non-Lawyers Through Participatory Law Scholarship," which greatly expanded my thinking on the theory and practice of PLS. This Piece was enriched by feedback from Sameer Ashar, Eric Berger, Jenny Carroll, Terrell Carter, Richard Chen, Harlan Cohen, Leigh Goodmark, Paul Gowder, Wendy Greene, Carrie Hutnick, Lauren Katz Smith, Amy Landers, Daniel Morales, Jaya Ramji-Nogales, Angie Raymond, Jesus A. Rodriguez, Jennifer Romig, Kempis Songster, Susan Tanner, Danielle Tully, and Madalyn Wasilczuk. I would also like to express my sincere gratitude to the Editors of the *Columbia Law Review*, especially Margaret Hassel, Shaniqua Shaw, and Sarah Yeoh-Wang, for their insights and thoughtful editing of this Piece. I am also indebted to Lia Knox-Hershey for her incredible research assistance and thoughtful contributions to this Piece.

knowledge is produced and by whom, asking what role legal academics should play in facilitating social change in the material world. The piece also responds to skeptics who believe this approach abdicates a scholar's "moral obligation" to truth, explaining why PLS is not just legitimate but urgently needed to address the fissures and fault lines law has created.

PREFACE: REFLECTIONS ON *REDEEMING JUSTICE*

During the heart of the pandemic, at a time when citizens were being brutalized by police for protesting the murder of George Floyd, a Black man who was killed while in police custody,[1] an unconventional idea for a law review article took shape—an idea that would culminate in the liberation of one of my coauthors and, in some ways, mine too.[2] The pandemic hindered a project undertaken by a group of men sentenced to a life without parole (LWOP). That project aimed to produce greater recognition of a right to redemption, a concept collectively conceived of as a human right by members of the group, who called themselves the Right to Redemption (R2R) Committee.[3] With the Committee unable to meet or speak due to a prolonged prison lockdown, it became imperative to find another way to carry the work forward. Upon learning that human rights jurisprudence echoed the legal framework first articulated by these men on the inside, I proposed writing a law review article with two leaders of the group, Terrell "Rell" Carter and Kempis "Ghani" Songster. Centering the group's Right to Redemption analytical framework as well as Rell's and Ghani's lived experiences, the article, I explained, would contend that the capacity for change is an innate human characteristic, fundamentally intertwined with human dignity.[4] Together, we would argue that this aspect of the human condition should be reflected in the law.[5] And so it was that *Redeeming Justice* was born. Through countless 2000-character messages via the Pennsylvania Department of Corrections messaging portal and fifteen-minute monitored calls made during the thirty-minute increments that my incarcerated coauthor Rell was permitted to be outside his cell, the article came to life.

---

1. Evan Hill, Ainara Tiefenthäler, Christiaan Triebert, Drew Jordan, Haley Willis & Robin Stein, How George Floyd Was Killed in Police Custody, N.Y. Times (May 31, 2020), https://www.nytimes.com/2020/05/31/us/george-floyd-investigation.html (on file with the *Columbia Law Review*) (last updated Jan. 24, 2022).

2. Press Release, UN Off. of the High Comm'r on Hum. Rts., USA: UN Experts Urge Far-Reaching Reforms on Policing and Racism (Feb. 26, 2021), https://www.ohchr.org/en/press-releases/2021/02/usa-un-experts-urge-far-reaching-reforms-policing-and-racism [https://perma.cc/US3J-H45M]; see also Letter from ACLU of Pa. & Andy and Gwen Stern Cmty. Lawyering Clinic to U.N. Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Nov. 23, 2020), https://www.ohchr.org/sites/default/files/Documents/Issues/Racism/RES_43_1/NGOsAndOthers/andy-gwen-stern-community-lawyering-clinic-aclu-pennsylvania-add.pdf [https://perma.cc/9NYC-UZAN] (documenting violence by the Philadelphia Police Department against protesters in wake of the murder of George Floyd for submission to the UN Special Procedures).

3. For more information about the Right to Redemption Committee, see Right to Redemption, https://right2redemption.com/ [https://perma.cc/3TDY-WMTW] [hereinafter R2R Mission] (last visited Aug. 5, 2023).

4. See Terrell Carter, Rachel López & Kempis Songster, Redeeming Justice, 116 Nw. U. L. Rev. 315, 318–19, 324–35 (2021).

5. Id. at 380–82.

That article would spur what is now becoming an emergent movement in the legal academy—a genre of legal scholarship called Participatory Law Scholarship or PLS. PLS is legal scholarship written in collaboration with authors like Rell and Ghani who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. This current piece, written from my perspective as an academic partner in PLS, is the first in a series that will map the contours and contributions of PLS to the legal academy, the law, and society more generally. But before we get there, it feels important to take a moment to reflect on what came before—in other words, what partnering to create *Redeeming Justice* meant for and revealed to me.

As I step back from *Redeeming Justice* and reflect on my own motivations for coauthoring the piece, I must acknowledge my own discomfort in doing so. While *Redeeming Justice* was foregrounded in the lived experiences of my coauthors, Ghani and Rell, my voice was notably absent. Ghani pushed this issue at one point in a podcast interview we did together. He wanted to know what motivated me, both generally and specifically in relation to this article. I remember dodging the question. Part of the reason was I never had to justify my scholarly choices based on my moral commitments before.[6] Since grade school, I had been taught to remove the "I" from my writing—to write myself out of my writing, essentially to erase myself. And as an academic, rigor is often marked by distance from the subject of study. So, we academics often strip ourselves from our work, as if we are not the ones forming and framing the ideas in the context of our own lived experience.[7] This project was different. Instead of being a ghost writer or pushing myself to be a distant observer of suffering, it gave me an opening to be closer to my work, to the reader, and to my own ideas. PLS involves not just bringing others to legal scholarship, but for the academic partners in PLS, bringing more of ourselves to legal scholarship.

But this scholarship is not just about self. It also involves another profoundly human element, one that is fundamental to the ethos and epistemology of Participatory Law Scholarship: *camaraderie*. Over the years, I have built partnerships with those who have been caught in the dragnet of the carceral state for decades, seemingly with very little opportunity to be treated as human beings or for emancipation no matter how they've changed. Because I know them as mentors, friends, and colleagues, I feel this injustice—and feel it deeply. Some legal scholars view

---

6. I owe a debt of gratitude to Lauren Katz Smith for helping me to come to this realization.

7. See, e.g., Angel E. Sanchez, In Spite of Prison, 132 Harv. L. Rev. 1650, 1653 (2019) ("When I . . . arrived at a university, I was led to believe that my personal experiences had no place in my academic writing. It was not enough to be neutral; I had to appear impersonally objective. . . . I created a pacified distance between my experience and me, hiding behind my writing.").

this as a liability, but as I document in Part III of this Piece, I see it as a tremendous asset to my scholarship.

But you might be wondering, why scholarship? Why not instead cabin my work to legal reports and litigation, the traditional province of legal advocates? Primarily, it is because these modalities limit the possibilities of true transformation, not just of laws, but of the systems that create, enforce, and maintain them.[8] Legal advocacy in other forums can be limiting because you must frame your argument under existing laws and legal structures. It often does not allow dreaming. Without denying that there are some real constraints in the format and conventions of legal scholarship, one of the attributes of legal scholarship is that scholars are not required to fit their arguments into existing legal doctrine or structures. Legal scholars regularly reject doctrine as unjust and imagine new legal rules and realities that might not be immediately realizable given current real-world constraints. You can think big. And, at this moment, what is needed most is not a new law, a successful lawsuit, or even a hard-hitting report, but a profound rethinking of the understandings, narratives, purposes, and structures on which law is built. This is not the work of a well-crafted policy paper or litigation strategy, which are essentially reformist strategies—it is the work of boundary-pushing thinkers and theorists wherever they are found. As I will explain further below, it is my conviction that those most impacted by laws and legal structures are best positioned to reimagine them because they know those structures more intimately than most.

On the other hand, some might question the wisdom of investing the time and energy needed to write a lengthy law review article, essentially aimed at legal elites, when that time could be put to better use in building extralegal movements. At a webinar on *Redeeming Justice* organized by the Carr Center for Human Rights Policy at the Harvard Kennedy School, Professor Andrew Crespo raised this question. Noting that the article lifted up two strategies for change, the "community organizer's strategy" and the "lawyer's strategy," which in his view are somewhat in tension with each other, he asked why *Redeeming Justice* centered lawyers, law, and judges, rather than focusing on organizing and building the power of the people in R2R.[9] It is certainly a fair question, given, as Crespo reminded us, the role lawyers have played in "kill[ing] off more groups by helping them than ever would have died if the lawyers had never showed up."[10] But according to the organizer who shared these cautionary words, the lawyer

8. Richard Delgado, Storytelling for Oppositionists and Others: A Plea for Narrative, 87 Mich. L. Rev. 2411, 2428–29 (1989) (explaining how the "linguistic code required by the court sterilize[s]" the facts and renders them muted and devoid of outrage).

9. Harvard Carr Ctr. for Hum. Rts. Pol'y, Redeeming Justice, YouTube, at 50:18 (Oct. 7, 2021), https://www.youtube.com/watch?v=dIXkivdvXh8 (on file with the *Columbia Law Review*).

10. William P. Quigley, Reflections of Community Organizers: Lawyering for Empowerment of Community Organizations, 21 Ohio N.U. L. Rev. 455, 457 (1994).

"kills the leadership and power of the group" by taking momentum away from the group.[11] Lawyers "want to advocate for others and do not understand the goal of giving a people a sense of their own power."[12] What distinguishes PLS, however, is that it does not center lawyers as problem-solvers. Rather, it shifts power to people who are not lawyers, establishing them as experts in their own legal realities. Moreover, instead of displacing grassroots organizers, PLS aims to push the boundaries of how society and the legal academy understand their interventions. In the spirit of what law professors Amna Akbar, Jocelyn Simonson, and Sameer Ashar suggest in *Movement Law*, PLS appreciates movements as sites of knowledge production and creativity.[13] It amplifies the making of legal meaning central to movement building but often less visible to the outside observer.[14]

Indeed, people with lived experience confronting the daily realities of injustice and organizing the disenfranchised are often theorists, whose perspectives are sorely needed to reimagine broken legal structures.[15] Informed by this expertise, they, much like academically trained scholars, craft theories of change based on factual investigation and power analyses. This was certainly the case with the members of the R2R Committee. Critically reflecting on their circumstances as well as the narratives that informed them, the R2R members collectively constructed an alternative narrative to disrupt the status quo, a theory of change to match, and prescriptions about what solutions are needed. That is the work of theorists. And as Professor Seema Saifee suggests, this work does not begin and end with the work of the R2R Committee; rather their work is an example of a larger movement for decarceral solutions emanating from individuals who are incarcerated.[16] This knowledge

---

11. Id. at 458.

12. Id.

13. See generally Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, Movement Law, 73 Stan. L. Rev. 821, 879 (2021) (arguing that legal scholars should center collective processes of ideation by producing legal scholarship in solidarity with social movements). I adopt the definition articulated by these authors of social movements as "collective effort[s] to change the social structure that uses extra-institutional methods at least some of the time." Id. at 824 n.1 (internal quotation marks omitted) (quoting Debra C. Minkoff, The Sequencing of Social Movements, 62 Am. Soc. Rev. 779, 780 n.3 (1997)).

14. See Lani Guinier & Gerald Torres, Changing the Wind: Notes Toward a Demosprudence of Law and Social Movements, 123 Yale L.J. 2740, 2756–57 (2014) (documenting how various social movements in the United States "forge[d] new understandings of the status quo . . . [by] creating an alternative narrative of constitutional meaning").

15. Delgado, supra note 8, at 2414–15 (describing how counternarratives "can open new windows into reality, showing us that there are possibilities for life other than the ones we live . . . [and can] enrich imagination and teach that by combining elements from the story and current reality, we may construct a new world richer than either alone").

16. See Seema Tahir Saifee, Decarceration's Inside Partners, 91 Fordham L. Rev. 53, 59 (2022) (arguing that legal scholars and all those committed to large-scale decarceration should look to the ideation of those behind prison walls for decarceral solutions).

production is happening organically in prisons across the United States.[17]

The authors of *Subversive Legal Education: Reformist Steps to Abolitionist Visions* adopt the term "organic jurists" to describe those who, like the members of the R2R Committee, are "legal scholars without traditional educational prerequisites."[18] The authors derive this term from philosopher Antonio Gramsci's concept of "organic intellectuals."[19] While Gramsci believed that all people are intellectuals, organic intellectuals, according to Gramsci, are those leaders from nondominant groups who organize others to take transformative action to replace the dominant ideology and alter their own realities.[20] But the work of organic jurists like the members of the R2R Committee goes further than community legal education. They are also organic legal theorists, in that they generate knowledge and liberatory theory through critical reflection on their lived experience. For example, the R2R Committee did more than educate themselves about their rights; they theorized a new right—the right to redemption—that better addressed the cruelty of their specific condition of confinement and created a path to freedom. Their process was "organic" in the sense that their theorizing was derived from living material without interference from the artificial agents of academic assimilation, which can produce rather formulaic scholarship devoid of innovation and conviction.

To be clear, I am not arguing that the training and education obtained at academic institutions are inconsequential. To the contrary, PLS involves a partnership with academically trained legal scholars for two principal reasons. First, because it is part of our jobs as academics, we have the time, training, and resources to engage in deep research to develop further support for the episteme of organic jurists, by bolstering it with other empirical evidence, grounding it in legal doctrine, and connecting it with other theories and literature. The role of the legally trained academic can be as rudimentary as identifying supporting sources and putting citations into *Bluebook* format or as profound as collectively building knowledge with organic jurists, grounded in legal academics' training in law and exposure to legal scholarship. In essence, PLS does not displace traditional doctrinal analysis but complements it and offers necessary context and perspective. Consequently, this collaboration can help both PLS partners to deepen

17. Id.

18. Christina John, Russell G. Pearce, Aundray Jermaine Archer, Sarah Medina Camiscoli, Aron Pines, Maryam Salmanova & Vira Tarnavska, Subversive Legal Education: Reformist Steps Toward Abolitionist Visions, 90 Fordham L. Rev. 2089, 2092 (2022).

19. Id.

20. Antonio Gramsci, Intellectuals and Education, *in* The Gramsci Reader: Selected Writings, 1916–1935, at 300, 304–05, 310 (David Forgacs ed., 2000) (explaining that all people have the capacity to be intellectuals, but what distinguishes "intellectuals" from others is their function in society as leaders, educators, and organizers of other people, with the aim of maintaining or supplanting, respectively, the dominant group's ideology).

their understanding of the changes needed to make the law more just and equitable.

Second, academics also have the privilege, platform, access, and connections needed to amplify the knowledge produced by organic jurists to new audiences, including judges, policymakers, and other legal scholars. This contribution to PLS can take the form of identifying venues for publication, organizing symposia, soliciting funding to compensate organic theorists for their contributions, and facilitating introductions to others who can also play a role in amplifying the episteme of organic jurists. Much like community lawyers, who envision marginalized communities as vital partners in problem-solving and achieving structural change and who use their legal training to advance communal goals, legal academic partners use their expertise in law and knowledge of the scholarly enterprise to amplify the analytical work of their non-academically trained partners.[21]

As will be explored more fully in a second article, participatory law scholarship's goal is not only to expose those in power to alternative ways of understanding the law and the social issues that it is meant to address, but also to make legal scholarship, and consequently law, more theoretically accessible to those who are not lawyers.[22] The law is hoarded by the powerful. The technicalities of the law make those who are not formally trained in law feel disconnected from the law and encourage apathy toward the law as a vehicle of social change. This mystification of the law inhibits organizing and leaves existing power structures intact. Legal scholarship aids and abets this disconnection from law because its identification of the problem and potential solutions can feel so detached from reality that it is rendered irrelevant to activists and practitioners. To counter this obfuscation of law, PLS aims to pull back the layers so that those for whom the law is most consequential can see themselves reflected in it and know that they are and can be a part of the making of legal meaning. PLS does this by ensuring that people who are formally educated in the law are not the only people who are able to contribute to legal scholarship and the development of legal theory. By validating alternative ways of knowing what the law is and what changes are needed for it to realize its full potential, PLS thus aims to democratize the law.[23] As Rell

---

21. For more background on community lawyering, see Susan L. Brooks & Rachel E. López, Designing a Clinic Model for a Restorative Community Justice Partnership, 46 Wash. U. J.L. & Pol'y 139, 149–51 (2015) ("While community lawyering appears to take many forms—such as litigation, transactional work, and dispute resolution—and span a range of practice areas, those who self-identify as community lawyers share a set of fundamental principles regarding what is necessary to alleviate poverty and oppression.").

22. Terrell Carter & Rachel López, The Demosprudential Potential of Participatory Law Scholarship (n.d.) (unpublished manuscript) (abstract on file with the *Columbia Law Review*).

23. See José Wellington Sousa, Relationship as Resistance: Partnership and *Vivencia* in Participatory Action Research, *in* Handbook on Participatory Action Research and Community Development 396, 404 (Randy Stoecker & Adrienne Falcón eds., 2022) ("On

and I will explain further in our next article, by involving organic jurists in legal thinking, PLS has the potential to make the law more accessible to the broader public, thereby hopefully making them more inclined to participate in the making of legal meaning in scholarship and elsewhere.

INTRODUCTION

Taking inspiration from the experience of coauthoring *Redeeming Justice*, in this Piece, I outline the theory and practice of what we are calling Participatory Law Scholarship. PLS is legal scholarship written in collaboration with authors who have no formal training in the law but rather expertise in its function and dysfunction through lived experience. While scholars in other disciplines have embraced research resulting from collaborations between academics and non-academically trained community leaders, such participatory methods are rarely employed in legal scholarship. Lawyers and legal scholars often evoke stories of nonlawyers in their work but almost never share authorship with them.[24] For that reason, when we wrote *Redeeming Justice*, we were uncertain how it would be received, whether it would have any impact, or even if it would be published at all. Yet, perhaps due to an unusual combination of timing, readiness for novel approaches to entrenched legal problems, and the incredible ingenuity of my coauthors, *Redeeming Justice* has been not only accepted but embraced. It was published in the *Northwestern Law Review* and awarded the 2022 Law and Society Association (LSA) Article Prize for the best socio-legal article published in the past two years. *Redeeming Justice* also helped lay the groundwork for a complaint to the United Nations alleging that the United States is committing torture by condemning people to "death by incarceration" (DBI) through extreme sentences like life without parole—thereby putting into action a call for such an appeal made in the R2R Committee's mission statement.[25] It also has been cited in several amicus briefs challenging LWOP sentences.[26] Most importantly, it contributed to the liberation of one of my coauthors when the Philadelphia District Attorney's office named the article as one reason for

---

one hand, these are institutional incentives towards university–community partnerships and contribute to the creation of a knowledge democracy by validating different ways of knowing.").

24. Binny Miller, Telling Stories About Cases and Clients: The Ethics of Narrative, 14 Geo. J. Legal Ethics 1, 4 (2000) ("Yet surprisingly, while clients are in the forefront of many law review articles, they are almost invisible in the decision making process about which story to tell or whether to tell a story at all.").

25. For more information about this UN Complaint, see Death by Incarceration Is Torture, https://www.deathbyincarcerationistorture.com [https://perma.cc/QC7Q-9GD7] (last visited Aug. 5, 2023); see also R2R Mission, supra note 3.

