COLUMBIA LAW REVIEW

LECTURE

ARTICLES

NOTES

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ABSTRACTS

LECTURE

The Columbia Law Review*'s Karl Llewellyn Lecture series celebrates pioneers in the law who have innovated and challenged legal theory. The third annual Lecture was delivered by Cahill Gordon & Reindel LLP Senior Counsel and distinguished First Amendment litigator Floyd Abrams on February 12, 2026. A transcript of Mr. Abrams's Lecture is published in this Issue.*

ARTICLES

The over $250 billion video game industry, the largest entertainment industry in the world, has rapidly developed unregulated monetary systems. Gaming companies issue what this Article terms "gaming money"—points earned in play, gift cards, and platform-stored balances—and increasingly enable conversion of these instruments into bank deposits at scale. Although they adopt many of the features of "money," they evade existing regulatory categorizations while producing familiar problems: rate manipulation, money laundering, and structural opacity and instability for firms in the gaming industry and their counterparties.

This Article shows how companies like Microsoft, Sony, and Roblox are not only harming gamers but issuing "shadow money," evading a host of laws governing money, banking, and finance. Like nineteenth-century canal, railroad, and mining companies, as well as twenty-first-century fintech and cryptocurrency companies, gaming giants engage in private monetary governance. Gaming companies claim to operate "virtual" worlds of entertainment, media, and the arts, beyond the reach of regulators. Yet the law does not ask whether money is "real," but whether its creation infringes on the state's monetary sovereignty. Convertibility—the degree to which gaming money is convertible into currency and bank deposits at scale—should determine regulatory jurisdiction and intensity.

Sony has now applied for a new national charter to issue stablecoins, signaling that gaming companies are moving toward more sophisticated infrastructure. The stakes are high: Gaming introduces most U.S. children to the very idea of money. Regulation must confront a future that is already here.

There is a gap in mootness doctrine that allows defendants to strategically "moot" their way out of class litigation. Before a class is certified, a defendant can resolve the named plaintiff's individual claim and then argue there is nothing left to litigate. This tactic, often referred to as "picking off" or "buying off" the plaintiff, can kill a class action before it begins, leaving systemic misconduct unchallenged and the broader class without recourse. Courts and scholars have long recognized this problem. But their responses have remained too narrow and too improvised to address the broader doctrinal opening that makes pick-offs possible in the first place.

This Article provides a comprehensive framework for understanding and responding to picking off. First, it identifies the gap in mootness doctrine—what this Article calls the "strategic mootness gap"—that leaves courts without a principled basis for responding to pick-offs even when they recognize them for what they are. Second, it maps the strategic mootness gap, examining not just the forced monetary payments that dominate existing scholarship but also cases featuring injunctive remedies and settlement offers that are "too good to refuse."

Finally, this Article proposes a solution: a "picking off" exception to mootness that addresses defendant-driven conduct which undermines the class certification process. This exception provides courts with an analytical framework for identifying when individualized relief improperly forecloses class treatment, while preserving space for legitimate early dispute resolution.

NOTES

Since the Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization*, the landscape of abortion access in the United States has been plagued by uncertainty and growing inequality across geographic, racial, and socioeconomic lines. As many states have passed new laws drastically restricting abortion access, reproductive rights litigators have increasingly turned to state courts and constitutions as vehicles for legal redress. The stories of individual patients who have suffered under these laws have been front and center in this new wave of advocacy, but the experiences of domestic violence survivors have been largely absent from the legal narrative. This Note makes the case for understanding domestic abuse as a reproductive justice issue that is exacerbated by post-*Dobbs *abortion restrictions. It argues that existing state constitutional law arguments rooted in privacy, equality, and autonomy fail to encapsulate the full scope of the harms suffered by survivors living under abortion restrictions and proposes bringing actions under state constitutional rights to safety to better address those harms. Using early gestational restrictions and* *parental involvement laws as case studies, this Note lays out a path for bringing such actions.*

The principle that federal courts exist to provide remedies rather than to vindicate abstract interests is firmly rooted in American jurisprudence and continues to animate doctrines of federal court jurisdiction. But remedies are elusive. Even executing on a money judgment, which is simple enough in principle, has been complicated by technologies that allow judgment debtors to conceal their assets quickly and effectively.

This Note argues that federal courts are falling behind developments in capital mobility because they have been constrained by an irrational and unnecessarily narrow view of equity. Since 1999, federal courts have been unable to enjoin litigants from transferring their assets pending the outcome of litigation, subject to narrow exceptions and work-arounds. By examining provisional relief in transnational litigation, this Note exposes the consequences of the Supreme Court's limited view of equity and proposes an avenue for developing effective provisional relief under the Court's precedents. By doing so, it contributes to the growth of academic engagement with substantive equity and its potential to reshape domestic law.

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LECTURE

REVIVING THE PRESS CLAUSE

Floyd Abrams *

It's a great pleasure and a more than memorable honor to me to have been invited to deliver the third Karl Llewellyn Lecture. His extraordinary stature, let alone that of the two more than distinguished individuals who preceded me in the role I play this evening, makes that honor all the clearer and my task all the more challenging.

Most of my professional career has related in one way or another to representing newspapers, broadcasters, and other entities that present news to the public, not least the journalists who write about and analyze events as they occur in the world. That has led me to write for courts, classes, and sometimes in books for the general public, about the scope and nature of First Amendment protection of the press and the ongoing threats to the press. This evening I thought I would speak more broadly about one of those threats and how the law might change to assure that the press might remain both free and relevant.

Unfortunately, today there are a number of threats to the press that cannot be ignored. What looks like the all but suicidal collapse of the *Washington Post* as a great newspaper is only one example. I will focus on another one of longer standing. In November 2023, a member of the *New York Times* editorial board wrote a piece taking a hard look at the role of the press in our nation.[1] From the beginning of the 20th century to that date, the article noted that the amount of daily and weekly newspapers had decreased from approximately 24,000 to around 6,000.[2] Since then, the situation has worsened to the point that only 5,400 U.S. newspapers remain alive, with two more newspapers disappearing each week.[3] The *Atlanta Journal-Constitution* and Newark's the *Star-Ledger*

* The author thanks Sylvan Lebrun, a student at Yale Law School, for her exemplary assistance in the preparation of this address.

1. Serge Schmemann, Opinion, A Powerful Tool for Fighting Corruption Is Going Extinct, N.Y. Times (Nov. 26, 2023), https://www.nytimes.com/2023/11/26/opinion/local-newspapers-democracy-journalism.html (on file with the *Columbia Law Review*).

2. Id.

3. Zach Metzger, The Medill Local News Initiative at Northwestern Univ., State of Local News Report 9 (2025).

stopped offering print editions last year.[4] On January 7 of this year, the *Pittsburgh Post-Gazette* announced it would cease its operation on May 3—a fate that was only prevented by a journalism-focused nonprofit's last-minute purchase of the newspaper.[5]

With newer forms of technology abounding, threats to the economic viability of newspapers and the like are unmistakable. Any diminution of the legal protections the press now has could well be economically disastrous. So too, I submit, would the failure to provide the press still more protection than it has now.

Let's begin with a brief view of some features of our history and the way the Framers of our nation viewed the press. A starting point is that the press was the only for-profit privately-owned nongovernmental entity even mentioned, let alone protected, in the Constitution.[6] When James Madison, on June 8, 1789, first submitted a draft, here in New York, of what became the First Amendment, it contained this language: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[7]

Note Madison's use of the word "inviolable." That word was commonly used when the notion of protecting the press in the future was considered. For example, the Delaware Declaration of Rights in 1776 contained language asserting that "the liberty of the press ought to be inviolably preserved";[8] the Constitution of Georgia in 1777 provided for "[f]reedom of the press and trial by jury, to remain inviolate forever";[9] and the Maryland Constitution of 1776 declared that "the liberty of the press ought to be inviolably preserved."[10]

Sweeping legal protection for the press was viewed by the Framers as an essential element of freedom in the new nation and was reflected in

4. J. Scott Trubey, AJC to Move to Fully Digital Publication, Phase out Print Dec. 31, Atlanta J.-Const., https://www.ajc.com/business/2025/08/ajc-to-move-to-fully-digital-publication-phase-out-print-dec-31/ (on file with the *Columbia Law Review*) (last updated Aug. 28, 2025); Tracey Tully, A Storied Newspaper Prepares to Print Its Own Obituary, N.Y. Times (Feb. 1, 2025), https://www.nytimes.com/2025/02/01/nyregion/new-jersey-star-ledger-prints-final-edition.html (on file with the *Columbia Law Review*).

5. Kris B. Mamula, Post-Gazette to Publish Final Edition and Cease Operations on May 3, Pittsburgh Post-Gazette (Jan. 7, 2026), https://www.post-gazette.com/local/city/2026/01/07/pittsburgh-post-gazette-final-edition/stories/202601070073 (on file with the *Columbia Law Review*) (last updated Jan. 9, 2026); Jeffrey A. Trachtenberg, Pittsburg Post-Gazette Is Being Sold to Baltimore Banner Owner, Wall St. J. (Apr. 14, 2026), https://www.wsj.com/business/media/pittsburgh-post-gazette-is-being-sold-to-baltimore-banner-owner-01a969bd?mod=lead_feature_below_a_pos1 (on file with the *Columbia Law Review*).

6. U.S. Const. amend. I.

7. 1 Annals of Cong. 451 (1789) (Joseph Gales ed., 1834).

8. Del. Const. of 1776, Declaration of Rts., § 23.

9. Ga. Const. of 1777, art. LXI.

10. Md. Const. of 1776, § 38.

the constitutions of the new states. As summarized by historian Wendell Bird in his book *The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act*,

> It is remarkable that nine of the eleven infant states adopting new fundamental law (plus Vermont, an independent government) protected liberty of press in their new declarations of rights or constitution during 1776–1783—more than protection of any other right except liberty of conscience and a right to jury trials. It is still more remarkable that every one of those states described that right in the broadest terms.[11]

Similarly, state conventions in North Carolina, Rhode Island, and Virginia described freedom of the press as one of the "greatest bulwarks of liberty, [which] ought not to be violated" in proposals about what to include in the new federal constitution;[12] and New York proposed language stating that "the Freedom of the Press ought not to be violated or restrained."[13]

As for the key Framers themselves, Madison's drafting and advocacy of what became the First Amendment speaks for itself. It was entirely consistent with his assertion in 1800 in his Report on the Virginia Resolutions that "to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression."[14]

Thomas Jefferson's advocacy of sweeping protection for the press was also exuberant in its breadth. When he was the first American ambassador to France, he all but threatened to oppose ratification of the Constitution if it lacked a Bill of Rights with a clause protecting the

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11. Wendell Bird, The Revolution in Freedoms of Press and Speech: From Blackstone to the First Amendment and Fox's Libel Act 303 (2020).

12. North Carolina Hillsborough Convention Amendments, 2 August 1788, reprinted in 18 Documentary History of the Ratification of the Constitution 454 (John P. Kaminski & Gaspare J. Saladino eds., 1995); Rhode Island Recommendatory Amendments, 29 May 1790, Ctr. for the Study of the Am. Const., https://csac.history.wisc.edu/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/rhode-island-recommendatory-amendments-29-may-1790/ (on file with the *Columbia Law Review*) (last visited April 11, 2026); Virginia Recommendatory Amendments, 27 June 1788, Ctr. for the Study of the Am. Const., https://csac.history.wisc.edu/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/virginia-recommendatory-amendments-27-june-1788/ (on file with the *Columbia Law Review*) (last visited April 11, 2026).

13. New York Recommendatory Amendments, 26 July 1788, Ctr. for the Study of the Am. Const., https://csac.history.wisc.edu/constitutional-debates/debate-about-amendments/recommendatory-amendments-from-state-conventions/new-york-recommendatory-amendments-26-july-1788/ (on file with the *Columbia Law Review*) (last visited April 11, 2026).

14. James Madison, The Report of 1800 (Jan. 7, 1800), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Madison/01-17-02-0202 [https://perma.cc/5YX6-5BTQ] (last visited Mar. 30, 2026).

press.[15] "It astonishes me," he wrote to William Stephens Smith regarding American opposition to a Bill of Rights, "that threefourths of [our countrymen] should be content to live under a system which leaves to their governors the power of taking from them the trial by jury in civil cases, freedom of religion, freedom of the press" and other rights.[16] "Our liberty depends on the freedom of the press," Jefferson wrote, "and that cannot be limited without being lost."[17] And still more memorably, that if he had to choose between "a government without newspapers, or newspapers without a government" that he would "not hesitate a moment to prefer the latter."[18] And finally, and unforgettably, "where the press is free, and every man able to read, all is safe."[19]

Inexplicably, such statements by the two most significant Framers and advocates of sweepingly broad First Amendment protection for the press have yet to be substantially relied upon in Supreme Court opinions involving press freedom. Nor has the Press Clause itself. When a group of colleagues and I drafted a recent law review article, we titled it "The Press Clause: The Forgotten First Amendment."[20]

We were not exaggerating. Our article set forth in detail our concerns that the Supreme Court has yet to recognize unique protections needed for journalists to best perform their role in a democratic society.[21] Rather, the Court's precedents have often treated violations of the rights of news organizations no differently than that of any other speaker or private enterprise.[22] Even key decisions arising out

15. Letter from Thomas Jefferson to James Madison (Dec. 20, 1787), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0454 [https://perma.cc/7WKG-W4N7].

16. Letter from Thomas Jefferson to William Stephens Smith (Feb. 2, 1788), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-12-02-0590 [https://perma.cc/6FLZ-TWQ5].

17. Letter from Thomas Jefferson to James Currie (Jan. 28, 1786), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-09-02-0209 [https://perma.cc/VQ6G-EY64].

18. Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/01-11-02-0047 [https://perma.cc/J9UD-676B].

19. Letter from Thomas Jefferson to Charles Yancey (Jan. 6, 1816), reprinted by Nat'l Archives: Founders Online, https://founders.archives.gov/documents/Jefferson/03-09-02-0209 [https://perma.cc/25KZ-Z5VL].

20. Floyd Abrams, Sandra Baron, Lee Levine, Jacob M. Schriner-Brigg & Isaac Barnes May, The Press Clause: The Forgotten First Amendment, 5 J. Free Speech L. 561 (2024).

21. Id. at 564.

22. See, e.g., Branzburg v. Hayes, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."); Associated Press v. Nat'l Lab. Rels. Bd., 301 U.S. 103, 132–33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws."); see also Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352–53 (2010) ("The law's exception for media corporations . . . results in a further, separate reason for finding this law invalid: Again by

of blatant violations of press freedom have often conflated speech and press freedoms to the point that the latter seems all but superfluous.[23]

This seems particularly inapt in light of recent disturbing events including a number of reporters in the last two presidential races being assaulted, arrested, and confined; news outlets hemorrhaging jobs; local governments utilizing their powers to undermine newsrooms; and other actions including barring journalists from witnessing executions.[24] These developments have led us to convene workshops of legal scholars and practitioners to discuss ways in which a more invigorated Press Clause could lead to a more robust press and better-educated public.

Of course, there is no shortcut available to fully revive a fading industry. As the modes of communication wax and wane in terms of their economic viability, there are obvious limits to what changes in law can accomplish. But a more robustly read and understood Press Clause could recognize and support the structural role that the press plays in our democracy, including acting as a check on the government and informing the voting public. Interpreting the Press Clause as an independent constitutional protection for journalists and news organizations could inspire changes to a status quo in which many legal barriers obstruct the reporting and publication process. Beyond the courts, this could also act as constitutional authority for new legislation to support and protect the press amid the many extralegal challenges it now faces.[25]

First, an invigorated Press Clause could prompt the courts and other government agencies to expand the First Amendment–rooted right-of-access beyond judicial proceedings.[26] Generally, the press is not guaranteed any "special access" rights beyond those of the general public

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its own terms, the law exempts some corporations but covers others, even though both have the need or the motive to communicate their views.").

23. See, e.g., N.Y. Times Co. v. Sullivan, 376 U.S. 254, 266–68 (1964) (justifying a heightened intent standard for defamation of public officials as required by both "the freedom of speech and of the press," referred to generally as "freedoms of expression"); see also, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 577 (1980) ("The right of access to places traditionally open to the public, as criminal trials have long been, may be seen as assured by the amalgam of the First Amendment guarantees of speech and press . . . .").

24. See Abrams et al., supra note 20, at 564–65 (discussing the recent challenges faced by the press, including government suppression, financial burdens, and degradation of public trust); see also Associated Press v. Neal, 788 F. Supp. 3d 959, 962 (S.D. Ind. 2025) (challenging Indiana's ban on press access to executions).

25. See Abrams et al., supra note 20, at 636, 644–45 (discussing legislative solutions to current economic threats to the journalism industry, including Congressional subsidies for local journalism, expansions of public media offerings, and arrangements to help news organizations receive a cut of the advertising revenue their stories generate for tech platforms).

26. Id. at 569–71; see also *Richmond Newspapers*, 448 U.S. at 580 (holding that the right of the public to attend criminal trials is "implicit in the guarantees of the First Amendment").

under the First Amendment.[27] In fact, some states have policies that explicitly prohibit members of the news media from accessing certain spaces or otherwise limit their ability to do so.[28] This is particularly troubling with regards to executions, where states have adopted their own access rules in the absence of a clear federal standard.[29] Indiana, a death penalty state, completely prohibits the press from witnessing executions.[30] In 2025, a coalition of media organizations sued to challenge this law as unconstitutional under the First Amendment, but they were denied a preliminary injunction.[31] They are now appealing that ruling.[32] Another recent lawsuit has challenged Tennessee's restrictions preventing journalists from witnessing many key steps of the execution process, recently winning a temporary injunction.[33] Tennessee also sets a cap on the number of media witnesses for executions, a common practice in death penalty states.[34] Arkansas used to have a policy for executions in which reporters—of which only three were allowed—could not even use a pencil and paper to take notes, although they reversed course in 2017 after public pressure.[35] The presence of media witnesses is often the only way for the public to receive clear, reliable information when an execution is botched, as was noted in the plaintiffs' filings in the Indiana lawsuit.[36]

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27. See Pell v. Procunier, 417 U.S. 817, 834 (1974) ("The Constitution does not, however, require government to accord the press special access to information not shared by members of the public generally.").

28. See, e.g., *Neal*, 788 F. Supp. 3d at 959; Sherman Smith, Kansas House Speaker Bans Reporters From Chamber Floor, Doesn't Say Why, Kan. Reflector (Jan. 13, 2025), https://kansasreflector.com/2025/01/13/kansas-house-speaker-bans-reporters-from-chamber-floor-doesnt-say-why/ (on file with the *Columbia Law Review*).

29. See, e.g., Leah Roemer, New Resource: In Era of Secrecy, States Increasingly Restrict Media Access to Executions, Death Penalty Info. Ctr. (Nov. 22, 2024), https://deathpenaltyinfo.org/new-resource-in-era-of-secrecy-states-increasingly-restrict-media-access-to-executions [https://perma.cc/GYA9-Y3TM] (last updated Mar. 14, 2025) (detailing state policies governing media access to executions).

30. *Neal*, 788 F. Supp. 3d at 962 (describing the Indiana policy challenged).

31. Id. at 961.

32. Appellants' Principal Brief at 1, Associated Press v. Neal, No. 25-2025 (7th Cir. filed Jul. 28, 2025).

33. Memorandum of Law in Support of Plaintiffs' Motion for Temporary Injunction, Associated Press v. Nelsen, No. 25-1513-III (Tenn. Ch. Ct. filed Oct. 29, 2025); Chancellor's Order Granting Temporary Injunction, Associated Press v. Nelsen, No. 25-1513-III (Tenn. Ch. Ct. filed Jan. 16, 2026).

34. See Roemer, supra note 29 (identifying Tennessee among several states that have limitations on the number of journalists permitted to witness executions).

35. Jacob Kauffman, Update: Arkansas Bars Media From Using Pen & Paper to Document Executions, Little Rock Pub. Radio (Apr. 20, 2017), https://www.ualrpublicradio.org/2017-04-20/update-arkansas-bars-media-from-using-pen-paper-to-document-executions [https://perma.cc/N2JG-X4JC].

36. Appellants' Principal Brief at 42–45, *Neal*, No. 25-2025 (7th Cir. filed July 28, 2025).

Right-of-access claims, including those raised in these execution lawsuits, are now generally analyzed through a broadly discretionary "experience and logic" test, which weighs whether there is an established history of access and whether such access is beneficial to the "functioning of the particular process."[37] A more enlightened or sympathetic reading of the Press Clause could support a loosening or complete reframing of this doctrine. Asserting clear constitutional rights to access on a federal level would replace the current patchwork state-by-state approach.[38] It could also provide, as Justice Stewart proposed in his concurring opinion in *Richmond Newspapers v. Virginia*, that when there is limited access to government proceedings, space must be reserved for members of the press.[39] And it could lead courts and other government agencies to exempt the press from certain time, place, and manner restrictions, including generalized dispersal orders or curfews. This would facilitate better reporting on timely matters of public concern such as protests.[40] Curfews and dispersal orders are a common rationale for arresting journalists who are doing their jobs[41]—a press exemption from such orders could also function to protect individual reporters.

More broadly but still within practical limits, an expanded understanding of the Press Clause could be wielded to challenge laws that seriously limit newsgathering by reaffirming that newsgathering is a fundamental First Amendment press right. Media organizations enjoy no immunities from generally applicable laws, even those that would obstruct their reporting process, under Supreme Court precedents such as *Associated Press v. NLRB*.[42] Under tort or contract law, journalists can end up liable for damages as a result of newsgathering activities including going undercover, entering restricted locations, or recording without consent.[43] When the generally applied law's burden on free

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37. See, e.g., Press-Enterprise Co. v. Superior Ct. of Cal., 478 U.S. 1, 8–9 (1986); Globe Newspaper Co. v. Superior Ct., 457 U.S. 596, 605–06 (1982).

38. See Abrams et al., supra note 20, at 570–71 ("The Second, Fourth, Sixth, and Ninth Circuits have broadened the right of access beyond the context of criminal proceedings . . . . [T]he Sixth Circuit has held that there is a First Amendment right of access to executive branch deportation hearings and the Third Circuit has held that there is not." (citations omitted)).

39. 448 U.S. 555, 600 n.3 (1980) (Stewart, J., concurring).

40. See Tyler Valeska, A Press Clause Right to Cover Protests, 65 Wash. U. J.L. & Pol'y 151, 163–64 (2021) (arguing that the Press Clause supports journalist newsgathering rights at protests, including through media exemptions from curfews and special access rights).

41. See, e.g., Freedom of the Press Found., U.S. Press Freedom in Crisis: Journalists Under Arrest in 2020 11–13 (2020); Hannah Bloch-Wehba, Policing Press Freedom, Knight First Amend. Inst. at Colum. U. (July 16, 2024), https://knightcolumbia.org/content/policing-press-freedom [https://perma.cc/5T3L-UD3H].

42. E.g., 301 U.S. 103, 132–33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws.").

43. See, e.g., Food Lion, Inc. v. Capital Cities/ABC Inc., 194 F.3d 505, 510–11, 524 (4th Cir. 1999) (upholding a judgment against ABC television reporters for the torts of

speech is only supposedly "incidental," there is no viable First Amendment defense.[44] Under a structural reading of the Press Clause, newsgathering and the acquisition of information otherwise unknown to the general public could and should be seen as a fundamental function of the press in a democracy. As such, courts could provide news organizations with exemptions or additional due process protections from laws of general applicability that would obstruct the reporting process.

A more expansive reading of the Press Clause could also support overturning or modifying certain precedents that have refused to protect news organizations from invasive inquiries by the state. One clear target would be *Branzburg v. Hayes*, in which the Court rejected a First Amendment argument for protecting journalists from subpoenas forcing them to testify before grand juries and potentially reveal confidential sources.[45] In response to *Branzburg*, many states have adopted "reporter's privilege" legislation to shield journalists from certain compelled disclosures of confidential sources and information.[46] These protections could be extended nationwide, in recognition of the potential weaponization of subpoenas to chill the reporting process and threaten press freedoms.

Branzburg is not the only decision that has left open this possibility of limiting state power to threaten journalistic independence. Under a strengthened Press Clause, the Court should adopt an approach to journalistic freedom that directly rejects its holding in *Zurcher v. Stanford Daily*.[47] In that case, the Court concluded that a police search of a newsroom did not violate the First Amendment as long as the preconditions for a search warrant were met, even when the newspaper itself was not suspected of criminal activity.[48] This decision, like *Branzburg*, was then superseded by statute—although this time on the federal level. The Privacy Protection Act of 1980 set a much higher bar for searches and seizures of reporters' work product,[49] although its efficacy has come into question after the recent late-night search of the

trespass and breach of duty of loyalty, which arose out of their undercover reporting activities at a grocery store chain).

44. See Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991) (noting that the case was controlled by a "well-established line of decisions holding that generally applicable laws do not offend the First Amendment simply because their enforcement against the press has incidental effects on its ability to gather and report the news").