26. See, e.g., Brief of Amicus Curiae Def. Ass'n of Phila. in Support of Appellants Marie Scott, Normita Jackson, Marsha Scaggs, and Tyreem Rivers at 20, Scott v. Pa. Bd. of Prob. & Parole, 284 A.3d 178 (Pa. 2022) (No. 16), https://ccrjustice.org/sites/default/files/attach/2021/10/Amicus%20Curiae%20Brief%20Defender%20Association%20of%20Philadelphia.pdf [https://perma.cc/7M5W-UAWZ].

why it supported Rell's commutation, which the Governor of Pennsylvania granted on July 14, 2022.[27]

For some, these "material outcomes," or at least a scholarly motivation to achieve them, render scholarship like *Redeeming Justice* suspect.[28] While some academics believe that scholarship like *Redeeming Justice* is urgently needed to advance social justice, others resist its classification as legal scholarship at all, claiming that it lacks the objectivity necessary to qualify.[29] For instance, in a recent editorial, London School of Economics law professor Tarunabh Khaitan characterizes legal scholars who engage with others outside of academia to inform the production of knowledge as compromising the "moral obligations" of a scholar.[30] As I will detail below, this debate inherently turns on one's theory of how knowledge is produced and whether you believe that human beings can perceive the external world through their own consciousness alone or instead believe that reality is collectively constructed.

Consequently, in part in response to these skeptics, this Piece begins to chart the epistemology—or theory of knowledge—that drives PLS. In line with the emancipatory pedagogy of Paulo Freire,[31] which provides its theoretical foundation, PLS rejects the narrow and detached notion of expertise that often informs the law and legal scholarship. This detached notion of expertise is epitomized by Khaitan, who believes that the sanctity of knowledge production depends on legal scholars abandoning their "activist impulse" and retreating from the world to discover "truth."[32]

---

27. Documentation on file with the *Columbia Law Review*.

28. See Tarunabh Khaitan, On Scholactivism in Constitutional Studies: Skeptical Thoughts, 20 Int'l J. Const. L. 547, 548 (2022) [hereinafter Khaitan, On Scholactivism].

29. See, e.g., Ian Leslie, Activism Isn't for Everyone: Why Academics and Journalists Shouldn't Take Sides, The Ruffian (Aug. 20, 2022), https://ianleslie.substack.com/p/activism-isnt-for-everyone [https://perma.cc/52L7-K4VF] (explaining why not all people can engage in the work activists do); Orin Kerr (@OrinKerr), Twitter (July 13, 2022), https://twitter.com/OrinKerr/status/1547287325209530368 [https://perma.cc/9HX8-JR74] ("The challenge, I think, is that scholarship requires willingness to change your mind. You need to go where the best arguments take you, including to a realization that everything you've ever thought before was wrong.").

30. Khaitan, On Scholactivism, supra note 28, at 548.

31. Paulo Freire, Pedagogy of the Oppressed 48 (Myra Bergman Ramos trans., 2014) [hereinafter Freire, Pedagogy of the Oppressed] (describing the Pedagogy of the Oppressed as "a pedagogy which must be forged with, not for, the oppressed (whether individuals or peoples) in the incessant struggle to regain their humanity").

32. See, e.g., Khaitan, On Scholactivism, supra note 28, at 555 ("Once the broad topic is selected, the scholar takes over. Framing the question, determining the appropriate method, literature survey, evidence gathering, argumentation, writing, workshopping, revising—these are all scholarly activities that must be undertaken with a deep commitment to intellectual virtues shaped solely by the goal of knowledge creation."); Tarunabh Khaitan, Facing Up: Impact-Motivated Research Endangers Not Only Truth, but Also Justice, Verfassungsblog (Sept. 6, 2022), https://verfassungsblog.de/facing-up-impact-motivated-research-endangers-not-only-truth-but-also-justice/ [https://perma.cc/5ZPX-2CRR] [hereinafter Khaitan, Facing Up] ("My project in the original piece was not to

Indeed, his prototypical methodology reflects his belief that legal scholars do their work best when they take "distance" from the subject being studied and adopt "an attitude of skepticism."[33] In contrast, PLS adopts a Freirean understanding of knowledge production, whereby legal scholars can better understand how the law functions in the world by examining it in concert with those who have experienced its bluntest consequences. According to Freire, because our individual knowledge is inherently subjective, "truth" can only be revealed through engaging in dialogue with others so that we can see a fuller picture of the world.[34] Drawing on Freire's dialectical process of learning through dialogue with others, this work presents an alternative theory of knowledge, based on the belief that we arrive at truth collectively, not singularly. PLS is thus grounded in a belief that we cannot fully understand the law's effects in the material world through our own consciousness alone. In other words, we cannot understand the law only by looking at how it appears on the page. Rather, law is best understood in conversation and solidarity with others who see law from a different vantage point.

I thus contend that partnership with those who have no formal training in law—but who have expertise in law's dysfunction—can help us to see the law more clearly. By foregrounding the lived experience and analysis of nonlawyers who are frequently marginalized, not just by the law, but in legal scholarship as well, PLS creates a fuller account of the law. As I set forth below, laws are often constructed and interpreted by those who are not directly affected by the problems the laws are meant to address.[35] For that reason, undergirding the law are nascent narratives about how the world works that at times do not reflect the realities of those most profoundly impacted by those laws.[36] At worst, these dominant discourses

---

evaluate any academic work, but to discuss an *internal* dilemma concerning scholarly ethics: 'how should I, as a scholar with activist impulses, approach my vocation.'").

33. Khaitan, On Scholactivism, supra note 28, at 551. Khaitan asserts activism often "(i) has shorter time and space horizons, (ii) demands an attitude of certainty, and (iii) celebrates and rewards those who realize material change." Id. Khaitan argues these key features of activism "are in tension with the academy's need to provide time and distance for research and reflection, inculcate an attitude of skepticism, and reward truth-seekers and knowledge-creators." Id.

34. Wayne Au, Epistemology of the Oppressed: The Dialectics of Paulo Freire, 5 J. for Critical Educ. Pol'y Stud. 175, 184–85 (2007) ("[T]hrough dialogue human beings both know what they know and know what they don't know[] and . . . can then improve . . . their ability to transform reality. . . . To learn in dialogue [involves] . . . a social act, a process which in turn helps you understand it for yourself.").

35. In this way, PLS echoes Professor Mari J. Matsuda's call to "look[] to the bottom" for insights into how best to design laws that serve social justice ends. Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 Harv. C.R.-C.L. L. Rev. 323, 324 (1987).

36. As Richard Delgado and Jean Stefancic observe:

> In legal discourse, preconceptions and myths, for example, about black criminality or Muslim terrorism, shape mindset—the bundle of received wisdoms, stock stories, and suppositions that allocate suspicion,

reflect a white heteronormative subjectivity and reproduce structural racism.[37] Indeed, because of an enduring fiction that interpreting the law is an objective, impartial, and politically neutral act, racial politics and power imbalances can remain hidden in judicial opinions and legal scholarship, lurking behind the technicalities and legalese of law.[38] As I will explain further in this Piece, this is particularly true in the realm of criminal law.[39]

PLS seeks to disrupt law's flawed construction by elevating critical lived experience that contradicts the dominant narratives that lay beneath laws.[40] In lifting up these critical stories, PLS seeks to pull out common threads shared by those who bear the consequences of law in order to expose where the law might be missing its mark and in need of upending. Often these common experiences fuel movements, which act as vehicles to alter how society understands the functionality and inevitabilities of law.[41] Accordingly, attention to episteme produced by movements is often a core component of PLS methodology. One of the primary goals of PLS is to expose counternarratives to the law, thereby creating spaces for social and legal change. By design, PLS also reminds us of the humanity behind the law, acting as a moral check and balance to the law. Building from the tradition of Critical Race Studies and an emerging body of Movement Law

---

> place the burden of proof on one party or the other, and tell us in cases of divided evidence what probably happened. These cultural influences are probably at least as determinative of outcomes as are the formal laws, since they supply the background against which the latter are interpreted and applied.

Richard Delgado & Jean Stefancic, Critical Race Theory: An Introduction 50 (3d ed. 2017).

37. Kimberlé Williams Crenshaw, Foreword: Toward a Race-Conscious Pedagogy in Legal Education, 11 Nat'l Black L.J. 1, 3 (1988) [hereinafter Crenshaw, Race-Conscious Pedagogy] (describing how "what is understood as objective or neutral is often the embodiment of a white middle-class world view").

38. See E. Tendayi Achiume & Devon W. Carbado, Critical Race Theory Meets Third World Approaches to International Law, 67 UCLA L. Rev. 1462, 1476–84 (2021) (discussing how the "colorblindness" of legal opinions obfuscates the racial dimensions of U.S. and international law).

39. See Alice Ristroph, The Curriculum of the Carceral State, 120 Colum. L. Rev. 1631, 1635–36 (2020) (arguing that the supposed neutrality of criminal law contributes to mass incarceration); see also infra section IV.A.

40. Cf. Delgado, supra note 8, at 2413–15 (noting that "Derrick Bell, Bruno Bettelheim, and others show[] [that] stories can shatter complacency and challenge the status quo" by providing counternarratives and disrupting mindsets).

41. See, e.g., Daniel Farbman, Resistance Lawyering, 107 Calif. L. Rev. 1877, 1881–82 (2019) (describing how abolitionist lawyers used the court cases of alleged fugitive enslaved people that arose under the Fugitive Slave Law of 1850 as an opportunity to wage "a vigorous rhetorical proxy battle against slavery"); Guinier & Torres, supra note 14, at 2756–59 (describing how social movements start as local sources of power that challenge the dominant understanding of law by providing alternative narratives); Matsuda, supra note 35, at 362–73 (documenting how Native Hawaiian and Japanese American claims for redress helped to shape emerging norms and a legal theory of reparations generated from the bottom).

scholarship, PLS thus aims to press the boundaries of what legal scholarship traditionally looks like by evoking lived experience as evidence and developing legal meaning alongside social movements.[42]

This Piece, the first of several in a series that will grapple with the participatory epistemology and methods needed to democratize the law, is written from my perspective as a legal academic partner in PLS. Part I situates PLS as part of a broader cross-disciplinary Participatory Action Research (PAR) movement to reposition subjects of research as partners in research. In doing so, it explores how participatory methods could inform legal scholarship but also identifies where PLS diverges from other forms of PAR. Specifically, unlike some forms of PAR, PLS's central purpose is *not* to work with those affected by the subject of the research to collect information in their community using traditional research methods like focus groups or interviews. Instead, through a collaborative process, the goal of PLS is to generate legal theory grounded by the analysis of those with lived experience in law's injustice, along with technical and research support from legal scholars. In line with Freire's emancipatory pedagogy, which centers the marginalized as those most equipped to liberate themselves from oppression,[43] PLS posits that true liberation cannot occur unless any reimagination of the law or legal systems involves analyzing the law along with those marginalized by it through praxis—a process of action and reflection.

Part II sets out the theoretical underpinnings of PLS. First, grounded in Freire's relational understanding of knowledge production, this Part articulates an alternative theory of knowledge, based on the belief that we arrive at truth collectively, not singularly. Drawing from this collaborative theory of knowledge, I contend that partnering in legal scholarship with

---

42. Amna A. Akbar, Sameer M. Ashar, and Jocelyn Simonson explain that:

> In this Article, we identi[f]y a methodology for working alongside social movements within scholarly work. We argue that legal scholars should take seriously the epistemological universe of today's left social movements, their imaginations, experiments, tactics, and strategies for legal and social change. We call this methodology *movement law.*
>
> Movement law is not the study *of* social movements; rather, it is investigation and analysis *with* social movements. Social movements are the partners of movement law scholars rather than their subject.

Akbar et al., supra note 13, at 825. Similarly, Critical Race Theory (CRT) often employs "legal storytelling" to offer "counter-accounts of social reality by subversive and subaltern elements of the reigning order." Kimberlé Crenshaw, Introduction, *in* Critical Race Theory: The Key Writings that Formed the Movement, at xiii, xiii (Kimberlé Crenshaw, Neil Gotanda, Gary Peller & Kendall Thomas eds., 3d ed. 1995) [hereinafter CRT Key Writings]; see also Delgado & Stefancic, supra note 36, at 77–78 (arguing that the racial narratives behind civil rights–era workplace discrimination statutes limit their applicability); Delgado, supra note 8, at 2437–38 (arguing that outgroups tell stories and "[b]y becoming acquainted with the facts of their own historic oppression—with the violence, murder, deceit, co-optation, and connivance that have caused their desperate estate—members of outgroups gain healing").

43. See Freire, Pedagogy of the Oppressed, supra note 31, at 44–45.

organic jurists who have expertise in law's injustice can help us see the "truth" of the law more clearly. Second, drawing from Robert Cover's pluralistic conception of the making of legal meaning,[44] this Part continues by setting out the legal theory for PLS. Like Cover, PLS takes as its starting point the conviction that the law has multiple meanings and that its interpretation necessarily depends on the worldview of its translator.[45] This Part contends that PLS enhances the formation and contestation of law by lifting up critical stories that counter the dominant discourses, which inform the law and its interpretation, sometimes expressly, other times covertly. By exposing and challenging these narratives, Part II describes how PLS can act as a check on arbitrary state power and violence. It further envisions legal scholarship, if participatory methods are employed, as one site where new legal worlds can be imagined.

Part III then turns to PLS's *praxis*—which Freire defines as "reflection and action upon the world in order to transform it"[46]—describing PLS's underlying ethos and methodology. Specifically, it describes how participatory methods are inherently relational in nature, explaining why forging PLS in trusting and solidaristic partnerships is the key to ensuring that it is nonexploitative. Part III also explores some of the features of the legal academy that might inhibit PLS from realizing its full potential and methods for overcoming them. To that end, it outlines the need for critical self-reflection by academic partners in PLS on how their positionality in academic institutions might limit their understanding of expertise and imaginative thinking and inform behaviors that propagate hierarchy.

Finally, Part IV responds to critics who believe that scholars should commit themselves to pursuing "objectivity" in legal scholarship and thus denounce "scholactivism."[47] In essence, these scholars argue that pursuing real-world objectives through legal scholarship and doing so in collaboration with nonacademics, as I did in *Redeeming Justice*, compromises a scholar's "special moral obligations" to "truth-seeking and knowledge dissemination."[48] This Part addresses those criticisms head on, exposing the risks of adopting a moral commitment to neutrality and objectivity in scholarship.

Ultimately, however, this Piece is directed at others like me who "yearn to build research collaboratively and respectfully with communities

---

44. See Robert M. Cover, The Supreme Court, 1982 Term—Foreword: *Nomos* and Narrative, 97 Harv. L. Rev. 4, 13 n.36 (1983) (describing how the process of making legal meaning is always dependent on cultural norms and thus inherently pluralistic since cultural norms differ across groups).

45. Id. at 11 (arguing that "the creation of legal meaning—*'jurisgenesis'*—takes place always through an essentially cultural medium").

46. Freire, Pedagogy of the Oppressed, supra note 31, at 51.

47. See, e.g., Khaitan, On Scholactivism, supra note 28, at 548–49 (arguing that "scholactivism is inherently contrary to the 'role morality' of a scholar").

48. Id. at 548.

outside the academy."[49] It has been developed in conversation with my coauthors of *Redeeming Justice*, Rell and Ghani, yet it is not meant to supplant their voices or speak for them. Rather, it is undertaken as a vehicle to reflect on and be transparent about the commitments and epistemology that led me to be part of this enterprise.[50] Principally, in this work, I explain why I believe that PLS is not just a legitimate form of scholarship but one that is urgently needed to address the fissures and fault lines that law, particularly criminal law, has created.

I. SITUATING PARTICIPATORY LAW SCHOLARSHIP

Participatory Law Scholarship is not the first of its kind. PLS is part of a broader movement in the academy to integrate participatory methods into research across different disciplines. The aim of this Part is to situate PLS within the broader cross-disciplinary Participatory Action Research movement to reposition subjects of research as partners in research. Section I.A describes the PAR movement and its efforts to break down the researcher–researched dichotomy. Section I.B then locates PLS as being most similar to a strand of PAR called Critical Participatory Action Research (CPAR), which centers questions of power and seeks to democratize knowledge production by involving all people, not just researchers, in the development of theory. Section I.C contrasts PLS with former attempts to bring participatory methods into the legal academy. Legal PAR so far has mirrored the PAR methodologies developed in the social sciences, in which certain community participants are identified and trained to perform research in their communities but often play a more limited role in generating theory to combat oppression and do not routinely coauthor the publications resulting from their research.[51] By contrast, PLS necessitates that organic jurists and scholars have solidaristic relationships that pre-date and outlast the discrete research project at hand such that they may create legal meaning together from a place of trust and common understanding.

---

49. Michelle Fine & María Elena Torre, Essentials of Critical Participatory Action Research 5 (2021) ("It is to graduate students and faculty that we share these considerations, commitments, and questions as a way to help you deepen inclusion and participation on your research teams and with those who participate in your studies . . . .").

50. It is an attempt to gain clarity on my own purpose akin to what Freire describes as meditation. See Freire, Pedagogy of the Oppressed, supra note 31, at 88 n.3 (describing "profound meditation [as] men . . . withdrawing from [the world] in order to consider it in its totality . . . [which] is only authentic when the meditator is 'bathed' in reality; not when the retreat signifies contempt for the world and flight from it, in a type of 'historical schizophrenia'").

51. See Sousa, supra note 23, at 402–04 (describing how, as PAR gained legitimacy, it became "less defined as a community-led or popular process of knowledge production to transform structures of oppression").

A. *Situating PLS Within the Participatory Action Research Framework*

Participatory Law Scholarship draws from the inspiration and insights of a broader cross-disciplinary Participatory Action Research movement, sometimes also called Community-Based Participatory Research (CBPR), to reposition subjects of research as partners in research.[52] This section aims to map the contours of the Participatory Research movement in order to locate PLS in its midst. While PAR takes many forms, the overarching goal of this movement, which has yet to take root in legal scholarship, is to break down the researcher–researched dichotomy.[53] Participatory Action Researchers share a fundamental belief that research should be driven by "disenfranchised people so that they can transform their lives for themselves."[54]

The philosophical underpinnings of PAR are drawn primarily from the teachings of two prominent theorists from the Global South: Freire, who is Brazilian, and Colombian sociologist Orlando Fals Borda.[55] Deriving from the emancipatory pedagogy of philosopher of education Freire, PAR is framed as a counterhegemonic approach for dismantling social, economic, and political structures that reproduce poverty and oppress the marginalized.[56] PAR reflects the teachings of Freire that true liberation is only possible when people have the power to make decisions for themselves and to develop their own praxis.[57] According to Freire, praxis is "the action and reflection of men and women upon their world in order to transform it."[58] Freire envisions a dialectic process in which human beings engage in critical reflection about the material world in

---

52. See id. at 404; see also Rachel Pain, Geoff Whitman & David Milledge, Participatory Action Research Toolkit: An Introduction to Using PAR as an Approach to Learning, Research and Action 2, https://www.dur.ac.uk/resources/beacon/PARtoolkit.pdf [https://perma.cc/NV94-2GYV] (last visited Aug. 5, 2023) (defining PAR and listing the various names used to describe it, including "Community-Based Participatory Research"); Barbara A. Israel, Amy J. Schulz, Edith A. Parker & Adam B. Becker, Review of Community-Based Research: Assessing Partnership Approaches to Improve Public Health, 19 Ann. Rev. Pub. Health 173, 177–80 (1998) (examining how community-based and related forms of research could inform the public health field); Flora Cornish, Nancy Breton, Ulises Moreno-Tabarez, Jenna Delgado, Mohi Rua, Ama de-Graft Aikins & Darrin Hodgetts, Participatory Action Research, 3 Nat. Rev. Methods Primers, no. 34, 2023, at 1, 3–7, https://www.nature.com/articles/s43586-023-00214-1 [https://perma.cc/43A9-7BYZ] (setting out the key steps in designing a PAR project).

53. Sousa, supra note 23, at 399–401.

54. See id. at 403 (internal quotation marks omitted) (quoting Peter Park, What Is Participatory Research? A Theoretical and Methodological Perspective, *in* Voices of Change: Participatory Research in the United States and Canada 1, 1 (Peter Park, Mary Brydon-Miller, Budd Hall & Ted Jackson eds., 1993)).

55. See id. at 403–08.

56. Pablo Alejandro Leal, Participation: The Ascendancy of a Buzzword in the Neo-Liberal Era, 17 Dev. Prac. 539, 540 (2007); Sousa, supra note 23, at 403–08.

57. Sousa, supra note 23, at 403 (stating that praxis is a process of becoming fully human and by becoming critically conscious of the way one exists in the world).

58. Freire, Pedagogy of the Oppressed, supra note 31, at 79.

conversation with each other to develop a critical consciousness and then, based on this critical consciousness, take transformative action to change the world for the better.[59] Likewise, Fals Borda believed that academic texts portrayed a skewed version of reality, so knowledge generated by the working class has an important role to play in disrupting the hegemonic discourses of history and society.[60] Guided by these principles, "PAR becomes a tool for 'the systematic creation of knowledge that is done with and for community for the purpose of addressing a community-identified need.'"[61]

Embedded in such participatory approaches is also a critique. Viewed through the lens of PAR, conventional research seems disconnected, time-limited, and unaccountable to its subjects. While some conventional researchers may engage with the communities most affected by their subject of choice, their engagement can ultimately become extractive. "Extractive research" mines communities for information and stories that can be presented as "evidence" to other academics, jurists, and policymakers.[62] While the use of stories in legal scholarship can be powerful, it can also feel rather instrumental, used to support the academic's perception of what is needed, rather than the storyholders'.[63] A scholar may stretch a story in one direction or dilute it in another to make their argument stronger.[64] In part, this is also a question of who reaps the most benefits from the story. Academics often benefit more than the individuals and communities who share their stories because these stories become material for publications, which in turn can help advance careers.[65] On the other hand, researched individuals and communities are unlikely to ever see any benefits from this research, much less see the

---

59. Au, supra note 34, at 182.

60. Sousa, supra note 23, at 401.

61. Id. at 404 (quoting Kerry Strand, Sam Marullo, Nick Cutforth, Randy Stoecker & Patrick Donohue, Community-Based Research and Higher Education: Principles and Practices 8 (2003)).

62. Sousa, supra note 23, at 400; see also Christine Zuni Cruz, [On the] Road Back In: Community Lawyering in Indigenous Communities, 5 Clinical L. Rev. 557, 561–63 (1999) (discussing the appropriation of Native voices by academics in scholarship).

63. See Lori D. Johnson & Melissa Love Koenig, Walk the Line: Aristotle and the Ethics of Narrative, 20 Nev. L.J. 1037, 1043 (2020) ("Specifically, scholars active in the current Applied Legal Storytelling movement have 'encourage[d] scholars to use storytelling to enhance their understanding of what skills lawyers practice and how to improve those skills.'" (alteration in original) (quoting Carolyn Grose, Storytelling Across the Curriculum: From Margin to Center, From Clinic to the Classroom, 7 J. Ass'n Legal Writing Dirs. 37, 38 (2010))); Miller, supra note 24, at 18–21 (exploring the ethical dilemmas raised by storytelling in legal scholarship).

64. See Miller, supra note 24, at 5 ("Authors typically change the names of their clients or the content of the stories as they were initially told, but only a handful seem to have explicitly discussed the written product with their clients or given their clients an opportunity to change the content.").

65. See Sousa, supra note 23, at 398–400 (providing anecdotal evidence that community members do not always benefit from academic research).

researcher again.[66] Participatory frameworks question the hierarchy and power imbalances that characterize most Western knowledge production and recognize the legitimacy and value of experiential knowledge.[67]

Despite these emancipatory aspirations, participatory research is still sometimes critiqued as being driven by the researcher.[68] This is also reflected in the processes described in many guides for how to conduct PAR as well as the methodologies described in PAR studies.[69] In some instances, the purpose or subject of study is still identified by the researcher, who then assembles a group of impacted people, provides them with reading, and trains them on research methodologies.[70] In other studies, the community partners act as consultants to the researcher as the researcher develops their research topic, design, and outcomes.[71] One guide describes the role of community partners as keeping "residents engaged" and keeping "the project aligned with community needs and action."[72]

B. *PLS's Alignment With Critical Participatory Action Research*

By contrast, PLS is most aligned with the strand of PAR known as Critical Participatory Action Research, or CPAR, in that it marks a break from "conventional approaches in which academics research and write 'about' or 'on' communities as objects of study."[73] The premise of CPAR is

---

66. See id. at 400.

67. See, e.g., Marie-Claude Tremblay, Debbie H. Martin, Alex M. McComber, Amelia McGregor & Ann C. Macaulay, Understanding Community-Based Participatory Research Through a Social Movement Framework: A Case Study of the Kahnawake Schools Diabetes Prevention Project, 18 BMC Pub. Health, no. 487, 2018, at 1, 2, https://bmcpublichealth.biomedcentral.com/counter/pdf/10.1186/s12889-018-5412-y.pdf [https://perma.cc/C962-2R5J] (explaining this as the core of Community-Based Participatory Research).

68. See Sousa, supra note 23, at 402 (explaining how as PAR gained momentum, it became "less defined as a community-led or popular process of knowledge production to transform structures of oppression").

69. See, e.g., Andrew Seeder, Reann Gibson, Andrew Binet, Yael Nidam, Rebecca Houston-Read, Shayanna Hinkle-Moore, Vedette Gavin & Mariana Arcaya, A Participatory Action Research Field Guide From the Healthy Neighborhoods Study 12–13 (2020), https://www.clf.org/wp-content/uploads/2021/01/PAR-Field-Guide.pdf [https://perma.cc/Q5K4-BLF4] (describing the process of identifying a community partner and training them on ethics and research methods).

70. See Simon Newitt & Nigel Patrick Thomas, Participating in Social Exclusion: A Reflexive Account of Collaborative Research and Researcher Identities in the Field, 20 Action Rsch. 105, 113–15 (2020).

71. Alma M. Ouanesisouk Trinidad, Community-Based Participatory Research, Encyc. of Soc. Work (2021), https://doi.org/10.1093/acrefore/9780199975839.013.69 [https://perma.cc/8H8C-3QH7] ("These partnerships focus on issues and concerns identified by community members and create processes that enable all parties to participate and share influence in the research and associated change efforts.").

72. Seeder et al., supra note 69, at 13.

73. Fine & Torre, supra note 49, at 3.

that all people, not just academics, should be empowered to "ask critical questions about the systems and practices that shape their lives, and to imagine—through research—how they might be otherwise."[74] In this spirit, the "objects of study," in collaboration with traditionally trained researchers, generate research questions, inform research design, analyze evidence, and develop theory.[75]

Grounded by a strong commitment to "knowledge justice,"[76] the method of CPAR can look quite different from other PAR projects. Research is developed through a process of participatory inquiry guided by those who are most impacted by the issue which is the subject of study.[77] CPAR is "critical" in the sense that, like other critical studies, it is "rooted in a range of social theories focused on questions of power, structural and intimate violence, and inequities" and "anchored by those most impacted by injustice."[78] CPAR researchers might decry other "depoliticized" versions of PAR for abandoning PAR's more emancipatory roots and criticize them for "inevitably serv[ing] to justify, legitimise, and perpetuate current neo-liberal hegemony."[79] CPAR thus differs from these forms of PAR because it intentionally centers "questions of power and injustice, intersectionality and action."[80] In addition, CPAR's fundamental goal is "democratic knowledge production."[81] It represents a "modest move to democratize and decolonize research as praxis with communities under siege, one dedicated to research that bends toward action."[82]

Like CPAR, PLS is democratizing in two key respects. It both gives voice to people whose viewpoints are crucial in understanding law and society (i.e., those people who bear the bluntest consequences of law's injustice) and expands the reach of scholarly inquiry to engage with the broader public, rather than just a small group of legal scholars. It thus forces traditional researchers educated in the academy to question the function, method, and audience of most scholarship, in ways that might feel threatening to academics who have built their careers on conventional understandings of expertise.[83] For academically trained researchers, it also

---

74. Id.

75. Id. at 3–4.

76. Id. at 5.

77. Id.

78. Id. at 6.

79. Leal, supra note 56, at 544.

80. Fine & Torre, supra note 49, at 6.

81. Id. at 8.

82. Id. at 4.

83. Cf. Koen P.R. Bartels & Victor J. Friedman, Shining Light on the Dark Side of Action Research: Power, Relationality and Transformation, 20 Action Rsch. J. 99, 100 (2022) ("The dark side of action research . . . [is that it] may signal 'identity costs' for action researchers, that is, becoming aware of the limitations of their presumed identity and having to work through conflicts among deeply-held beliefs . . . ." (citation omitted) (quoting Hendrik Wagenaar, Philosophical Hermeneutics and Policy Analysis: Theory and Effectuations, 4 Critical Pol'y Analysis 311, 323 (2007))). These beliefs stem from the desire

widens the scope of our understanding of social issues, broadens the evidence we consider, and expands the ways that we express our findings to the world.[84] For this last reason, it may also differ in its outputs. While the results might be published in traditional venues, such as academic journals, they might also be adapted to other forums, like street theater, spoken word, documentary films, popular magazines or books, science fiction, comics, digital shorts, music, and classroom curriculum.[85]

C. *Participatory Methods in Legal Scholarship*

While there are examples of legal scholars employing participatory methods to varying degrees in their scholarship,[86] Professors Emily M.S. Houh and Kristin Kalsem are the only U.S. academics that I am aware of to make a robust case for bringing PAR practices into legal scholarship.[87] They did so under an approach they called Legal Participatory Action Research, or Legal PAR, framing it as a way for legal scholars and activists

---

to promote "the value and impact of their work, preserv[e] their professional integrity, and advanc[e] their careers." Id.

84. Fine & Torre, supra note 49, at 6.

85. Id. at 7.

86. See, e.g., Ashley Albert & Amy Mulzer, Adoption Cannot Be Reformed, 12 Colum. J. Race & L. 557, 558–59 (2022) (building from Ashley Albert's experience of voluntarily surrendering her parental rights to argue that adoption should be separate from the family regulation system); Lauren Johnson, Cinnamon Pelly, Ebony L. Ruhland, Simone Bess, Jacinda K. Dariotis & Janet Moore, Reclaiming Safety: Participatory Research, Community Perspectives, and Possibilities for Transformation, 18 Stan. J. C.R. & C.L. 191, 193 (2022) (offering a community-based participatory research study about safety following protests over racialized police violence); Janet Moore, Marla Sandys & Raj Jayadev, Make Them Hear You: Participatory Defense and the Struggle for Criminal Justice Reform, 78 Alb. L. Rev. 1281, 1281 (2015) (introducing participatory defense as a model for reforming public defense and challenging mass incarceration); Jeremy Perelman & Katharine Young with the participation of Mahama Ayariga, Freeing Mohammed Zakari: Rights as Footprints, *in* Stones of Hope: How African Activists Reclaim Human Rights to Challenge Global Poverty 123–35 (Lucie E. White & Jeremy Perelman eds., 2011) (invoking the story of Mohammed Zakari to illustrate how the process of rights-claiming evolves over time); Charles D. Weisselberg & Linda Evans, Saving the People Congress Forgot: It Is Time to Abolish the U.S. Parole Commission and Consider All "Old Law" Federal Prisoners for Release, 35 Fed. Sent'g Rep. 106 (2022) (consisting of scholarship coauthored with Linda Evans, who served sixteen years in federal prison).

87. See Emily M.S. Houh & Kristin Kalsem, It's Critical: Legal Participatory Action Research, 19 Mich. J. Race & L. 287, 296 (2014) (advocating "that PAR has much to offer legal scholars and scholarship"). Monica Bell has also noted the need to incorporate participatory methods into legal scholarship. See Monica C. Bell, The Community in Criminal Justice: Subordination, Consumption, Resistance, and Transformation, 16 Du Bois Rev. 197, 211 (2019) ("This framework supports, for example, Participatory Action Research, which sees members of marginalized communities as creators of valuable knowledge, not just passive subordinates and consumers of the criminal justice apparatus."); see also Susan R. Jones & Shirley J. Jones, Innovative Approaches to Public Service Through Institutionalized Action Research: Reflections From Law and Social Work, 33 U. Ark. Little Rock L. Rev. 377, 384–86 (2011) (arguing that action research methodologies should be incorporated into service learning within law schools).

to "explicitly incorporate[] Participatory Action Research into [Critical Race Theory], [Critical Race Feminism], feminist legal scholarship, or the growing legal literature on fringe economies and economic justice."[88] In many respects, the underlying premises of Legal PAR and PLS are the same. Drawing from Professor Mari J. Matsuda's seminal article urging scholars to "look to the bottom" for legal insight,[89] Legal PAR requires not only "'looking to the bottom' in a theoretical sense, but also . . . treating those 'at the bottom' as equal research partners who are presumptively best situated to identify, analyze, and solve the problems that directly affect them."[90] PLS adopts this approach as well.

PLS differs from Legal PAR, however, in four main respects. First and foremost, the modality and goals of these approaches are different. The driving motivation behind PLS is the making of legal meaning and legal theory alongside organic jurists. In the exemplary projects Houh and Kalsem describe, the methods employed resemble PAR in the social sciences in that the community participants were identified and then trained to collect data on important social issues with legal implications. These issues focused on payday lending; the data was collected through interviews, questionnaires, and focus groups, and that data was used by the group to support broader advocacy efforts.[91] By contrast, PLS's primary focus is not to collect information on lived experience through focus groups or interviews but rather to generate legal theory that is grounded in the critical reflection and analysis by organic jurists on their own lived experience. There are no "subjects" of research in PLS. Instead, PLS requires coauthorship with organic jurists to ensure shared decisionmaking in developing the descriptive account of their own realities, the normative assessment of how things should be, and the prescriptive analysis of what is needed for social change.[92] As Freire emphasized, "Every prescription represents the imposition of one individual's choice upon another, transforming the consciousness of the person prescribed to into one that conforms with the prescriber's consciousness."[93] PLS thus necessitates coauthorship with organic jurists, so that they can control the use of their own stories and generate the prescriptions that flow from them. Coauthorship is one way that PLS

88. Houh & Kalsem, supra note 87, at 294–96.

89. See Matsuda, supra note 35, at 324–25 (describing "looking to the bottom" as scholars "adopting the perspective . . . of groups who have suffered through history" to better conceptualize law and justice).

90. Houh & Kalsem, supra note 87, at 294.

91. See id. at 294, 321–22, 329 (describing the authors' project done in partnership with Public Allies Cincinnati, an AmeriCorps program whose goal is "to identify, develop, and train a new 'generation' of diverse community leaders and organizers").

92. Cf. Leal, supra note 56, at 545 ("[S]haring through participation does not necessarily mean sharing in power." (internal quotation marks omitted) (quoting Sarah C. White, Depoliticising Development: The Uses and Abuses of Participation, 6 Dev. Prac. 6, 6 (1996))).

93. Freire, Pedagogy of the Oppressed, supra note 31, at 47.

redistributes power between academic and nonacademic partners. Further, while PLS is inherently collaborative, the default position of legal scholars should be to play a supportive role as organic jurists engage in critical reflection and theorize solutions.[94]

Second, and relatedly, the explicit goal of PLS is to engage in knowledge production with organic jurists to transform structures of oppression. For that reason, PLS involves more than just collecting information and formulating reforms, which is the typical method of mainstream PAR. Indeed, since PLS aims to expose and counter the dominant discourses that undergird the law, it necessitates prefigurative legal analysis. In this way, it resonates with what Professors Amy J. Cohen and Bronwen Morgan call "prefigurative legality," which involves "efforts to use the language, form, and legitimacy of law to imagine law otherwise."[95] Namely, PLS is grounded in the belief that participation as a methodology is more likely to serve emancipatory goals when it is in the service of broader struggles by marginalized groups to transform legal frameworks.[96] Thus, PLS posits that true liberation cannot occur unless any reimaging of the law or legal systems involves those marginalized by the law.[97] Drawing from Freire, Professor Pablo Alejandro Leal argues that "[if] there is no collective analysis of the causes of oppression or marginalisation and what actions can be taken to confront and affect those causes, then any efforts are unlikely to be empowering."[98] PLS is more than the inclusion of someone else's story to illustrate a point or make an argument. At its best, PLS should be understood in the tradition of Muhammad Rahman, a PAR theorist and practitioner from Bangladesh, who describes participatory research as a "people's own

---

94. See Sousa, supra note 23, at 402–03 (noting that scholars play a supportive role, and the "'real' researchers" are the organic intellectuals).

95. Amy J. Cohen & Bronwen Morgan, Prefigurative Legality, 48 Law & Soc. Inquiry (forthcoming 2023) (manuscript at 1), https://ssrn.com/abstract=4268294 [https://perma.cc/26QR-LXFS].

96. See Leal, supra note 56, at 544 (citing Sam Hickey & Giles Mohan, Relocating Participation Within a Radical Politics of Development: Insights From Political Action and Practice, *in* Participation: From Tyranny to Transformation 159, 159 (Samuel Hickey & Giles Mohan eds., 2004)).

97. See Freire, Pedagogy of the Oppressed, supra note 31, at 66–67 (discussing how legitimate liberation requires the involvement of marginalized populations). He argued for collective liberation via praxis:

> But while to say the true word—which is work, which is praxis—is to transform the world, saying that word is not the privilege of some few persons, but the right of everyone. Consequently, no one can say a true word alone—nor can she say it *for* another, in a prescriptive act which robs others of their words.

Id. at 88.

98. Leal, supra note 56, at 545 (citing Freire, Pedagogy of the Oppressed, supra note 31, at 46).

independent inquiry" primarily belonging to them.[99] PLS thus advances self-determination.

Third, PLS thus often involves amplifying the analytical interventions of existing movements. Like CPAR, PLS is often "in, by, and for movements for justice."[100] With this focus on movements, PLS can be seen as part of an emerging body of scholarship, which Akbar, Ashar, and Simonson call "Movement Law."[101] Movement Law is an approach to legal scholarship grounded in solidarity, accountability, and engagement with grassroots organizing and left social movements, and it is a methodology that can be employed by scholars across substantive areas.[102] Akbar, Ashar, and Simonson contrast this approach with scholarship that focuses on law and social movements—a field of study that unpacks the relationship between lawyers, legal process, and social change.[103] As the authors elucidate, "Movement law is not the study *of* social movements; rather it is investigation and analysis *with* social movements."[104]

The fourth way that PLS is distinguishable from Legal PAR is its central epistemological focus on disrupting the narratives that undergird the law through the lived experience of organic jurists. This approach is informed by the tradition of Critical Race Theory (CRT), which at times employs storytelling to reveal alternative accounts of our social and legal realities.[105] As Richard Delgado has extolled, "Stories attack and subvert the very 'institutional logic' of the system."[106] Like CRT, PLS's aim is to render visible the voices, experiences, and logics that have otherwise disappeared in legal scholarship.[107] As the next Part will describe in further detail, the centrality of narrative sets it apart from other forms of PAR, is particular to the discipline of law, and informs the theory behind PLS.