45. 408 U.S. 665, 691 (1972).

46. See, e.g., N.Y. Civ. Rights Law § 79-h(b) (McKinney 2025); Reporters' Privilege Compendium, Reporters Comm. for Freedom of the Press, https://www.rcfp.org/reporters-privilege/ [https://perma.cc/AH9B-S2D7] (last visited Feb. 9, 2026).

47. 436 U.S. 547, 551 (1978).

48. Id. at 565–67.

49. 42 U.S.C. § 2000aa (2024).

home of a *Washington Post* reporter.[50] Such searches, like the subpoenas greenlit in *Branzburg*, provide a mechanism for threatening the privacy and editorial freedom of news organizations, and thus should be treated with major skepticism not only by lawmakers, but also by the courts.

Finally, a more sympathetic reading of the Press Clause could support greater protections for journalists who publish leaked information that may have been illegally obtained by sources. The Supreme Court's decision in *New York Times Co. v. United States* refused, in the context of the facts of the case, to allow prior restraints on the publication of highly classified government information, even as the Vietnam War continued.[51] The opinions in that case still left open the possibility of subsequent punishment after publication, with Justice Byron White in his concurrence discussing the possibility of convictions under the Espionage Act.[52]

Three decades later, the Court addressed this question of the media's liability for publishing illegally obtained information in *Bartnicki v. Vopper*.[53] The test established in *Bartnicki* shields a journalist from liability for publishing information on a matter of public concern if they "played no part" in the initially illegal acquisition and lawfully acquired the information themselves.[54]

Unsurprisingly, this test has been difficult to apply consistently, particularly due to technological developments that have changed the ways that information can be obtained and shared. Professors Erik Ugland and Christina Mazzeo, in their analysis of *Bartnicki*,[55] have instead suggested adopting a simple principle already set forth in the Court's decision in *Smith v. Daily Mail Publishing Co.*, a case that I argued and that held that when a newspaper "lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."[56] This approach is far more

50. Adam Liptak, Search of Reporter's Home Tests Law With Roots in a Campus Paper's Suit, N.Y. Times (Jan. 19, 2026), https://www.nytimes.com/2026/01/19/us/politics/washington-post-search-press-freedom.html (on file with the *Columbia Law Review*).

51. 403 U.S. 713, 714 (1971). See generally Floyd Abrams, Speaking Freely (2005) (providing further context on the case and the publication of the Pentagon Papers).

52. *N.Y. Times Co.*, 403 U.S. at 735–37 (White, J., concurring) ("The Criminal Code contains numerous provisions potentially relevant to these cases . . . . [T]he newspapers are presumably now on full notice of the position of the United States and must face the consequences if they publish.").

53. 532 U.S. 514, 517–18 (2001).

54. Id. at 525.

55. Erik Ugland & Christina Mazzeo, Hacks, Leaks, and Data Dumps: The Right to Publish Illegally Acquired Information Twenty Years After *Bartnicki v. Vopper*, 96 Wash. L. Rev. 139, 194 (2021).

56. 443 U.S. 97, 103 (1979).

consistent with an interpretation of the First Amendment that prioritizes the role that a free and intrepid press plays in an informed democracy.

Whether the Supreme Court appears likely to provide any such interpretation is, at best, unclear. Indeed, repeated language of that Court suggests an unwillingness on its part to make much, if anything, of the explicit language of the First Amendment protecting the press. It is difficult otherwise to interpret the Court's repeated assertion that "we have consistently rejected the proposition that the institutional press has any constitutional protection beyond that of other speakers."[57] Perhaps it is only the undefined "institutional" press the Court had in mind. But however read, the Court's language can hardly be read as supportive of protecting the press—however defined—from governmental overreach.

In suggesting that some or all of what I have just proposed would significantly advance First Amendment interests, I think it useful to indicate what would not do so. That would involve our nation's adoption of what has become known as a "right to be forgotten," a quite different approach to balancing freedom of speech with claims of privacy which is in effect throughout most of Europe.[58]

In 2014, the Court of Justice of the European Union, in what has become known as the *Google Spain* case, articulated a "right to be forgotten" which effectively requires Google and other search engines to remove links to content initially published in newspapers or elsewhere that is determined to be "inadequate, irrelevant or no longer relevant."[59] Under that legal regime, truth is no defense.[60] Indeed the truthfulness of the targeted information is usually why it is sought to be forgotten.

The initial 2014 *Google Spain* decision establishing a right to be forgotten essentially required the search engine to delist certain newspaper articles from its search results. A 2023 decision of the European Court of Human Rights went further. In the case of *Hurbain v. Belgium*, that Court upheld a decision of a Belgian court ordering a

57. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 352 (2010) (internal quotation marks omitted) (quoting Austin v. Mich. Chamber of Com., 494 U.S. 652, 691 (1990) (Scalia, J., dissenting)); see also Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 783–84 (1985) (Brennan, J., dissenting) ("Accordingly, at least six Members of this Court . . . agree today that, in the context of defamation law, the rights of the institutional media are no greater and no less than those enjoyed by other individuals or organizations engaged in the same activities.").

58. See Robert C. Post, Data Privacy and Dignitary Privacy: *Google Spain*, The Right to be Forgotten, and the Construction of the Public Sphere, 67 Duke L.J. 981, 986–87 (2018) (describing the series of events that established the right to be forgotten in the European Union).

59. Case C-131/12, Google Spain SL v. Agencia Española de Protección de Datos, ECLI:EU:C:2014:317, ¶¶ 94, 100 (May 13, 2014).

60. Id. ¶ 94.

newspaper to anonymize an article in its electronic archive.[61] The offending article asserted that a named individual had caused a car accident with two fatalities while under the influence of alcohol, for which he was convicted and imprisoned.[62] In the end, European courts agreed that the driver had a right to have his fatal car accident forgotten, expressing concern that the article had scarred the driver with "a virtual criminal record."[63] Other European newspapers have similarly found articles they published delisted from search engines for containing truthful but embarrassing information from the past including past criminal arrests or convictions.[64]

In September 2015, the English newspaper *The Telegraph* published almost one hundred examples of truthful articles it had published that Google was obliged to remove from its search results under the right to be forgotten.[65] Here are ten examples out of that hundred.[66]

1. An article about a former porn star and brother of a baroness who had been found guilty of two counts of insider trading.
2. An article about a pilot who was killed during a fundraising flight for his village church.
3. A story about a mother of two who was unanimously found not guilty of seven charges made against her by a sixteen-year-old male pupil who alleged that the pair had a ten-month relationship.
4. A story about a law student who was convicted of killing and burying in concrete his controlling father who wanted him to study at the Sorbonne in Paris.
5. A story about a detective who sparked an armed siege inside a police station after allegedly threatening to kill a colleague.

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61. Hurbain v. Belgium, App. No. 57292/16, ¶¶ 255–257 (Jul. 4, 2023), https://hudoc.echr.coe.int/eng?i=001-225814 (on file with the *Columbia Law Review*) (last visited Mar. 3, 2026).

62. Id. ¶ 13.

63. Id. ¶¶ 255–257 (internal quotation marks omitted).

64. See, e.g., Alex Hern, Google Stops Notifying Publishers of 'Right to be Forgotten' Removals From Search Results, The Guardian (Feb. 15, 2024), https://www.theguardian.com/technology/2024/feb/15/google-stops-notifying-publishers-of-right-to-be-forgotten-removals-from-search-results [https://perma.cc/LP2B-WYZ4]; see also Requests to Delist Content Under European Privacy Law, Google, https://transparencyreport.google.com/eu-privacy/overview?hl=en [https://perma.cc/8U42-7ENM] (last visited Feb. 16, 2026) (providing data on delisting requests received and granted by Google under the "right to be forgotten," including examples of real requests).

65. Rhiannon Williams, Telegraph Stories Affected by EU 'Right to be Forgotten', The Telegraph (Sep. 3, 2015), https://www.telegraph.co.uk/technology/google/11036257/Telegraph-stories-affected-by-EU-right-to-be-forgotten.html [https://perma.cc/JSM9-MQBH].

66. Id.

6. An article about a director who was jailed for eight years for stealing more than 34 million pounds from a dotcom company.
7. An article about a former world boxing champion who was jailed for two and a half years after he was caught with £21,000 worth of cannabis in his car.
8. A story about the jailing of a doctor for six years for attempting to spike his pregnant mistress's drinks with drugs to cause her to miscarry their son. The link concerned was an article detailing an email he sent to a colleague following his arrest.
9. An article about a Scottish man who was jailed for life for strangling his wife with a tartan tie and hiding her body under their bed for a week.
10. An article about a company director who killed himself while on Skype with his partner.

Some of the pieces, but by no means all, may seem inconsequential, and depending upon one's view, even unworthy of publication in newspapers. And there is no doubt that all of them caused discomfort at some level to those written about. But taken separately, or as a whole, they reflected the reality of life as depicted in *The Telegraph.* The crimes described were real; the deaths occurred; the trials transpired. The articles related to matters of public interest, yet none may now be accessed through search engines.

The suppression of accurate speech of that sort is inherently troubling. In recent cases in Europe, the right to be forgotten has often been applied in cases in which the supposed vice of what has been published has been nothing less than the truthfulness of what has been published. In 2022, for example, the European Court of Human Rights, in a case entitled *Mediengruppe Österreich GmbH v. Austria*, upheld an order requiring a media company to refrain from publishing a photograph of the brother of the office manager of a candidate for President of Austria if he was referred to as a convicted neo-Nazi in the text.[67] The brother had been convicted as a neo-Nazi in 1995, spending several years in prison, but the conviction had since been erased.[68] To justify the restraint on future publication, the European Court of Human Rights reiterated the Austrian courts' rationale that the photo caption was "not complete" because it did not mention him having "served his sentence and . . . behaved well since."[69]

In this case and others, European judges have been making highly specific editorial decisions about how journalists and media organizations may report information. Right to be forgotten cases often

67. Mediengruppe Österreich GmbH v. Austria, App. No. 37713/18, ¶¶ 1, 6, 72 (Apr. 26, 2022), https://hudoc.echr.coe.int/eng?i=001-216975 (on file with the *Columbia Law Review*).

68. Id. ¶ 9.

69. Id. ¶ 71.

rely on a judge's balancing of discretionary factors to determine whether individuals deserve to have their pasts forgotten, or whether the public deserves to have access to certain information.

For example, in the first right to be forgotten decision by the UK High Court of Justice, two businessmen involved in past white-collar crimes received opposite verdicts when asking Google to take down evidence of their past misbehavior.[70] The court based its decision in part on the extent of each individual's "rehabilitation," deciding to grant the delisting demand only of the man who had "acknowledge[d] his guilt."[71] The right to be forgotten—the right rooted in the notion that truth may not be spoken of certain plainly newsworthy events—has yielded to this highly subjective approach by courts, a disturbing way to decide what truthful speech may be permitted.

Although European law now limits truthful speech in the service of avoiding what it views as undue harm, the United States is not alone in refusing to censor that speech. Brazil has offered a useful anti-censorial approach. In 2021, Brazil's highest court explicitly considered and denied the existence of a legal "right to be forgotten."[72]

That Court found that limiting the spread of truthful information would be incompatible with the nation's constitution,[73] which protects freedoms of expression, information, and the press.[74] The case that led to this determination was not an easy one. Decades after the sexual assault and murder of a young woman, Brazilian media giant Globo had aired photographs of her and her family members in a television broadcast.[75] The woman's surviving family sued for damages based on the unauthorized use of the truthful images.[76] In rejecting the claim, some Brazilian Supreme Court justices emphasized the importance of maintaining a "collective memory," including of the most painful and uncomfortable elements of a nation's history.[77] In her opinion, Justice Cármen Lúcia Antunes Rocha spoke powerfully about the value of preserving stories like the one sought to be forgotten in this case.[78] She asked, "Who will know about slavery, about violence against women, against indigenous people, against gays, except through accounts and the

70. NT1 & NT2 v. Google LLC [2018] EWHC (QB) 799 [5]–[7], [229]–[30] (Eng.).

71. Id. at ¶¶ 169, 222.

72. S.T.F., Recurso Extraordinário No. 1.010.606, Relator: Min. Dias Toffoli, 11.02.2021, Superior Tribunal de Federal Jurisprudência [S.T.F.J.], 4, https://redir.stf.jus.br/paginadorpub/paginador.jsp?docTP=TP&docID=755910773 (on file with the *Columbia Law Review*).

73. Id.

74. Constituição Federal [C.F.] [Constitution], art. 220 (Braz.).

75. S.T.F., Recurso Extraordinário No. 1.010.606 at 97–98.

76. Id. at 98–99.

77. Id. at 81, 174.

78. Id. at 211.

exhibition of specific examples to prove the existence of aggression, torture, and femicide?"[79]

The full court concluded that "[t]he idea of a right to be forgotten, understood as the power to prevent, by reason of the passing of time, the publication of truthful facts and data, lawfully obtained, and published by digital or analogue communication media, is not compatible with the constitution."[80]

Brazil is an admirable example of a nation whose judges are prepared to defend truth-telling. Here too, an imposed right to be forgotten on truthful speech should be understood as utterly irreconcilable with our Constitution. The First Amendment should never allow courts to decide which truths from our past may and may not be unpublished. Preventing the importation of the right to be forgotten to our shores is part of the battle to assure that freedom of the press will remain inviolable.

A final word or two. The topic I have chosen for this evening is necessarily narrow, albeit of wide importance. It does not include, by way of example only, the direct threats mounted by this administration to freedom of the press by dispatching the FBI to raid the home of a *Washington Post* journalist in search of classified information.[81] Or the decision of that newspaper to eliminate its sports department entirely as part of its more general self-destruction.[82]

And second, but hardly secondarily, we're meeting this evening at a law school, a great law school, so I think it's appropriate to close with a few words about law firms and their behavior when confronted with direct threats to their existence by the Trump Administration.

The worst of those days seem to be over. A few firms—too few, of course—behaved gallantly, defending themselves and ultimately the legal profession as a whole from a frontal assault by the Trump Administration on nothing less than the willingness of law firms to represent clients that take positions critical of the government. Thus far the four firms that fought back have prevailed,[83] as they should have, and those that settled

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79. Id. (approximate translation).

80. Id. at 4 (approximate translation).

81. Liptak, supra note 51.

82. Benjamin Mullen, Washington Post Sports Department Was Among Last of Its Kind, N.Y. Times (Feb. 4, 2026), https://www.nytimes.com/2026/02/04/business/media/washington-post-layoffs-sports-section.html (on file with the *Columbia Law Review*).

83. Zach Montague, Judge Strikes Down Trump Order Targeting Another Top Law Firm, N.Y. Times (June 27, 2025), https://www.nytimes.com/2025/06/27/us/politics/trump-susan-godfrey-law-firm-order.html (on file with the *Columbia Law Review*); Zach Montague, Trump Loses Another Battle in His War Against Elite Law Firms, N.Y. Times (May 27, 2025), https://www.nytimes.com/2025/05/27/us/politics/trump-law-firms-wilmerhale.html (on file with the *Columbia Law Review*).

have lost both reputation and money by doing so.[84] Perhaps the braver firms have taught a lesson to those who crumbled under the pressures of the Trump Administration—and to all of us as well. The First Amendment is a mighty cudgel but only when it is used.

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84. See, e.g., Matthew Goldstein, Jessica Silver-Greenberg & Michael S. Schmidt, Inside Elite Law Firms, Protests and Quitting After Trump Deals, N.Y. Times (Apr. 2, 2025), https://www.nytimes.com/2025/04/02/business/trump-law-firms-skadden-paul-weiss.html (on file with the *Columbia Law Review*); Danielle Kaye, Lauren Hirsch & Maureen Farrell, Paul Weiss Deal With Trump Faces Backlash From Legal Profession, N.Y. Times (Mar. 21, 2025), https://www.nytimes.com/2025/03/21/business/paul-weiss-trump-reaction.html (on file with the *Columbia Law Review*); Michael S. Schmidt, Jessica Silver-Greenberg & Matthew Goldstein, Karen Dunn and Other Top Lawyers Depart Paul Weiss to Start Firm, N.Y. Times (May 23, 2025), https://www.nytimes.com/2025/05/23/business/karen-dunn-paul-weiss-partners.html (on file with the *Columbia Law Review*).

ARTICLES

GAMING MONEY

Raúl Carrillo *

The over $250 billion video game industry, the largest entertainment industry in the world, has rapidly developed unregulated monetary systems. Gaming companies issue what this Article terms "gaming money"—points earned in play, gift cards, and platform-stored balances—and increasingly enable conversion of these instruments into bank deposits at scale. Although they adopt many of the features of "money," they evade existing regulatory categorizations while producing familiar problems: rate manipulation, money laundering, and structural opacity and instability for firms in the gaming industry and their counterparties.

This Article shows how companies like Microsoft, Sony, and Roblox are not only harming gamers but issuing "shadow money," evading a host of laws governing money, banking, and finance. Like nineteenth-century canal, railroad, and mining companies, as well as twenty-first-century fintech and cryptocurrency companies, gaming giants engage in private monetary governance. Gaming companies claim to operate "virtual" worlds of entertainment, media, and the arts, beyond the reach of regulators. Yet the law does not ask whether money is "real," but whether its creation infringes on the state's monetary sovereignty. Convertibility—the degree to which gaming money is convertible into currency and bank deposits at scale—should determine regulatory jurisdiction and intensity.

Sony has now applied for a new national charter to issue stablecoins, signaling that gaming companies are moving toward more

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sophisticated infrastructure. The stakes are high: Gaming introduces most U.S. children to the very idea of money. Regulation must confront a future that is already here.

INTRODUCTION

Video games have never been more serious. The gaming industry generated approximately $224 billion in global revenue in 2024.[1] Some experts project that figure will reach $300 billion by 2029.[2] That is more annual revenue than the global movie and music industries combined.[3] Roughly four billion people play video games worldwide, including roughly three out of four children in the United States.[4]

Within the last fifteen years, gaming companies have adopted a "monetize[d]" business model.[5] Many companies earn revenues through *microtransactions*—minor but regular payments for points and items.[6]

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1. Perspectives from the Global Entertainment & Media Outlook 2025–2029, PwC (July 24, 2025), https://www.pwc.com/gx/en/issues/business-model-reinvention/outlook/insights-and-perspectives.html [https://perma.cc/A7CN-5J63] ("The segment had total revenues of US$223.8 billion in 2024 . . . .").

2. See, e.g., id. (stating the industry "is expected to grow to nearly US$300 billion in 2029, fuelled in part by new releases such as *Grand Theft Auto VI* (scheduled for May 2026)").

3. Julian Alcazar & Sam Baird, Game Changer: The Evolution of Video Games' Payments Infrastructure, Fed. Rsrv. Bank Kan. City (Apr. 9, 2025), https://www.kansascityfed.org/research/payments-system-research-briefings/game-changer-the-evolution-of-video-games-payments-infrastructure/ [https://perma.cc/6RUZ-E5JZ] (noting video games generated nearly $190 billion globally in 2024, "much greater than the combined revenues of the global recorded music industry ($36 billion) and global box office industry ($32 billion)").

4. Ent. Software Ass'n, 2023 Essential Facts About the U.S. Video Game Industry 2 (2023), https://www.theesa.com/wp-content/uploads/2023/07/ESA_2023_Essential_Facts_FINAL_07092023.pdf [https://perma.cc/F5EV-SDZA] [hereinafter 2023 Essential Facts] (reporting that "[n]early two-thirds of U.S. adults play video games regularly, and that number jumps to 76% for children under the age of 18"); Video Game Industry Will Flourish 2025 and Beyond, But One of the Big Three Console Makers Will Struggle, DFC Intel. (Dec. 17, 2024), https://www.dfcint.com/video-game-industry-will-flourish-2025-and-beyond-but-one-of-the-big-three-console-makers-will-struggle/ [https://perma.cc/NN5R-B7YZ] (reporting that "[m]ore than 3.8 billion people worldwide played video games in 2024" and forecasting that "that figure is expected to exceed 4 billion players by 2027—nearly half the global population").

5. See Tomas Hubka, Exploring Game Monetization: Traditional Strategies, GameAnalytics (May 16, 2025), https://www.gameanalytics.com/blog/traditional-monetization-strategies [https://perma.cc/ZZ7T-2VQJ] ("The extent of [monetization] strategies vary[,] . . . but they all aim to maximize revenue while providing value to players.").

6. See Daniel L. King, Paul H. Delfabbro, Sally M. Gainsbury, Michael Dreier, Nancy Greer & Joël Billieux, Unfair Play? Video Games as Exploitative Monetized Services: An Examination of Game Patents From a Consumer Protection Perspective, 101 Computs. Hum. Behav. 131, 131 (2019) ("Games as a service are designed to encourage users to make 'in-game purchases' or 'microtransactions', which involves spending money, usually in small amounts (e.g., between $1 and $5), to access (or have the possibility of accessing) virtual items or currency within the game.").

Some games now collect revenue entirely through these purchases rather than sticker prices.[7] According to proponents, microtransactions enable quicker gameplay.[8] Platform distributors—Microsoft, Sony, Apple, Google, and Valve—control monetary infrastructure.[9] Players (or their parents) can add funds to accounts via company gift cards and branded credit cards.[10] Companies also issue store balances.[11]

Most troublingly, gaming companies issue financial instruments within games, and players can convert the value into other forms of money, including dollar-denominated bank deposits.[12] Compared to the early days of analog gaming, it is as if Parker Brothers and the toy industry had collaborated to create, lend, and transfer Monopoly money worldwide, even helping players cash out "funny money" into "real money."

This Article analyzes a suite of financial instruments issued and deployed by the video game industry, terming them "gaming money," as they now display critical features that legal scholars assign to "money," most notably convertibility into government-backed money (bank deposits and cash) at an expanding scale.[13] By issuing this money, gaming companies are not merely creating virtual financial systems, but encroaching on the domain of banking law, which contains several statutes restricting money creation to the federal government-chartered banks, as well as several other laws governing money and finance.[14]

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7. Alcazar & Baird, supra note 3 ("[T]he 'live service' model . . . does not charge for initial access to the game and instead collects revenue solely from microtransactions, such as on virtual items, upgrades, and additional content.").

8. Insert More Coins: The Psychology Behind Microtransactions, Touro Univ. Worldwide (Feb. 25, 2016), https://www.tuw.edu/psychology/psychology-behind-microtransactions/ [https://perma.cc/E4JF-RMMX] ("[M]icrotransactions offer [players] a faster and easier way to advance [in games].").

9. See infra Part II.

10. See infra section II.B.

11. See infra section II.B.

12. See infra section II.B.

13. See, e.g., Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality 3 (2019) [hereinafter Pistor, Code of Capital] (arguing that law creates four key elements of assets that "privilege its holder," including "*convertibility*, which . . . allows holders to convert their private credit claims into state money on demand and thereby protect their nominal value, for only legal tender can be a true store of value"); see also id. at 77–79 (expanding on the earlier point and noting states do not face a "binding survival constraint," as they have the power to create new money, but when private parties are in financial distress, they may have to turn to a government that issues money); Christine Desan, Money's Design Elements: Debt, Liquidity, and the Pledge of Value From Medieval Coin to Modern "Repo", 38 Banking & Fin. L. Rev. 331, 338 (2022) (arguing that shadow bank "near money" is generally supported with "a legally enforceable promise of convertibility to cash or implicit backing by the sovereign's taxing power").

14. See infra section II.B.

Although money is at the core of banking and finance (public and private), no provision of federal banking or financial regulation defines "money." Regulators adopt different, usually implicit definitions of "money" in different ways to govern different sets of disparate markets, activities, and instruments that do not seem to fit into particular categories.[15]

For instance, the Federal Reserve Act requires that Federal Reserve notes be redeemed in "lawful money," which neither the Act nor the courts have defined.[16] The Treasury and state governments license "money services businesses,"[17] including "money transmitters" such as Western Union, and impose requirements regarding data governance, solvency, and the prevention of illicit flows.[18] Federal and state agencies now apply these frameworks (lightly) to regulate digital wallet companies, including companies primarily offering wallets for cryptocurrencies.[19] The Treasury surveils the financial system for various activities clustered under a broad definition of "money laundering."[20]

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15. See, e.g., Remarks by Under Secretary for Domestic Finance Nellie Liang "Modernizing the Regulatory Framework for Domestic Payments" at the Chicago Payments Symposium, Hosted by the Federal Reserve Bank of Chicago, U.S. Dep't of the Treasury (Oct. 9, 2024), https://home.treasury.gov/news/press-releases/jy2639 [https://perma.cc/U8L5-DB77] ("[N]ew kinds of private money or money-like instruments are growing. By 'money,' I mean instruments that are designed to have a stable value and can be used for exchange.").