---

99. Sousa, supra note 23, at 404 (internal quotation marks omitted) (quoting Muhammad Anisur Rahman, The Theoretical Standpoint of PAR, *in* Action and Knowledge: Breaking the Monopoly With Participatory Action-Research 13, 17 (Orlando Fals-Borda & Muhammad Anisur Rahman eds., 1991)).

100. Fine & Torre, supra note 49, at 6 ("There are many variations of participatory action research (PAR) . . . . An important distinction is that CPAR focuses intentionally on questions of power and injustice, intersectionality and action.").

101. See generally Akbar et al., supra note 13, at 825–26 (outlining an emerging genre of legal scholarship they call "movement law").

102. Id. at 826.

103. See id. at 825–26.

104. Id. at 825.

105. See Delgado & Stefancic, supra note 36, at 45.

106. Delgado, supra note 8, at 2429.

107. See id. at 2414–15 (describing the power of counterstories to challenge received wisdom and expose alternative realities).

II. THE THEORY OF PLS

In this Part, I turn to the theoretical foundations of PLS. Section II.A describes the theory of knowledge that drives PLS, describing it as fundamentally relational. Namely, PLS is grounded in the belief that human beings arrive at truth collectively, not individually. Therefore, partnering with those who have no formal training in the law but expertise in law's injustice can help us to see the "truth" of the law more fully. Following from that analysis, section II.B grounds PLS in Cover's legal theory of *nomos* and narrative. Cover argued that *nomos* and narrative inform our worldview and in turn shape how we create and interpret the law.[108] Building from Cover, this Part argues that PLS provides a mechanism for analyzing existing law more thoroughly, because it includes the *nomos* and narrative of those who have developed expertise in the law through experiencing its bluntest consequences.

A. *PLS's Theory of Knowledge*

PLS is fundamentally a relational epistemology, much like Freire's well-known relational *Pedagogy of the Oppressed*, which is focused on the collective construction of "truth."[109] PLS's guiding philosophy is that knowledge and truth are collectively constructed through dialogue. Relationships are intrinsic to the PLS approach because PLS is grounded in the belief that knowledge is attained collectively and in dialogue with others.[110] PLS starts from the premise that human knowledge is by its nature, imperfect.[111] But through dialogue with other human beings, we become more aware of what we know and what we have failed to perceive, thereby improving our own understanding of reality and our ability to change it.[112] If you understand knowledge production as "intrinsically relational," then partnership in research is not a liability but "an ontological necessity."[113]

Much like Freire's *Pedagogy of the Oppressed*, PLS draws its theory of knowledge from dialectical philosophy, which is far more relational than the individualist rational logic of the Enlightenment.[114] In contrast to the rationalist tradition, which studies objects in the material world in isolation from one another, fixed in time and space, dialectics is grounded in the

---

108. See Cover, supra note 44, at 4–6.

109. See Sousa, supra note 23, at 410 (explaining how Freire's pedagogy is grounded in the idea of *companheirismo*).

110. Cf. id. at 401 (explaining that "the quality of the relationships, particularly partnerships, in this 'coming together' is a fundamental aspect for successful knowledge creation, action, and consequently to move towards desired outcomes").

111. Cf. Au, supra note 34, at 184 (noting that for Freire, human beings recognize the imperfection of their collective consciousness through dialogue).

112. See id.

113. Sousa, supra note 23, at 407.

114. See Au, supra note 34, at 177.

belief that human beings can only perceive things in relation to each other, so our reality "cannot be analyzed as independently existing pieces."[115] Additionally, dialectical philosophy is grounded in the belief that human beings cannot understand the material world (or discover "truth") through our own consciousness alone; rather, a fuller picture of reality is only possible in fellowship and solidarity with others.[116] According to Freire, "[O]nly through communication can life hold meaning."[117] Freire thus built his theory of knowledge on dialectical philosophy, adding a fundamentally social understanding of knowledge production and discovery of truth.[118] In *Politics and Education*, he explains that "[c]onsciousness and the world cannot be understood separately, in a dichotomized fashion, but rather must be seen in their contradictory relations. Not even consciousness is an arbitrary producer of the world or of objectivity, nor is it a pure reflection of the world."[119] In short, Freire believed that humans are unable to perceive the world objectively through our own consciousness; instead, he maintained that we learn what the material world is only through sharing our subjective lens with others to reveal the bigger picture.[120]

Consequently, Freire understood objectivity and subjectivity to be intertwined in the pursuit of knowledge.[121] One "cannot exist without the other."[122] In order to truly see the world as it is objectively, we must embrace our inherent subjectivity. That is, we must understand that we see the world through the lens of our own lived experience, which will only ever be subjective. In Freire's estimation, dialogue with others allows humans to better discern the material world, because through that dialogue we are not limited to our own subjective understandings.[123] Engagement with others fosters critical thinking about our own

115. Id.

116. See Freire, Pedagogy of the Oppressed, supra note 31, at 85–86 (arguing from a materialist and dialectical standpoint that knowledge and consciousness exist only through collective relations); Au, supra note 34, at 184–85 (explaining that dialectics as a dialogue expand human beings' knowledge of the material world by laying bare to them "what they know" and "what they don't know").

117. Freire, Pedagogy of the Oppressed, supra note 31, at 77.

118. See Au, supra note 34, at 184–85 (noting how "dialogue about an object of study" is central to the process of gaining knowledge).

119. Paulo Freire, Politics and Education 19 (1998).

120. Au, supra note 34, at 178.

121. See Freire, Pedagogy of the Oppressed, supra note 31, at 38 ("For this individual the subjective aspect exists only in relation to the objective aspect (the concrete reality, which is the object of analysis). Subjectivity and objectivity thus join in a dialectical unity producing knowledge in solidarity with action, and vice versa.").

122. Id. at 50 ("On the contrary, one cannot conceive of objectivity without subjectivity. Neither can exist without the other, nor can they be dichotomized.").

123. See Au, supra note 34, at 184–85 (elaborating on Freire's theory that the "social act" of dialogue expands human beings' capacity for knowledge).

perception of reality and thereby facilitates deeper understanding of the material world more broadly.[124]

Furthermore, Freire understood truthseeking as dynamic, because "reality is really a *process*, undergoing constant transformation."[125] Because the world is not static, the process of seeking truth involves ongoing dialogue and critical reflection with others.[126] If you agree with Freire that "ultimately our consciousness is first and foremost a social consciousness" in that it is not formed alone,[127] it follows that one cannot discover the truth or attain knowledge in isolation. Instead, we can only discover truth or attain knowledge through our engagement with the world and others who inhabit it. Because our perception of reality is inherently informed by our imperfect subjective consciousness, relationships become central to knowledge production.

B. *The Legal Theory of PLS*

The relational process of knowledge production described above is uniquely valuable in the context of the law. As I experienced firsthand while writing *Redeeming Justice*, partnering with those who have no legal training but have expertise in law's dysfunction can help us to see the "truth" of the law more clearly. This section goes further by explaining the legal theory behind PLS.

Specifically, drawing from Cover's profound insights into how cultural norms and coconstitutive narratives shape law's formation, this section explains how participatory methods can help create a fuller account of the law. Since laws are often constructed and interpreted by those who are not directly affected by the problems they are meant to address, they can be inadequate to address the most pressing problems of our time.[128] PLS charts a path to developing a more holistic and democratic account of law through collaboration with nonlawyers who intimately know the law by their experience of its injustice.

1. Nomos *and Narrative*. — The legal theory of PLS is best situated in the pluralist account of the making of legal meaning developed by Cover. Cover uniquely understood how narrative informs societies and influences their making of legal meaning, detailing the relationship between *nomos*

---

124. See id. (noting how, for Freire, dialogue helps society arrive at a deeper understanding of reality).

125. Freire, Pedagogy of the Oppressed, supra note 31, at 75.

126. Au, supra note 34, at 185 ("Epistemologically, then, for Freirian liberatory pedagogy, it is through dialogue about an object of study that, 'we try to reveal it, unveil it, see its reasons for being like it is, the political and historical context of the material. This . . . is the act of knowing . . . .'" (omissions in original) (quoting Ira Shor & Paulo Freire, A Pedagogy For Liberation: Dialogues on Transforming Education 13 (1987))).

127. Au, supra note 34, at 180 (noting that Freire believed that "our consciousness comes from dialectical interaction with th[e] world").

128. In this way, PLS echoes Matsuda's call to "look[] to the bottom" for insights into how best to design laws that serve social justice ends. Matsuda, supra note 35, at 324.

and narrative in his seminal article of the same name.[129] As defined by Cover, *nomos* is the normative universe in which we situate ourselves.[130] *Nomos* exists somewhere between reality and vision—that is, between the material world we inhabit and the imagined community we wish we did.[131]

Cover argues that *nomos* cannot be constructed without narrative.[132] Cover describes narrative as "[t]he codes that relate our normative system to our social constructions of reality and to our visions of what the world might be."[133] Narrative also connects the "is" to the "ought."[134] As Cover posits, "The very imposition of a normative force upon a state of affairs, real or imagined, is the act of creating narrative."[135] Others who share our vision of right and wrong communally create the narratives that inform *nomos*.[136] We may act individually, but we do so in relation to a common script about how the world works.[137] This vision of narrative and its function echoes how Delgado, a scholar of CRT, understood the role of narrative in "construct[ing] social reality by devising and passing on stories—interpretive structures by which we impose order on experience and it on us."[138]

Put more simply, *nomos*, and the narratives that inform it, "frame" the world for us. Sociologists use the concept of "framing" to describe the "interpretive lens, which guides people to see the world differently and compels them to act according to that new understanding."[139] Frames not only inform our worldview, they also help us communicate our

---

129. See Cover, supra note 44, at 4–5 ("No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning . . . . Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

130. Id. at 4 ("We inhabit a *nomos*—a normative universe.").

131. Id. at 9 ("A *nomos*, as a world of law, entails the application of human will to an extant state of affairs as well as toward our visions of alternative futures. A *nomos* is a present world constituted by a system of tension between reality and vision.").

132. Id. at 5. ("In this normative world, law and narrative are inseparably related.").

133. Id. at 10.

134. Id. ("[L]iv[ing] in a legal world requires that one know not only the precepts, but also their connections to possible and plausible states of affairs. It requires . . . integrat[ing] not only the 'is' and the 'ought,' but the 'is,' the 'ought,' and the 'what might be.' Narrative so integrates these domains.").

135. Id.

136. See id. at 10–11 (describing the communal character of forming narratives that inform our behavior and *nomos*).

137. Id. at 10.

138. See Delgado, supra note 8, at 2415 (explaining how we use stories and storytelling to make sense of our own context and social reality).

139. See Katharine G. Young, Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States, 4 Ne. U. L.J. 323, 324 (2012) (extending Cover's analysis of *nomos* and narrative to the economic, social, and cultural rights movement in the United States).

worldview to others.[140] Frames can "unite actors, discredit opponents, persuade bystanders, and change minds."[141]

2. Nomos*, Narrative, and the Law.* — *Nomos* and narrative have significant implications for how we frame the law too. They shape how laws are made, interpreted, justified, and critiqued.[142] As Cover vividly illustrated, law itself is constructed based on *nomos*, informed by narratives, which in turn frames our understanding of the world.[143] Narratives, as the bridges between the "is" and the "ought," are inseparable from prescriptions about what is needed for a society to function best, which, as Cover pointed out, are embedded in the law.[144] Narratives, and the moral commitments that inform them, influence not only our individual actions but also how we collectively make meaning of the law.[145] There is not one singular *nomos* that drives any one legal system. Rather, Cover contended that there is a "range of meaning that may be given to every norm" by different groups and that how any norm is interpreted turns on not only the plain language of legal text itself but also on the interpreter's "multiplicity of implicit and explicit commitments."[146] It is the connection between narrative and law that exposes any group's commitments.[147] Narratives provide the "resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law."[148] Cover describes this process of making legal meaning as "jurisgenesis," which is inherently a cultural and subjective practice.[149]

Judges also interpret law in the image of their own *nomos* and narrative. Unlike other legal theorists, such as H.L.A. Hart, Hans Kelsen, and Ronald Dworkin, who focused on the indeterminacy of the law in a few "hard cases,"[150] Cover believed that the problem with judicial

---

140. Id.

141. Id.

142. See Cover, supra note 44, at 9 (explaining how a place's legal tradition is "part and parcel of a complex normative world").

143. See id. at 4–5 ("Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live.").

144. See id. at 5 ("In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose.").

145. See id. at 9 ("A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, but also a language and a mythos—narratives in which the corpus juris is located by those whose wills act upon it.").

146. See id. at 46 (explaining how groups form narratives that communicate their commitments).

147. Id. ("The narratives that any particular group associates with the law bespeak the range of the group's commitments.").

148. Id.

149. See id. at 11 (describing the social process of creating legal meaning).

150. Legal theorists like Hans Kelsen, H.L.A. Hart, and Ronald Dworkin focused much of their analysis and resultant legal theories on how judges should make meaning of the law when it does not provide a clear answer to a given legal question. See, e.g., H.L.A. Hart, The

decisionmaking is not that the law is "unclear," but rather that there is "too much law."[151] Namely, he argued that the law has multiple meanings, because different nomic communities have their own principles and precepts that inform their understanding of and interaction with the law.[152] Consequently, when a judge analyzes and interprets legal doctrine, they do so within the context of their own *nomos*.[153] In doing so, judges, backed by state power, "kill" variants of law other than their own.[154] For that reason, Cover characterizes judges as "people of violence."[155] Judges might not even realize the harm they are inflicting on the law or those subject to it because their perception of and exposure to the world is limited to their own experience or to that of those in their nomic community who experience the world in a similar way.[156] In making prescriptions about the law, legal scholars regularly make similar decisions, consciously or unconsciously, about whether they wish to embrace a particular nomic interpretation of law. The problem is that when a narrow group of elites—whether lawmakers, judges, or scholars—develop the law through their own *nomos* and narratives, the law can reflect a version of reality that is inapposite to the way people experience it in their daily lives.

3. *Envisioning a Democratic Future Through Participatory Methods.* — Instead of killing alternative interpretations of the law, Cover believed that democratic legal regimes should embrace the alternatives and view the plurality of *nomos* and narratives as a check on arbitrary state power and violence.[157] In explaining his reasoning, Cover predicted the following:

Concept of Law 124–54 (2d ed. 1994) (describing the law as "open textured" because it is unable to anticipate every legal issue that might arise); Hans Kelsen, Pure Theory of Law 349–50 (Max Knight trans., 2d ed. 1967) (arguing that the law cannot foresee every possible circumstance and so is inherently indefinite); Ronald Dworkin, Hard Cases, 88 Harv. L. Rev. 1057, 1058 (1975), reprinted in Taking Rights Seriously 81, 82 ("Statutes and common law rules are often vague and must be interpreted before they can be applied to novel cases.").

151. See Cover, supra note 44, at 42 ("Modern apologists for the jurispathic function of courts usually state the problem not as one of *too much law*, but as one of *unclear* law.").

152. See id. (arguing that "different interpretive communities will almost certainly exist and will generate distinctive responses to any normative problem of substantial complexity").

153. See Benjamin Levin, Criminal Justice Expertise, 90 Fordham L. Rev. 2777, 2815 (2022) (explaining that even appointed judges "are political actors in that they are embedded in a political culture and decide cases filtered through the lens of their political commitments").

154. See Cover, supra note 44, at 53 ("Because of the violence they command, judges characteristically do not create law, but kill it. Theirs is the jurispathic office. Confronting the luxuriant growth of a hundred legal traditions, they assert that *this one* is law and destroy or try to destroy the rest.").

155. Id.

156. Id. at 67 ("[Judges] interpret and they make law. They do so in a niche, and they have expectations about their own behavior in the future and about the behavior of others.").

157. See id. at 68.

> The statist impasse in constitutional creation must soon come to an end. When the end comes, it is unlikely to arrive via the Justices . . . . It will likely come in some unruly moment—some undisciplined jurisgenerative impulse, some movement prepared to hold a vision in the face of the indifference or opposition of the state. Perhaps such a resistance—redemptive or insular—will reach not only those of us prepared to see law grow, but the courts as well. The stories the resisters tell, the lives they live, the law they make in such a movement may force the judges, too, to face the commitments entailed in their judicial office and their law.[158]

As the public's trust in the U.S. Supreme Court erodes and movements protest the police's murder of citizens in the streets, this moment may have already come. Imaginative generation of new legal theory and thought more tethered to on-the-ground realities seems more needed now than ever. Law's natural instinct might be retrenchment, but Cover argued that instead of "circumscribing the *nomos*[,] we ought to invite new worlds."[159]

4. *PLS as a Tool for Critical Legal Imagination.* — PLS proposes legal scholarship as one site where these new worlds of law can be imagined. As others have highlighted, the "prevailing legal narrative [in legal scholarship] is one created by lawyers for lawyers," though their writing has the power to shape the lives of others who are not part of their *nomos*.[160] Like other critical legal traditions, PLS shares the view that it is critically important to "contest the terrain and terms of dominant legal discourse" because they often legitimize repressive power structures.[161] In particular, PLS and CRT share a belief in the power of stories to expose misconceptions and debunk stereotypes "by calling attention to neglected evidence and reminding readers of our common humanity."[162] Likewise, PLS creates space for those directly impacted by law's injustices to have a role in shaping future laws through their own narratives and *nomos* and to delegitimize legal structures that marginalize or dehumanize them.[163] As summarized by Jocelyn Simonson, "[T]he responsibility to change the injustices of our criminal justice system lies not only with prisoner administrators and legislators[] but also with those of us with the ability to tell stories and to create the space in which others can tell theirs as well."[164]

---

158. Id. at 67–68.

159. Id. at 68.

160. John et al., supra note 18, at 2119.

161. CRT Key Writings, supra note 42, at xxii.

162. See Delgado & Stefancic, supra note 36, at 51.

163. See id. at 50–51 ("Stories can give [silenced groups] a voice and reveal that other people have similar experiences. Stories can name a type of discrimination (e.g., microaggressions, unconscious discrimination, or structural racism); once named, it can be combated.").

164. Jocelyn Simonson, Foreword—Breaking the Silence: Legal Scholarship as Social Change, 41 Harv. C.R.-C.L. L. Rev. 289, 298 (2006).

Some skeptics might question why certain people's lived experiences should be highlighted over others. PLS does not intend to create a hierarchy of lived experience. Rather, it is built on the insight that nonlawyers experience law in distinct ways and that those who experience law's injustice should have multiple avenues, including through legal scholarship, to express those injustices and shape legal meaning in ways that minimize harm to them. It is also driven by a belief that those who experience harm from the law have unique insight into how law operates, above and beyond what is on the page, and acutely understand where law must be altered or abandoned to avoid unnecessary suffering. In other words, lived experience in law's reality can aid in the imagination of new legal realities.[165] As Cover would put it, "To know the law—and certainly to live the law—is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations."[166] For these reasons, these organic jurists should play a role in the making of legal meaning through PLS.

III. THE PRACTICE OF PLS

With the theory of PLS delineated above, what then constitutes PLS's praxis? This Part is meant to address that question, sketching out the contours of what PLS looks like in practice. The practice of PLS is probably more akin to an approach or a mindset than a methodology, so those looking for a step-by-step guide to how such partnerships can be realized will be sorely disappointed. PLS is much more relational and organic than existing legal research methodologies and thus cannot be reduced to a specific formula. It depends on trust, developing solidarity between coauthors, and each author's ability to engage in critical self-reflection to examine how they might, in their minds and through their actions, be perpetuating hierarchy and inequity. Drawing from the experience of coauthoring *Redeeming Justice*, this Part focuses on the process of building camaraderie across difference between coauthors and explores what critical self-reflection might entail for academic partners in PLS. Section III.A introduces the risks partners must be aware of to ensure PLS is not exploitative. Section III.B turns to the strategies needed to ensure equitable partnerships in PLS. It contends that self-reflection is an essential element of PLS, requiring academics to explore the ways in which they have been institutionalized by the legal academy. Finally, section III.C contends that relationship is resistance to the political economy of the legal academy that might otherwise create perverse incentives for academics to capitalize on PLS for their own gain. It also illustrates the

165. Cover, supra note 44, at 46; see also id. at 10 ("To live in a legal world requires that one know not only the precepts[] but also their connections to possible and plausible states of affairs.").

166. Id. at 46.

importance of being proximate to struggles for social justice and developing a partnership mentality.

A. *The Inherent Risks of PLS*

With that in mind, a caveat is in order. As we turn our attention to the methods and techniques of PLS, there is a risk that PLS will become technocratic and formulaic, thereby undermining its intended emancipatory potential, which can too readily be assumed merely due to its participatory nature.[167] Just as with other scholarship that uses others' stories in service of legal argument, there is an acute risk that PLS could transform into the same brand of scholarly extractive industry that PLS seeks to dismantle. There is also a risk that it could become co-opted as CPAR scholars allege happened to PAR methodologies as they became mainstream.[168]

Likewise, as PLS gains ground, researchers may be incentivized to manufacture partnerships and extract stories from their coauthors. Especially in the existing academic political economy, in which scholarship is the coin of the realm, researchers might be "inclined to perceive relationships through a utilitarian and instrumental lens and consequently as a necessary strategy" for career advancement.[169] Whereas academically trained researchers have built-in incentives to engage in scholarly endeavors, the same incentives might not exist for organic jurists. Academics must thus be careful not to impose participation in PLS, especially given that past research has "show[n] how action researchers may unintentionally impose participation on partners while ignoring power differences stemming from structural factors."[170] Some researchers have suggested that it is not uncommon for PAR academics to adopt a utilitarian approach to relationships, in which relationships are a means to an end or part of a broader strategy to achieve material goals.[171] While some degree of mutual instrumentalization by all authors in PAR is common and usually benign as long as both parties experience mutual benefits from the relationship, there is a perpetual, lingering risk that the

---

167. See Leal, supra note 56, at 544 (explaining how participation can be undermined through technification and formalization).

168. See Sousa, supra note 23, at 404–05 (explaining how the emancipatory potential of PAR was undercut as it gained legitimacy).

169. Id. at 396.

170. Bartels & Friedman, supra note 83, at 101 (citing Daniella Arieli, Victor J. Friedman & Kamil Agbaria, The Paradox of Participation in Action Research, 7 Action Rsch. 263 (2009)).

171. See, e.g., id. at 103 ("Relationality and critical reflexivity are our guiding principles for staying true to participatory intentions and transformative ambitions."); Sousa, supra note 23, at 402 ("PAR becomes a tool for 'the systematic creation of knowledge that is done with and for community for the purpose of addressing a community-identified need.'" (quoting Kerry Strand, Sam Marullo, Nick Cutforth, Randy Stoecker & Patrick Donohue, Community-Based Research and Higher Education: Principles and Practices 8 (2003))).

PAR partnership can become one-sided, especially because it is often the academic who holds much of the access to resources and power in the partnership.[172] "Nevertheless, when people see each other as holders of intrinsic worth, they are more likely to put people first, which leads to a more relational reciprocity."[173]

B. *Strategies for Equitable PLS Partnerships*

So how, then, do PLS authors ensure that their partnership is based on mutual respect and appreciation? The remainder of this Part is devoted to this question. As a starting point, simply adding a coauthor who has lived experience with the injustice of a particular law or legal regime is insufficient to ensure that PLS will realize the liberatory ambitions envisioned here.[174] Coauthorship in PLS is not immune from all the racial, economic, and gender hierarchies that exist in the world. In fact, PLS is probably more apt to be infused with oppressive forces because, like CPAR, it is "shaped in conversation and dialogue, across lines of power and difference."[175] By its nature, PLS involves struggling to equalize power differentials. Consequently, PLS's methodology, if it can be characterized as such, depends on restructuring the relationship between researcher and research subject to one between collaborators.[176]

Drawing from the experience of coauthoring *Redeeming Justice*, here, I will highlight some of the strategies that PLS authors can employ to guard against abusive power relations and strive for more equal partnerships while producing scholarship. This section will explore the process of critical self-reflection that PLS coauthors must undertake as part of this process. Since this piece is written from my vantage point as an academic partner in PLS, I will focus primarily on how the culture and structure of academic institutions might undercut participatory values and methods and how critical self-reflection can loosen institutions' grip on our mindset and behaviors.

1. *Fostering Critical Self-Reflection.* — Coauthors in PLS must be ever vigilant of how their positionality might affect the power dynamics of coauthorship. Thus, one of the most difficult tasks of PLS scholars is ensuring that they are not "reinforcing the very structural inequalities and powers that they [seek] to transform."[177] PLS is not just about "changing

172. See Bartels & Friedman, supra note 83, at 101.

173. Sousa, supra note 23, at 406.

174. See Leal, supra note 56, at 544 ("By placing emphasis on the *techniques* of participation, rather than on its meaning, empowerment is thus presented as a *de facto* conclusion to the initiation of a participatory process . . . .").

175. Fine & Torre, supra note 49, at 5.

176. See Sousa, supra note 23, at 411. ("*[V]ivencia* is not a methodology per se, but a way of being in the world. In the same way, PAR is not a research approach per se, but community in action, a social movement to transform the world.").

177. See Bartels & Friedman, supra note 83, at 101 (reminding the reader that laudable intentions are not enough to free researchers from hegemony).

something 'out there'" but is "also about both changing ourselves and our mental models, and our relationships between the out there and the in here."[178] Critical self-reflection is therefore an essential part of the creative process.[179] Without greater reflexivity in research processes, the power differences that exist between PLS participants may lead them to reenact the relations and norms that uphold the repressive legal order they aim to unsettle.[180] PLS challenges academics to engage in deep critical self-reflection as a tool for rooting out "perspectives borne through hegemonic privilege and oppression."[181] The reflective process also must be continual.[182] Despite our best efforts to resist and challenge hegemony, PLS authors simply cannot fully "escape its acquiescing forces and relational power dynamics."[183]

The academic partner in particular "must be willing to embrace the hard work of examining how [their] multiple identities shape and inform engagement with community members."[184] As with Movement Law scholarship, academic partners must be "mindful and engaged about how our professional and other identities, including race, gender, class, sexuality, and disability, may impact how one shows up in movement spaces, and how those identities shape what it means to engage in solidarity."[185] PLS requires a level of vulnerability and epistemological humility that is not usually rewarded in the legal academy that can only be gained through critical examination of how academics' positionality in law schools frames their understanding of the world.[186]

2. *Combatting Academic Institutionalization.* — As anthropologist Mary Douglas put it in her influential book *How Institutions Think*, an academic's

178. Id. at 103 (internal quotation marks omitted) (quoting Hillary Bradbury, Steve Waddell, Karen O'Brien, Marina Apgar, Ben Teehankee & Ioan Fazey, A Call to Action Research for Transformations: The Times Demand It, 17 Action Rsch. 3, 8 (2019)).

179. See Freire, Pedagogy of the Oppressed, supra note 31, at 60 ("Those who authentically commit themselves to the people must re-examine themselves constantly."); see also Bartels & Friedman, supra note 83, at 101; Newitt & Thomas, supra note 70, at 113.

180. See Newitt & Thomas, supra note 70, at 114 (observing that existing power imbalances between participants may self-perpetuate without reflexivity in research processes).

181. See Fine & Torre, supra note 49, at 7 (describing the process of engaging in collective reflection to explore how lived experience informs perspective and analysis).

182. See Freire, Pedagogy of the Oppressed, supra note 31, at 60 (arguing that former oppressors who convert to the cause of the people must engage in constant self-reflection).

183. See Bartels & Friedman, supra note 83, at 100 (suggesting that self-reflexivity alone cannot overcome hegemonic power differences).

184. See Houh & Kalsem, supra note 87, at 337–38 (internal quotation marks omitted) (quoting Mary Brydon-Miller, Michael Kral, Patricia Maguire, Susan Noffke & Anu Sabhlok, Jazz and the Banyan Tree: Roots and Riffs on Participatory Action Research, *in* The SAGE Handbook of Qualitative Research 387, 389 (Norman K. Denzin & Yvonna S. Lincoln eds., 4th ed. 2011)).

185. Akbar et al., supra note 13, at 879.

186. See Freire, Pedagogy of the Oppressed, supra note 31, at 90 (explaining that "dialogue cannot exist without humility").

best "hope of intellectual independence is to resist, and the necessary first step of resistance is to discover how the institutional grip is laid upon our mind."[187] Sociologist Pierre Bourdieu's theories of "doxa" and "habitus" can help to uncover how institutional forces might undermine the partnership necessary for the liberatory potential of PLS to be fully realized. Bourdieu understood power to be constantly reinforced by a potent mixture of agency and structure.[188] Under Bourdieu's theory, our propensities to think, feel, and act a certain way, or as he puts it, our habitus, are guided to some extent by doxa, which is a broader adherence to relations of order that are in turn informed by the institutions and societies we inhabit.[189] Doxa is so ingrained in us that we are often unconscious of how it drives us and leads us to view such ordering as self-evident.[190] Our identities as researchers can blind us to understanding how research itself can be "a contested and ideologically privileged site."[191]

So, if we understand that academics have an interest in the survivial of the legal academy, we will start to identify ways in which academics have restructured their thinking in order to effectively participate and advance within that institution.[192] As Douglas described, over time academics start to view the norms and cultural practices that perpetuate the legal academy as natural and necessary.[193] For example, one of the challenges of implementing PLS is that academic culture tends to be highly individualistic.[194] This is an especially high hurdle in the legal academy, as legal scholarship tends to be a uniquely solitary endeavor.[195] As compared to other disciplines, the legal academy has a strong preference for the single author.[196] Consequently, a proprietary impulse may infect or

187. Ristroph, supra note 39, at 1686–87 (internal quotation marks omitted) (quoting Mary Douglas, How Institutions Think 92 (1986)). Mary Douglas's work explores how humans structure their thoughts and actions in ways that perpetuate the institutions of which they are members in order to ensure their survival. Id.

188. Newitt & Thomas, supra note 70, at 114.

189. See id. (explaining how, under Bourdieu's conception, habitus and doxa work together to influence decisionmaking).

190. See id. (describing how human beings adhere to a world order that we take for granted as self-evident).

191. Id.

192. See Ristroph, supra note 39, at 1686–87 (arguing that institutional survival depends on members of the institution participating in and perpetuating the institution).

193. See id. ("Douglas argued that for an institution to survive, it must structure the thinking of the individual humans who will participate in and perpetuate that institution. People must come to view the institution as necessary and natural.").

194. Sousa, supra note 23, at 396, 406.

195. See Michael I. Meyerson, Law School Culture and the Lost Art of Collaboration: Why Don't Law Professors Play Well With Others?, 93 Neb. L. Rev. 547, 563–64 (2014) (describing how legal academia is characterized by a lack of collaboration).

196. See, e.g., Benjamin P. Edwards, Co-Authoring & Essays in the Legal Academy, PrawfsBlawg (Aug. 15, 2016), https://prawfsblawg.blogs.com/prawfsblawg/2016/08/co-authoring-essays-in-the-legal-academy.html [https://perma.cc/87LT-BSAY] (noting

inhibit PLS partnerships because our institutions tend to evaluate us based on what we have produced alone rather than collectively. Indeed, junior researchers are often advised not to coauthor work because coauthored articles are likely to be dismissed by other academics since it will be unclear who authored what.[197]

Also, when writing with organic jurists, regardless of how conscious we are of "our position in policing the borders of legal academic discourse," we may still blindly follow "the conventional structures of legal scholarship [that] in turn restrict us as both thinkers and editors."[198] For this reason, academic partners must be ever vigilant not to silence organic jurists through the editing process. For example, Simonson described that as a student editor, she "made fewer changes to sentence structure and word choice than [she and her fellow editors] have with other authors in the past" when editing an incarcerated individual's piece that was published in her journal.[199] Simonson also discussed the need to "identify where we should silence our criticisms in the interest of preserving [the] author's voice."[200] As the convening author of *Redeeming Justice*, I was tasked with gathering all our contributions and merging them into one cohesive whole, which required an analogous editing process. This was a particularly challenging task as I wanted to be very careful not to edit my coauthors' words to fit the conventions of legal scholarship, thereby editing out their voices. Rell, a gifted creative writer, has described to me how he writes to a tempo, which is evident to anyone who has read his carefully crafted sentences. The rhythm in his writing doesn't always conform to the sentence structures that line the pages of law reviews, but that is part of its power. It sings to you. When editing his or Ghani's writing, I always ran even the smallest changes by them before sending the finished product along to the editors. In addition, when choosing where to publish, we consciously chose a law review with editors who we knew understood and valued the unique voices embedded in our scholarship.

Another convention in legal scholarship that sometimes gets in the way of imaginative thinking is the propensity to require extensive sourcing of all legal arguments. To be clear, I am not arguing that authors should not have sources to substantiate their claims but rather that legal imagination can be stunted if claims must always be grounded in past

---

that single-author pieces are valued more in legal academia than coauthored pieces); Ari Ezra Waldman (@ariezrawaldman), Twitter (Aug. 13, 2022), https://twitter.com/ariezrawaldman/status/1558495682734039040?s=20&t=9Wx-wisqAi5UldKF1T3-rw [https://perma.cc/US77-EXL6?type=image] ("[S]ome faculty have, in my experience, dismissed co-authored pieces bc [sic] hard to know what the applicant wrote. In other fields, co-authoring is the norm. It's more common in law now, but not yet there.").

197. Edwards, supra note 196; Waldman, supra note 196.

198. Simonson, supra note 164, at 295.

199. Id. at 294.

200. Id. at 295.

propositions, which themselves can be limiting and regnant.[201] Critical scholars often evoke stories for this very reason.[202] Stories provide a means of injecting the traditional canon of scholarship with fresh ideas and perspectives that are otherwise absent from the volumes of law reviews that came before.

C. *Relationship Is Resistance*

How then do academic partners uncover what are often unconscious subjugating tendencies inherent to their positionality in academic institutions? Simply put, relationship is resistance. Instead of seeing relationships as threats to research, PLS sees them as generative and as a necessary check on one's own positionality. As Professor José Wellington Sousa put it, "[R]elationship becomes a resistance against a dehumanizing institutional culture that alienates us from one another."[203] In explaining the concept of *companheirismo*, Freire gives us insights into the two core components that should inform any PLS partnership: (1) *convivência*—to live with; and (2) *simpatia*—to support; to have appreciation and care for someone.[204] Embracing *convivência* requires "leaving" spaces of comfort that reinforce status.[205] This "leaving" goes beyond "leaving" physical spaces of our institutions; it also requires "leaving" the institutional mindset that allows us to view others as research subjects.[206] Accordingly, academic researchers must leave behind the "participant observation" model—in which the researcher objectifies "its" subject—and instead

---

201. "Regnant" is a term developed by Gerald López and "refers to lawyering for poor people in a fashion that relies upon conventional remedies and institutions, and upon lawyer expertise and dominance, even while seeking the client's 'best interests.'" Paul R. Tremblay, Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy, 43 Hastings L.J. 947, 950 n.12 (1992) (citing Gerald P. López, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1609 (1989)). While López uses the term "regnant" to refer to a particular modality of lawyering, described as a "strain of legal activity characteristic of liberal and progressive lawyers who care about social justice, but who are too enmeshed in their law oriented environment to perceive its limitations and harms," the term is also apt to describe some brands of legal scholarship. Id. at 953 (citing Gerald P. López, Reconceiving Civil Rights Practice: Seven Weeks in the Life of a Rebellious Collaboration, 77 Geo. L.J. 1603, 1609 (1989)).

202. See, e.g., Delgado & Stefancic, supra note 36, at 37–49 (discussing the multiple ways in which storytelling in legal discourse can amplify underrepresented voices); Patricia A. Cain, Feminist Legal Scholarship, 77 Iowa L. Rev. 19, 20 (1991) ("One must listen carefully to women's life stories to develop a feminist point of view."); Delgado, supra note 8, at 2411–12 (explaining that legal scholars have increasingly been utilizing stories because "stories create their own bonds[] [and] represent cohesion, shared understandings, and meanings" for "outgroups").

203. Sousa, supra note 23, at 404–05, 408, 410 (explaining how PAR became co-opted in the development context and arguing that building stronger partnerships with directly impacted communities is key to getting back to PAR's emancipatory roots).

204. Id. at 408.

205. Id. at 411.

206. Id. at 410–11.

inhabit "the world they are learning from."[207] In the words of Professor Bryan Stevenson, "[W]e . . . [can't] change the world by staying just on Harvard's campus . . . . [I]f we care about injustice, if we care about inequality . . . we're going to have to get close enough to [affected communities] . . . to understand."[208]

This section will explore how relationships are one method for resisting the dehumanizing institutional culture that alienates us from one another. It will then discuss methods for establishing trusting and solidaristic partnerships between PLS coauthors. Finally, it will describe how PLS coauthors must alter their mindsets. Specifically, coauthors must adopt a partnership mentality, which requires coming to the partnership without any preconceived idea of what will be created and recognizing the expertise of both nonacademic and academic partners in PLS.

1. *Embracing* Convivência *and* Simpatia *to Redeem Justice.* — To build solidaristic partnerships, academics must immerse themselves in the conditions and daily experience of law's injustice and identify themselves with those who regularly experience this reality.[209] In this way, it is not just the organic jurist's lived experience that informs legal analysis and prescription but also the academic partner's firsthand witnessing of injustice.[210] Academic partners in PLS can see "truth" more clearly because we "place our own being in a wider, more fulfilling context."[211] For instance, some of my insights into the cruelty of LWOP sentences that informed *Redeeming Justice* were gleaned from representing clients serving that sentence over the years. In that capacity, I have witnessed firsthand the cruelty of the law, the callousness of the Department of Corrections, and the systems' inability to recognize when circumstances and people have changed. One of the clients who has stuck with me was an elderly man with a spotless prison record who was unable to walk, but who was not near death enough to be granted compassionate release so that he could spend his remaining days with his family. Another one of my clients was a man in his seventies who was denied temporary release to attend his wife's funeral even though she was the mother of his children and stood by him for over fifty years. Through these firsthand experiences, I developed a solidaristic stance with those most affected by law's injustice—in this case, those serving LWOP sentences—which *simpatia* requires.[212]

---

207. Id.

208. Harvard Kennedy Sch., 4 Rules for Achieving Peace and Justice, at 00:26–00:52, YouTube (Jan. 31, 2019), https://www.youtube.com/watch?v=9vI7UPuCUrE (on file with the *Columbia Law Review*).

209. See Sousa, supra note 23, at 410–11.

210. See id.

211. See id. at 410 (internal quotation marks omitted) (quoting Orlando Fals Borda, Some Basic Ingredients, *in* Action and Knowledge: Breaking the Monopoly With Participatory Action-Research 3, 4 (Orlando Fals Borda & Mohammad Anisur Rahman eds., 1991)).