16. See What Is Lawful Money? How Is It Different From Legal Tender?, Bd. of Governors of the Fed. Rsrv. Sys., https://www.federalreserve.gov/faqs/money_15197.htm [https://perma.cc/MSB7-CGDS] (last visited Apr. 3, 2026) (discussing the Act and state and federal court treatment). Other bodies of law define "money" for purposes beyond the scope of this paper. See U.C.C. § 1-201(b)(24) (defining money as "a medium of exchange currently authorized or adopted by a domestic or foreign government" as part of the model state framework for private commercial transactions); 18 U.S.C. § 2311 (2024) (defining money as legal tender for prosecutions concerning stolen property).

17. See Money Services Business (MSB) Information Center, IRS, https://www.irs.gov/businesses/small-businesses-self-employed/money-services-business-msb-information-center [https://perma.cc/QD3B-JCVS] (last visited May 16, 2026) (defining money services businesses as those "offering check cashing; foreign currency exchange services; or selling money orders, travelers' checks or pre-paid access . . . for an amount greater than $1,000 per person, per day, in one or more transactions").

18. See Nakita Q. Cuttino, The Rise of "FringeTech": Regulatory Risks in Earned-Wage Access, 115 Nw. U. L. Rev. 1505, 1528–30 (2021) ("The law of money transmitters is designed primarily to protect consumer funds that are temporarily in trust with the money transmitters, prevent money laundering, and safeguard consumer data." (footnotes omitted)).

19. Paul Tierno, Cong. Rsch. Serv., IF12405, Introduction to Cryptocurrency 2 (2025), https://crsreports.congress.gov/product/pdf/IF/IF12405 (on file with the *Columbia Law Review*) ("The regulatory framework for MSBs is largely a state-based licensing regime and applies to many nonbank institutions, including crypto exchanges and crypto automated teller machines. At the federal level, these crypto firms are considered MSBs . . . .").

20. See Kathryn Judge & Anil K. Kashyap, Anti-Money Laundering: Opportunities for Improvement 3–8 (2024), https://wifpr.wharton.upenn.edu/wp-content/

Federal and state securities regulators treat markets that blur the lines between banking, securities, and derivatives as "money market funds."[21] Finally, a set of rarely invoked laws governing "legal tender" contain their own conceptions of "money."[22]

One might view the lack of a universal statutory definition of money as a feature of financial regulation that facilitates innovation. From the perspective of this Article, it is more like a "bug" in governance that confuses financial regulation and circumvention of the sovereign's constitutional authority over money creation.[23]

Within gaming money systems, gamers suffer many harms. *Roblox*, the most popular video game in the world, has 112 million daily active users, thirty million of whom are under the age of thirteen.[24] Players exist as avatars, which users customize with "clothing, gear, animations, simulated gestures, emotes, and other objects" and use to play games.[25] Within an immersive environment without a single storyline, players learn how to code and develop games for other players to play.[26] Gamers can earn "Robux" as they become entrepreneurs.[27] Although players can purchase Robux through platforms like the Apple and Google stores, the

uploads/2024/03/WIFPR-Anti-Money-Laundering-Judge-and-Kashyap.pdf [https://perma.cc/CPY5-RSQE] (describing the federal anti-money-laundering regime).

21. See, Craig M. Lewis, Money Market Funds and Regulation, 8 Ann. Rev. Fin. Econ. 25, 26 (2016) (describing the "hybrid," "bank-like" nature of money market funds and the difficulty of regulating these funds).

22. See 31 U.S.C. § 5103 (2024) ("United States coins and currency (including Federal reserve notes and circulating notes of Federal reserve banks and national banks) are legal tender for all debts, public charges, taxes, and dues. Foreign gold or silver coins are not legal tender for debts.").

23. See U.S. Const. art. I, § 8, cl. 5 (granting Congress the power to "coin Money" and "regulate the Value thereof"); id., § 10, cl. 1 ("No State shall . . . coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts . . . .").

24. Statista Rsch. Dep't, Daily Active Users (DAU) of Roblox Games Worldwide From 4th Quarter 2018 to 2nd Quarter 2025, Statista (Nov. 27, 2025), https://www.statista.com/statistics/1192573/daily-active-users-global-roblox/ [https://perma.cc/S6UZ-G9UP] (explaining that *Roblox* had "over 111.8 million daily active users," a 41% increase from Q2 2024, and "as of the first quarter of 2025, about 61 million *Roblox* gamers are aged 13 years or above, compared to 29.7 million younger users").

25. Noel v. Roblox Corp., No. 3:24-cv-00963-JSC, 2024 WL 3747454, at *1 (N.D. Cal. Aug. 8, 2024) (internal quotation marks omitted) (quoting Complaint ¶ 54, *Noel*, 2024 WL 3747454 (N.D. Cal. filed Feb. 16, 2024)).

26. Id.

27. See Guiding Your Up-and-Coming Roblox Developer, Roblox Support, https://en.help.roblox.com/hc/en-us/articles/4438648708756-Guiding-Your-Up-and-Coming-Roblox-Developer (on file with the *Columbia Law Review*) (last visited Feb. 5, 2026) (promoting *Roblox* as an opportunity for entrepreneurship and describing how successful developers make money by converting Robux into fiat currency).

distributors take a 30% cut of all sales.[28] On February 16, 2024, Raymond and Laura Noel, the parents of three gamers, filed a class action lawsuit against Roblox, claiming it financially exploits children.[29] Such lawsuits proceed alongside multiple state attorney general lawsuits (and other federal lawsuits) alleging that *Roblox*'s design facilitates child abuse and grooming (a subject matter beyond the scope of this Article).[30]

For roughly a decade, Electronic Arts' *FIFA* Football franchise, one of the best-selling games of all time,[31] has been a site of fraud. In 2016, coconspirators created software bots that "logged thousands of FIFA football matches within a matter of seconds," improperly earning "*FIFA* coins," which they sold in illicit secondary markets for over $16 million.[32] In 2021, Ukrainian law enforcement inspected a warehouse thought to have been used for cryptocurrency mining, finding fraudsters running bots on 3,800 PlayStation 4 consoles to earn *FIFA* coins and sell them in illicit markets.[33]

During the global COVID-19 pandemic, many gamers in countries with unstable currencies made a living by earning gaming money they could convert into government-backed money.[34] For instance, in *Axie*

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28. Tim Higgins, Apple Doesn't Make Videogames. But It's the Hottest Player in Gaming., Wall St. J., https://www.wsj.com/articles/apple-doesnt-make-videogames-but-its-the-hottest-player-in-gaming-11633147211 (on file with the *Columbia Law Review*) (last updated Oct. 2, 2021).

29. *Noel*, 2024 WL 3747454, at *1–3.

30. See Reuters, Florida Attorney General Issues Subpoenas to Roblox Over Child Safety, NBC News (Oct. 20, 2025), https://www.nbcnews.com/tech/tech-news/florida-attorney-general-issues-subpoenas-roblox-child-safety-rcna238711 [https://perma.cc/TBB3-W3FR] (noting "mounting scrutiny" including lawsuits "alleging [Roblox] fails to implement adequate safety measures and enables sexual predators to exploit children"); see also Complaint at 28, Tennessee v. Roblox Corp., No. 25CV-55330 (Tenn. Ch. Ct. filed Dec. 18, 2025) (arguing Roblox's "virtual currency system gives predators a ready-made bargaining chip—Robux—which becomes both the bait and the weapon"); Clare Duffy, Lawsuits Claim Roblox Endangers Kids. New AI Age Verification Aims to Block Them From Chatting With Adults, CNN Bus., https://www.cnn.com/2025/11/18/tech/roblox-ai-age-verification-youth-safety (on file with the *Columbia Law Review*) (last updated Nov. 18, 2025) (detailing the company response, which now requires children to provide government ID or let "an artificial intelligence age estimation tool photograph their face").

31. Tom Bowen, The Most Popular Video Game Franchises of All Time, Game Rant, https://gamerant.com/biggest-best-selling-video-game-franchises-most-popular/ (on file with the *Columbia Law Review*) (last updated Sep. 12, 2024) (listing *FIFA* at number six).

32. Press Release, DOJ, Fourth Defendant Convicted in Scheme that Defrauded Software Company of Over $16 Million Worth of Virtual Currency (Nov. 16, 2016), https://www.justice.gov/archives/opa/pr/fourth-defendant-convicted-scheme-defrauded-software-company-over-16-million-worth-virtual [https://perma.cc/JKE6-3S9D].

33. Adam Bankhurst, Thousands of PS4s Being Used as a FIFA Ultimate Team Bot Farm Seized by Ukrainian Police, IGN (July 18, 2021), https://www.ign.com/articles/thousands-of-ps4s-used-as-fifa-ultimate-team-bot-farm-ukrainian-police-seized [https://perma.cc/AHA4-MFJQ].

34. See, e.g., Lyllah Ledesma, Axie Infinity Finds Ready Players in Hyperinflation-Racked Venezuela, CoinDesk (Nov. 23, 2021), https://www.coindesk.com/

Infinity, a game reminiscent of Nintendo's Pokémon, players buy, trade, and battle each other with creatures called "Axies" (which are themselves digital representations of art known as non-fungible tokens, or NFTs).[35] In 2022, the game's payment token, "Smooth Love Potion," collapsed, plunging many users into debt and leaving others with worthless investments in Axies.[36]

As harm to players becomes apparent, online gaming is receiving more academic attention. While other scholars have explored money in video games from different angles, such as gambling law[37] and consumer protection for children,[38] as well as the possibility of taxation[39] and securities regulation[40] within virtual environments, the literature has yet

markets/2021/11/23/axie-infinity-finds-ready-players-in-hyperinflation-racked-venezuela/ [https://perma.cc/44UW-HWBM] (last updated May 11, 2023) ("Given the complicated economic situation in Venezuela, Axie Infinity's method of letting people earn money by playing offers an attractive alternative to citizens to signing on to low-wage jobs to overcome the nation's hyperinflation.").

35. Xuan-Thao Nguyen, Blockchain Games and a Disruptive Corporate Business Model, 6 Stan. J. Blockchain L. & Pol'y 43, 67–68 (2023).

36. See Andrew R. Chow & Chad de Guzman, A Crypto Game Promised to Lift Filipinos Out of Poverty. Here's What Happened Instead, Time (July 25, 2022), https://time.com/6199385/axie-infinity-crypto-game-philippines-debt/ [https://perma.cc/KC23-XYKC].

37. See, e.g, Sheldon A. Evans, Pandora's Loot Box, 90 Geo. Wash. L. Rev. 376, 378 (2022) (arguing state agencies should regulate loot boxes—virtual boxes with unknown contents that players can purchase—as gambling); John T. Holden, Trifling and Gambling With Virtual Money, 25 UCLA Ent. L. Rev. 41, 94–96 (2018) (arguing Congress should "propos[e] legislation that would treat activities that act like gambling as gambling activities and provid[e] common-sense regulation and consumer protections"); Alex Reyes, Open-World Regulation: The Urgent Need for Federal Legislation on Video Game Loot Boxes, 16 Wash. J.L. Tech. & Arts 87, 104 (2021) (proposing "a ban similar to the Netherlands and Belgium, but with a more constrained focus on restricting sales of loot boxes to children").

38. See, e.g., Nizan Geslevich Packin, Financial Inclusion Gone Wrong: Securities and Cryptoassets Trading for Children, 74 Hastings L.J. 349, 356 (2023) (situating the gamification of finance within a growing body of children's law and arguing fintech games could "have a developmentally and behaviorally disruptive influence on children").

39. See, e.g., Young Ran (Christine) Kim, Taxing the Metaverse, 112 Geo. L.J. 787, 795, 802, 806, 810 (2024) (proposing that the IRS subject Metaverse income and wealth to immediate taxation or risk "open[ing] up the Metaverse as a potential tax haven"). "[T]he term Metaverse is used to describe any network of virtual worlds wherein participants engage in economic activity, including the ability to consume, create, trade, and accumulate digital items with real economic value." Id. at 792.

40. Compare Eric C. Chaffee, Securities Regulation in Virtual Space, 74 Wash. & Lee L. Rev. 1387, 1392 (2017) ("[R]egulators and courts should determine that these securities existing entirely within virtual space, which are dependent on virtual activity, are not securities for purposes of federal securities regulation."), with Wendy Gerwick Couture, The Risk of Regulatory Arbitrage: A Response to *Securities Regulation in Virtual Space*, 74 Wash. & Lee L. Rev. Online 234, 235–36 (2018), https://scholarlycommons.law.wlu.edu/wlulr-online/vol74/iss2/1 (on file with the *Columbia Law Review*) (responding to Chaffee's argument, countering that the virtual transactions, because of their ability to facilitate arbitrage, should fall within the ambit of

to examine new online gaming practices as a unique puzzle for laws governing money.

This Article shows how dominant video game companies are not only harming gamers but, much like financial technology and cryptocurrency companies, developing "shadow money" systems[41] and thus evading regulations meant to prevent structural harms. Compounding problems further, gaming companies can invoke a distinctive defense, claiming they operate "virtual" worlds of entertainment, media, and the arts, beyond the reach of regulators. Yet the laws governing money do not ask if money is "real," for instance, but whether its issuance infringes on the legal privileges of the federal

securities regulation, and instead proposing a new "exemption from registration that would further the policy goals of the securities laws while not stifling innovation in virtual space").

41. The legal literature on money, banking, and finance contains many different definitions of shadow money. This Article uses the term shadow money to refer to a variety of financial instruments issued by nonbank corporations that serve most or all of the functions of money without government regulation. See, e.g., Morgan Ricks, The Money Problem: Rethinking Financial Regulation 4, 11 (2016) [hereinafter Ricks, The Money Problem] (defining shadow money as "close substitutes for deposit instruments"); John Crawford, The Dollar Dilemma: Hegemony, Control, and the Dollar's International Role, 18 Va. L. & Bus. Rev. 149, 159–61 (2024) (situating "shadow money" below Federal Reserve and commercial bank deposits within a "*hierarchy* of money claims"); Lev Menand & Morgan Ricks, Rebuilding Banking Law: Banks as Public Utilities, 41 Yale J. on Regul. 591, 646 (2024) ("[T]he decision to design deposit insurance primarily for households is part of the reason a range of highly unstable shadow money instruments . . . emerged in the second half of the twentieth century."); David Min, Housing Finance Reform and the Shadow Money Supply, 43 J. Corp. L. 899, 900 (2018) (arguing that government-backed housing finance produces liabilities that function as money and crowd out shadow money); Daniela Gabor & Jakob Vestergaard, Towards a Theory of Shadow Money 2 (Inst. for New Econ. Thinking, Working Paper, 2016), https://www.ineteconomics.org/uploads/papers/Towards_Theory_Shadow_Money_GV_INET.pdf [https://perma.cc/6FSR-99FY] (defining "shadow money" as "repo liabilities, promises backed by tradable collateral"). Readers may be more familiar with the term "shadow banking," as opposed to "shadow money." Although scholars initially used the term "shadow banking" to refer primarily to nonbank maturity transformation, it is now more comprehensive. See, e.g., Ricks, The Money Problem, supra note 41, at 95–96 (explaining that experts use the term "shadow banking" narrowly, whereas others use it as a general reference to bank-like activity, or unregulated or lightly regulated parts of the financial system); Adam J. Levitin, Rent-A-Bank: Bank Partnerships and the Evasion of Usury Laws, 71 Duke L.J. 329, 342 (2021) [hereinafter Levitin, Rent-A-Bank] (expanding the definition of shadow banking to include consumer-facing activities); Steven L. Schwarcz, Regulating Shadow Banking, 31 Rev. Banking & Fin. L. 619, 620–26 (2012) (describing shadow banking as intermediation that is less regulated than chartered banking, which can function as a "public good" and increase efficiencies, but can also "pose systemic risks to the financial system"). For the macro dynamics of shadow money and banking, see, e.g., Dan Awrey & Kathryn Judge, Why Financial Regulation Keeps Falling Short, 61 B.C. L. Rev. 2295, 2304 (2020) (arguing a shadow banking "network" "funded mortgages . . . using short-term debt, with commercial paper, repurchase . . . agreements, and money market funds serving as substitutes for deposits"); Robert C. Hockett & Saule T. Omarova, The Finance Franchise, 102 Corn. L. Rev. 1143, 1175 (2017) (describing how nonbank financial institutions "replicate" the role of chartered banks within the broader economy).

government and its chartered money.[42] Financial regulation, especially banking law and legal tender law, contemplates the development of shadow money regardless of technological format. Moreover, banking regulators govern "by hypothetical" and should not wait for small-scale problems to become large-scale crises.[43] The Treasury, including its Financial Crimes Enforcement Network (FinCEN), and state money transmitter and securities regulators all require corporations engaged in money transmission and related services to register before doing business.[44] Finally, the application of legal tender law, although unassigned to any particular regulator, would explicitly ban many of the practices adopted by video game companies.

The Article proposes that federal agencies supervise companies converting or materially supporting the conversion of gaming money to government-backed money (currency and bank deposits) at scale. Ultimately, however, Congress should empower regulators to supervise gaming companies that issue convertible gaming money at scale.

The Article concludes by reviewing the argument and expounding on how an analysis of gaming money generates insights that should inform how scholars and policymakers should approach the relationship between financial regulation, especially monetary regulation, and technology. Gaming money is part of a new kind of payments infrastructure, embedded within a functionally sovereign social platform where the financial instruments in question often remain the property of the issuer. For now, at least, this regime should be agnostic toward the specific quality of this technology in defining jurisdiction but sensitive in the intensity of supervision of companies that do not cause concern regarding their conversion practices.

Beyond gaming, the Article suggests that regulators should approach money itself as a category of regulatory concern, regardless of how the regime has previously governed the instruments in question. This Article does not undertake to prove this broader, structural claim, but does illustrate it within a particularly technologically sophisticated industry. The gaming case urges a more unified analysis.

Part I analyzes the history of corporations deploying new technology to create "shadow money" just beyond the reach of the law. Congress has charged banking regulators with preventing such developments. Policymakers have also previously terminated or proactively prevented

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42. See infra Part III (discussing the laws governing money, banking, and finance, and the risks of underregulation).

43. See Mehrsa Baradaran, Regulation by Hypothetical, 67 Vand. L. Rev. 1247, 1255–57 (2014) (citing stress tests and living wills as key examples of banking "regulation by hypothetical").

44. 31 U.S.C. § 5330(a)(1), (d) (2024) (requiring money transmitters, including transmitters of "value that substitutes for currency," to register with the Treasury); 31 C.F.R. § 1022.380(a)(1) (2025) (requiring money services businesses [MSBs] to register with FinCEN).

the issuance of shadow money by railroad, canal, and mining companies,[45] retail giants,[46] and social media conglomerates.[47] Per Professor Dan Awrey of Cornell Law School, "[f]or most of the twentieth century, banks enjoyed a virtual monopoly over private money creation."[48] Today, gaming companies follow fintech and cryptocurrency companies that have been issuing shadow money for over a decade.[49] They engage in activities in ways that confuse regulatory categories and boundaries.[50] In the twenty-first century, the sovereign struggles to govern money and banking. History suggests banking regulation is incomplete without a vision of concretely regulating nonbank corporate monies.

Part II shows how gaming companies create money through games, online stores, and gift cards. Gaming money is critical in organizing information, data governance, and behavior within the game.[51]

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45. Congress mitigated the circulation of "scrip" during the Civil War through the nearly forgotten Stamp Payments Act of 1862, a regulatory form of legal tender law. For the contemporary codification of the Stamp Payments Act, see 18 U.S.C. § 336 (2024) ("Whoever makes, issues, circulates, or pays out any note . . . or other obligation for a less sum than $1, intended to circulate as money or to be received or used in lieu of lawful money of the United States, shall be fined under this title or imprisoned . . . ."); see also infra section I.C. (discussing how railroad, canal, and mining companies have issued scrip).

46. See, e.g., Arthur E. Wilmarth, Jr., Wal-Mart and the Separation of Banking and Commerce, 39 Conn. L. Rev. 1539, 1568–69 (2007) (arguing that "federal and state legislators have repeatedly passed laws to separate banks from commercial enterprises," including the Banking Act of 1933, widely known as the Glass–Steagall Act, as well as the Bank Holding Company Act of 1956).

47. See, e.g., Elizabeth Dwoskin & Gerrit De Vynck, Facebook's Cryptocurrency Failure Came After Internal Conflict and Regulatory Pushback, Wash. Post (Jan. 28, 2022), https://www.washingtonpost.com/technology/2022/01/28/facebook-cryptocurrency-diem/ [https://perma.cc/ZJJ9-Z55G] (describing policymakers' response to Facebook's attempt to issue "Libra," a stablecoin).

48. Dan Awrey, Bad Money, 106 Corn. L. Rev. 1, 39 (2020) [hereinafter Awrey, Bad Money].

49. See infra Part III.

50. See Dan Awrey, Unbundling Banking, Money, and Payments, 110 Geo. L.J. 715, 719–20 (2022) (discussing how "shadow payment platforms (SPPs)" have "forced policymakers to rethink the legal, technological, and institutional architecture of our existing systems of money and payments" (internal quotation marks omitted) (quoting Dan Awrey & Kristin van Zwieten, Mapping the Shadow Payment System 1 (SWIFT Inst., Working Paper No. 2019-001, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3462351 (on file with the *Columbia Law Review*))) [hereinafter Awrey, Unbundling]; Saule T. Omarova & Graham S. Steele, Banking and Antitrust, 133 Yale L.J. 1162, 1244–50 (2024) (arguing a host of recent unbundling dynamics have undermined "the traditional public-policy principles embedded in the U.S. banking law").

51. Although the broader data governance dimensions of gaming money warrant thorough analysis, they are beyond the scope of this Article, which focuses on money, banking, and finance. For now, it is sufficient to note that data collection is intrinsic to the gaming money business model and prefigures each of the financial harms this Article addresses.

Moreover, the monetization of video games leads to many harmful practices. First, gaming companies manipulate exchange rates between gaming money and government currency, rendering the nominal value of many retail financial products and services illusory.[52] Second, gaming companies have created environments ripe for laundering money between gaming money systems and chartered banks.[53] Third, gaming companies expose gamers, developers, and counterparties to new forms of payments and liquidity risk.[54]

Part III argues that gaming companies also present a novel legal challenge, which is nevertheless surmountable. Unfortunately, many policymakers have implicitly subscribed to the metaphor of a "magic circle," a term some scholars use to separate worlds of play from the real world, that is the proper realm of law,[55] even as many dispute the metaphor's utility.[56] In the courts, the gaming industry regularly leverages the background laws of intellectual property, speech, and communications that encase technology and entertainment companies from regulation.[57] Gaming companies constitute and reinforce this

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52. See infra section II.C.1.

53. See infra section II.C.2.

54. See infra section II.C.3.

55. Historian Johan Huizinga coined the metaphor in 1938 in his book *Homo Ludens*. See Johan Huizinga, Homo Ludens: A Study of the Play-Element in Culture 10 (Roy Publishers trans., 1950) (1938) ("The arena, the card-table, the magic circle, the temple, the stage, the screen, the tennis court, the court of justice, etc., are all in form and function play-grounds . . . within which special rules obtain. All are temporary worlds within the ordinary world, dedicated to the performance of an act apart."). For foundational legal treatment of the "magic circle" metaphor, see Joshua A.T. Fairfield, The Magic Circle, 11 Vand. J. Ent. & Tech. L. 823, 824–25 (2009) [hereinafter Fairfield, Magic Circle] ("The purpose of the magic circle is to protect virtual worlds from outside influences—law, real-world economics, real-world money, and the like."); id. at 825 ("This Article seeks to debunk the magic circle. The thrust of my argument is simple: There is no 'real' world as distinguished from 'virtual' worlds. Rather, all supposedly 'virtual' actions originate with real people, and impact real people, albeit through a computer-mediated environment.").

56. See Trey Hickman & Kristin E. Hickman, The Myth of the Magic Circle: Rejecting a Single Governance Model, 2 U.C. Irvine L. Rev. 537, 537–43 (2012) (discussing different perspectives regarding the magic circle metaphor and arguing not for jettisoning it, but rather for redefining it "from a regulatory perspective," as "a worthwhile endeavor").