212. See id.

Consequently, instead of objectifying those who experience law's injustice as "research subjects," these experiences helped me to relate to nonacademic partners as *companheiros*, or as friends and colleagues.[213] Moreover, because trust is built with time and broader commitment to struggles against injustice, sometimes an academic researcher might be called to support their coauthors in other contexts as well and strive to find "multiple and continuous ways to give back that go[] beyond any one-time project."[214] As explained in the Preface, *Redeeming Justice* was conceived after my clinic students and I had already been regularly meeting with Rell and other members of the R2R Committee in a state prison outside of Philadelphia. Collectively, we sought to develop a project on the Right to Redemption, but the pandemic stifled further advancement of that project. Because of those early meetings, which mostly involved listening to the group explain how it understood the Right to Redemption, I had a robust understanding of the philosophy and experiences that informed the concept long before Rell, Ghani, and I ever embarked on writing an article together. Similarly, when I approached Ghani, a formerly incarcerated founding member of the R2R Committee, about coauthoring *Redeeming Justice*, we were already working together on a joint report documenting the risk of COVID-19 to the inside members of the group and recommending legal avenues for their release. It was this proximity to and support of the group's struggle for liberation that laid the groundwork for the trusting relationship that produced *Redeeming Justice*.

This solidaristic stance has continued even after *Redeeming Justice* was published, when my legal clinic supported Rell in his successful petition for commutation. At first, I was hesitant for my clinic to take his case, because I feared that the power imbalances frequently described as endemic to the attorney–client relationship would undermine the equal partnership that we had built as coauthors. In the end, however, I discovered that the equal partnership we developed in the process of writing *Redeeming Justice* enhanced my ability to be an effective advocate in his commutation case. First, because I knew Rell so well and wholeheartedly believed that he deserved to have his sentence commuted, I was in a better position to advocate for him in our written submission and zealously advocate for his release. Second, instead of creating a power imbalance, our past collaboration and the trust already built between us meant that Rell felt comfortable pushing back when my clinic didn't get something right. Rell put faith in our advice because he knew that we had his best interests at heart. We had created what others have called a "participatory contact zone," which is a space where PLS partners "can speak and listen, argue differences and disagreements, develop trust

213. See id. at 409–10 ("[W]e became *companheiros* because our ties of affection bring with it a purpose of learning through community-driven initiatives.").

214. See id. at 410 (citing Gautam Bhan, Moving From 'Giving Back' to Engagement, 10 J. Rsch. Prac., no. N14, 2014, at 1, 2).

together, stumble, say I am sorry, learn from mistakes, challenge each other, grow new analyses, and build a more critical and imaginative knowledge base—precisely because we dare to inquire together."[215] While we did so organically, some PAR researchers describe intentionally building such zones, by collectively adopting commitments to certain group practices and methodologies that are "antiracist, antisexist, anti-homophobic, anti-xenophobic, anti-Islamophobic, [and] anti-ableist."[216] Critically, when someone falls short of these commitments, there is a process for acknowledging, questioning, and growing from the experience.[217]

2. *Embracing* Convivência *and* Simpatia *to Resist the Academic Political Economy*. — PLS's methodology may have the added positive effect of helping academics to overcome the alienation often felt in academic spaces.[218] By embracing *convivência* and *simpatia*, the academic partner is also more able to resist the academic political economy, because we draw our sense of purpose and meaning from outside of the perverse incentives and individualism that drive academic culture in our institutions.[219] PLS helps us to better see ourselves and feel more connected to our work through our relationships to our coauthors.

According to Sousa, Freire described this as a process of conscientization (*conscientização*) in which we become more fully conscious through self-reflection and action in community with others.[220] For Freire, the underlying goal of *Pedagogy of the Oppressed* was to use this process to help people more fully realize their humanity and therefore more fully understand their reality.[221] Through engagement with organic jurists, academic partners can become more aware of how our institutions are limiting our imaginations by framing what seems possible, how we understand the law vis-à-vis our relation to it, and what change in the legal order is needed. In essence, "This is an invitation for academics and community members to live with and experience life with one another as an ontological given and the basis for consciousness and transformative action."[222] This posture echoes calls from Black feminist scholars like Toni Cade Bambara and Audre Lorde to adopt "[a]n 'irresistible' pedagogy,"

---

215. Fine & Torre, supra note 49, at 9.

216. Id.

217. See id. ("Our participatory contact zones carve out a 'holding environment' where we can speak and listen, argue differences and disagreements, develop trust together, stumble, say I am sorry, learn from mistakes, challenge each other, grow new analyses, and build a more critical and imaginative knowledge base . . . ." (citation omitted)).

218. See Sousa, supra note 23, at 410 ("For academics, the kind of relationship that *companheirismo* and *vivencia* suggest means resisting the academic political economy and being committed to the humanization of both themselves and community members.").

219. See id.

220. Id. at 403–04.

221. Id. (citing Freire, Pedagogy of the Oppressed, supra note 31, at 81).

222. Id. at 412.

which is an anti-oppressive pedagogy that rejects the "violence of institutional academic spaces premised on white patriarchal exclusivity of knowledge" and on the scaling of hierarchies of knowledge and power.[223] Instead, this model of teaching embraces "a collaborative poetic posture"—that is, one that is mutual, coalition-driven, curative, and pushes us toward "'creative' visions of change."[224]

3. *Grappling With My Own Institutionalization.* — Through the process of writing *Redeeming Justice*, I came to realize all the ways that I was institutionalized as well. I had been policing myself to fit the conventions and situate myself in the hierarchy of the legal academy. The legal academy is rife with rigid binaries: teaching through a clinic versus at the podium; legal advocacy versus legal scholarship; and theory versus practice. I have found these binaries to limit creativity and innovation.

The legal academy has its own caste system, with clinical and legal writing faculty often occupying the lower ranks.[225] I have described in past scholarship that as a law professor who sometimes teaches in a clinic and sometimes at the podium, I have at times felt the need to erase a part of my professional identity out of fear that my scholarship will be discounted.[226] Even at my institution, where faculty of all stripes have tenure and produce groundbreaking legal scholarship, I was advised to write scholarship that looked "traditional" out of fear that peer reviewers might discount pieces that appeared more "clinical" during the tenure process.

---

223. Mecca Jamilah Sullivan, Pedagogies of the "Irresistible": Imaginative Elsewheres of Black Feminist Learning, J. Feminist Scholarship, Spring 2022, at 1, 2, https://digitalcommons.uri.edu/cgi/viewcontent.cgi?article=1211&context=jfs [https://perma.cc/5SUP-GDTN].

224. Id. at 2–3.

225. See, e.g., Renee Nicole Allen, Alicia Jackson & DeShun Harris, The "Pink Ghetto" Pipeline: Challenges and Opportunities for Women in Legal Education, 96 U. Det. Mercy L. Rev. 525, 527 (2019) (explaining that women in legal academia disproportionately occupy skills positions, which are characterized by not being on the tenure track, lower status and pay, less job security, and limited freedom to choose the subject matters on which they teach); Ruth Gordon, On Community in the Midst of Hierarchy (and Hierarchy in the Midst of Community), *in* Presumed Incompetent: The Intersections of Race and Class for Women in Academia 313, 326–27 (Gabriella Gutiérrez y Muhs, Yolanda Flores Niemann, Carmen G. González & Angela P. Harris eds., 2012) ("[M]any of us spend our professional lives contesting hierarchy and exclusion—whether on the basis of race, gender, or class—but when it comes to academia—and I would suggest especially legal academia—we appear to have finally found a hierarchy we can believe in."); see also Susan Ayres, Pink Ghetto, 11 Yale J.L. & Feminism 1, 2 (1999) (describing the feeling of invisibility that female legal writing professors feel in relation to tenured male professors); Jo Anne Durako, Second-Class Citizens in the Pink Ghetto: Gender Bias in Legal Writing, 50 J. Legal Educ. 562, 562–65 (2000) (arguing that there is a pink ghetto in the legal academy made up of legal writing professors); Rachel López, Unentitled: The Power of Designation in the Legal Academy, 73 Rutgers U. L. Rev. 923, 925–28 (2021) [hereinafter López, Unentitled] (arguing that academic titles perpetuate stereotypes and entrench existing racial and gender hierarchies in the legal academy, although they appear race- and gender-neutral).

226. López, Unentitled, supra note 225, at 929–31.

I came to see my occupation of the borderlands in academia as a strength through the process of writing *Redeeming Justice* with Ghani and Rell. Often, Rell and Ghani would challenge me to stretch my understanding of what is possible and embrace the passion and commitments that drove my research. In fact, Ghani, in his very generous way, critiqued a piece I wrote on the ballooning elderly population behind bars as so technical and legalistic that it lost sight of the humanity of the situation.[227] He was right. The doctrine I invoked obscured the full picture—almost sanitizing the issue with legalese. The insight Ghani shared with me is in part what sparked the original idea of *Redeeming Justice*.[228]

4. *Cultivating a Partnership Mentality.* — Another critical aspect of PLS is that it is forged, not made. Because every individual comes to the partnership with their own *nomos*, PLS authors must come together in partnership without any preconceived idea of what will be created. While PLS collaborations are driven by a common higher purpose of making a law or legal practice more just, their expression and form are created together through a meeting of the minds. This process is time-consuming and distinctly relational in the sense that it must be built on a foundation of trust in and respect for your coauthors.[229] It is not the sort of collaboration that can be manufactured or generated in a short period of time. In the case of *Redeeming Justice*, our partnership in PLS was forged in the context of my longtime collaboration with members of the R2R Committee, which started in 2014 when members of the group trained me in community-based learning practices as part of a workshop for Drexel faculty engaged in experiential learning.

When forging PLS, legal academics must adopt a partnership mentality, which necessitates valuing the expertise of those who are directly impacted, and at times harmed, by the law. This partnership mindset is quite distinct from the service mentality so common among lawyers, who envision their role as providing "legal services" to meet the needs of clients.[230] The service mentality is also present among academically trained legal scholars who believe that the legal academy alone holds the answers to alleviate poverty, dismantle racial injustice, and

---

227. See generally Rachel López, The Unusual Cruelty of Nursing Homes Behind Bars, 32 Fed. Sent'g Rep. 264 (2020) (using legal and statistical principles instead of human narratives to describe the incarcerated elderly population).

228. I also have Wendy Greene, Taja-Nia Henderson, and Brian Frye to thank for expanding my horizons, so that I could see all the possibilities of legal scholarship.

229. See Freire, Pedagogy of the Oppressed, supra note 31, at 91 ("Founding itself upon love, humility, and faith, dialogue becomes a horizontal relationship of which mutual trust between the dialoguers is the logical consequence. It would be a contradiction in terms if dialogue—loving, humble, and full of faith—did not produce this climate of mutual trust . . . .").

230. This distinction between a partnership mentality versus a service mentality was brought to my attention by Kirsten Britt, one of my clinic's community partners.

advance social change. In other words, it manifests in a belief that only academic expertise is needed.

The service mentality exacerbates the silencing of those already marginalized by the law.[231] Criminal defendants' voices are especially silenced as they are usually spoken for by their attorneys in criminal proceedings.[232] As Professor Alexandra Natapoff points out, the criminal legal process systematically "excludes defendants from the social narratives that shape the criminal justice system itself, in which society ultimately decides which collective decisions are fair and who should be punished."[233] The resulting deprivation of the right to speak their own reality is what Freire would call "dehumanizing aggression," which must be overcome for true liberation to occur.[234]

Instead, the PLS mindset is distinguished by its mutual recognition and respect for each partner's expertise. PLS is animated by a commitment to amplifying the voices of those who are regularly silenced by the law, a belief that those most intimately impacted by the law should have a role in building it, and an implicit protest of the need for "objectivity" in legal scholarship. To be an academic partner in PLS requires epistemological humility and decentering institutional benchmarks of expertise.

IV. RESPONDING TO THE SKEPTICS

Since the publication of *Redeeming Justice*, there has been an uptick in lawyers and legal scholars deriding scholarship with social justice aims like *Redeeming Justice*. This Part addresses those criticisms head on.

London School of Economics Professor Tarunabh Khaitan provoked the current debate in an editorial published a few weeks after *Redeeming*

---

231. See, e.g., Anthony V. Alfieri, Reconstructive Poverty Law Practice: Learning Lessons of Client Narrative, 100 Yale L.J. 2107, 2130–31 (1991) (describing how some lawyers reproduce their clients' stories in a disempowering way); Clark D. Cunningham, A Tale of Two Clients: Thinking About Law as Language, 87 Mich. L. Rev. 2459, 2465 (1989) (describing a case in which a judge effectively put words into a silent defendant's mouth, entering a not guilty plea on their behalf); Christopher P. Gilkerson, Poverty Law Narratives: The Critical Practice and Theory of Receiving and Translating Client Stories, 43 Hastings L.J. 861, 873 (1992) ("In order to win cases, poverty lawyers must fit their clients' stories into law's established terms by squeezing client identities, histories, and problems into universalized narratives."); Lucie E. White, Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G., 38 Buff. L. Rev. 1, 28–31, 39, 45–47 (1990) (demonstrating through the story of Mrs. G. how subordinated groups must fit their stories into narratives that judicial decisionmakers find sympathetic).

232. See, e.g., Jessica Feierman, Creative Prison Lawyering: From Silence to Democracy, 11 Geo. J. on Poverty L. & Pol'y 249, 269 (2004) (arguing that the silencing of criminal defendants in court contributes to inaccurate public perceptions about crime); Alexandra Natapoff, Speechless: The Silencing of Criminal Defendants, 80 N.Y.U. L. Rev. 1449, 1458–59 (2005) (describing how the adjudicatory process systematically silences criminal defendants).

233. Natapoff, supra note 232, at 1449.

234. Freire, Pedagogy of the Oppressed, supra note 31, at 88–89.

Justice received the Law and Society Association Article Prize.[235] Khaitan's editorial unleashed a flurry of scholarly debate about the role of advocacy in legal scholarship, with scholars on both sides of the debate weighing in.[236] In the editorial, he criticizes what he calls "scholactivism" as being "inherently contrary to the 'role morality' of a scholar."[237] Khaitan frames "scholactivism" as research driven by "a motivation to directly pursue specific material outcomes (i.e. outcomes that are more than merely discursive) through one's scholarship."[238] In his view, striving to achieve change in the real world compromises the "special moral obligations that attach to a scholar qua one's role as a scholar."[239] He names "discovering truth and disseminating knowledge" as two such moral obligations unique to being a scholar.[240] "*Truth*," he says, "concerns reality itself."[241] As I will detail below, he believes that seeking a material outcome undermines a scholar's ability to discover the truth, and therefore vitiates a scholar's moral obligations.

The current debate about what constitutes legal scholarship and what role legal scholars should play in the material world echoes earlier debates in the legal academy. In the 1990s, Daniel Farber and Suzanna Sherry, among others, criticized CRT scholars for their use of storytelling in legal

---

235. Khaitan, On Scholactivism, supra note 28; LSA 2022 Annual Awards Announced, Law & Soc'y Ass'n (June 21, 2022), https://www.lawandsociety.org/2022/06/21/lsa-2022-annual-awards-announced/ [https://perma.cc/4QTW-XYD4].

236. See, e.g., Debate: #Scholactivism, Verfassungsblog, https://verfassungsblog.de/category/debates/scholactivism-debates/ [https://perma.cc/3725-UEH8] (last visited Sept. 29, 2023) (collecting a multitude of responses to Khaitan's original piece on scholactivism); see also, e.g., Alberto Alemanno, Letter to the Editor, "Knowledge Comes With Responsibility": Why Academic Ivory Towerism Can't Be the Answer to Legal Scholactivism, 20 Int'l J. Const. L. 561, 561–62 (2022) (criticizing Khatian's argument against "scholactivism"); Paul Horwitz, Constitutional Scholactivism, Foreign and Domestic, Jotwell (Aug. 2, 2023), https://conlaw.jotwell.com/constitutional-scholactivism-foreign-and-domestic/ [https://perma.cc/4F23-TGAT] (noting that Khaitan's article has occasioned "a good deal of pushback" abroad, but criticizing the fact that these debates had yet not appeared in U.S. journals as "a sign of defects in the machinery of American legal scholarship").

237. Khaitan, On Scholactivism, supra note 28, at 548 (quoting Judith Andre, Role Morality as a Complex Instance of General Morality, 28 Am. Phil. Q. 73, 73 (1991)). Khaitan adopts the term "scholactivism" from a 2016 article in *University World News*, which defines it as "an umbrella term for the approach taken by an increasing number of academics who believe they have a role to play in creating social justice[—]and who do something about it." See Rebecca Farnum, Scholactivism—A Growing Movement of Scholar-Activists, Univ. World News (June 3, 2016), https://www.universityworldnews.com/post.php?story=20160530142606345 [https://perma.cc/9KNR-JB4K]. The *University World News* article on which he relies expressly names "participatory research methods" like those employed in *Redeeming Justice* as a form of scholactivism. Id.

238. Khaitan, On Scholactivism, supra note 28, at 548 (emphasis omitted).

239. Id. (citing David Luban, Lawyers and Justice: An Ethical Study 104–05 (1988); Judith Andre, Role Morality as a Complex Instance of Ordinary Morality, 28 Am. Phil. Q. 73 (1991)).

240. Id. at 549.

241. Id. at 548.

scholarship as an abdication of their obligation to search for truth.[242] In reviewing Farber and Sherry's book, Judge Richard Posner also criticized CRT scholars for "forswearing analysis in favor of storytelling" and questioning the existence of objective truth, and for that reason, labeled them as "lunatic[s]," "childish," and "intellectually limited."[243] His dismissal of storytelling is grounded in his belief that understanding someone's experience and having empathy for that experience lacks normative value.[244]

While each iteration of this debate has different dimensions and touchpoints, those concerned with upholding the sanctity of legal scholarship tend to be united in their concern with several central questions: (1) Should scholars strive to be neutral and objective? (2) Should scholars aim to have a real-world impact? (3) Who should produce, engage with, and consume legal scholarship? (4) How is "truth" discovered by scholars? This Part addresses each of these concerns in turn.

Namely, section IV.A responds to critics who believe that scholars should commit themselves to pursuing "objectivity" in legal scholarship and thus denounce "scholactivism." It contends that legal scholarship is never neutral or devoid of moral commitments. While critics suggest legal scholarship should at least appear neutral, this section outlines the ways in which doing so can be more harmful than when scholars are transparent about their motivations. Section IV.B addresses the argument that combining scholarship with activism compromises the accuracy of research because advocates are less open to the possibility that their views are wrong. Section IV.C challenges the notion that legal scholarship should be created in isolation, or perhaps in consultation with other academics, and then deposited on the public. It contends that scholarship produced in this matter portrays an incomplete understanding of law. Finally, section IV.D argues that the "scholactivism" debate turns on distinct perceptions about how truth and knowledge are produced. Whereas Khaitan and others believe that researchers can perceive the external world through their own consciousness alone, as described more fully in section II.A, PLS is grounded in a more collective epistemology, which centers collaborative knowledge production with organic jurists.

In sum, the purpose of this Part is not to reject other methodological or epistemological approaches to legal scholarship, but rather to demonstrate that PLS is principled and grounded, despite what others

---

242. Daniel A. Farber & Suzanna Sherry, Beyond All Reason: The Radical Assault on Truth in American Law 73–74 (1997) (claiming that "radical scholars" and the use of storytelling they advocate threaten to degrade legal scholarship's function as a "reality check").

243. Richard A. Posner, The Skin Trade, New Republic, Oct. 13, 1997, at 40, 40–43 (reviewing Farber & Sherry, supra note 242).

244. Richard A. Posner, Overcoming Law 381–82 (1995) ("[T]he internal perspective—the putting oneself in the other person's shoes—that is achieved by the exercise of empathetic imagination lacks normative significance.").

might claim. We will argue that PLS simply derives from a different theory of knowledge than that relied upon by others who might dismiss PLS as purely partisan or lacking the intellectual rigor of other scholarly pursuits.

A. *A Scholar's Moral Obligation to "Truth"*

The skepticism about scholarship with social justice aims like *Redeeming Justice* chiefly derives from a belief that such scholarship undermines a scholar's ability to pursue "truth," a quality which, under a skeptic's view, separates scholars from everyone else. As noted above, Khaitan grounds his argument against "scholactivism" in his belief that pursuit of real-world objectives inhibits "truth-seeking," which he characterizes as constitutive of being a scholar.[245] Likewise, Jan Komárek, a scholar Khaitan references in his editorial, reminds scholars that "the academic task is to discover truths rather than adhere to truths already established."[246] He describes the pursuit of knowledge as the academy's "core purpose."[247] Relatedly, Farber and Sherry object to the use of storytelling in CRT scholarship because they believe that it is inherently subjective and therefore undercuts truthseeking.[248] They warn that "first-person storytelling is fraught with exactly the kind of dangers that scholarship is designed to avoid: creating, through interpretation, a biased, misleading, and nonverifiable account of the world."[249] They criticize CRT scholars for their "casualness about truth," because, in their words, "truth matters."[250]

Interestingly, however, a closer look at this scholarship reveals these scholars' underlying ambivalence about the existence of objective truth. Khaitan claims that he is not demanding pure objectivity, nor that scholars "stay out of partisan or political disputes."[251] Indeed, in subsequent writing, he recognizes that law can have multiple interpretations that should be evaluated based on their plausibility and reasonableness, a

---

245. See Khaitan, On Scholactivism, supra note 28, at 548 ("Whereas truth-seeking and knowledge dissemination are constitutive of the role of a scholar, scholactivism-driven research is distinguished by the existence of a *motivation to directly pursue specific material outcomes* . . . .").

246. Id. at 549; Jan Komárek, Freedom and Power of European Constitutional Scholarship, 17 Eur. Const. L. Rev. 422, 441 (2021) [hereinafter Komárek, Freedom and Power] (internal quotation marks omitted) (quoting Stanley Fish, Versions of Academic Freedom: From Professionalism to Revolution 50 (2014)).

247. Komárek, Freedom and Power, supra note 246, at 436.

248. See Farber & Sherry, supra note 242, at 95–117 (arguing that storytelling that does not aim at objective truth "distorts discourse both within and without the narrator's immediate community").

249. Id. at 111.

250. Id. at 97, 100, 117.

251. Khaitan, On Scholactivism, supra note 28, at 549; Tarunabh Khaitan (@tarunkhaitan), Twitter (Aug. 8, 2022, 1:07 PM), https://twitter.com/tarunkhaitan/status/1556688618160275457 [https://perma.cc/N2GR-MC78] ("I don't call for pure objectivity, and explicitly endorse the value of democratising knowledge . . . .").

concept he concedes to be "fuzzy."[252] In short, Khaitan seems to be saying that identifying the truth, while not limitless, might well be subjective. At the same time, Khaitan believes that there is value in striving toward objectivity, even if it is elusive.[253] While Khaitan cites Komárek as demanding "value neutrality in scholarship,"[254] Komárek himself also disputes that it is possible to achieve value neutrality, particularly in legal scholarship, which is inherently normative.[255] This commentary also echoes the perspective of CRT critics Farber and Sherry. Like Khaitan, they "do not defend the existence of objective truth, but rather argue that it is pragmatically useful to assume that objective truth exists, or that we create truth as ways of organizing what otherwise would be a chaotic experience."[256]

Except for Khaitan, whose views on neutrality are addressed in the next section, these scholars seem more concerned with upholding the appearance of neutrality than with defending the existence of objective truth.[257] Thus, to some extent, this disagreement about the ethics of legal scholarship centers not on whether truth is obtainable, but rather whether scholars ought to be transparent about the motivations and political or moral commitments behind their scholarship. These scholars maintain that an appearance of neutrality serves such high ideals as academic freedom, justice, and democracy. While Komárek acknowledges that scholarly findings "will never be value-free,"[258] he nonetheless urges scholars to strive to give the "appearance of neutrality," even when engaged in political acts.[259] In a later piece, he even calls the need to keep up the appearance of neutrality a "performative constraint" on scholars.[260] Komárek believes that it is necessary to uphold this façade in order to

---

252. See Khaitan, Facing Up, supra note 32.

253. See Tarunabh Khaitan (@tarunkhaitan), Twitter (Aug. 8, 2022, 1:24 PM), https://twitter.com/tarunkhaitan/status/1556692799822635008 [https://perma.cc/TP98-SS4W] ("[B]ut it's not possible to achieve perfect justice, complete civility, kindness in everything we do: surely these are all still worthwhile goals to aspire and try to get closer to?").

254. See Khaitan, On Scholactivism, supra note 28, at 549.

255. See Jan Komárek, Letter to the Editor, "Scholarship Is About Knowledge, Not Justice", 20 Int'l J. Const. L. 558, 558 (2022) [hereinafter Komárek, Scholarship Is About Knowledge].

256. Daria Roithmayr, Guerrillas in Our Midst: The Assault on Radicals in American Law, 96 Mich. L. Rev. 1658, 1674 (1998) (reviewing Farber & Sherry, supra note 242) (citing Daniel A. Farber, Legal Pragmatism and the Constitution, 72 Minn. L. Rev. 1331, 1338–39 (1988); Suzanna Sherry, The Sleep of Reason, 84 Geo. L.J. 453, 472–73 (1996)).

257. As will be discussed more later in this section, Khaitan diverges from these scholars on this point in that he is concerned less with the appearance of neutrality and more with the internal motivation of the scholar. See Khaitan, Facing Up, supra note 32 (arguing that motivation to make a material impact through scholarly work is risky for the pursuit of truth).

258. Komárek, Scholarship Is About Knowledge, supra note 255, at 558.

259. Komárek, Freedom and Power, supra note 246, at 438.

260. Komárek, Scholarship Is About Knowledge, supra note 255, at 558.

maintain public confidence in academic institutions.[261] He portrays the failure to do so as an existential threat to the ability of academics to produce legal scholarship.[262] Harking back to our earlier discussion in section II.B of Bourdieu's theory of *habitus*, one might wonder then if an institution-preserving instinct may be driving some of the resistance to scholarship in action. In addition to arguing that keeping up the appearance of neutrality helps to maintain academic freedom, Komárek argues that maintaining the appearance of neutrality in legal scholarship may help to uphold democracy.[263] He is not the first to make such an association. Farber and Sherry devote an entire chapter in their book to this topic. According to Farber and Sherry, "To condemn scientific objectivity and the aspiration toward universal truth, then, is to place democracy at risk."[264]

I think that it is important to ask: What is the appearance of neutrality concealing? As the critics would likely concede, legal scholars often, if not always, draw from their own personal or professional experiences to inform their production of legal scholarship.[265] Some do so explicitly.[266] Others do so implicitly with their life experiences informing what questions they are asking and how they understand the function of law in society.[267] Legal scholarship is also often informed by its authors' political

---

261. See Komárek, Freedom and Power, supra note 246, at 436–38 (explaining the importance of integrity to academic institutions' pursuit of knowledge and the tension created by institutional indebtedness to public and private funders).

262. See id. at 430–31, 436 (arguing that failure to maintain academic protocols threatens the scholarly work which those protocols protect).

263. Id. at 438 ("So it may help liberal democracy if extramural speeches at least seek to keep an appearance of neutrality and try to see beyond ideology.").

264. Farber & Sherry, supra note 242, at 108.

265. See Akbar et al., supra note 13, at 872 ("All legal scholarship is biased: Inevitably our views of the law are shaped by our underlying moral understandings and commitments, by our experiences and social location.").

266. See generally Terence Andrus, Reflection on *Andrus v. Texas*, 134 Harv. L. Rev. Forum 78 (2020) (reflecting on the author's changed view of the American legal system based on the appeal of his own death sentence); Brian L. Frye & Maybell Romero, The Right to Unmarry: A Proposal, 69 Clev. St. L. Rev. 89 (2020) (arguing based on the authors' own difficulties finalizing their divorces that roadblocks to divorce violate a constitutional right to unmarry); Jill Wieber Lens, Tort Law's Devaluation of Stillbirth, 19 Nev. L.J. 955 (2019) (discussing the law's inadequacy in valuing claims based on stillbirth in parallel with the author's stillbirth experience); Melissa Murray, Foreword: The Milkmaid's Tale, 57 Cal. W. L. Rev. 211 (2021) (describing the racialized nature of judging parents for feeding their babies formula based on the author's own experiences); Maybell Romero, Ruined, 111 Geo. L.J. 237 (2022) (discussing, in the context of the author's own experience as a survivor of sexual assault, the problematic nature of using "broken" language to describe victims of sexual assault).

267. For examples of academics whose experiences inform their work, see responses to Rachel E. López (@Rachel_E_Lopez), Twitter (Aug. 17, 2022), https://twitter.com/Rachel_E_Lopez/status/1559898159605743619?s=20 [https://perma.cc/QX4V-ALDF]. For examples of scholarship informed by the scholar's lived experience, see, e.g., Deborah N. Archer, "Black Rage" and the Architecture of Racial Oppression, *in* Fight the Power: Law

and moral commitments, which can be hidden under the veil of neutrality.[268] In this way, Cover might say that legal scholars, like judges, interpret the law and produce legal scholarship informed by their own *nomos*. Scholars can also have commitments to feminism, antiracism, or abolition, which inform their methodological choices, including the decision to evoke lived experience in scholarship.[269] Even the critics accept that legal scholarship, because of its normative nature, is intrinsically subjective, in part because it often involves evaluating claims about morality.[270]

Yet, a significant risk inherent to feigning neutrality is that white subjectivity is often mistaken for objectivity. For some time, numerous scholars have argued that what is considered "neutral" or "objective" in

---

and Policy Through Hip-Hop Songs 231 (Gregory S. Parks & Frank Rudy Cooper eds., 2022); Deborah N. Archer, Classic Revisited: How Racism Persists in Its Power, 120 Mich. L. Rev. 957 (2022); Michael Fakhri, Images of the Arab World and Middle East—Debates About Development and Regional Integration, 28 Wis. Int'l L.J. 391 (2011); Jordana R. Goodman, Ms. Attribution: How Authorship Credit Contributes to the Gender Gap, 25 Yale J.L. & Tech. 309 (2023); Jon J. Lee, Catching Unfitness, 34 Geo. J. Legal Ethics 355 (2021); Robyn M. Powell, Disability Reproductive Justice, 170 U. Pa. L. Rev. 1851 (2022); Ruqaiijah Yearby, Internalized Oppression: The Impact of Gender and Racial Bias in Employment on the Health Status of Women of Color, 49 Seton Hall L. Rev. 1037 (2019). These authors have confirmed that their lived experience informed their research. Other scholarship focuses on how the lived experience of notable legal scholars influenced their research. See, e.g., Nicola Lacey, A Life of H.L.A. Hart: The Nightmare and the Noble Dream (2006); Eliav Lieblich, Assimilation Through Law: Hans Kelsen and the Jewish Experience, *in* The Law of Strangers: Critical Perspectives on Jewish Lawyering and International Legal Thought 51 (James Loeffler & Moria Paz eds., 2019); Edward A. Purcell Jr., A Subjective Jurisprudence: The Structural Constitution, *in* Antonin Scalia and American Constitutionalism: The Historical Significance of a Judicial Icon 56 (2020). Correspondence confirming the aforementioned pieces were informed, in part, by the various authors' life experiences is on file with the *Columbia Law Review*.

268. See generally Evan Selinger & Robert P. Crease, Introduction to The Philosophy of Expertise 1, 3 (Evan Selinger & Robert P. Crease eds., 2006) ("[T]he authority so conferred on experts . . . risks elitism, ideology, and partisanship sneaking in under the guise of value-neutral expertise."); Akbar et al., supra note 13, at 872–74; David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 Stan. L. Rev. 575, 618 (1984) ("For the Critical scholar, the pretense that social science methods lead to objective and value neutral knowledge hides an implicit and conservative political message behind a neutral and technocratic facade.").

269. See, e.g., Delgado & Stefancic, supra note 36, at 45 ("Critical race theorists have built on everyday experiences with perspective, viewpoint, and the power of stories and persuasion to come to a deeper understanding of how Americans see race."); Cain, supra note 202, at 20; Delgado, supra note 8, at 2411–12.

270. Komárek, Freedom and Power, supra note 246, at 423 ("Constitutional scholarship may not be the same as politics and power, but it is certainly difficult to separate them. This relates to what Kaarlo Tuori calls the 'imposed normativity of all legal scholarship'. Normativity (and power) is 'imposed' because it can never be fully escaped by legal scholars." (quoting Kaarlo Tuori, Ratio and Voluntas: The Tension Between Reason and Will in Law, at xiii (2011))); Khaitan, Facing Up, supra note 32 ("I believe moral claims are truth claims . . . .").

the academy reflects a white middle-class worldview.[271] Scholars have called the demand that scholars adopt an impersonal voice "false neutrality," which is meant to preclude "the possibility of grounding a scholarly voice in the material, aesthetic, emotional, and spiritual experiences of people of color."[272]

This approach also might reinforce what Professor Kimberlé Williams Crenshaw calls "perspectivelessness," which is the pervasive belief in academia that legal analysis and discourse can be "objectiv[e]," in essence removed from any cultural, political, or other context.[273] Moreover, scholarship that is completely divorced from perspective runs the risk of reducing racism to something that exists outside of and apart from law, while characterizing the law itself as race neutral.[274] According to civil rights attorney and professor Derrick Bell, such colorblind notions of law mask its role in producing and concretizing white dominance.[275] For this reason, CRT scholars "reject[] the prevailing orthodoxy that scholarship should be or could be 'neutral' and 'objective,'" primarily because of a belief that legal scholarship about race "can never be written from a distance of detachment or with an attitude of objectivity."[276]

Moreover, only engaging with other academics in scholarship may have the unintended consequence of reinforcing white heteronormative subjectivity. As Professor Bennett Capers recently underscored, law schools are essentially "white spaces,"[277] where learning how to "think like a lawyer" is often code for learning "a white middle-class world view."[278] In addition, consulting only with other academics inhibits exposure to a more diverse array of perspectives and counternarratives. Under the Freirean understanding of knowledge production, it also "diminishes the

---

271. See, e.g., Elizabeth Mertz, The Language of Law School: Learning to "Think Like a Lawyer" 1 (2007) (explaining that the seemingly neutral manner in which legal thinking is presented in American law schools conceals the social context in which the law operates); Crenshaw, supra note 37, at 3 (arguing that the positioning of legal thinking as an objective mode of analysis is harmful to minority students); Kimani Paul-Emile, Foreword: Critical Race Theory and Empirical Methods Conference, 83 Fordham L. Rev. 2953, 2956 (2015) ("[T]he social sciences' implicit claims of 'objectivity' and embrace of 'neutrality' in knowledge production stand in contrast to CRT's contention that these claims mask hierarchies of power that often cleave along racial lines.").

272. See CRT Key Writings, supra note 42, at 314.

273. See Crenshaw, supra note 37, at 2.

274. See, e.g., CRT Key Writings, supra note 42, at xxiv.

275. See Derrick Bell, Racial Realism, 24 Conn. L. Rev. 363, 369 (1992) ("As every civil rights lawyer has reason to know—despite law school indoctrination and belief in the 'rule of law'—abstract principles lead to legal results that harm blacks and perpetuate their inferior status.").

276. CRT Key Writings, supra note 42, at xiii.

277. Bennett Capers, The Law School as a White Space?, 106 Minn. L. Rev. 7, 35–37 (2021).

278. Id. (internal quotation marks omitted) (first quoting Mertz, supra note 271, at vii; then quoting Crenshaw, supra note 37, at 3).

conversation through which we create reality," leading to an impoverished understanding of the truth and limiting creativity.[279]

According to Richard Delgado, we should be suspicious of "objectivity" because it "often mischaracterizes, minimizes, dismisses, or derides without fully understanding opposing viewpoints. Implying that objective, correct answers can be given to legal questions also obscures the moral and political value judgments that lie at the heart of any legal inquiry."[280]

On the other hand, because lived experience is only understood within a broader cultural context,[281] it is inherently subjective or *perspective-full*.[282] In current legal scholarship, lived experience operates on three planes: (1) the good; (2) the bad; and (3) the invisible. The *good* scholarship is based on insights drawn from professionalized experience working as a judge or political appointee, which is commonly seen as providing someone with special insights into legal issues.[283] The *bad* is lived experience at a personal level, mostly experienced by those at the margins of law.[284] The *invisible* lived experience is informed by white lived experience that is taken for granted as natural or typical, because it reaffirms the status quo.[285] Realities constructed from invisible narratives can be problematic because they can inhibit our imagination, making us believe that certain situations are inevitable and blinding us from seeing new possibilities.[286]

---

279. See Delgado, supra note 8, at 2439.

280. Id. at 2441.

281. See Au, supra note 34, at 189 ("With progressive education, respect for the knowledge of living experience is inserted into the larger horizon against which it is generated . . . . Respect for popular knowledge, then, necessarily implies respect for cultural context." (internal quotation marks omitted) (quoting Paulo Freire, Pedagogy of Hope: Reliving Pedagogy of the Oppressed 85 (Robert R. Barr trans., 1994))).

282. Cf. Delgado, supra note 8, at 2411–12 (discussing how a narrative approach necessarily presents one's culturally informed account of events).

283. See Richard A. Posner, Legal Scholarship Today, 115 Harv. L. Rev. 1314, 1315–17 (2002).

284. Cf. Delgado, supra note 8, at 2412 ("Many, but by no means all, who have been telling legal stories are members of what could be loosely described as outgroups, groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized.").

285. See id. at 2412–13 ("The dominant group creates its own stories, as well. The stories or narratives told by the ingroup remind it of its identity in relation to outgroups, and provide it with a form of shared reality in which its own superior position is seen as natural."); id. at 2440–41 ("Traditional legal writing purports to be neutral and dispassionately analytical, but often it is not . . . [i]n part . . . because legal writers rarely focus on their own mindsets, the received wisdoms that serve as their starting points, themselves no more than stories, that lie behind their quasi-scientific string of deductions.").

286. See id. at 2416–17 (explaining that accepted narrative patterns become "habitual" and lock us into the notion that the way things are is "inevitable").

Despite the critics' claims that maintaining the appearance of neutrality helps to promote justice, portraying doctrinal analysis as a neutral act can have stark unintended consequences in law and lead to a more unjust society. For instance, in *The Curriculum of the Carceral State*, Alice Ristroph documents how Herbert Wechsler, one of the primary architects of modern criminal law,[287] championed the "neutral," "color-blind" principles of criminal law as a way to build the legitimacy of the criminal legal regime, which at the time was seen as marginal.[288] He and his contemporaries depicted criminal law as "an egalitarian system that imposes obligations without reference to race."[289] Yet this "egalitarian" legal system ushered in the era of mass incarceration, widely understood today to be "rife with racial disparities."[290]

Perhaps then what we should be more concerned with is those scholars who have moral and political commitments that inform their research questions, methodology, and theoretical lens, but who feign neutrality.[291] Like Movement Law scholarship, PLS accepts that scholarship is biased.[292] Contrary to the approach preferred by the skeptics, PLS's methodology necessitates transparency about moral and political commitments in legal scholarship. That is part of its strength. More harm is done to democracy in darkness than in light.