57. See infra section III.A (discussing how companies structure some forms of gaming money as licensed virtual content rather than financial instruments, enabling them to disclaim user property interests and alienability rights to evade a suite of laws beyond financial regulation, where the virtuality defense is anticipated, but not yet deployed); see also Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 790 (2011) ("California correctly acknowledges that video games qualify for First Amendment protection."); Colvin v. Roblox Corp., 725 F. Supp. 3d 1018, 1027 (N.D. Cal. 2024) ("The plaintiffs' claims are not barred by Section 230 because they do not treat Roblox as a publisher or speaker."); Coffee v. Google, LLC, No. 20-cv-03901-BLF, 2022 WL 94986, at *12–13 (N.D. Cal. Jan. 10, 2022) (holding that a loot box item is not a "thing of value" under California gambling law because the platform's terms of service prohibit sale); Taylor v. Apple, Inc.,

defense through contract and property law—terms of service (ToS) and end-user license agreements (EULAs) disclaiming convertibility, user property rights, and deposit-like and bank-like features.[58] The disclaimers are revealing: The need to deny such categorization of these legal and financial relations presupposes that the broader public may view the balances this way. Indeed, SEC disclosures and other financial statements reveal some companies may classify gaming money as liabilities on their balance sheets while simultaneously telling those same consumers that gaming money has no monetary value and constitutes no property right.[59] Effectively, gaming companies operate as if exempt from many important laws governing money, banking, and finance.[60] Situating the analysis within the law and technology literature on virtual spaces[61] and

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No. 20-cv-03906-RS, 2021 WL 11559513, at *5 (N.D. Cal. Mar. 19, 2021) (holding that virtual items obtained from loot boxes lack transferable value in the "real world" and thus lie beyond gambling regulation); Comment Letter from Jeffrey P. Ehrlich, McGuireWoods LLP, to Bureau of Consumer Fin. Prot., at 2, 9 (Mar. 31, 2025), https://downloads.regulations.gov/CFPB-2025-0003-0105/attachment_1.pdf (on file with the *Columbia Law Review*) (urging the CFPB to abandon its proposed rule applying the Electronic Fund Transfer Act [EFTA] to forms of gaming money "akin to tokens at an arcade" that "do not represent real-world monetary value" because "the consumer is still just purchasing an entertainment commodity . . . to use on a specific platform to enhance the entertainment experience.").

58. See, e.g., Epic Account Balance Terms, Epic Games (June 4, 2025), https://legal.epicgames.com/en-US/epicgames/account-balance-terms [https://perma.cc/7G9J-ST3R] (emphasizing that among other features, the Epic Account Balance does not establish personal property rights, is not a bank account or a payment account, does not "constitute deposits," and is not FDIC-insured); Steam Subscriber Agreement § 3(C), Valve Corp. (Sep. 18, 2025), https://store.steampowered.com/subscriber_agreement/ [https://perma.cc/HZL8-K69L] ("Steam Wallet funds do not constitute a personal property right . . . .").

59. See infra section II.B.3 (discussing Roblox reporting on its gift card accounting).

60. See infra Part III (arguing that gaming companies often claim content is "virtual," beyond the reach of governance).

61. For an extensive series of essays written shortly after Linden Labs, the developer and publisher of PC Game *Second Life*, issued the first gaming money, see generally The State of Play: Law, Games, and Virtual Worlds (Jack M. Balkin & Beth Simone Noveck eds., 2006). For similar work, see, e.g., Mark A. Lemley, The Dubious Autonomy of Virtual Worlds, 2 U.C. Irvine L. Rev. 575, 578–79 (2012) (arguing that while the internet has complicated the magic circle metaphor, "the physical architecture of the world we create is at least as powerful a determinant of how people will act as the legal rules and the social norms that more directly intend to govern behavior"); Harrison M. Rosenthal & Genelle I. Belmas, Cyber-Recapitulation? What Online Games Can Teach Social Media About Content Management, 61 Jurimetrics 331, 351–52 (2021) (arguing that while games might not be sovereign entities, the magic circle is still useful in determining whether legal intervention is appropriate); see also F. Gregory Lastowka & Dan Hunter, The Laws of the Virtual Worlds, 92 Calif. L. Rev. 1, 71 (2004) ("Given the complexity of ascertaining a virtual world's emerging legal rules and balancing them with avatar rights and wizardly omnipotence . . . real-world courts entertaining virtual disputes is . . . not very appealing. Perhaps . . . it would be best to require that the laws of the virtual worlds develop within their own jurisdiction.").

platform power,[62] the Article argues that virtuality—or more accurately, the claim of sovereignty over a virtual world—is an insufficient defense against financial regulation. Lawmakers should adopt the regulatory axis of "convertibility," as it tracks the power of private money creation and, thus, the level of public governance necessary.[63] Governments have consistently regulated entities that support the conversion of private money into currency and bank deposits, paying close attention to the instruments and new technologies of conversion.[64] Some companies may not yet engage in pernicious activity at scale and hence may only require light regulatory supervision. However, regulators should not wait for a micro issue to become a macro issue. Despite working in uncertain conditions with limited information, financial regulatory agencies aim to anticipate and ideally prevent crises.[65]

Part IV offers a graduated framework for regulating gaming money, replacing the industry's magic circle with public administrative standards revolving around convertibility to government money, bank deposits, and now, stablecoins, at scale. Based on existing laws, the Consumer Financial Protection Bureau (CFPB) could lead other regulators to examine large

62. In a new casebook, scholars define platforms as "large-scale, centralized places—physical or virtual—that allow people to interact or transact." Morgan Ricks, Ganesh Sitaraman, Shelley Welton & Lev Menand, Networks, Platforms, and Utilities: Law and Policy 7 (2022) (offering railroads, stock exchanges, and social media companies as examples of platforms); see also K. Sabeel Rahman, The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept, 39 Cardozo L. Rev. 1621, 1668–69 (2018) (characterizing platforms as "linking producers and consumers of goods, services, and information"). Some law and technology scholars offer more specific definitions. See Julie E. Cohen, Between Truth and Power: The Legal Constructions of Informational Capitalism 37–47, 63–74 (2019) (describing how platforms both generate and intermediate information networks, while also disciplining infrastructures that facilitate particular types of interactions and value extraction); see also Amy Kapczynski, The Law of Informational Capitalism, 129 Yale L.J. 1460, 1466 (2020) (building on Cohen's account by showing how platform companies leverage various background laws, including laws related to data governance, trade secrecy, intermediary immunities, and the First Amendment). For a canonical example of platform power in the tech sector, see Lina M. Khan, Note, Amazon's Antitrust Paradox, 126 Yale L.J. 710, 710 (2017) (arguing that the consumer welfare standard in antitrust law failed to recognize platform power).

63. See Saleh M. Nsouli, John B. McLenaghan & Klaus-Walter Riechel, Concepts of Convertibility and Stages of Monetary Integration, *in* Currency Convertibility in the Economic Community of West African States 3 (1982) ("A currency may therefore have different degrees of convertibility vis-à-vis other currencies, depending on the ease with which it can be converted and the extent to which it can be used for foreign transactions.").

64. See, e.g., Fact Sheet on MSB Registration Rule, Fin. Crimes Enf't Network, https://www.fincen.gov/fact-sheet-msb-registration-rule [https://perma.cc/F5G3-27Q9] (last visited Feb. 6, 2026) (extending banking regulations to money services businesses such as "currency dealers or exchangers," "check cashers," "issuers of traveler's checks or money orders," "sellers or redeemers of traveler's checks or money orders," and "money transmitters").

65. See, e.g., Baradaran, supra note 43, at 1281 ("Proper risk modeling must incentivize firms to envision and prepare for the worst-case scenario.").

gaming companies that support converting gaming money to currency and bank deposits and other familiar financial instruments for unfair practices.[66] As a practical reality in this political moment, the CFPB is unlikely to move forward, and its very existence is in peril.[67] Ultimately, Congress should also pass a Gaming Money Act, empowering regulators to license and supervise companies issuing gaming money. Licensed gaming money companies would face tailored rate controls, customer identification requirements, and structural separation of gaming money operations from broader business activity, according to relative harms and risks outlined in Parts I and II. These laws would apply regardless of the technological media of gaming money or its characterization per the laws governing media, entertainment, and the arts, but according to its interface with the public money system.

The Article concludes by reviewing the argument and how it suggests a more concerning future for the governance of money, banking, and finance. The stakes are becoming more urgent. Sony has applied for a national trust bank charter to issue cryptocurrency (stablecoins), placing some of its gaming money operations in a new, cognizable, and regulated (if underregulated) space.[68] This move signals that video game companies are seriously interested in building out private monetary systems we hardly understand. If technology companies can engage in regulatory arbitrage across imagined lines of virtuality and reality, then policymakers and scholars must reconstruct regulation.[69]

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66. In 2024, the CFPB expressed concern about video games, focusing on the most apparent harms, such as payment processing errors and privacy violations, but did not adopt a structural framework. CFPB, Banking in Video Games and Virtual Worlds 16 (2024), https://files.consumerfinance.gov/f/documents/cfpb_banking-in-video-games-and-virtual-worlds_2024-04.pdf [https://perma.cc/L8JS-27TE] [hereinafter CFPB Report]; LFG (Looking for Gamers): CFPB Wants to Hear About Your Video Game Loot, CFPB (Jan. 10, 2025), https://www.consumerfinance.gov/about-us/blog/lfg-looking-for-gamers-cfpb-wants-to-hear-about-your-video-game-loot/ [https://perma.cc/S9Y3-YQ3V] (proposing a rule to interpret EFTA to cover gaming, but providing minimal details, right before a change in leadership).

67. Trump Administration Attempts to Close the CFPB, Block Agency's Work, Econ. Pol'y Inst. (Jan. 16, 2026), https://www.epi.org/policywatch/trump-administration-closes-the-cfpb/ (on file with the *Columbia Law Review*) (detailing the timeline over which the Trump administration has challenged the CFPB).

68. Application of Sony Bank Incorporated to Establish a National Trust Bank and Commence Certain Activities Involving Cryptocurrency, Off. of the Comptroller of the Currency (Oct. 6, 2025), https://www.occ.gov/topics/charters-and-licensing/digital-assets-licensing-applications/connectia-trust.pdf [https://perma.cc/H64P-HKCK].

69. See Awrey & Judge, supra note 41, at 2322 (arguing there is a disconnect between the reality of a complex, dynamic, uncertain financial system and regulatory processes that "assume a high degree of knowability, stability, and predictability in designing rules that are both effective and legitimate"); see also id. at 2350–53 (arguing a "holistic mindset" contemplates "emerging, systemic issues that have not yet congealed enough to be salient using a more conventional lens").

I. SHADOW MONEY

Chartered banking incorporates three core functions: money creation, transfer, and lending.[70] Here, we focus on money creation. Banking law scholars have referred to different contemporary forms of nonbank money as "shadow money,"[71] "bad money,"[72] "platform money,"[73] and similar terms. This Article uses the term shadow money to refer to various financial instruments issued by nonbank corporations that serve most or all of the functions of money without government regulation. Since money creation is a legal privilege of banks, nonbank corporations that issue shadow money also engage in shadow banking per expansive, overlapping definitions of that term (engaging in unregulated banking activity).[74] This Part analyzes the history of regulating a continuum of shadow monies from the perspective of banking regulation and its forgotten companion, legal tender regulation. First, it discusses monetary instruments issued by the U.S. government, then instruments issued by nonbank corporations. Finally, it addresses the typical harms caused by tech companies that evade regulation. In Part II, this Article discusses gaming money as shadow money within this continuum, demonstrating how the general harms identified here arise in the specific context of the gaming industry.

A. *Government Money*

There are many scholarly disagreements as to what constitutes money. For many neoclassical economists, money serves only three functions: "a medium of exchange, a unit of account, and a store of value."[75] Other economics textbooks cite a mnemonic rhyme—"Money's a matter of functions four, a Medium, a Measure, a Standard, a Store"—meaning a medium of exchange, a common measure of value (or unit of account), a standard of deferred payment, and a store of value.[76]

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70. See Awrey, Unbundling, supra note 50 (explaining the "bundled" system of banking).

71. See Crawford, supra note 41, at 159 (explaining "the rise of shadow money").

72. See Awrey, Bad Money, supra note 48, at 2–8 (defining bank deposits and regulated money market fund (MMF) shares as "good money," but various contemporary fintech instruments as "bad money," unsafe and lacking in credibility).

73. See Raúl Carrillo, Platform Money, 41 Yale J. on Regul. 894, 900 (2024) (defining "platform money" as "digital wallet balances, held out by technology companies as if they were as safe as FDIC-insured bank deposits").

74. Initially, scholars focused on shadow banking within high finance, but they now address business practices in consumer finance. See, e.g., Levitin, Rent-A-Bank, supra note 41, at 342 (expanding the definition of shadow banking to include consumer-facing activities).

75. N. Gregory Mankiw, Principles of Macroeconomics 325 (6th ed. 2009) (emphasis omitted).

76. Alfred Milnes, The Economic Foundations of Reconstruction 55 (1919).

Over the past decade, against the background of the global financial crisis, the Eurozone crisis, and the popularity of digital currency, many legal scholars studying banking and finance have focused more specifically on money, offering different, often more complex definitions. These definitions inform this Article's analysis, but to deftly grasp the broader argument, economist Hyman Minsky offers a practical quip: "[E]veryone can create money; the problem is to get it accepted."[77] Anyone can issue an IOU, but the IOU likely has little value beyond a bilateral relationship. Whether or not an IOU is "money" is a matter of law and power.

Many legal scholars and economists plot financial instruments within a "hierarchy of money," which helps situate gaming money within monetary history.[78] Atop the hierarchy are government-issued currencies.[79] People are most likely to use currencies because the government promises to accept them to satisfy government debts (such as taxes, fines, and fees).[80] Governments also establish currency as the common denominator for settling debts between private parties in the courts.[81] Government subjects hold these government IOUs, and currency becomes money. The government directly spends into the economy by issuing new money through cash, coins, cards,[82] or whatever

77. Hyman Minsky, Stabilizing an Unstable Economy 255 (McGraw Hill 2008) (1986).

78. See, e.g., Pistor, Code of Capital, supra note 13, at 3 (arguing that "only legal tender can be a true store of value" and that it thus sits atop a hierarchy of assets that can be coded as capital); Katharina Pistor, Moneys' Legal Hierarchy, *in* Just Financial Markets? Finance in a Just Society 185, 187–90 (Lisa Herzog ed. 2017) (arguing that "[h]ierarchy in finance is not a question of fundamental values, but of structures rooted in law and power"). Pistor engages extensively with the scholarship of Perry Mehrling. See Pistor, Moneys' Legal Hierarchy, supra note 78, at 185 ("Following Mehrling (2012) and others, I use the term money to refer to both state and private money, where private money consists of private claims to future payments that can be used as means of payment in their own rights."); Perry Mehrling, The Inherent Hierarchy of Money, *in* Social Fairness and Economics: Economic Essays in the Spirit of Duncan Foley 394, 394 (Lance Taylor, Armon Rezai & Thomas Michl eds., 2013) ("Always and everywhere, monetary systems are hierarchical."); see also Stephanie Bell, The Role of the State and the Hierarchy of Money, 25 Cambridge J. Econ. 149, 160 (2001) ("The debt of the state, which is required in payment of taxes and is backed by its power to make and enforce laws, is the most acceptable money in the pyramid and, therefore, occupies the first tier.").

79. Bell, supra note 78, at 160.

80. See Christine Desan, Money as a Legal Institution, *in* Money in the Western Tradition: Middle Ages to Bretton Woods 18, 24 (David Fox & Wolfgang Ernst eds., 2016) ("Spending and taxing by the government enlarges and constricts money flow. As they anticipate expansion and contraction in supply relative to demand, people determine how much value to attribute to money.").

81. Id. (explaining that the government creates a unit of account that the public and public authorities, including courts, use to settle obligations).

82. See Raúl Carrillo, Seeing Through Money: Democracy, Data Governance, and the Digital Dollar, 57 Ga. L. Rev. 1207, 1218–19 (2023) [hereinafter Carrillo, Seeing Through Money].

instruments it chooses, so long as it proclaims the government will accept them in satisfaction of debts to that government.[83] Many scholars argue that the ability to issue currency and regulate private money is a core component of sovereignty.[84] To distinguish the liabilities of the sovereign, scholars may refer to currency as "high-powered money" within the hierarchy.[85] Governments then regulate other monies according to their functional proximity to government-backed currency. "Low-powered" private money (like gaming money) gains expansive acceptance by its convertibility (at least potentially) into high-powered money. Gaming money sits near the bottom of this hierarchy—below stablecoins and other deposit substitutes and closer to the scrip that railroad and mining companies issued in the nineteenth century.[86] For some scholars, nearly any IOU can become money given sufficient legal reinforcement.[87]

B. *Bank Money*

Bank money lies slightly beneath government money on the hierarchy.[88] The Treasury issues currency,[89] but Congress has delegated general management of the monetary system to the central bank and the broader commercial banking sector, in part to prevent government officials from manipulating it for their own interests.[90] The U.S.

83. See, e.g., John Maynard Keynes, A Treatise on Money 4 (MacMillan & Co. 1935) (1930) (calling the power to determine the money of the economy a "right [that] is claimed by all modern States and has been so claimed for some four thousand years at least"); Adam Smith, The Wealth of Nations 312 (Random House 1937) (1776) (observing that "[a] prince, who should enact that a certain proportion of his taxes should be paid in a paper money of a certain kind, might thereby give a certain value to this paper money").

84. For literature on monetary sovereignty, see, e.g., Karina Patrício Ferreira Lima, Sovereign Solvency as Monetary Power, 25 J. Int'l Econ. L. 424, 424 (2022) ("Drawing on contemporary critiques of money and finance, [this article] argues that as long as the international monetary system is structured upon a global hierarchy of currencies, the solvency of sovereign states is set to be critically determined by their monetary power."); Katharina Pistor, From Territorial to Monetary Sovereignty, 18 Theoretical Inquiries L. 491, 492 (2017) ("It goes without saying that only countries that issue their own currencies retain control over their monetary policies, a precondition for 'monetary' sovereignty.").

85. See Philip Cagan, Determinants and Effects of Changes in the Stock of Money, 1875–1960, at 45 (1965) (introducing "high-powered money" to refer to "bank reserves and currency held by the public").

86. See infra section II.C.

87. See Georg Friedrich Knapp, The State Theory of Money 31–32 (H.M. Lucas & J. Bonar trans., abr. ed. 1924) (1895) (arguing that currency, a coat-check ticket, and a stamp are sanctioned means of payment "to which legal ordinance gives a use independent of its material").

88. This account draws on a previous account of banking law by the Author. See Carrillo, Platform Money, supra note 73, at 909–15.

89. See U.S. Const., art. I, § 8, cl. 5 (granting Congress the power to coin the nation's money and regulate its value).

90. See, e.g., Lev Menand, Why Supervise Banks? The Foundations of the American Monetary Settlement, 74 Vand. L. Rev. 951, 958 (2021) [hereinafter Menand, Why Supervise?] ("The legislators who established the OCC, the Fed, and the FDIC believed

government charters banks to create the instruments people recognize and use as money.[91] Indeed, many scholars have treated banks as public utilities and common infrastructure.[92] A new loan that credits a borrower's account generates a deposit just as much as receiving funds from an external source, and this deposit maintains par value with a U.S. dollar bill.[93] Banks across different jurisdictions and technological contexts have also issued notes, checks, prepaid debit cards, and other instruments with similar attributes.[94] Historically, the law reserved the claims of the one-to-one peg to government-backed money to banks.[95] In exchange for their privileges, chartered banks accepted specific responsibilities regarding safety and soundness, inclusiveness, and integrity.

Regulators make the process of obtaining banking charters more challenging than a generic corporate charter.[96] Chartering locks in commitments regarding services to depositors, monitoring of illicit flows, and safety and soundness.[97] As there is no omnibus screening process, a

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that the power to expand the money supply was too great to leave in the hands of elected bodies and that doing so would lead to corruption, stagnation, and a debased currency.").

91. See United States v. Phila. Nat'l Bank, 374 U.S. 321, 326 (1963) (describing the money-creating role of commercial banks); see also Brief of Thirty-Three Banking Law Scholars as *Amici Curiae* in Support of Appellee at 1–5, Lacewell v. Off. of the Comptroller of the Currency, 999 F.3d 130 (2d Cir. 2021) (No. 19-4271-cv) [hereinafter Lacewell Amici Brief] (explaining that a fundamental aspect of banking is the creation of money); Michael McLeay, Amar Radia & Ryland Thomas, Money Creation in the Modern Economy, Bank Eng. Q. Bull., Mar. 14, 2014, at 14, 16 (describing how bank lending creates new money).

92. See, e.g., Alan M. White, Banks as Utilities, 90 Tul. L. Rev. 1241, 1244 (2016) (advocating for the "broad application of public utility law to banks" in order to "assert democratic control of the state and market institutions that banks have become").

93. McLeay, Radia & Thomas, supra note 91, at 16 ("When a bank makes a loan . . . it does not typically do so by giving them thousands of pounds worth of banknotes. Instead, it credits their bank account with a bank deposit . . . . At that moment, new money is created."). On the merits and limits of the *making* and *taking* framings, see Howell E. Jackson, Toward a Mixed View, Just Money (Feb. 13, 2020), https://justmoney.org/towards-a-mixed-view/ [https://perma.cc/J85U-MCFT] (comparing an endogenous money view to post-Newtonian physics).

94. See Carrillo, Seeing Through Money, supra note 82, at 1281–99 (analyzing stored-value instruments).

95. Gary B. Gorton & Jeffery Y. Zhang, Taming Wildcat Stablecoins, 90 U. Chi. L. Rev. 909, 940 (2023) ("Banks had to back their note issuance one-for-one with state bonds that were deposited with the state treasurers.").

96. See Menand, Why Supervise?, supra note 90, at 958 (describing the various requirements needed to obtain a bank charter).

97. See David Zaring, Modernizing the Bank Charter, 61 Wm. & Mary L. Rev. 1397, 1401 (2020) ("To even apply for a charter . . . '[b]ank organizers are required to submit detailed financial information, business plans, and performance projections in order to convince chartering authorities of their ability to provide banking services in a safe and sound manner.'" (second alteration in original) (quoting Robert C. Hockett & Saule T. Omarova, "Special," Vestigial, or Visionary? What Bank Regulation Tells Us About the Corporation—and Vice Versa, 39 Seattle U. L. Rev. 453, 474–75 (2016))).

new bank chooses its regulator when it applies for a charter—usually the Office of the Comptroller of the Currency (OCC), an independent Treasury bureau, for national banks,[98] or the Federal Deposit Insurance Corporation (FDIC) and state regulators for most banks with state charters.[99] The Federal Reserve System (Fed) is the primary regulator for sizeable state-chartered banks that are members of the system, the bank holding companies (BHCs) that own most banks, foreign banks, and any large firm that the Financial Stability Oversight Council (a group of leaders of regulatory agencies) designates as systemically important.[100]

Banking regulators also engage in a mode of governance distinguishable from most other regulatory agencies—supervision. Banking supervision predates the Administrative Procedure Act by nearly a century.[101] Rather than enumerate prohibited activities, Congress authorized supervisors to detect and address problematic practices on an iterative basis.[102] According to Professor Lev Menand's review of the history of supervision, examiners often occupy offices within regulated institutions, conduct inspections, issue directives, and replace management when necessary.[103] Disputes with supervised banks seldom result in lawsuits.[104] In 1963, the Supreme Court concluded that federal supervision is "one of the most successful [systems of economic regulation], if not the most successful," to which "we may owe, in part, the virtual disappearance of bank failures."[105] Other financial regulators now have supervisory mandates. For instance, the CFPB co-supervises banks with over $10 billion in assets.[106]

98. Marc Labonte, Cong. Rsch. Serv., R44918, Who Regulates Whom? An Overview of the U.S. Financial Regulatory Framework 13 (2023), https://sgp.fas.org/crs/misc/R44918.pdf (on file with the *Columbia Law Review*).

99. Id. at 13, 28.

100. Id. at 16.

101. See Menand, Why Supervise?, supra note 90, at 994–96 (arguing that the National Banking Act of 1863 marked the beginning of the modern system of banking supervision); id. at 961 (explaining that the APA "sidestepped supervision by focusing on formal actions").

102. Id. at 953–54 (describing the expansive, proactive, and discretionary authority of banking supervisors).

103. Id. at 954–55 (observing that "[f]or large banks, this dialogue is continuous, with agency examiners working, day in and day out, at offices and desks inside the bank"); id. at 978 (pointing out "the ability of the banking agencies to enter banks uninvited, direct bank activities, and remove bank officers and directors").

104. Id. at 954–55 ("[I]t is the very rare dispute . . . that culminates in any formal action." (second alteration in original) (internal quotation marks omitted) (quoting In re Subpoena Served Upon the Comptroller of the Currency, 967 F.2d 630, 633–34 (D.C. Cir. 1992))).

105. United States v. Phila. Nat'l Bank, 374 U.S. 321, 330 (1963) (alteration in original) (internal quotation marks omitted) (quoting Kenneth Culp Davis, 1 Administrative Law Treatise § 4.04, at 247 (1st ed. 1958)).