B. *Dangers of Activism in Scholarship*

In contrast to Komárek, Farber, and Sherry, Khaitan is less concerned with the outward appearance of neutrality and more concerned with a scholar's internal motivation to achieve change in the material world.[293]

---

287. Ristroph, supra note 39, at 1635.

288. Jonathan Simon, Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government, 7 Buff. Crim. L. Rev. 247, 257–265 (2003); see also Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 29–34 (1959) (expressing concern that some of the Supreme Court's racial equality opinions, including Shelley v. Kraemer, 334 U.S. 1 (1948), and Brown v. Bd. of Ed., 347 U.S. 483 (1954), were not adequately supported by "neutral principles").

289. Ristroph, supra note 39, at 1635.

290. Id.

291. This sentiment accords with the theories of several other legal scholars. Bernard Harcourt raised the concern that policy experts portray their decisionmaking as neutral when their decisions "necessarily entail normative choices about political values at every key step." Bernard E. Harcourt, The Systems Fallacy: A Genealogy and Critique of Public Policy and Cost-Benefit Analysis, 47 J. Legal Stud. 419, 421 (2018). Benjamin Levin has asked, "[S]hould we be concerned about decision-makers' ability to wrap their decisions in the language of science or the potentially unassailable trappings of authority?" Levin, supra note 153, at 2816 (2022).

292. Akbar et al., supra note 13, at 872 ("All legal scholarship is biased: Inevitably our views of the law are shaped by our underlying moral understandings and commitments, by our experiences and social location.").

293. See Khaitan, On Scholactivism, supra note 28, at 548 ("[S]cholactivism-driven research is distinguished by the existence of a motivation to directly pursue specific material

According to Khaitan, "[A]ll that may separate a normative scholar from a scholactivist is the absence of an activist *motive* to pursue a direct, non-discursive outcome in a proximate case through one's scholarship."[294] Principally, he believes that combining scholarship with activism makes academics too susceptible to abusive power and carries a risk of undermining truthseeking.[295]

What drives Professor Khaitan's skepticism about activism? In his view, activism compromises a scholar's ability to seek truth because it "(i) has shorter time and space horizons, (ii) demands an attitude of certainty, and (iii) celebrates and rewards those who realize (material) change."[296] According to Khaitan, "These features are in tension with the academy's need to provide time and distance for research and reflection, inculcate an attitude of skepticism, and reward truth-seekers and knowledge-creators."[297] Since PLS inherently involves working with organic jurists, many of whom also identify as activists, to advocate material change to legal systems of oppression, I want to address each of these concerns in turn.

First, Khaitan portrays activism as "requir[ing] quick responses to concrete problems in particular places" and concludes that this urgency undermines the quality of scholarship by not permitting time to properly vet one's scholarship.[298] He bases his argument on a rather narrow understanding of activists and their goals. Indeed, the worries that Khaitan articulates—failing to get the law right and providing short-sighted solutions that apply only in narrow circumstances—would be just as problematic for advocates who base their success on their reputation for quality work.[299] Short-sightedness is just as costly to activists as it is to scholars. For instance, in her seminal article on human rights fact-finding, Professor Diane Orentlicher articulated the reputational costs for human rights organizations of getting it wrong.[300] Advocates, particularly the successful ones, rely on their reputation and credibility to make change.[301]

---

outcomes (i.e. outcomes that are more than merely discursive) through one's scholarship.").

294. Id. at 549.

295. Id.

296. Id. at 551.

297. Id.

298. Id. at 552.

299. See id. at 552–53 ("Because activism's practically oriented horizons tend to be limited in time and space, a scholactivist motivated by the pursuit of specific outcomes in particular cases is at greater risk of overlooking the potential unintended consequences of their normative claims beyond the temporally and spatially proximate issue at hand.").

300. See, e.g., Diane Orentlicher, Bearing Witness: The Art and Science of Human Rights Fact-Finding, 3 Harv. Hum. Rts. J. 83, 91 (1990) (showing by historical example that political adversaries will seek to find and publicize mistakes made by human rights organizations).

301. See id. at 92–93 (describing the credibility of NGO factfinding as NGOs' "stock-in-trade").

As Orentlicher illustrated by documenting the heated attacks against human rights groups by the Reagan administration, which were meant to undermine the groups' credibility, advocates' targets have a strong incentive to discredit them, making the costs of getting it wrong very high.[302] As Orentlicher put it, "For NGOs, the stakes in surviving such scrutiny could not be higher. The credibility of their fact-finding is their stock-in-trade."[303] Moreover, activists who are only concerned with short-term wins are unlikely to be successful in the long term.[304]

Second, Khaitan fears that activism requires "an attitude of certainty" that is ill-suited for the task of producing legal scholarship.[305] Khaitan believes that "a 'research' project whose hypothesis the 'researcher' is irrefutably committed to confirming *even before the research has begun* is either not worth pursuing (because the conclusion is known) or simply not real scholarship."[306] Khaitan implies that advocates do not have the same "commitment to truth" as scholars do because they aren't open to the possibility that their views are wrong or able to revise their findings in light of evidence contrary to their position.[307] Such an approach to legal scholarship is a rather robotic and incomplete understanding of scholarly production. First, it discounts other ways of "knowing." In particular, it diminishes the value of accumulated knowledge (i.e., knowledge built over time through scholarly engagement as well as through practical experience) that might come before putting pen to paper. For the purposes of PLS, it fails to recognize lived experience as a method of knowing. It would disqualify people like my coauthors, Ghani and Rell, from producing scholarship, because their process of building knowledge by reflecting on their experience and theorizing occurred before they decided to coauthor *Redeeming Justice* with me. Second, because PLS often emerges from existing relationships with organic jurists and is best executed when academics are in close proximity to the issues they are studying, the "research" process starts much earlier. In essence, academics engaged in PLS are indeed constantly revising their views in light of contradictory evidence, albeit outside of the formal research process that might begin for a professor when they sit down to start a discrete project.

Scholarly reliance solely on doctrinal analysis also narrows "knowing" down to the interpretation of the black letter of the law—portraying a law

---

302. See id. at 89–92.

303. Id. at 92.

304. Id. at 93 ("[F]act finding 'works' when it convinces the target audience that the published allegations are well founded.").

305. Khaitan, On Scholactivism, supra note 28, at 551.

306. Id. at 550.

307. See id. at 553 ("[A] commitment to truth requires a commitment to skepticism and revisability: a scholar must unqualifiedly and abidingly remain open to the possibility that her hypotheses may be disproved rather than confirmed . . . . The default activist attitude of certainty is inherently in tension with the prized scholarly instinct of revisability.").

as discoverable just by looking at the page. If we were to base all our understanding of law solely on what is written in statutes, constitutions, and codes, we would have a very shallow understanding of what the law is. In contrast, learning through the lived experience of those with expertise in law's injustice can reveal the reality of how law functions in a way that simply reading case law or even courtroom observation never could. Moreover, the distinction that Khaitan makes between discursive and material goals is shallow.[308] Words have the power to motivate action. To Freire, words are praxis, in that they innately involve reflection and action and "to speak a true word is to transform the world."[309] In this view, a word "deprived of its dimension of action" is "an empty word, one which cannot denounce the world, for denunciation is impossible without a commitment to transform, and there is no transformation without action."[310] When one voices only empty words, critical reflection is undermined too.[311]

C. *The Banking Concept of Legal Scholarship*

Another feature shared by the critics of scholarship with social justice aims is their understanding of *who* should produce, engage with, and consume legal scholarship. Namely, in their view, scholarship is the province of academics and best suited exclusively for law reviews. For example, Komárek describes the legal academy as an "enterprise maintained by (and for) all academics."[312] For that reason, in deciding which activities are deserving of the protections of academic freedom, he believes that the institutions in the legal academy should be the ones deciding "what passes as 'academic.'"[313] He also believes that the venue where speech appears should be determinative of whether it is academic.[314]

To a lesser extent, this gatekeeping of legal scholarship by the academy is also reflected in Khaitan's prescription for how to ensure truthseeking in legal scholarship. According to Khaitan, scholars may allow activists and activism to inform their topic of inquiry and post-publication engagement, but the research and theory-building phases risk being corrupted by collaboration with activists and by scholars' own activist

308. See Khaitan, On Scholactivism, supra note 28, at 548 (emphasizing the distinction between scholars engaged in "truth-seeking and knowledge dissemination" and those motivated by "specific material outcomes").

309. Freire, Pedagogy of the Oppressed, supra note 31, at 87.

310. Id.

311. See id. ("When a word is deprived of its dimension of action, reflection automatically suffers as well; and the word is changed into idle chatter . . . .").

312. See Komárek, Freedom and Power, supra note 246, at 437.

313. Id.

314. See id. at 434.

impulses.[315] As Khaitan puts it: "Once the broad topic is selected, the scholar takes over. Framing the question, determining the appropriate method, literature survey, evidence gathering, argumentation, writing, workshopping, revising—these are all scholarly activities that must be undertaken with a deep commitment to intellectual virtues shaped solely by the goal of knowledge creation."[316]

In Khaitan's view, during this phase of research, working with activists to achieve a material goal also compromises the earnest pursuit of knowledge.[317] Only after knowledge has been produced is it acceptable to collaborate with practitioners and activists, seemingly because it is within their "*pro tanto* expertise" to translate and disseminate the scholar's knowledge to the wider public "through [the] regular channels of democratic politics," like newspapers, legal briefs, interviews, conferences, etc.[318] Khaitan describes dissemination as "providing explanations that give reasons to others to justifiably accept their truth claims," but the truth at this stage has already been preordained by the scholar and is immutable.[319] The scholar's job, in collaboration with others outside of academia, is to proselytize it.

This understanding of legal scholarship resembles Freire's "banking concept" of pedagogy, in which teachers deposit their knowledge with their students, who passively receive and collect knowledge.[320] Freire describes the banking method as the following two step process:

> The banking concept (with its tendency to dichotomize everything) distinguishes two stages in the educator's actions. During the first, he cognizes a cognizable object while he prepares his lessons in his study or his laboratory; during the second, he expounds to his students about that object.[321]

The first stage resembles the understanding of knowledge production, depicted in Khaitan's scholarly process, in which the scholar "in his study or his laboratory" discovers truth in isolation without undue influence from the outside world. Then, during the second stage, analogous to how teachers "deposit" knowledge under Freire's banking conception of pedagogy, Khaitan describes the process of how scholars

---

315. Khaitan, On Scholactivism, supra note 28, at 548 ("[W]hile the pre-research choice of the topic of inquiry and post-publication public engagement and dissemination are permitted to the activists inside us, the pursuit of specific material impact through our scholarship is not.").

316. Id. at 555.

317. Id. at 551–55 (describing a hypothetical academic as "a *moderate* scholactivist" whose research is compromised because she responds to a call from activists to write an article about pending legislation and overlooks "the potential unintended consequences of [her] normative claims beyond the temporally and spatially proximate issue at hand").

318. Id. at 555–56.

319. Id. at 549.

320. Freire, Pedagogy of the Oppressed, supra note 31, at 75.

321. Id. at 80.

"disseminate . . . knowledge" to the public.[322] As described by Freire, knowledge becomes "a gift bestowed by those who consider themselves knowledgeable upon those whom they consider to know nothing."[323] In line with the banking method, the pupil and the wider public are both "receptacles" to be filled with knowledge.[324] Much like the teacher justifies their existence through the absolute ignorance of their pupil, the scholar exists because the rest of society cannot know their reality without the scholar unveiling it.[325] In this view, the scholar's role is to "regulate" what "truth" is received by the public through a process of filtering out nontruth claims.[326]

His solution for checking the activist impulse (or one's subjectivity) is self-awareness and workshopping scholarship, "especially with colleagues who are likely to be unsympathetic towards [your] claims."[327] While workshopping scholarship can help a scholar refine their ideas, under a Freirean understanding of knowledge production, gaining self-awareness is not possible in isolation from the broader world. Limiting scholarly engagement to academics, even those who don't agree with you, results in a distorted sense of the world, informed only by the subjective experience of those who have similar experiences, assumptions, and expertise to your own. This is especially so in the realm of legal scholarship, where academics share a common foundation of a particular modality of legal education that informs one's understanding of the law. Moreover, with the move toward hyper-credentialism, the legal academy is rife with intellectuals who all have the same markers of success, and those markers are ones of extraordinary privilege and good fortune. Recent statistics suggest that to secure a tenure-track position in the U.S. legal academy, which facilitates the production of legal scholarship, one now must have a degree from Yale or Harvard Law School, a PhD, a clerkship, or an academic fellowship.[328] This path dependence breeds scholarship that is informed by a very narrow breadth of professional and life experience.

In a sense, PLS demands the same level of reflection on one's own perspectives as Khaitan describes, but through employing a different method. Rather than trying to push aside one's own positionality, PLS

---

322. See Khaitan, On Scholactivism, supra note 28, at 555.

323. Freire, Pedagogy of the Oppressed, supra note 31, at 72.

324. Id. (describing how the banking concept of pedagogy turns students "into 'containers,' into 'receptacles' to be 'filled' by the teacher").

325. Id. ("The teacher presents himself to his students as their necessary opposite; by considering their ignorance absolute, he justifies his own existence.").

326. This replicates "the banking notion of consciousness" in which the "educator's role is to regulate the way the world 'enters into' the students." Id. at 76.

327. Khaitan, On Scholactivism, supra note 28, at 555.

328. Sarah Lawsky, Reported Entry-Level Law School Hiring Spring 2023, PrawfsBlawg (May 15, 2023), https://prawfsblawg.blogs.com/prawfsblawg/2023/05/lawsky-entry-level-hiring-report-2023.html (on file with the *Columbia Law Review*).

calls for academically trained researchers to push through it. It requires overcoming "alienating intellectualism" by embracing collective subjectivity as a vehicle for getting closer to the truth.[329] In order to engage in PLS, academics must examine their priors—their prior perspectives, prior academic training, and prior understanding of expertise and how knowledge is produced—through critical dialogue and collective inquiry.

D. *Toward a Relational Theory of Knowledge*

Overall, the debate about the morality of "scholactivism" inherently turns on one's theory of knowledge. Whereas Khaitan believes that knowledge can only be produced by academics when they are insulated from their desires to obtain change in the material world and from others who share those desires, Freire understands knowledge as emerging "through the restless, impatient, continuing, hopeful inquiry human beings pursue in the world, with the world, and with each other."[330] The debate thus depends on whether you believe that the "truth" is discovered best in isolation or whether it can only be discovered in dialogue with those viewing it from different vantage points. This divergence in ideology is reflected in how these two intellectuals describe the process of producing knowledge. Khaitan claims that workshopping scholarship can help to ensure its objectivity, but his audience is limited to other scholars.[331] In contrast, Freire believes that "[a]uthentic thinking, thinking that is concerned about reality, does not take place in ivory tower isolation, but only in communication."[332] To Freire, it is not possible to be in dialogue with the world if you "start from the premise that naming the world is the task of an elite."[333] This also resonates with how Delgado understands "[r]eality [as] not fixed, not a given" but rather "construct[ed] . . . through conversations, through our lives together."[334]

Freire's understanding of knowledge production is contrary to the conception of scholarship that Khaitan proposes. If communal dialogue is essential to learning and social transformation, then a researcher cannot simply name social problems on behalf of someone else and then "deposit" their ideas into the world to be consumed.[335] Rather, a researcher must engage with the world and others in it to gain critical consciousness. As described in section II.B, this idea is central

---

329. Freire, Pedagogy of the Oppressed, supra note 31, at 86.

330. Id. at 72.

331. Khaitan, On Scholactivism, supra note 28, at 555 (noting scholars must engage in "workshopping" and be "generous towards colleagues").

332. Freire, Pedagogy of the Oppressed, supra note 31, at 77 (emphasis omitted).

333. Id. at 90.

334. Delgado, supra note 8, at 2439.

335. Au, supra note 34, at 185 (internal quotation marks omitted) (quoting Freire, Pedagogy of the Oppressed, supra note 31, at 89).

to Freire's conception of "praxis," which is the core of his epistemology.[336] Freire's liberatory pedagogy in essence requires that researchers interact with the world, which is "inherently ideological, political, and decidedly not neutral."[337] Social change is also intertwined in the process of knowledge production and learning, because the transformation of one's circumstances for the better is the goal.[338]

CONCLUSION

Redeeming Justice made me understand legal scholarship's full emancipatory potential. It gave me a living example of how solidaristic scholarship, forged with those with expertise in law's injustice, not only improves legal scholarship by tethering it to the tangible but can also have tangible impacts in the world. While the use of the term "emancipatory" in scholarship can sometimes seem like a buzzword, in the case of *Redeeming Justice*, it is not hyperbole. In many ways, it laid the groundwork for the liberation of my coauthor Rell from a death-by-incarceration prison sentence. This is not to say that I freed him through this piece or with my legal work. Without a doubt, Rell wrote his own way to freedom. *Redeeming Justice* did, however, offer him a platform to make the case for redemption, both his and others'. And through the process of writing *Redeeming Justice*, I came to know him as a friend and advisor, outside of the confines of the attorney–client relationship, which ultimately made me a better advocate for him when the time came for me to argue for his freedom as his attorney later on.

Some might find this mix of advocacy and scholarship unseemly, maybe even immoral, but for me it has been life changing. Writing *Redeeming Justice* was freeing for me too. PLS has allowed me to embrace my entire professional identity, which sometimes includes, but is not limited to, lecturing at a podium or employing doctrinal analysis in legal scholarship. At other times, it involves working in solidarity with community leaders while teaching in a clinic. Both facets of my professional life enrich my thinking and scholarship. Going forward, I might at times follow the conventions of scholarship, but when I do, it won't be out of fear for how others will perceive me. It will be a choice about when doctrinal analysis is needed or when a certain theoretical framework advances my thinking. In full candor, it has also helped me to let go of some aspirations that were inhibiting this embrace. I accept

336. Id. at 180 ("This process of human critical reflection on the world and taking conscious, transformative action on that world is how Freire conceives of 'praxis' . . . which is the core of his epistemology." (citations omitted) (citing Rex Davis & Paulo Freire, Education for Awareness: A Talk with Paulo Freire, *in* Literacy and Revolution: The Pedagogy of Paulo Freire 59 (1981))).

337. Id. at 187.

338. Id.

that my devotion to this "unconventional" form of scholarship will likely pose obstacles to the acceptance of me and my work in some circles of the legal academy. But I hold fast in my commitment to PLS because I believe that it can improve the law for the better, and as a dear colleague wisely advised me, you "don't need a particular status or position to do the work that matters most. What you need is a platform."

Accordingly, the goal of this piece and our broader PLS project is to build a bigger platform—one that can fit not just Rell, Ghani, and me, but other academic and nonacademic scholars like us.

Columbia Law Review. ISSN 0010-1958.

Published by Columbia Law School students monthly except for February, July, August, and September. Printed in Hanover, Pennsylvania. Editorial Office, 435 West 116th Street, New York, New York 10027. For issues prior to volume 118 inquire of William S. Hein & Co., Inc., 1285 Main Street, Buffalo, New York 14209-1987, 1-800-828-7571, https://www.wshein.com. Back issues are also available in PDF format through Hein Online, https://www.heinonline.org. For current and recent printed issues, please send an email to business@columbialawreview.org.

Information for Contributors: Unsolicited manuscripts will be considered for publication. All manuscripts should be double spaced. Text and citations should conform to *The Bluebook: A Uniform System of Citation* (21st ed. 2020). As a matter of policy, the *Review* encourages the use of gender-neutral language. The *Review* requires contributors to submit pieces electronically via the instructions on its Submissions page. Please visit https://www.columbialawreview.org/submissions for further information regarding submissions.

Internet Address: The *Columbia Law Review* homepage is located at https://www.columbialawreview.org.

VOL. 123, NO. 6 COLUMBIA LAW REVIEW Pages 1533 to 1854 OCTOBER 2023