106. See 12 U.S.C. §§ 5515(a)–(b) (2024).

Within the New Deal framework, Congress situated supervision in a broader campaign to structurally separate banking and commerce.[107] Congress aimed to prevent banks from engaging in generic commercial activity,[108] making unsound loans to business partners, excessively concentrating economic power, corrupting the integrity of banking, and jeopardizing stability.[109] It also wanted to prevent commercial firms from using banks to fund risky business activities, exacerbate predatory behavior, or further complicate the moral hazard of bailouts.[110] As such, regulators can also compel restructuring and divestiture of banking conglomerates (even if they compel divestiture infrequently).[111]

C. *Shadow Money*

As this section discusses, other powerful institutions, including financial institutions and technology companies, issue money to establish the rules, structure, and dynamics of economies. When governments allow private monies, the issuers must follow architectural rules of the hierarchy of money.[112] In the United States, money has a constitutional basis in Article I.[113] Given time, the consequences of failing to regulate private money creation can be dire. For instance, the financial crises of

107. See Saule T. Omarova, The Merchants of Wall Street: Banking, Commerce, and Commodities, 98 Minn. L. Rev. 265, 273, 275 (2013) [hereinafter Omarova, Merchants of Wall Street] ("The separation of banking and commerce is one of the fundamental principles underlying the U.S. system of bank regulation.").

108. See id. at 275 ("In effect, the entire system . . . is designed to keep institutions that are engaged in deposit-taking and commercial lending activities from conducting, directly or through some business combination, any significant non-financial activities, or from holding significant interests in any general commercial enterprise.").

109. See id. ("The main arguments in favor . . . [have] included the needs to preserve the safety and soundness of insured depository institutions, to ensure a fair and efficient flow of credit to productive economic enterprise, and to prevent excessive concentration of financial and economic power in the financial sector." (citing Bernard Shull, The Separation of Banking and Commerce in the United States: An Examination of Principal Issues 29–30, 46–47, 52 (Off. of the Comptroller of the Currency, Econ. Working Paper No. 1999-1, 1999))).

110. See id. at 275–76 (detailing the "safety and soundness argument").

111. Omarova & Steele, supra note 50, at 1214 (noting that federal bank regulators have the power to "force divestiture" and restructuring of conglomerates but observing that banking regulators have "rarely used" the Federal Deposit Insurance Act to do so).

112. See Rohan Grey, Monetary Resilience, 41 W. New Eng. L. Rev. 505, 509–12 (2019) ("[E]ven 'private' monies have a 'public' dimension, in the sense that they implicate, and must remain accountable to, the broader public monetary regime under which they operate.").

113. See U.S. Const. art. I, § 8, cl. 5; id. § 10, cl. 1 (prohibiting states from coining money or emitting bills of credit); see also Christine Desan, The Constitutional Approach to Money: Monetary Design and the Production of the Modern World, *in* Money Talks: Explaining How Money Really Works 109, 114 (Nina Bandelj, Frederick F. Wherry & Viviana A. Zelizer eds., 2017) (using the United States as an example of the constitutional approach to money wherein its currency operates as a "sovereign IOU").

1907, 1933, and 2008 resulted from runs on private money that policymakers failed to regulate via banking law.[114]

Shadow money creates immediate legal problems. Today, although many laws nominally restrict money creation to chartered banks, statutory conflicts and permissive interpretation by courts and agencies help nonbank companies create financial instruments that begin to look like money.[115] In financial regulation, agencies are responsible for ensuring compliance—a company does not have to cease monetary business practices until an agency initiates legal action.[116]

The New Deal supervisory paradigm eroded over time.[117] As early as the 1950s, the Fed began treating securities dealers similarly to banks and assisting them in money creation.[118] In the 1970s, the Securities and Exchange Commission (SEC) and the Department of Justice abetted the rise of money market mutual funds (another issuer of deposit substitutes).[119] In the 1990s, they generally allowed banks to engage in additional commercial activities.[120] Today, major technology companies "are investing billions of dollars to create dominant information technology systems, platforms, and ecosystems across the financial universe."[121] Big tech platforms in retail banking are "likely . . . to leverage their customer relationships, unlimited funds, superior data and AI capabilities . . . to monopolise the origination and distribution of loans to households and small . . . enterprises."[122] Nonbank companies

114. Menand, Why Supervise?, supra note 90, at 1018–19.

115. See Nicholas K. Tabor, Katherine E. Di Lucido & Jeffery Y. Zhang, A Brief History of the U.S. Regulatory Perimeter 2, 16–23 (Fed. Rsrv. Bd., Fin. & Econ. Discussion Series Working Paper No. 2021-051, 2021), https://www.federalreserve.gov/econres/feds/files/2021051pap.pdf [https://perma.cc/H9D7-FYZG] (detailing the rise of "non-bank banks," acknowledging that "[a]ccounts of changing technology have figured in much of this discourse").

116. See Labonte, supra note 98, at 2–3 ("Regulators can compel firms to modify their behavior through enforcement powers . . . includ[ing] . . . cease-and-desist orders . . . .").

117. Menand, Why Supervise?, supra note 90, at 1015. See also William K. Black, The Best Way to Rob a Bank Is to Own One: How Corporate Executives and Politicians Looted the S&L Industry 5–35 (updated ed. 2013) (2005) (discussing how "desupervision" led to the Savings and Loan Crisis); Menand, Why Supervise?, at 956 n.20 (crediting Black for coining the term "desupervision").

118. Menand, Why Supervise?, supra note 90, at 1015.

119. See Morgan Ricks, Money as Infrastructure, 2018 Colum. Bus. L. Rev. 757, 812 [hereinafter Ricks, Money as Infrastructure] (explaining the role of the DOJ in the rise of the money market mutual fund industry).

120. See Omarova, Merchants of Wall Street, supra note 107, at 278–80 (detailing the effects of the Gramm–Leach–Bliley Act).

121. Dirk A. Zetzsche, William A. Birdthistle, Douglas W. Arner & Ross P. Buckley, Digital Finance Platforms: Toward a New Regulatory Paradigm, 23 U. Pa. J. Bus. L. 273, 278–79 (2020).

122. Jorge Padilla, BigTech "Banks", Financial Stability and Regulation, Fin. Stability Rev., Spring 2020, at 11.

create shadow money primarily by issuing instruments that substitute for either bank deposits or notes.

1. *Deposits.* — The legal definitions of what constitutes a "bank" or "deposit" are now muddled. Professor Morgan Ricks has demonstrated why this is a critical problem for monetary governance, offering "no practical way forward" for regulators to stop shadow money and shadow banking.[123] Although the Banking Act of 1933 (popularly known as the Glass–Steagall Act) prohibits a firm without a banking charter from issuing or accepting deposits,[124] the statute lacks a definition of "deposit," meaning regulators cannot easily invoke it against shadow money issuers, frustrating proper governance.[125] Although one might imagine that regulators could combine or cross-reference statutory provisions, constructive analysis is generally unhelpful. For instance, the Federal Deposit Insurance Act of 1950 defines a "deposit" as "money or its equivalent received or held by a bank,"[126] but the Glass-Steagall Act classifies "bank[s]" as chartered institutions that accept "deposits."[127] Courts have generally hesitated to clarify definitions of "bank" and "deposit."[128]

As a result, many technology companies now not only transfer but store money in "digital wallets" (software applications) like Venmo and CashApp that lack standard bank account protections, including FDIC insurance.[129] According to a 2024 Federal Reserve consumer payments study, "[y]ounger consumers report relying more heavily on digital wallets (80% Gen Z & 78% millennial), while older generations rely more on check, credit card and ACH."[130] In the cryptocurrency and digital asset industry, the stablecoin company Circle issues U.S. Dollar Coin (USDC), which it markets as a Digital Dollar, implying it is just as stable as a dollar bill.[131] But USDC—like Venmo and CashApp balances—is a privately issued liability, merely pegged to currency value.[132]

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123. Ricks, Money as Infrastructure, supra note 119, at 812. See also Dan Awrey & Kristin van Zwieten, The Shadow Payment System, 43 J. Corp. L. 775, 776 n.2 (2018) ("There are several definitions of a 'bank' under U.S. law.").

124. See 12 U.S.C. § 378(a)(2) (2024).

125. Ricks, Money as Infrastructure, supra note 119, at 809–10 ("'Deposit' is not defined in the entry restriction provision in federal law.").

126. 12 U.S.C. § 1813(l)(1).

127. Id. § 1841(c)(1)(B).

128. See, e.g., Bd. of Governors of Fed. Rsrv. Sys. v. Dimension Fin. Corp., 474 U.S. 361, 374 (1986) (halting the Fed Board's attempt to expand how deposits are defined in the Bank Holding Company Act).

129. See, e.g., Carrillo, Platform Money, supra note 73, at 899–900.

130. Fed. Rsrv. Fin. Servs., Consumer Payments Study 12 (2024), https://fedpaymentsimprovement.org/wp-content/uploads/2024-consumer-payments-study.pdf [https://perma.cc/F3TL-VTBM].

131. See Arthur E. Wilmarth, Jr., We Must Protect Investors and Our Banking System From the Crypto Industry, 101 Wash. U. L. Rev. 235, 316 n.398 (2023) ("Congress could

Second, the law explicitly allows some nonbank financial institutions to originate loans.[133] From the perspective delineated earlier in this Part and the framework of this Article, these companies constructively participate in the creation of money via lending. For instance, nonbank companies engage in "bank partnerships" (sometimes referred to as "rent-a-bank" arrangements), in which a nonbank company operates the interface with consumers and connects them with banks, but does not hold loans on its own books, allowing nonbank firms to offer credit without the responsibilities of charters.[134] In some cases, a commercial entity and a bank may issue a cobranded credit card that provides financial rewards for purchases of particular commercial products.[135] The nonbank companies enjoy the rights of the bank with equivalent responsibilities.[136] Among these privileges that the nonbank can take advantage of is the lack of a universal, national bank usury cap or a weak usury cap in the state where the bank is operating.[137] Lawmakers, bankers, and scholars consistently debate these partnerships.[138]

2. *Notes.* — Before the Civil War, state-chartered banks tended to issue physical notes (redeemable for gold or silver coins) rather than

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require all issuers and distributors of stablecoins to be FDIC-insured banks by amending Section 21(a) of the Glass–Steagall Act, 12 U.S.C. § 378(a).").

132. Joe Light & Vildana Hajric, Coinbase, Circle to Move All USDC Reserves Into Cash, Treasuries, Bloomberg (Aug. 23, 2021), https://www.bloomberg.com/news/articles/2021-08-23/coinbase-circle-to-move-all-usdc-reserves-into-cash-treasuries (on file with the *Columbia Law Review*).

133. See, e.g., Cuttino, supra note 18, at 1534 (noting that "some states requir[e] a license for any consumer lending . . . at certain interest rates [or] principal amounts" (citations omitted)).

134. See Levitin, Rent-A-Bank, supra note 41, at 359 (describing how "[a] nonbank lender contracts with a bank to make loans according to the nonbank lender's specifications and then sells the loans to the nonbank lender," although not situating this dynamic in terms of money creation); id. at 345 (observing how "consumer lending has become disaggregated over the past several decades with different components of a single lending transaction being handled by different institutions").

135. See, e.g., Mike Whalen, Bank Partnership or Go It Alone?, Goodwin Procter LLP: Fintech Flash (Aug. 23, 2016), https://www.goodwinlaw.com/en/insights/publications/2016/08/08_23_16-bank-partnership-or-go-it-alone (on file with the *Columbia Law Review*) (observing that "[b]ank partnerships in lending are nothing new," as private-label credit cards, for instance, predate contemporary fintech significantly).

136. See Levitin, Rent-A-Bank, supra note 41, at 333 (arguing that in a partnership,"[t]he nonbank then claims to shelter in the bank's exemption from state usury laws and other consumer protection laws, as well as the benefit of the choice-of-law provisions applicable to the bank," and "claims that it is exempt from state licensure requirements for nonbank lenders").

137. See, e.g., id. at 349–50 (citing Marquette Nat'l Bank of Minneapolis v. First of Omaha Serv. Corp., 439 U.S. 299, 313–14 (1978), in which the Court held that an OCC-chartered national bank may export the interest rate in its "home" state when lending to consumers in different states).

138. See id. at 336 (arguing that "rent-a-bank lending stands on an uncertain and contested legal foundation").

deposit balances.[139] Legal scholars and economists across the intellectual and political spectra have agreed these notes were economically no different from bank deposits and circulated as money.[140]

But the National Bank Acts of 1863 and 1864 taxed these private bank notes and limited circulation.[141] Upholding the legislation, the Supreme Court favored government and government-backed money, holding that United States notes (greenbacks) and national bank notes "are issued on the credit of the government; and . . . will, perhaps, satisfy the wants of the community, in respect to a circulating medium, as perfectly as any mixed currency that can be devised."[142] The Federal Reserve Act of 1913 and the Banking Act of 1933 (Glass–Steagall Act) finally cemented the Federal Reserve Note and the commercial bank account as the dominant, legitimate forms of money.[143] As Professor Dan Awrey notes, "[f]or most of the twentieth century, banks enjoyed a virtual monopoly over private money creation."[144]

In a less well-known fashion, corporations have also issued notes throughout U.S. history. As early as the nineteenth century, corporations issued "scrip," or "common tender."[145] This Article argues that scrip was a very "low-powered" money within the hierarchy of money.[146] Scrip was often a note "redeemable in the goods or services of the issuer" but could be used to purchase other goods and services or other monies within a network.[147] In the mid-nineteenth century, U.S. railroad and

139. See Gary B. Gorton & Jeffery Y. Zhang, Protecting the Sovereign's Money Monopoly, 75 Ala. L. Rev. 955, 974 (2024) (explaining that "[p]rivate bank notes were used widely as an alternative" to paper money and specie).

140. See, e.g., Ludwig von Mises, The Theory of Money and Credit 53 (H.E. Batson trans., Yale Univ. Press 1953) (1912) ("[B]anknotes, say, and cash deposits differ only in mere externals, important perhaps from the business and legal points of view, but quite insignificant from the point of view of economics."); A. Mitchell Innes, What Is Money?, 30 Banking L.J. 377, 407 (1913) ("A bank note differs in no essential way from an entry in the deposit register of a bank.").

141. Bruce Champ, The National Banking System: A Brief History 5–6 (Fed. Rsrv. Bank of Cleveland, Working Paper No. 07-23R, 2007) https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1156&context=ypfs-documents (on file with the *Columbia Law Review*).

142. Veazie Bank v. Fenno, 75 U.S. 533, 549 (1869) (anchoring the sovereign power to prohibit private banking in Art. I, Section 8, Clause 5 of the U.S. Constitution, which grants Congress the power to coin money and regulate its value).

143. See Menand, Why Supervise?, supra note 90, at 1001–05.

144. Awrey, Bad Money, supra note 48, at 39.

145. Richard H. Timberlake, Private Production of Scrip-Money in the Isolated Community, 19 J. Money, Credit & Banking 437, 438–39 (1987) [hereinafter Timberlake, Private Production] (emphasis omitted).

146. See Cagan, supra note 85 (defining "high-powered money"). This Article logically extends the concept: "Low-powered money" consists of privately issued instruments, the acceptance of which depends on their relationship to high-powered money, especially concerning convertibility.

147. Bruce Champ, Fed. Rsrv. Bank of Cleveland, Private Money in Our Past, Present, and Future (2007), https://www.clevelandfed.org/publications/economic-commentary/

canal companies issued "technologically cutting-edge[] paper note obligations . . . which were receivable in payment to that entity and often in state taxes as well."[148] Networked transportation "made their redemption far more likely, while their value nonetheless ensured successful circulation as small denomination money."[149] Additionally, "[f]rom 1820 to 1875, . . . transportation companies, merchants, and farmers issued a significant amount of small-denomination currency."[150] Economist Richard Timberlake refers to these instruments as "unaccounted money" or "unaccounted currencies."[151] Because corporations issued scrip illegally, it is inherently difficult to measure the supply of scrip in circulation.[152]

To help nationalize the banking system and centralize money creation, Congress passed the Legal Tender Acts of 1862 to 1863.[153] The government issued U.S. notes, known as "greenbacks" (the precursor to Federal Reserve notes, or "dollar bills").[154] In a series of cases known as the *Legal Tender Cases*, the Court affirmed Congress's power under Article I to issue paper currency and declare it legal tender for private debts, cementing public money's place in the hierarchy of currency and empowering it as a medium of exchange.[155]

The government also passed the Stamp Payments Act of 1862. The first of its two components addressed public finance squarely: In response to a cash and coin circulation problem, in 1862 the government authorized the receipt of postage stamps in values of "less than $5" as payment of debts.[156]

2007/ec-20070101-private-money-in-our-past-present-and-future [https://perma.cc/SSZ2-YVY7] [hereinafter Champ, Private Money].

148. John Haskell & Nathan Tankus, Virtual Currency (in the Shadows of the Money Markets), Just Money (Apr. 9, 2020), https://justmoney.org/j-haskell-n-tankus-virtual-currency-in-the-shadows-of-the-money-markets [https://perma.cc/2G6Q-KFN2].

149. Id.

150. Champ, Private Money, supra note 147.

151. See Richard H. Timberlake, Jr., The Significance of Unaccounted Currencies, 41 J. Econ. Hist. 853, 854–55 (1981).

152. See id. at 857–58 (explaining the difficulty of estimating how much unaccounted currency was in circulation).

153. 12 Stat. 345 (1862); 12 Stat. 532 (1862); 12 Stat. 709 (1863).

154. See 12 Stat. 345, 345 (1862).

155. See Knox v. Lee, 79 U.S. 457, 554 (1871) (affirming that Congress did not exceed its powers). The government can also void contractual provisions that make private debts only payable in gold. Norman v. Balt. & Ohio R.R. Co., 294 U.S. 240, 316 (1935) (holding that gold clauses interfere with the powers granted to Congress). It has also prohibited private persons from even holding gold bullion or coins. See Ruffino v. United States, 114 F.2d 696, 697 (9th Cir. 1940) (affirming the validity of the executive order restricting the holding of gold to specific licensees).

156. Thomas P. Vartanian, Robert H. Ledig & Yolanda Demianczuk, Echoes of the Past With Implications for the Future: The Stamp Payments Act of 1862 and Electronic Commerce, 67 BNA's Banking Rep. 57, 60 (1996) ("Section 1 of the Act provided for the use of postage stamps as currency for government debts valued at less than $5 . . . ."). On

The second component was regulatory in nature. Congress declared that "no private corporation, banking association, firm, or individual shall make, issue, circulate, or pay any note, check, memorandum, token, or other obligation, for a less sum than one dollar, intended to circulate as money or to be received or used in lieu of lawful money of the United States."[157] The Act followed a long tradition in legal thought, "prohibit[ing] competition to [the state's] currency" and exercising control over "the unit of account."[158] Although Congress quickly replaced the first component of the legislation with the National Bank Act of 1863, it maintained the second component, which is still good law.[159]

But Congress still struggled to stop scrip after nationalization. Immediately, "private issuers of paper money began denominating their currency in services (for example, miles of railroad service) instead of in dollars."[160] Throughout the late nineteenth and first half of the twentieth century, many companies issued scrip denominated in their own units of account—by one scholar's estimation, roughly twenty thousand coal company stores across North America from 1903 to 1958.[161] During the Great Depression, banks collapsed and merchants issued scrip in response.[162] "Often this scrip became redeemable in official currency after banks once again allowed deposit withdrawals."[163] In "company towns," railroad and mining companies paid employees with scrip.[164]

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the history and application of the Stamp Payments Act to Bitcoin, see Reuben Grinberg, Note, Bitcoin: An Innovative Alternative Digital Currency, 4 Hastings Sci. & Tech. L.J. 159, 183–91 (2012) ("The Act is unlikely to apply to anything that (1) circulates in a limited area, (2) is redeemable only in goods, (3) does not resemble official U.S. currency and is otherwise unlikely to compete with small-denominations of U.S. currency, or (4) is a commercial check . . . ." (footnotes omitted)); see also Joshua J. Doguet, Comment, The Nature of the Form: Legal and Regulatory Issues Surrounding the Bitcoin Digital Currency System, 73 La. L. Rev. 1119, 1132–35 (2013) (arguing Bitcoin falls outside the Act because statutory terms like "note," "check," and "token" are "physical manifestation[s] of currency" (internal quotation marks omitted) (quoting Grinberg, supra, at 188)).

157. Act of July 17, 1862, ch. 196, § 2, 12 Stat. 592, 592.

158. See Christine Desan, Making Money: Coin, Currency, and the Coming of Capitalism 93–94 (2014) [hereinafter Desan, Making Money] (discussing the Anglo–Saxon political tradition of currency unification).

159. Vartanian et al., supra note 156, at 61 ("Although Section 1 of the Stamp Payment Act was soon repealed by the National Bank Act of 1863, Section 2 has remained in force."(footnote omitted)).

160. Champ, Private Money, supra note 147.

161. Timberlake, Private Production, supra note 145, at 443 ("Another source lists 20,000 coal company stores in the United States, Canada, and Mexico all of which used scrip between 1903 and 1958." (citing Gordon Dodrill, 20,000 Coal Company Stores in the United States, Mexico and Canada (1971))).

162. Champ, Private Money, supra note 147.

163. Id.

164. See Company Towns: 1880s to 1935, Va. Commonwealth Univ. Librs. Soc. Welfare Hist. Project, https://socialwelfare.library.vcu.edu/programs/housing/company-

Although Congress banned scrip for wages under the Fair Labor Standards Act of 1938, it did not invoke legislation or pass new bills to eliminate scrip.[165]

There is also a technological dimension to legal tender law and policy. Today, the government distributes currency into the economy via mints, various Treasury bureaus, and administrative agencies and regulates its use.[166] This system underscores the government's crucial responsibilities in managing the quality and quantity of money and ensuring the stability and integrity of the monetary system.[167] As part of its mission, the government plays a crucial role in preventing other entities from mimicking the U.S. currency's legal and technological functions and from developing private money that competes with U.S. currency. Most importantly, various agencies deploy sophisticated security measures to combat counterfeiting.[168] The Treasury also requires financial institutions to regulate and report significant currency flows.[169] The Commodity Futures Trading Commission (CFTC) supervises foreign currency exchanges.[170]

Still, for over eight decades, the federal government has gradually permitted the creation of stored-value instruments resembling scrip. Businesses issue store-branded gift cards, which circulate as money on

towns-1890s-to-1935/ [https://perma.cc/44BT-P7SQ] (last visited Oct. 10, 2025) ("In some cases, companies paid employees with a scrip that was only good at company stores.").

165. See 29 U.S.C. § 203(m) (2024) ("'Wage' paid to any employee includes the reasonable cost, as determined by the Administrator, to the employer of furnishing such employee with board, lodging, or other facilities . . . ."). See also 29 C.F.R. § 531.27(a) (2025) (requiring that employers pay employees "in cash or negotiable instrument[s] payable at par"); id. § 531.34 (providing that "scrip, tokens, credit cards, 'dope checks,' coupons, and similar devices" are not lawful for payment of wages).

166. Carrillo, Seeing Through Money, supra note 82, at 1281 (describing the role of Treasury subdepartments in the monetary system, including the Bureau of Engraving and Printing, the U.S. Mint, and the Bureau of the Fiscal Service).

167. Ricks et al., supra note 62, at 816–19; see also Christine Desan, How to Spend a Trillion Dollars: Our Monetary Hardwiring, Why It Matters, and What to Do About It 11 (Harvard Pub. L., Working Paper No. 22-04, 2022), https://ssrn.com/abstract=4056241 (on file with the *Columbia Law Review*) ("The government mobilizes to protect finance not because it is too big to fail but because it is the essential circuitry, the hardwiring, of economic exchange within our peculiar architecture.").

168. See Carrillo, Seeing Through Money, supra note 82, at 1226 ("Recent technological developments enhance the government's power to see through money and raise the stakes of new systems design.").

169. See id. at 1250 (describing the requirement that financial service providers report cash-based transactions above $10,000).

170. Foreign Currency Trading: Advisory on Foreign Currency, Commodity Futures Trading Comm'n (Feb. 5, 2001), https://www.cftc.gov/LearnAndProtect/FraudAwarenessPrevention/ForeignCurrencyTrading/forex_adv06-01 (on file with the *Columbia Law Review*).

the low end of the hierarchy.[171] Legislatures, regulators, and courts treat prepaid debit cards and gift cards differently from banknotes.[172] For example, in the 1990s, when banks and nonbanks began to issue gift cards more frequently, the Fed, OCC, and FDIC refrained from offering a formal legal opinion on their legal features and place within the regulatory taxonomy or how value flows from commercial bank deposits into the gift card ecosystem.[173] But a 1997 American Bar Association Task Force argued that regulators should treat the cards more like notes: "promises of the issuer to pay . . . upon demand."[174] Rightly or wrongly, a world of informal finance lies beyond the domain of robust financial and technological regulation.

D. *Harms & Risks*

Shadow money issuers have more freedom in business activities than traditional banks.[175] The proliferation of shadow money obscures and undermines the critical function of the monetary sovereign-chartered banks within the economy. The gap undermines a key rationale for state oversight: There is little reason for banks to "submit to special supervision when their charters no longer confer the same valuable privileges."[176] The jurisdictional gap prevents regulators from managing monetary policy and financial stability effectively.[177] Nonbank companies that engage in shadow banking may take advantage of the public power of money creation to privatize gains while socializing losses.[178] This leads to problems such as rate manipulation, money laundering, and financial instability.

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171. See Gorton & Zhang, supra note 139, at 964–65 (explaining that gift cards act as "circulating money" but only hold value within "specific ecosystems").

172. See Steven Stites & Norman I. Silber, Merchant Authorized Consumer Cash Substitutes, 14 Va. L. & Bus. Rev. 261, 266 (2020) ("[T]he law surrounding such things as coupons, rebates, rewards, company cash, scrips, tokens, cash-back offers and the like have presented a legal patchwork that has produced confusion and incoherence.").

173. See, e.g., Task Force on Stored-Value Cards, A Commercial Lawyer's Take on the Electronic Purse: An Analysis of Commercial Law Issues Associated With Stored-Value Cards and Electronic Money, 52 Bus. Law. 653, 675 (1997) (discussing an FDIC General Counsel Opinion that indicated most stored-obligation products would not be FDIC-insured but did not comment on the legality of those products).

174. Id. at 699.

175. See Menand, Why Supervise?, supra note 90, at 1018–19 (noting that "[g]overnment agencies cannot effectively manage monetary outsourcing if only some private money issuers are subject to their oversight").

176. Id. at 1019.

177. Id.

178. For the impact of such a dynamic see, e.g., John C. Coffee, Jr., The Political Economy of Dodd–Frank: Why Financial Reform Tends to Be Frustrated and Systemic Risk Perpetuated, 97 Corn. L. Rev. 1019, 1079 (2012) ("The pervasive underregulation of 'shadow banking,' which continued for decades, was a leading cause of the 2008 financial debacle and the current economic stagnation.").

1. *Rate Manipulation.* — U.S. banking law and consumer financial protection law impose various forms of rate regulation, and issues may trigger regulation under both sets of laws.[179] Banking laws against rate manipulation protect deposited holders but are also crucial for the integrity of the financial system. Limits on how banks price their products can prevent abuse of power stemming from their special privileges.[180] Banking laws dictate the terms of credit that banks offer to insiders and affiliated entities[181] and also monitor gift card issuance that involves a national bank.[182]

Regulators also monitor how banks control conversion rates between bank deposits, foreign currency, partner-issued prepaid debit card balances, reward points, and cashback deals to ensure fair practices and instill confidence in the banking system.[183] The OCC charters and directly supervises national "credit card banks" (e.g., American Express Bank and Capital One Bank).[184]

Although the CFPB is often reduced to consumer protection agency, it is also more substantive financial regulator, and directly supervises and takes enforcement actions against banks and nonbank companies issuing money-like instruments.[185] The CFPB also monitors the redemption of credit card rewards,[186] and conducts biennial reviews of the credit card

179. See Omarova & Steele, supra note 50, at 1207–09 ("[N]umerous banking laws and regulations target pricing of bank products.").

180. See id. at 1207–08.

181. See id. at 1211–13.

182. See Credit Cards, Debit Cards, and Gift Cards, Off. of the Comptroller of the Currency, https://www.occ.gov/topics/consumers-and-communities/consumer-protection/credit-cards-debit-cards-and-gift-cards/index-credit-cards-debit-cards-gift-cards.html [https://perma.cc/7JD2-C2D7] (last visited Feb. 5, 2026) ("Credit, debit, and gift cards have made the access to credit more convenient, but they come with terms and conditions that consumers should understand."); What You Should Know About Gift Cards, Fed. Deposit Ins. Corp. (Dec. 2019), https://www.fdic.gov/consumers/consumer/news/december2019.html [https://perma.cc/H96P-BHVA] ("Bank gift cards, which carry the logo of a payment card network (e.g., Visa, MasterCard), are also subject to Credit CARD Act Protections and can be used wherever the brand is accepted.").

183. See, e.g., News Release 2014-157, Off. of the Comptroller of the Currency, OCC Fines Three Banks $950 Million for FX Trading Improprieties (Nov. 12, 2014), https://www.occ.gov/news-issuances/news-releases/2014/nr-occ-2014-157.html [https://perma.cc/U3L9-M76Y] (fining "several large banks" that "permitted an environment to develop in which unscrupulous traders discussed manipulating foreign exchange markets" (quoting Thomas J. Curry, Comptroller of the Currency)).

184. See Zaring, supra note 97, at 1462–64 (discussing the history of the "credit card bank" special purpose charter, noting that most credit card banks are actually "bank affiliate[s] that can get around state usury laws").

185. See infra section IV.C.1–.2 (discussing the CFPB's role as a gap-filling banking and shadow money regulator).

186. CFPB, Credit Card Rewards 3 (2024), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-rewards_issue-spotlight_2024-05.pdf [https://perma.cc/3DWY-AE2L] [hereinafter CFPB, Credit Card Rewards].

market.[187] Credit card companies must notify cardholders at least forty-five days ahead of a change in rates.[188] The CARD Act of 2009 "restrict[ed] fees[] [and] prohibit[ed] expiration in less than five years."[189] Under Regulation E, the CFPB regulates a range of conversion-related consumer practices: error resolution rules,[190] consumer access to account information,[191] disclosure of fees,[192] and disclosures related to "currency conversion" and "foreign exchange processing" fees under the Prepaid Card Rule.[193] The CFPB Remittance Transfer Rule, also promulgated under Regulation E, requires remittance transfer providers to disclose the applicable exchange rate and fees before the transaction and on the receipt.[194]

Some scholars and regulators argue that manipulation of reward programs can disproportionately benefit more affluent individuals.[195] For cardholders with low scores, banks and credit card companies typically charge more interest and fees on a rewards card than on non-rewards cards.[196] The CFPB has taken action against credit card issuers for unfair

187. CFPB, CARD Act Report: A Review of the Impact of the CARD Act on the Consumer Credit Card Market 4 (2013), https://files.consumerfinance.gov/f/201309_cfpb_card-act-report.pdf [https://perma.cc/39LL-CJ2H].

188. When Can My Credit Card Company Increase My Interest Rate?, CFPB, https://www.consumerfinance.gov/ask-cfpb/when-can-my-credit-card-company-increase-my-interest-rate-what-can-i-do-to-get-the-rate-back-down-en-69/ [https://perma.cc/7E82-8M2V] (last modified Sep. 10, 2024).

189. Greg L. Johnson, Amy L. Pierce & Deborah S. Thoren-Peden, CARD Act Will Exempt Prepaid Phone Cards (Not Mobile Broadband/Internet Access), Pillsbury (May 18, 2010), https://www.pillsburylaw.com/en/news-and-insights/card-act-will-exempt-prepaid-phone-cards-not-mobile-broadband.html [https://perma.cc/T24R-AW4J].

190. Consumer & Cmty. Affs., Prepaid Accounts Rule: Interagency Consumer Compliance Examination Procedures, Fed. Deposit Ins. Corp. (Feb. 22, 2019), https://www.fdic.gov/news/financial-institution-letters/2019/fil19009.html [https://perma.cc/98P2-LYEH].

191. CFPB Proposes Strong Federal Protections for Prepaid Products, CFPB (Nov. 13, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-strong-federal-protections-for-prepaid-products/ [https://perma.cc/A6WG-XUTM].

192. CFPB Finalizes Strong Federal Protections for Prepaid Account Customers, CFPB (Oct. 5, 2016), https://www.consumerfinance.gov/about-us/newsroom/cfpb-finalizes-strong-federal-protections-prepaid-account-consumers/ [https://perma.cc/Y6TU-QHZQ].

193. See 12 C.F.R. § 1005.18(b)(4)(ii) (2025) (requiring long-form disclosure of all prepaid account fees); 12 C.F.R. § 1005 (Supp. I 2025), comment 18(b)(2)(viii)(A)–2.iii.C (identifying international transaction charges as subject to disclosure).

194. See 12 C.F.R. § 1005.31(b) (requiring pre-payment disclosure and a receipt showing exchange rates, fees, and other charges); id. § 1005.32 (creating narrow exceptions in which companies may provide estimated rather than exact figures).

195. See, e.g., Vijay Raghavan, Consumer Law's Equity Gap, 2022 Utah L. Rev. 511, 562–63 (arguing that merchants pass credit card interchange fees onto low-income consumers in the context of structural issues with consumer protection).

196. See CFPB, Credit Card Rewards, supra note 186, at 5 ("[C]ardholders with near-prime and subprime scores typically pay more in interest and fees on a rewards card than a card without rewards, even after accounting for the value of earned rewards." (citing

practices related to rewards.[197] But the complexity of rewards programs with vague conditions, devaluation of rewards, and revocation of earned rewards remains a significant problem.[198]

Partnership lending has increased the risk of rate manipulation, almost necessarily given its scale. Three-quarters of credit card accounts include rewards programs.[199] Cardholders can apply rewards to a wide variety of purchases, including retail goods, merchandise, gift cards, travel, college savings, and financial market investments.[200] The bank leverages a merchant's relationship with its customers.[201] They "make large payments to merchants for rewards[,] . . . including . . . [through] revenue sharing[] [and] origination bounties."[202] The nonbank partner "typically controls the value of rewards . . . [and] the inventory available for reward redemption" without banking regulation.[203]

2. *Money Laundering*. — Congress and the Treasury have enrolled financial institutions, especially banks, in anti-money-laundering efforts for many purposes of governance.[204] The "Bank Secrecy Act / Anti-Money Laundering regime" (BSA/AML) has rendered a mass surveillance system that supports financial regulation, criminal law enforcement, and national security.[205] The government does not require

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Sumit Agarwal, Andrea Presbitero, André F. Silva & Carlo Wix, Who Pays for Your Rewards? Redistribution in the Credit Card Market, Fed. Rsrv. Bd. Sys., Fin. & Econ. Discussion Series Working Paper 2023-007 (2023))).

197. See, e.g., Bank of America, N.A., No. 2023-CFPB-0007, at 22–23 (July 11, 2023) (consent order) (imposing civil penalties and restitution for opening credit card accounts without permission and withholding rewards).

198. See CFPB, Credit Card Rewards, supra note 186, at 12–22 (identifying four recurring themes from several hundred consumer complaints regarding credit card rewards programs: "unexpected promotional conditions, devaluation, redemption problems, and revocation").

199. CFPB, Consumer Financial Protection Circular 2024-07: Design, Marketing, and Administration of Credit Card Rewards Programs 2 (2024), https://files.consumerfinance.gov/f/documents/cfpb_circular-2024-07.pdf [https://perma.cc/MBX5-56LV]. Consumers have earned substantial and increasing credit card rewards in recent years. CFPB, Credit Card Rewards, supra note 186, at 9 ("Consumers earned more than $40 billion in rewards on major issuers' general purpose credit cards in 2022, increasing over 50 percent from 2019 levels." (citing CFPB, The Consumer Credit Card Market 69–70 (2023), https://files.consumerfinance.gov/f/documents/cfpb_consumer-credit-card-market-report_2023.pdf [https://perma.cc/K4R3-T4FH])).

200. CFPB, Credit Card Rewards, supra note 186, at 7.

201. See id. at 9 (explaining that "[i]n a co-brand relationship, banks bid for the right to leverage the brand recognition and loyalty program of a particular merchant").

202. Id.

203. Id. at 10.

204. See, e.g., Kathryn Judge, Financial Regulation Beyond Stability, 19 J.L. Econ. & Pol'y 194, 200 (2024) (arguing that the government enrolls financial institutions into the BSA/AML regime for many purposes, including the prevention of corruption).

205. See 12 U.S.C. §§ 1829b, 1951–1959 (2024) (establishing recordkeeping duties for banks and other insured depository institutions); 18 U.S.C. §§ 1956–1957, 1960 (criminalizing money laundering and unlicensed money transmission); 31 U.S.C. §§ 5311–

that banks identify and report all instances of possible money laundering or terrorist financing, but the recordkeeping and reporting requirements are the most effective tools available.[206] The Treasury may examine any records of domestic financial institutions, nonfinancial trades, or businesses relevant to BSA/AML law.[207] FinCEN shares roughly 6,500 intelligence reports annually with 165 federal, state, and local agencies.[208] FinCEN covers a wide array of "financial institutions," including banks,[209] which must verify, authenticate, and maintain records of ID for accountholders.[210] Financial institutions must also file "suspicious activity reports" when they suspect a customer derived funds from illegal activity or find a transaction unusual, and the transactions are above particular monetary thresholds (e.g., $5,000 for banks).[211]

But many scholars, policymakers, and industry voices have criticized the effectiveness of BSA/AML law.[212] "The [Nasdaq] *2024 Global Financial Crime Report* found that more than $3.1 trillion in illicit funds flowed through the global financial system" in 2023.[213] Although assessing effectiveness is challenging, experts are troubled by many metrics, including an estimation of seized funds relative to total illicit funds, inferences from patterns from public leaks of confidential documents, and findings from third-party reporting.[214]

Many financial technology companies deliver new financial instruments via distributed networks, which cross international borders.

5314, 5316–5336 (establishing recordkeeping obligations, as well as the filing of Currency Transaction Reports, Suspicious Activity Reports, and beneficial ownership information); see also Carrillo, Seeing Through Money, supra note 82, at 1267–71 (arguing that BSA/AML operates as a system of mass financial surveillance).

206. Judge, supra note 204, at 201–03 ("[T]he IRS reported in early 2023 that over the past three years, more than 83% of their investigations recommended for prosecution had a primary subject with a related BSA filing.").

207. See 12 U.S.C. § 1953.

208. Joanna Derman, Fully Equip FinCEN to Combat Money Laundering and the Financing of Terrorism, Project on Gov't Oversight (Apr. 28, 2022), https://www.pogo.org/testimonies/fully-equip-fincen-to-combat-money-laundering-and-the-financing-of-terrorism (on file with the *Columbia Law Review*).

209. See 31 U.S.C. § 5312(a)(2) (defining "financial institution" to include banks and entities transmitting "value that substitutes for currency").

210. Id. § 5318(l); see also 31 C.F.R. § 1020.220 (2025).

211. 31 U.S.C. § 5318(g)(6)(B); see also 31 C.F.R. §§ 1020.310, 1020.320, 1022.320.

212. See Judge & Kashyap, supra note 20, at 3 ("The United States' current anti-money laundering (AML) regime is expansive, expensive and one of America's most important domestic public-private initiatives . . . . [S]everal indicators suggest it is falling far short of what is possible.").

213. Nasdaq Releases First Global Financial Crime Report, Measuring the Scale and Human Impact of Financial Crime, Nasdaq (Jan. 16, 2024), https://www.nasdaq.com/press-release/nasdaq-releases-first-global-financial-crime-report-measuring-the-scale-and-human [https://perma.cc/E2EV-RLPT].

214. See Judge & Kashyap, supra note 20, at 10–19 (surveying the landscape from a "number of different vantage points, with each perspective providing additional but incomplete insights into just how well the system is currently working").

"This novel infrastructure fundamentally alters the organizational . . . patterns that anchor traditional jurisdictional claims."[215] Treasury has delegated BSA/AML supervision to the financial regulators based on sectoral taxonomies (for instance, banking regulators regulate banks).[216] The Treasury has also designated the IRS as a supervisor of last resort for all other financial institutions.[217] Thus, the IRS must supervise a wide array of businesses (including cryptocurrency companies, casinos, and card clubs).[218] As of the writing of this Article, the current Treasury leadership is transforming BSA/AML law, but signs point toward a general lessening of obligations for financial institutions, including digital asset platforms.[219] On June 18, 2025, then-Deputy Secretary of the Treasury Michael Faulkender indicated that they will "find the optimal fulcrum for balancing the somewhat opposing forces of costs and benefits."[220]

3. *Financial Instability.* — Safety and soundness regulation promotes bank solvency to protect financial and macroeconomic stability.[221] Most importantly for gaming money, regulators impose strict requirements to manage liquidity and payment risk. All firms face liquidity risk: the possibility that they might not be able to satisfy short-term financial

215. Saule T. Omarova, Technology v. Technocracy: Fintech as a Regulatory Challenge, 6 J. Fin. Regul. 75, 93–94 (2020) (arguing companies have developed "innovative financial instruments" that break regulatory categories to increase profits).

216. See 31 C.F.R. § 1010.810(b)(1)–(7) (2025) (delegating BSA examination authority to banking regulators).

217. Id. § 1010.810(b)(8).

218. See IRM 4.26.1.4.1.1 (Feb. 15, 2019), https://www.irs.gov/irm/part4/irm_04-026-001 [https://perma.cc/A62W-GWH9] (listing money services businesses, casinos, and card clubs); id. 4.26.9.13 (Nov. 12, 2019), https://www.irs.gov/irm/part4/irm_04-026-009 [https://perma.cc/9Y6H-Z6B5] (providing for examination of virtual currency businesses).

219. See Press Release, Scott Bessent, Sec'y, U.S. Dep't of the Treasury, Treasury Secretary Scott Bessent Remarks Before the American Bankers Association (Apr. 9, 2025), https://home.treasury.gov/news/press-releases/sb0078 [https://perma.cc/QT8C-DCBX] (announcing Treasury's aim to reform the BSA/AML framework to "explicitly permit financial institutions to de-prioritize lower risks"); M. Kendall Day, Stephanie Brooker, Jason Cabral, Ella Alves Capone, Sam Raymond, Roxana Akbari, Rachel Jackson, & Jimmy Scoville, 2025 Year-End Developments in Anti-Money Laundering, Gibson Dunn (Jan. 12, 2026), https://www.gibsondunn.com/2025-year-end-developments-in-anti-money-laundering/ [https://perma.cc/U8W7-DUQM] (cataloguing changes including FinCEN guidance lowering burdens for filing suspicious activity reports and DOJ policy against "regulation by prosecution" in the digital asset industry).

220. Press Release, Michael Faulkender, Deputy Sec'y, U.S. Dep't of the Treasury, Deputy Secretary Faulkender Lays Out Guiding Principles for Bank Secrecy Act Modernization (June 28, 2025), https://home.treasury.gov/news/press-releases/sb0173 [https://perma.cc/GC5Y-ZD7X].

221. See Bd. of Governors of the Fed. Rsrv. Sys., The Fed Explained: What the Central Bank Does 55 (11th ed. 2021), https://www.federalreserve.gov/aboutthefed/files/the-fed-explained.pdf [https://perma.cc/9XFR-CKVZ] [hereinafter Bd. of Governors of the Fed. Rsrv. Sys., The Fed Explained].

obligations.[222] "[B]anks . . . fund long-term loans (like mortgages) with short-term liabilities (like deposits)".[223] This "maturity mismatch" can "create[] liquidity risk if depositors withdraw funds suddenly," causing a bank run.[224] Payments risk refers to the potential for a "cascading failure of payments technologies" to disrupt retail payments and hinder broader economic activity.[225] For instance, credit card payments "could take several days to ultimately settle," heightening the possibility of default.[226] Professor Hilary Allen has characterized a payments crisis as "look[ing] more like a rolling blackout than a bank run."[227]

The U.S. government backstops banks through federal deposit insurance and Federal Reserve emergency support to manage liquidity risk. The FDIC typically insures up to "$250,000 per depositor, per FDIC-insured bank, per ownership category."[228] Insured depositors are less likely to withdraw their funds.[229] In the event of collapse, the FDIC

222. See Kevin Werbach & David Zaring, Systemically Important Technology, 101 Tex. L. Rev. 811, 858 (2023) ("Liquidity risk refers to the risk that a company may not have sufficient funding to satisfy its short-term needs."). The Congressional Research Service overviews how to analyze these challenges: "[A] bank's balance sheet—its assets, liabilities, and capital (equity)—provides the foundation for analyzing many banking issues." Raj Gnanarajah & Andrew P. Scott, Cong. Rsch. Serv., IF10035, Introduction to Financial Services: Banking 1 (2022), https://www.everycrsreport.com/files/2022-01-13_IF10035_de888abc5e9027474920d342aba2bb756d381fe3.pdf [https://perma.cc/F3NJ-PU2Z]. Most of a bank's assets include loans made, securities, bonds, and other financial market instruments. See id. Banks use liabilities and equity to "make loans and acquire assets." Id. Liabilities include customer deposits, "as the bank owes these funds to its customers and creditors. The difference between the assets and liabilities equals the bank's equity (assets - liabilities = equity)." Id.

223. Will Kenton, Understanding Liquidity Risk in Banks and Business, With Examples, Investopedia, https://www.investopedia.com/terms/l/liquidityrisk.asp (on file with the *Columbia Law Review*) (last updated Apr. 30, 2026).

224. Id. This Article examines funding liquidity risk on the liability side of the balance sheet. For a classic analysis of bank runs, see Douglas W. Diamond & Philip H. Dybvig, Bank Runs, Deposit Insurance, and Liquidity, 91 J. Pol. Econ. 401, 401 (1983) ("During a bank run, depositors rush to withdraw their deposits because they expect the bank to fail . . . . In a panic with many bank failures, there is a disruption of the monetary system and a reduction in production.").

225. See Hilary J. Allen, Payments Failure, 62 B.C. L. Rev. 453, 453 (2021) [hereinafter Allen, Payments Failure].

226. See id. at 462 ("There also is credit risk embedded in many traditional forms of retail payment, such as checks and credit cards, where the payment could take several days to ultimately settle, leaving at least one party to the transaction exposed to default.").

227. Id. at 455.

228. Deposit Insurance FAQs, Fed. Deposit Ins. Corp., https://www.fdic.gov/resources/deposit-insurance/faq [https://perma.cc/C7F9-8UV3] (last updated Apr. 1, 2024); accord 12 U.S.C. § 1821(a)(1)(E) (2024) (defining the "standard maximum deposit insurance amount" as $250,000).

229. See Fed. Deposit Ins. Corp., Options for Deposit Insurance Reform 8 (2023), https://www.fdic.gov/analysis/options-deposit-insurance-reforms/report/options-deposit-insurance-reform-full.pdf [https://perma.cc/BGY4-WNGF] ("It is important to recognize that insured depositors do not have an incentive to run based on fears that their deposits are at risk.").

follows a unique resolution process.[230] The Fed acts as a lender of last resort.[231] It may provide access to the Federal Reserve payments services and the discount window,[232] allowing banks to borrow against good collateral when facing emergencies.[233]

In exchange for government protection, banks must adhere to prudential requirements.[234] "Banks need a robust [liquidity and] cash flow management system"[235] and must "[c]onduct[] stress tests to simulate adverse market conditions,"[236] "develop contingency funding plans to address [these] potential liquidity shortfalls,"[237] draft "living wills" to provide plans to wind down failing banks safely,[238] and "mitigate potential risks associated with payment processing."[239]

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230. See Matthew Bruckner, Who's Down With OCC('s Definition of "Banks")?, 24 U. Pa. J. Bus. L. 144, 147–48 (2021) (comparing the bank resolution process to traditional bankruptcy proceedings).

231. See 12 U.S.C. § 347b (authorizing Federal Reserve banks to make advances to member banks); Bd. of Governors of the Fed. Rsrv. Sys., The Fed Explained, supra note 221, at 54.

232. See 12 U.S.C. § 248a ("All Federal Reserve bank services covered by the fee schedule shall be available to nonmember depository institutions and such services shall be priced at the same fee schedule applicable to member banks . . . .").

233. See id. § 347b ("Any Federal Reserve bank, under rules and regulations prescribed by the Board of Governors . . . may make advances to any member bank on its time or demand notes having maturities of not more than four months and which are secured to the satisfaction of such Federal Reserve bank.").

234. See, e.g., 12 C.F.R. § 3.10(a) (2025) (capital standards for national banks). Such regulatory requirements encourage institutions to mitigate risk. See Todd Phillips & Matthew Adam Bruckner, Consumer Shadow Banks, 35 Stan. L. & Pol'y Rev. 226, 238 (2024) ("Risk-based capital requirements ensure bankers [and shareholders] . . . are in first-loss positions ahead of their depositors, including a total capital ratio of at least 8% and leverage ratio of at least 4%, with heightened requirements for larger and more systemically risky institutions.").

235. Kenton, supra note 223.

236. Id.; see also Matthew C. Turk, Stress Testing the Banking Agencies, 105 Iowa L. Rev. 1701, 1713–15 (2020) (analyzing Dodd–Frank stress test procedures capaciously); Rory Van Loo, Stress Testing Governance, 75 Vand. L. Rev. 553, 556 (2022) (arguing stress tests are "central tools of modern governance").

237. Kenton, supra note 223. The Basel Committee on Banking Supervision "introduced . . . the liquidity coverage ratio (LCR) . . . to ensure that banks have a sufficient stock of high-quality liquid assets to survive a hypothetical thirty-day stress scenario . . . . The NSFR [net stable funding ratio] . . . is designed to constrain the reliance of banks on unstable, short-term sources of wholesale funding." Awrey & Judge, supra note 41, at 2335.

238. See Baradaran, supra note 43, at 1300–10 ("Living wills are a response to perhaps the most vexing problem that emerged from the recent crisis: the realization that certain firms were too big to fail.").

239. Payments Risk Management 101: Key Components and Best Practices, Stripe, https://stripe.com/resources/more/payments-risk-management-101-key-components-and-best-practices [https://perma.cc/9XAC-2A9E] (last updated Aug. 12, 2024). "These risks include fraud, . . . data breaches, . . . operational failures, and financial losses." Id.; see also Allen, Payments Failure, supra note 225, at 467 (describing how the cascade effect of individual risks impacts a larger system).

Nonbank companies do not have to abide by these rules and face different types of liquidity and payments risk. The distress for nonbank corporations storing and transferring money, as well as selling tangible goods and services, creates various kinds of risk compared to banks, especially concerning their inventory and supply chains.[240] If unexpected events cause disruptions at a nonbank company that maintains consumer balances, it can cause consumers to withdraw or spend funds on goods and services quickly. While the former scenario resembles a bank run, the latter scenario is a run on inventory. Moreover, "liquidity problems in large corporations can result in job losses, reduced consumer spending, and a decline in investor confidence," as well as "reputational damage," and "in severe cases, insolvency or bankruptcy."[241] As demonstrated during the global financial crisis and the COVID-19 pandemic, however, the federal government may support non-financial firms in exigent circumstances.[242]

Recent literature examines the systemic financial risk that tech companies create and the likelihood of government bailout. Professors Kevin Werbach and David Zaring have argued technology regulators should designate some technology firms as "systemic[ally] importan[t]."[243] Technology firms that appear stable can suffer through a chain reaction of interdependency, especially as the tech and finance sectors "are necessarily interconnected because money is money; it is the representation of value, unit of account, and means of exchange across all firms and users."[244] In 2020, researchers at the RAND Corporation studied financial contagion—the "disease-like spread of economic shocks"[245]—flowing from revenue shortfall at major technology

240. See Peter Atwater, The Troubling Parallels Between Supply Chains and Securitisation, Fin. Times (Aug. 31, 2021), https://www.ft.com/content/cece55b7-d137-4278-9e21-25ffba999946 (on file with the *Columbia Law Review*) ("Today, in response to shortages, businesses and even governments are shifting to what I call a 'just-in-case' business model. They are stockpiling critical supplies, onshoring previously outsourced production and boosting inventories where possible.").

241. Kenton, supra note 223.

242. See Eric Milstein & David Wessel, What Did the Fed Do in Response to the COVID-19 Crisis?, Brookings (Jan. 2, 2024), https://www.brookings.edu/articles/fed-response-to-covid19/ [https://perma.cc/VN74-P3AY] (detailing various measures the Federal Reserve took to support nonbank corporations during the pandemic); see also Adam Levitin, In Defense of Bailouts, 99 Geo. L.J. 435, 453–57 (2011) [hereinafter Levitin, In Defense of Bailouts] (arguing systemic risk is not limited to financial firms and analyzing the federal government rescue of the auto industry during the 2008 financial crisis).

243. Werbach & Zaring, supra note 222, at 813–14.

244. Id. at 833. See also Rory Van Loo, Digital Market Perfection, 117 Mich. L. Rev. 815, 858–69 (2019) (arguing that mass digital switching by consumers could trigger firm and sector instability with potential systemic consequences).

245. Jonathan William Welburn, Aaron Strong, Florentine Eloundou Nekoul, Justin Grana, Krystyna Marcinek, Osonde A. Osoba, Nirabh Koirala & Claude Messan Setodji, RAND Corp., Systemic Risk in the Broad Economy: Interfirm Networks and Shocks in the

companies.[246] They found that a run on goods and services at Amazon would generate more significant contagion and loss of economic value than a run on any bank.[247] Other scholars have argued dominant tech companies may cause "counterparty contagion," "informational contagion," or a "common shock"[248]—"a shock caused to a particular sector that leads to multiple entities in the sector simultaneously collapsing and causing broad harm to the economy."[249]

II. GAMING MONEY

This Part surveys the structure of the video game industry and the mechanics of gaming money. Companies issue a spectrum of private financial instruments within games and distribution platforms, such as the Sony PlayStation Store and Microsoft Store, which gamers can "cash out" into a bank account or digital wallet or onto a gift card.[250] Gaming money is critical in organizing information, data governance, behavior, and culture within the game. As this Part will explain, gaming money also helps some gamers shop for and purchase more products faster and more easily. In many instances, games allow players to store value on their game account—items, in-game currency (what this Article terms "play money" below), cryptocurrency, or balances denominated in fiat currency. Digital wallets (console, computer, and smartphone applications) help gamers use this value to make payments outside the game. Players may purchase items from in-game or console-based stores. As opposed to consumer protection concerns, the money and banking perspective focuses our attention not on the purchases so much as the

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U.S. Economy 5 (2020), https://www.rand.org/content/dam/rand/pubs/research_reports/RR4100/RR4185/RAND_RR4185.pdf (on file with the *Columbia Law Review*) (citing Rudiger Dornbusch, Yung Chul Park & Stijn Clessens, Contagion: Understanding How It Spreads, 15 World Bank Rsch. Observer 177, 178 (2000)).

246. See id. at 31 (estimating the total economic loss a 1% shock to each firm can cause).

247. See id. at 32 tbl. 6.1 (finding that a run at Amazon could cause a loss of $77 billion in the economy and a run at Bank of America a loss of $23 billion).

248. Levitin, In Defense of Bailouts, supra note 242, at 55–61 (internal quotation marks omitted).

249. M.P. Ram Mohan & Sai Muralidhar K., Conceptualizing "Systemically Important Technological Institutions" as Too Big to Fail Entities: Moving the Insolvency Goal Post, 57 Vand. J. Transnat'l L. 877, 890 (2024) (citing Levitin, In Defense of Bailouts, supra note 242, at 460); see also Nordine Abidi & Ixart Miquel-Flores, Too Tech to Fail? 27 (Eur. Banking Inst., Working Paper No. 124, 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4149787 [https://perma.cc/N8VG-VKJ8] ("[W]e find that bondholders of BigTech institutions appear to have an expectation that the government will (possibly) shield them from losses in the event of a 'tech failure' and, as a result, they do not accurately price risk.").

250. See, e.g., Everything Gaming: Buy and Sell Safely, Gameflip, https://gameflip.com/overview/sell/game-items [https://perma.cc/HZF8-XP32] (last visited Oct. 31, 2025) ("SELL YOUR ITEMS FOR REAL CASH").

unspent balances, in which the issuer owes the balance holder future value.

As detailed below, in some cases, players may also transfer value from gamer to gamer. Some gaming companies that store value allow users to "cash out"—convert gaming money to bank deposits.[251] The dominant companies allow developers to use their software to create third-party platforms where gamers can exchange gaming money or use it to speculate.[252]

A. *Offline Games*

In the 1970s, companies like Nintendo initially focused on manufacturing and selling analog fun, such as playing cards.[253] In the 1980s, digital gaming took off as players (primarily teenagers) gathered at mall arcades.[254] They inserted coins into the slots of tollbooth-sized machines to play now-classic titles like Space Invaders, Ms. Pac-Man, and Donkey Kong and could play until they lost the game or ran out of tokens.[255] Beginning in the late 1970s, hardware manufacturers started to sell "consoles"—small computers for playing platform-specific games.[256] These devices enabled companies to deliver games from the arcade booth to a household television set (consoles such as the Nintendo Entertainment System, Sega Genesis, and Sony PlayStation). Technological development of game consoles, console cartridges, and memory cards allowed gamers to save progress and points on their own

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251. See infra sections II.B.1 and II.B.2.

252. See infra section II.C.2.

253. See Gili Malinsky, From Creating Japanese Playing Cards in 1889 to Becoming One of the Most Iconic Video Game Companies in History, See How Nintendo Has Evolved, Bus. Insider (Mar. 18, 2019), https://www.businessinsider.com/nintendo-game-boy-super-mario-history-evolution-2019-3 [https://perma.cc/8MXL-8CQ2] ("Nintendo would become the biggest card-selling company in the country, before morphing into its numerous iterations (a taxi company, a food manufacturing company, a toy company) and finding worldwide success with its enterprising video game systems and games in the '80s.").

254. Kyle Riismandel, Arcade Addicts and Mallrats: Producing and Policing Suburban Public Space in 1980s America, 5 Env't, Space, Place 65, 66 (2013) ("The video game arcade emerged at a propitious moment for suburban development. During the 1970s and 80s, a mall-building boom in these outlying areas provided new commercial and recreational spaces eventually overtaken by suburban teens.").

255. Tim Wu, The Attention Merchants: The Epic Struggle to Get Inside Our Heads 191–97 (2017) ("[C]abinets with various games . . . started cropping up in various public places, sometimes collected in amusement arcades, alongside pinball machines.").

256. Id. at 196 ("Atari . . . thought a home video game system could succeed by allowing people to play the most popular arcade games . . . on their televisions . . . . Atari licensed *Space Invaders* in 1979; it would . . . sell a million [consoles] that year; then two million units in 1980, and by 1982 it had sold 10 million . . . .").

games.[257] Computer gaming companies made more complicated games with their own internal economies.[258]

B. *Online Games*

In the twenty-first century, games have moved online and become increasingly social. Multiplayer, interactive video games adopt powerful graphic processing hardware and AI to enhance the gaming experience.[259] For many gamers, online gaming and innovative technology make gaming feel more authentic through "real-time player interaction and increasingly personalized interfaces."[260] Some gaming companies are industry stalwarts (e.g., Sony, Nintendo, and Valve, the dominant platform distributor of computer games[261]), some are relatively new publishers (e.g., Roblox), and many are Silicon Valley titans (e.g., Meta, Apple, Google, and Microsoft).[262] The industry leaders, Sony and Microsoft, manufacture consoles and develop, publish, and sell games through online stores.[263]

Like most other technology companies, gaming companies surveil their users, tending toward "data maximization"—constantly collecting and sharing data under the premise that it will necessarily improve

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257. See Shannon Symonds, Saving in Video Games, Strong Nat'l Museum of Play (July 14, 2011), https://www.museumofplay.org/blog/saving-in-video-games/ [https://perma.cc/Q5HJ-82TR] (discussing the evolution of saving capacities in video games).

258. In the 1960s, Mabel Addis, the first known woman game designer, created the first game with storytelling. In *The Sumerian Game*, a player would "act as the ruler of the Mesopotamian city-state of Lagash, in Sumer, in 3500 B.C." Anna Diamond, Overlooked No More: Mabel Addis, Who Pioneered Storytelling in Video Gaming, N.Y. Times (Aug. 24, 2024), https://www.nytimes.com/2024/08/24/obituaries/mabel-addis-overlooked.html(on file with the *Columbia Law Review*).

259. See The Future of Artificial Intelligence in Video Games, Colum. Eng'g, https://ai.engineering.columbia.edu/ai-applications/ai-video-games/ [https://perma.cc/4WP3-CZRT] (last visited Oct. 10, 2025) (discussing how AI is used to make video game graphics look more photorealistic).

260. Revolutionizing the Gaming Industry Through Embedded Payments, J.P. Morgan (Oct. 27, 2023), https://www.jpmorgan.com/insights/payments/payment-trends/revolutionizing-gaming-through-embedded-payments [https://perma.cc/ZE7G-4BVV].

261. Louis Ashworth, Valve Conquered PC Gaming. What Comes Next?, Fin. Times (July 4, 2025), https://www.ft.com/content/f4a13716-838a-43da-853b-7c31ac17192c (on file with the *Columbia Law Review*).

262. NVIDIA started as a company focused on developing "accelerated, or graphics-based, computing" for personal computers and video games. Andrew Nusca, This Man Is Leading an AI Revolution in Silicon Valley—And He's Just Getting Started, Fortune (Nov. 16, 2017), https://fortune.com/2017/11/16/nvidia-ceo-jensen-huang/ [https://perma.cc/UE4Z-3UEB]. It now sells AI software and hardware. Id.

263. See About Sony Interactive Entertainment, PlayStation, https://www.playstation.com/en-us/corporate/about-us/ [https://perma.cc/R8SG-38HA] (last visited Oct. 31, 2025); Xbox Games, Xbox, https://www.xbox.com/en-us/games [https://perma.cc/R6U2-TSKH] (last visited Apr. 4, 2026).

desired outcomes.[264] This means gaming companies have realized they can not only build psychographic profiles of their players to sort, store, score, share, and sell, but predict the behavior of players writ large. Gaming databases include social media data, browsing history, and records of in-game behavioral interactions.[265] Mobile games allow companies to access more detailed information about players' locations, social contacts, and sensor data.[266] Some companies that offer virtual reality (VR) headsets can accurately identify unique users by tracking brief head, hand, and eye movements.[267]

Moreover, gaming companies increasingly interact with individuals and groups in personalized ways based on their identities, more quickly expanding the user base and enhancing ways to keep gamers on their platforms. An estimated 76% of children in the United States play video games.[268] Due to "specific . . . gaming motivations,"[269] as well as tailoring to make games more gender-neutral (within a historically male-dominated user base), roughly half of gamers are women and girls.[270] Additionally, many companies now design their games with racial

264. See Omri Ben-Shahar, Data Pollution, 11 J. Legal Analysis 104, 140 (2019) (internal quotation marks omitted) (defining data maximization as the collection of all possible data).

265. See N. Cameron Russell, Joel R. Reidenberg & Sumyung Moon, Privacy in Gaming, 29 Fordham Intell. Prop. Media & Ent. L.J. 61, 74–75 (2019) (noting that some games collect location data, require access to a smartphone's contacts, and purchase histories).

266. Id. at 75 (noting that Nintendo, creator of mobile game *Pokémon Go*, "can use a device's 'precise' location based on GPS and mobile network access").

267. See Vasilis Xynogalas & M.R. Leiser, The Metaverse: Searching for Compliance With the General Data Protection Regulation, 14 Int'l Data Priv. L. 89, 97 (2024) (collecting studies on VR user re-identification through motion data). For examples of legal literature on VR, MR, and AR, see Joshua A.T. Fairfield, Mixed Reality: How the Laws of Virtual Worlds Govern Everyday Life, 27 Berkeley Tech. L.J. 55, 84 (2012) (arguing mixed reality ends the "enduring and erroneous theoretical idea of the Magic Circle"); Mark A. Lemley & Eugene Volokh, The Real Law of Virtual Reality, 51 U.C. Davis L. Rev. 51, 64 (2017) (exploring novel problems presented by AR and VR).

268. 2023 Essential Facts, supra note 4, at 2.

269. Tomoko Yokoi, Female Gamers Are on the Rise. Can the Gaming Industry Catch Up?, Forbes (Mar. 4, 2021), https://www.forbes.com/sites/tomokoyokoi/2021/03/04/female-gamers-are-on-the-rise-can-the-gaming-industry-catch-up/ (on file with the *Columbia Law Review*) (last updated Dec. 10, 2021) (discussing how the gaming industry has taken steps to work toward gender inclusion within different spheres).

270. Ent. Software Ass'n, Power of Play: 2025 Global Video Games Report 7 (2025), https://www.theesa.com/wp-content/uploads/2025/09/PoP-2025-v10-web-spreads.pdf [https://perma.cc/8FXU-6XRS] (reporting that 40% of global gamers are female); see also Kishonna L. Gray & David J. Leonard, Introduction *in* Woke Gaming: Digital Challenges to Oppression and Social Injustice 3, 7–10 (Kishonna L. Gray & David J. Leonard eds., 2018) (critiquing a discriminatory culture in the wake of GamerGate, an online harassment campaign, but promoting a new wave of women, gender nonconforming, and queer developers, and developers of color).

representation in mind.[271] Outside of the gaming context, Professor Salomé Viljoen characterizes targeted advertising as a paid data-driven capability structured around consumer identity.[272] She explains that economic value in data markets is produced through classification into group categories, which underwrites behavioral and identity-based targeting among advertisers.[273] Video game companies have operationalized this fact by relying on player data and algorithmic audience segmentation to sustain consumer demand, particularly through in-game advertising. Identity-based advertising increases the industry's range and endurance as companies compete to win lifelong, brand-loyal gamers.[274]

Above all, the operating principles of data maximization have accompanied new monetization opportunities. Gaming companies earn most of their revenue through microtransactions.[275] They use algorithms to combine "behavioral, biometric, and personal data" and to control "prices" (or what this Article refers to as exchange rates), as well as the "availability of goods or services on a highly individualized level."[276] Some gaming terms of service flatly state that "[p]rices of in-game items may be determined by factors not disclosed to the player."[277] The availability of

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271. See Chad Valdez, Indigenous Representation in Video Games, Cultural Survival (Mar. 26, 2024), https://www.culturalsurvival.org/news/indigenous-representation-video-games [https://perma.cc/2DKU-MASE] (discussing the evolution of indigenous representation in videogames).

272. See Salomé Viljoen, A Relational Theory of Data Governance, 131 Yale L.J. 573, 590 (2021).

273. See id. at 607, 609–11 (discussing how data flows allow companies to structure advertising content around "the social fact of group identity via shared preferences, social patterns, and behaviors that make people similar to one another").

274. See Nick Woodford, The Rise of Gaming in Advertising: Insights From Industry Leaders on Growth, Challenges, and Opportunities, Advert. Wk., https://advertisingweek.com/the-rise-of-gaming-in-advertising-insights-from-industry-leaders-on-growth-challenges-and-opportunities/ [https://perma.cc/2228-2FK3] (last visited Oct. 10, 2025) ("[W]ith the growing maturity of intrinsic in-game ads, advanced audience targeting is . . . enabling brands to precisely reach player segments that align with their campaigns across various games and platforms."); see also CFPB Report, supra note 66, at 15 (providing examples of demographic identity markers commonly used in in-game advertising, including "age, gender, family, and economic status"); Roblox Corp., Annual Report (Form 10-K) (Feb. 11, 2026), https://www.sec.gov/Archives/edgar/data/1315098/000131509826000024/rblx-20251231.htm [https://perma.cc/7L3Y-7TMM] [hereinafter Form 10-K] at 15 (describing "immersive ads" as ad units that creators insert "for Roblox to programmatically serve ad content from advertisers"). See, e.g., id. at 18 ("Users build a direct relationship with the Roblox brand by establishing an identity and creating their social graph . . . . [T]his approach . . . promotes loyalty and engagement.").

275. See supra note 6 and accompanying text.

276. CFPB Report, supra note 66, at 14; see also King et al., supra note 6, at 137 (examining exploitative data practices within microtransactions in video games).

277. King et al., supra note 6, at 137 & tbl. 3; see also CFPB Report, supra note 66 (noting industry experts commonly use the term "dynamic odds" to describe the business practice of adjusting gameplay based on player data).

funds, including in user accounts, may change at any time.[278] Platforms deploy nearly identical contractual language: Gaming money has no cash value and is non-transferable, and the platform operator has a unilateral modification authority operator.[279] They contractually disclaim the characteristics (convertibility, property status, deposit-like features) that would trigger, for instance, banking or money transmitter regulation.[280]

Below, this Article considers three different types of gaming money: "play money," instruments earned or purchased in games; "store money," instruments held in proprietary digital wallets; and gift cards, which are also IOUs of gaming companies and play a crucial role in converting and transferring financial value between the gaming industry and the rest of the economy.

1. *Play Money.* — While companies can still monetize games with currency, gaming money helps further streamline multipoint ecosystems.[281] Typically, players can easily earn gaming money within a game by completing specific tasks, defeating another player, or discovering money during gameplay.[282] They can then use gaming money to buy energy, lives, boosters, or level-ups within the game or outside of it. Gaming money offers players a more frictionless, interactive, and

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278. See Microsoft Services Agreement, Microsoft (July 30, 2025), https://www.microsoft.com/en-us/servicesagreement [https://perma.cc/5ENA-VHTF] ("Microsoft may at any time regulate, control, modify and/or eliminate the game currency and/or virtual goods associated with any one or more Xbox games or apps as it sees fit in its sole discretion."); Legal, Rockstar Games, https://www.rockstargames.com/eula [https://perma.cc/2W9G-KNQ9] (last updated Feb. 28, 2025) (stating in the end user agreement that the publisher may revise or take action that impacts the perceived value of or purchase price for items and gaming money at any time). See also Epic Games Terms of Service § 10, Epic Games, https://legal.epicgames.com/en-US/epicgames/tos [https://perma.cc/A8ZS-VHTJ] [hereinafter Epic Games, Terms of Service] (last updated Feb. 27, 2026) ("The features, pricing, availability, and functionality of Credits and other In-Game Content may change at any time without notice . . . .").

279. See, e.g., Epic Games, Terms of Service, supra note 278, § 10 ("Credits are not the same as cash, gift cards, or banks accounts and cannot be exchanged for real currency or other items outside the Epic ecosystem." (emphasis omitted)); PlayStation Network Terms of Service and User Agreement § 8.13, Sony, https://www.playstation.com/en-us/legal/psn-terms-of-service/ [https://perma.cc/XR8S-NPEG] [hereinafter PSN Terms of Service] (last updated Mar. 2025) ("Virtual Items have no value or application outside of the game or PlayStation Store, and may not be sold, transferred, or redeemed for real money or items of value. Virtual Items may be modified or removed without notice.").

280. See User Agreement, Elec. Arts, https://www.ea.com/legal/user-agreement [https://perma.cc/V43F-MLN9] (last updated Dec. 11, 2025) (disclaiming all property rights in virtual currency and reserving the right to change pricing, availability, and functionality without notice); Roblox Terms of Use § 3(g), Roblox, https://en.help.roblox.com/hc/en-us/articles/115004647846-Roblox-Terms-of-Use (on file with the *Columbia Law Review*) (last updated Dec. 19, 2025) (reserving unilateral right to modify or eliminate virtual items "with or without notice").

281. See J.P. Morgan, supra note 260 (proposing the inclusion of "an embedded payments ecosystem" to "minimize friction[]" for players when switching between games and platforms).

282. Id.

organized environment by simplifying the acquisition and use of virtual goods and services.

Players also have the option to purchase gaming money with currency, which can further reduce friction. For example, in *Fortnite*, an extremely popular cooperative battle game, players buy blocks of V-Bucks via bank accounts, which they then use in increments to pay as they play.[283] The publisher, Epic Games, organizes and values gameplay and enables gamers to purchase items and services within the game without having to retrieve credit card information and interrupt the experience.[284]

While monetization with currency may organize a system of achievements that sets gameplay parameters, gaming money tracks progress while more easily enabling in-game transactions. The gaming money is a crucial component of an in-game economy. Many games have "in-game marketplaces" in which players can purchase and trade assets.[285] This social aspect of gaming money enhances the overall experience, making players feel more connected and engaged.[286] For gaming companies, platform-specific money keeps users on the platform. Gaming money, like other forms of digital assets, can also "reduc[e] the transaction fees associated with other forms of payments and even reduc[e] the cost of funding."[287]

Some companies deploy gaming money within a "loot box." "A loot box is a seemingly randomized package" of gaming money and items, and "the player only knows the contents after paying and opening the package."[288] Gaming companies market "the contents [of a loot box] . . . as containing rare and valuable items missing from a player's collection,

283. See Redeem Your V-Bucks Card, Fortnite, https://www.fortnite.com/vbuckscard (on file with the *Columbia Law Review*) (last visited Oct. 10, 2025).

284. Id.

285. CFPB Report, supra note 66, at 6.

286. Compare Hubka, supra note 5 (arguing monetization strategies aim to "maximize revenue while providing value to players," including "additional content, features, or virtual goods to players within the game, enhancing the overall gaming experience") and J.P. Morgan, supra note 260 (arguing embedded payment ecosystems add "a layer of continuity across games, enhancing the overall gaming experience and user engagement"), with King et al., supra note 6, at 139 (examining how thirteen patented in-game purchasing systems could take advantage of information asymmetries and be considered "unfair or exploitative"), and Elena Petrovskaya & David Zendle, Predatory Monetisation? A Categorisation of Unfair, Misleading and Aggressive Monetisation Techniques in Digital Games From the Player Perspective, 181 J. Bus. Ethics 1065, 1072 (2022) (surveying gamers and finding thirty-five monetization techniques that players reported as "unfair, misleading, and aggressive").

287. Elena Carletti, Stijn Claessens, Antonio Fatás & Xavier Vives, IESE Banking Initiative, The Bank Business Model in the Post-Covid-19 World 102 (2020), https://www.iese.edu/media/research/pdfs/ST-0549-E.pdf [https://perma.cc/3AT9-ULYL].

288. CFPB Report, supra note 66, at 10 n.37.

or game currency."[289] Players can sell gaming money and items for currency on third-party websites.[290] Some games, such as *Roblox* and *Axie Infinity*, support a "two-way flow," in which players can use fiat currency to purchase gaming money, but also exchange gaming money for fiat currency on gaming platforms or third-party markets.[291]

Several third-party websites operate platforms that allow gamers to exchange gaming money and items.[292] For instance, Gameflip offers an easy way to sell *FIFA* cards and coins for cash.[293] In the popular smartphone multiplayer strategy game *Clash of Clans*, there is no way to sell items within the virtual world, so players purchase other players' gaming accounts and digital wallets online.[294] In many cases, video game companies—such as Valve—prohibit players from cashing out within the game, but third-party platforms facilitate the conversion process.[295] Third-party platforms offer gateways to licit and illicit secondary markets. Some gaming companies support these markets to attract new players to their games.

Most notoriously, Valve has developed a secondary market for gaming money and items.[296] Founded in 1996, Valve Software is a U.S. video game developer, publisher, and digital distribution company headquartered in Bellevue, Washington.[297] Although Valve publishes famous online multiplayer game franchises such as *Counter-Strike*, *Half-Life*, and *DOTA*, it makes most of its profit through the dominant computer game distribution platform, Steam.[298] Valve has helped develop

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289. Id.

290. See id. at 10 n.37, 23.

291. Id. at 17.

292. Public websites show the current exchange rate of various gaming currencies to U.S. dollars. See PlayerAuctions In-Game Currency Price Tracker, PlayerAuctions, https://www.playerauctions.com/market-price-tracker/ (on file with the *Columbia Law Review*) (last visited Oct. 10, 2025).

293. See Listings, Gameflip, https://gameflip.com/shop?page=1&term=fifa&status=onsale&limit=36&start=0 [https://perma.cc/NGJ4-XVUR] (last visited Oct. 10, 2025).

294. See Clash of Clans Accounts for Sale—CoC Bases & ID, PlayerAuctions, https://www.playerauctions.com/clash-of-clans-account/ (on file with the *Columbia Law Review*) (last visited Oct. 10, 2025).

295. See CFPB Report, supra note 66, at 17–18.

296. Id. at 21–22 (describing the Steam Community Market as a "platform-supported secondary market" where players can use Steam Wallet Funds to buy items, as well as trade and sell them).

297. Jeff Dunn, Full Steam Ahead: The History of Valve, GamesRadar (Oct. 4, 2013), https://www.gamesradar.com/history-of-valve/ [https://perma.cc/WGJ9-DRBD] ("Around that same time, it moved its headquarters about five miles south to Bellevue, Washington. And while all this was happening, Valve started work on two new endeavors that would take it beyond mere game development: Source and Steam.").

298. sblemast, Printing Money: How Valve Went From Being an Indy Game Developer to the Most Profitable Company per Employee in the USA, Digit. Innovation & Transformation, https://d3.harvard.edu/platform-digit/submission/printing-money-how-valve-went-from-being-an-indy-game-developer-to-the-most-profitable-company-per-

the Steam Community Market—a platform-supported secondary market where players buy, trade, and sell items outside individual games.[299] Valve takes a 25% cut of a game's earnings on Steam, a 20% cut of the earnings over $50 million, and a 5–15% fee for every inter-player transaction within the Steam Community Market.[300]

Steam has facilitated a popular market for "skins"—essentially costumes that alter an avatar's appearance and display social status within gaming communities.[301] Most skins do nothing to substantively change gameplay, but the Steam Community Market enables players to swap them for Steam Wallet funds, creating a secondary market.[302] Gamers can convert the value of cosmetic items into fiat currency, rendering them attractive, speculative assets.[303] Third-party websites have thus enabled casino-like games for wagering skins and Steam Wallet funds: games on games.[304] Third-party websites also facilitate "skin betting" on events like competitive gaming contests ("esports").[305]

2. *Store Money*. — Many major gaming platforms offer digital wallets, allowing gamers to purchase items from in-game or console stores. As this Article shows, companies like Sony, Microsoft, Valve, Apple, and Google manage complex systems of wallet balances, credit card points, loyalty points, and gift cards. Since they do not have to report these flows or balances, however, it is challenging to quantify the average or total amounts, making store money resemble scrip.

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employee-in-the-usa/ [https://perma.cc/Y9M8-MS2G] (last updated Feb. 26, 2017) (describing how Valve "leverag[ed] its user base created through its success in game development . . . to launch the Steam platform").

299. See Community Market FAQ, Steam, https://help.steampowered.com/en/faqs/view/61F0-72B7-9A18-C70B [https://perma.cc/39ZZ-SNMQ] (last visited Oct. 10, 2025); see also CFPB Report, supra note 66, at 22 n.88 (explaining how users can buy and sell items on the community market).

300. CFPB Report, supra note 66, at 22 n.88 (noting that "Valve (Steam) may earn up to 15 percent of an item's total value for a transaction that occurs on the Steam Community Market"); New Revenue Share Tiers and Other Updates to the Steam Distribution Agreement, Steam (Nov. 30, 2018), https://steamcommunity.com/groups/steamworks/announcements/detail/1697191267930157838 [https://perma.cc/7S8R-CGJL].

301. CFPB Report, supra note 66, at 20 & n.79.

302. Id. at 20–21.

303. Id.

304. Id. at 22 (citing Desirée Martinelli, Skin Gambling: Have We Found the Millennial Goldmine or Imminent Trouble?, 21 Gaming L. Rev. 557, 558–61 (2017)).

305. Mark R. Johnson & Tom Brock, Gambling Rsch. Exch. Ont., How Are Video Games and Gambling Converging? 3–5 (2019), https://www.greo.ca/Modules/EvidenceCentre/files/Johnson%20and%20Brock%20(2019)%20How%20are%20video%20games%20and%20gambling%20converging.pdf [https://perma.cc/3H7R-2HRR]. See also People Make Games, How Valve Is Profiting From Steam's Back-Door Casinos, at 4:52, 6:01, 28:09 (YouTube, Nov. 7, 2022), https://www.youtube.com/watch?v=eMmNy11Mn7g (on file with the *Columbia Law Review*) (explaining how third-party sites use Steam's API to operate games where gamers can bet Call of Duty skins on virtual competitions).

Sony operates an expansive online PlayStation Store for gamers to "buy digital games, subscriptions, virtual currency, and other digital content."[306] Players can buy PlayStation Network (PSN) play money, items, and skins.[307] Notably, gamers cannot use wallet funds to purchase hardware.[308] PlayStation Direct accepts only credit cards (MasterCard, Visa, and Discover) and Klarna (a fintech company which will lend for purchases).[309]

To spend money in the store, users must create a master account linked to a digital wallet, which allows them to hold balances similarly to services like Venmo.[310] Sony prescribes acceptable payment methods (now including credit, debit, and prepaid cards, PayPal, Venmo, promotional codes, vouchers, digital and physical gift cards), and may vary them from time to time in each specific country.[311] Sony sets the cap on wallet funds at its discretion but does not publish them and reserves the right to change them.[312]

Sony's terms of service contract states that wallet funds are "non-refundable and non-transferable except where the law requires."[313] Furthermore, "Wallet Funds have no value outside PSN and can only be used to make purchases through PSN Services or certain Third-Party Services."[314] Sony has "no obligation to reverse or refund unauthorized charges."[315] Sony will not restore the value of any unused or "abandoned" funds.[316] But players can purchase digital gift cards and transfer value to other players as described below in section II.B.3. They

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306. PSN Terms of Service, supra note 279, § 8.1.

307. See How to Make Purchases From PlayStation Store, Sony, https://www.playstation.com/en-us/support/store/purchase-games-apps-ps-store/ [https://perma.cc/TD5M-5VNC] [hereinafter Sony Wallet] (last visited Oct. 11, 2025).

308. PlayStation Gift Cards FAQ, PlayStation, https://www.playstation.com/en-us/playstation-gift-cards [https://perma.cc/UP6F-S99F] (last visited Oct. 11, 2025) ("PlayStation Store gift cards can only be used on digital products at PlayStation Store. Physical products from PlayStation Direct and merch from PlayStation Gear can't be purchased with a gift card.").

309. Billing & Payments FAQ, PlayStation, https://direct.playstation.com/en-us/support/billing-payments [https://perma.cc/3RPY-HZL6] (last visited Feb. 7, 2026). For more on Klarna, see Jackie Veling, Klarna Buy Now, Pay Later: 2025 Review, NerdWallet, https://www.nerdwallet.com/personal-loans/reviews/klarna-buy-now-pay-later [https://perma.cc/3K9D-CZVU] (last updated Nov. 21, 2025).

310. See Sony Wallet, supra note 307.

311. See Payment Methods Accepted on PlayStation Store, Sony, https://www.playstation.com/en-us/support/store/payment-methods-accepted-on-ps-store/ [https://perma.cc/QGC3-ARJ9] (last visited Oct. 11, 2025).

312. See PSN Terms of Service, supra note 279, § 7.2.

313. Id. § 7.3 (emphasis omitted).

314. Id. § 7.2.

315. Id. § 7.3 (emphasis omitted).

316. See id. (emphasis omitted) ("WALLET FUNDS THAT ARE DEEMED ABANDONED OR UNUSED BY LAW WILL NOT BE RETURNED OR RESTORED.").

can also buy play money and transfer it in games that convert it into bank deposits or cryptocurrency through third-party platforms.[317]

The Microsoft gaming money system is more complex than the Sony system. Unlike with the Sony wallet, Microsoft allows gamers to use wallet funds to purchase hardware "[p]roducts includ[ing] Xbox, Surface, phones, PCs and accessories."[318]

Until July 2024, Microsoft operated an Xbox Games Store, account, and wallet system separate from other Microsoft products.[319] Gamers now use a singular Microsoft Store.[320] Gamers can now purchase consoles, games, merchandise, and hardware accessories like controllers at the generic Microsoft Store.[321] As with the PlayStation store, players can also buy Microsoft play money, items, and skins.[322] Players can add funds to their wallets via credit card, debit card, PayPal account, or gift cards.[323] Gamers can also fund their wallets with the no-annual-fee Xbox Card from Barclays, which offers rewards.[324] Players earn rewards by playing games, using Bing, and purchasing products in the Microsoft Store, and can use these rewards to purchase games, devices, movies, apps, and more.[325]

Unlike Sony, Microsoft imposes a disclosed limit on wallet funds. One Microsoft wallet may contain up to $1,000, but players may hold up

317. See CFPB Report, supra note 66, at 20–23.

318. Spend the Money in My Microsoft Account, Microsoft Support, https://support.microsoft.com/en-us/account-billing/spend-the-money-in-my-microsoft-account-b7c7baec-1769-6c57-3a47-64413e69cc5d (on file with the *Columbia Law Review*) [hereinafter Microsoft Support, Spend the Money in My Microsoft Account] (last visited Feb. 7, 2026).

319. See Dave McCarthy, The Xbox 360 Store Will Close July 2024, But You Can Keep Playing Your Favorite Games, Microsoft (Aug. 17, 2023), https://news.xbox.com/en-us/2023/08/17/xbox-360-store-will-close-july-2024/ [https://perma.cc/6Z9Q-UMP7].

320. See Jowi Morales, Xbox 360 Store to Close July 29, 2024 — But You Can Still Play Games Without Issue, Tom's Hardware (May 1, 2024), https://www.tomshardware.com/video-games/xbox/xbox-360-store-to-close-july-29-2024-but-you-can-still-play-games-without-issue [https://perma.cc/C88J-KBUG] (explaining that former users of the Xbox Store now must make purchases via the Microsoft Store).

321. See Microsoft Support, Spend the Money in My Microsoft Account, supra note 318.

322. See Xbox Consoles, Games, Controllers, Gear & More, Microsoft Store, https://www.microsoft.com/en-us/store/b/xbox [https://perma.cc/7BXK-MCPY] (last visited Feb. 7, 2026).

323. See How to Add Money to Microsoft Account, Process Street, https://www.process.st/how-to/add-money-to-microsoft-account/ [https://perma.cc/W8LS-FT6L] (last visited Oct. 11, 2025).

324. See Craig Joseph & Kenley Young, 5 Things to Know About the Xbox Credit Card, NerdWallet, https://www.nerdwallet.com/article/credit-cards/xbox-card [https://perma.cc/WMK7-YCTE] (last updated Feb. 4, 2026).

325. See Rewards With Xbox, Xbox, https://www.xbox.com/en-US/rewards#earn [https://perma.cc/QUN4-YGHR] (last visited Oct. 11, 2025).

to five wallets with a combined limit of $5,000.[326] The Microsoft Gift Card Terms and Conditions state that refunds are conditional and wallet funds are nontransferable.[327] Moreover, the Microsoft Services Agreement provides that "Microsoft may at any time regulate, control, modify [or] eliminate the game currency [and] virtual goods . . . as it sees fit in its sole discretion."[328] Critically, unlike Sony, Microsoft clearly states players may purchase these products using play money.[329] Thus, players can earn value through games and use it for other products in the Microsoft Store. For example, Microsoft serves as a conversion platform for publishers like Epic Games, which issues *Fortnite* V-Bucks.[330] After purchasing V-Bucks from the Microsoft store, players add the V-Bucks to a *Fortnite* Shared Wallet.[331] V-Bucks purchases do not come with additional redemption codes, and players cannot gift them to other accounts.[332] Theoretically, there is no further conversion mechanism. But because players may add funds they earned in games, they may effectively bring "play money" into the "real world" through Microsoft Store purchases. This portal between the gaming industry and the rest of the economy presents particular forms of harm and risks, discussed below in section II.C.

3. *Gift Cards.* — As mentioned above, publishers also use gift cards as a conversion mechanism between gaming money and currency, adding another dimension to the system. For instance, Roblox earns nearly all of its revenue via the sale of Robux.[333] The business model, however, is

326. Limits on the Money in Your Microsoft Account, Microsoft Support, https://support.microsoft.com/en-us/account-billing/limits-on-the-money-in-your-microsoft-account-a37b3221-363b-e789-13cd-ff1641128004 (on file with the *Columbia Law Review*) (last visited Oct. 11, 2025).

327. See Microsoft Gift Card Terms and Conditions § 2.5, Microsoft Support, https://support.microsoft.com/en-us/account-billing/microsoft-gift-cards-terms-and-conditions-94295a5a-a0bb-070e-1d15-2145344b741d (on file with the *Columbia Law Review*) (last visited Feb. 7, 2026).

328. Microsoft Services Agreement, supra note 278, § 14(a)(vi).

329. See id. ("[Microsoft Store items] may be purchased from or on behalf of Microsoft using actual monetary instruments or using game currency.").

330. See Fortnite—1,000 V-Bucks, Xbox, https://www.xbox.com/en-US/games/store/fortnite-1000-v-bucks/C0F5HT9NV86P [https://perma.cc/4CNK-QMF6] (last visited Apr. 5, 2026) (listing V-Bucks for purchase, which can then be transferred across platforms supporting *Fortnite*'s Shared Wallet).

331. See V-Bucks Purchased on PlayStation Join Fortnite Shared Wallet, Fortnite (May 16, 2022), https://www.fortnite.com/news/v-bucks-purchased-on-playstation-join-fortnite-shared-wallet (on file with the *Columbia Law Review*) ("If you purchased V-Bucks through the Microsoft . . . Store, you must log into *Fortnite* on the corresponding platform to receive them before accessing them across all . . . Shared Wallet platforms.").

332. See Redeem Your V-Bucks Card, Fortnite, https://www.fortnite.com/vbuckscard (on file with the *Columbia Law Review*) (last visited Oct. 10, 2025).

333. See Annual Revenue of Roblox Corporation Worldwide From 2019 to 2024, by Region, Statista (Nov. 27, 2025), https://www.statista.com/statistics/1376991/annual-revenue-roblox-corporation-region/ [https://perma.cc/BLQ6-YVVH] ("Roblox generates almost all of its revenue through the sales of virtual currency, 'Robux,' which players can

highly seasonal, "with the highest percentage of . . . bookings" occurring during the winter holidays,[334] when the use of gift cards increases.[335] Players can also use gift cards to transfer the value of some play or store money between each other. For instance, although Sony prohibits players from transferring money between PlayStation wallets,[336] players can gift each other gaming money through the digital gift card system.[337]

C. *Harms & Risks*

Gaming money introduces new techniques for value extraction and potentially predatory behavior by companies against gamers. When gaming companies deploy money, they take advantage of built-in environments and users who have no choice but to participate in the surveilled monetary system to continue playing the game. These are the same "harms and risks" discussed in section I.D, as illustrated here in the gaming money context.

1. *Rate Manipulation.* — Some companies blur the distinction between gaming and currency. The use of instruments like Robux undermines the psychological link between gameplay and real expenditure. For instance, eliminating the need to use one's credit card during gameplay or go to a store makes the consumer less sensitive to the actual monetary cost of a purchase.[338] The European Consumer Organisation has reported that virtual currencies reduce what researchers call "payment aversion"—the mental friction that ordinarily restrains spending.[339] Moreover, "[g]aming companies . . . us[e]

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use to purchase virtual items sold by the *Roblox* developer and creator community on the platform.").

334. Form 10-K, supra note 274, at 19 (noting Roblox has "historically experienced seasonality in monetization . . . and tend[ed] to generate higher levels of bookings in the fourth quarter of the year primarily due to the end-of-year holiday season").

335. Id. at 25 (noting holidays "lead to increased spend on pre-paid Robux gift cards, and we expect this trend to continue").

336. PSN Terms of Service, supra note 279, § 7.3 ("Funds added to the PSN Wallet are non-refundable and non-transferable except where the law requires." (emphasis omitted)).

337. PlayStation Store Gift Cards, PlayStation, https://www.playstation.com/en-us/playstation-gift-cards/ [https://perma.cc/W7LP-XNR4] (last visited Feb. 8, 2026) (noting that "[d]igital currencies like V-Bucks, EA SPORTS FC Points and Call of Duty® Points can absolutely be purchased with a PlayStation Store gift card").

338. See Marie-Claire Broekhoff & Carin van der Cruijsen, Paying in a Blink of an Eye: It Hurts Less, but You Spend More, 221 J. Econ. Behav. & Org. 110, 112 (2024) (finding that convenience and lower salience of a payment reduce the "pain of paying" and increase the likelihood of overspending for mobile payments as compared to credit card payments, much less cash).

339. Bureau Européen des Unions de Consommateurs, Monetising Play: Regulating In-Game and In-App Premium Currencies 16 (2024), https://www.beuc.eu/sites/default/files/publications/BEUC-X-2024-061_Monetising_play_Regulating_in_game_and_in_app_premium_currencies.pdf [https://perma.cc/2QZ5-DAJ2] (describing how, according to the "'pain of paying' principle," cash payments involve "an aversion to

behavioral, biometric, and personal data to manipulate prices and the availability of goods or services on a highly individualized level."[340] Companies may set prices using algorithms that consider "factors that are not disclosed to the player"—reserving the right to change "the availability, value, and quality of goods, including those in the user's account, . . . at any time."[341] Companies may deploy several tactics to obscure the fiat value of gaming money itself, including (1) confusing consumers about the comparative value of different forms of gaming money,[342] for instance, by packaging them together as deals, (2) confusing gamers about exchange rates between gaming money and currency,[343] or (3) confusing consumers about withdrawal rates and ratios.[344]

The 2024 class action *Noel v. Roblox Corporation* offers a detailed account of how Roblox confuses gamers and captures value throughout its Robux operations.[345] According to the complaint, Roblox maintains substantially distinct exchange rates for when gamers and developers

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payment," whereas when consumers use "other forms of payment such as credit cards, fidelity cards, vouchers, virtual credits, or when the transaction is in general less tangible, they tend to spend more" (footnotes omitted) (citing Priya Raghubir & Joydeep Srivastava, Monopoly Money: The Effect of Payment Coupling and Form on Spending Behavior, 14 J. Experimental Psych. 213 (2008))).

340. CFPB Report, supra note 66, at 14; see also King et al., supra note 6, at 137 (describing how video games "use . . . individual and/or player population data to optimize the type and scheduling of purchasing offers or discounts for each player").

341. CFPB Report, supra note 66, at 14–15; infra section III.A.

342. See Petrovskaya & Zendle, supra note 286, at 1072 (discussing player testimony about how having multiple gaming currencies makes actual costs unclear, beyond typical predatory advertising considerations).

343. See id. (discussing player testimony about how using gaming money instead of fiat currency creates confusion about the cost of in-game purchases); see also Advertising Body Consults on New Guidance on Ads for 'Loot Boxes' and Other In-Game Purchases, Soc'y for Computs. & L. (Nov. 6, 2020), https://www.scl.org/12095-advertising-body-consults-on-new-guidance-on-ads-for-loot-boxes-and-other-in-game-purchases/ [https://perma.cc/DK9T-HN57] ("[W]here consumers can buy credits to use for in-game purchases, their cost must be clear . . . . If the real-world price given is indicative or approximate, this should be made clear to consumers, and information about how this price was calculated should be easily available.").

344. Tonya Mosley & Allison Hagan, Boundless Creativity or Labor? Critics Say Roblox Hoards Profits and Shortchanges Kids' Safety, WBUR (Jan. 18, 2022), https://www.wbur.org/hereandnow/2022/01/18/roblox-kids-safety-profits [https://perma.cc/Y8FT-JLDZ] ("If you have a huge payday because you made a successful game, you're a sort of virtual millionaire on Roblox . . . . But the moment you choose to take that Robux off the platform, if you choose to withdraw it, only at that point are your assets devalued." (internal quotation marks omitted) (quoting investigative journalist Quintin Smith)).

345. Complaint at 4–5, Noel v. Roblox Corp., No. 3:24-cv-00963-JSC (N.D. Cal. filed Feb. 16, 2024), 2024 WL 3747454 ("Roblox has built its entire platform around profiting from the creative development of its users . . . and exploiting their labor for Roblox's own profit.").

purchase Robux versus when they withdraw them.[346] For example, the complaint notes that on February 2, 2024, $4.99 was worth 400 Robux (approximately $0.0125 per singular Robux), while gamer-developers converting Robux back to dollars receive $3.50 for 1,000 Robux (approximately $0.0035 per singular Robux).[347]

Roblox's own terms confirm the platform's power over rates. The Terms of Use state that the corporation "has and retains all rights in and to Robux," including "the right to modify, revoke, or terminate your license to use Robux without notice, payment, or liability to you."[348] Moreover, "Roblox makes no guarantees or warranties regarding Robux or their availability or value."[349] Indeed, in September 2025, Roblox began to generate even more confusion by implementing two different conversion rates as a general matter.[350] Roblox will grandfather in any Robux earned before September 5, 2025 at the "Old Rate" of $0.0035 per singular Robux, while the company will convert any Robux earned after that at a "New Rate" of $0.0038.[351] Developers do not appear to have a right to appeal the rates or even the categorization of funds.[352]

This Article contends that Roblox extends this dynamic into the physical retail world by issuing closed-loop gift cards denominated in the sovereign's unit of account.[353] If a consumer purchases a gift card denominated in dollars, it is still only a claim on whatever quantity of Robux is available at the exchange rate Roblox sets.[354] Because the dollar value of the cards is only spendable when converted to Robux—the value of which Roblox controls—the nominal dollar value of the card is illusory. By changing the exchange rate within its gaming environment at will, Roblox can retroactively change the card's value within the game and the nature of the gamers' purchase. Although companies may alter

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346. See id. at 4 ("When purchasing Robux, one Robux is valued at 0.0125 USD, meaning $4.99 USD can buy you 400 Robux; however, when trying to cash out Robux from the platform, the conversion rate significantly differs and one Robux is worth only $0.0035 USD, meaning 1,000 Robux can only be converted for $3.50.").

347. Id.

348. Roblox Terms of Use § 3(e), Roblox, https://en.help.roblox.com/hc/en-us/articles/115004647846 (on file with the *Columbia Law Review*) (last updated Jan. 7, 2026).

349. Id.

350. See Developer Exchange—Help and Information Page, Roblox, https://en.help.roblox.com/hc/en-us/articles/13061189551124-Developer-Exchange-Help-and-Information-Page [https://perma.cc/9LN8-KDTM] (last visited Apr. 5, 2026).

351. Id.

352. See Developer Exchange Terms of Use, Roblox, https://en.help.roblox.com/hc/en-us/articles/115005718246-Developer-Exchange-Terms-of-Use [https://perma.cc/GKW9-695V] [hereinafter Roblox Developer Exchange Terms of Use] (last visited Apr. 5, 2026).

353. See supra section II.B.3.

354. See supra notes 348–349 and accompanying text.

the price of goods at will, Roblox's proprietary unit of account renders another layer and opportunity for opacity of pricing.

2. *Money Laundering.* — Experts have warned that modern gaming presents a significant risk of money laundering: "disguising financial assets so they can be used without detection of the illegal activity that produced them."[355] Fraudsters can use stolen credit card numbers and gaming credentials to purchase items and then sell them for gaming money.[356] They can then conduct various transactions to conceal the source of the funds.[357] Eventually, they can sell gaming money for cryptocurrency or convert the value to a digital wallet balance, commercial bank deposit, or cash, claiming they earned the funds the old-fashioned way.[358] Money laundering may occur when "players of a video game can trade in-game goods" and when "an established market for exchanging virtual assets for legal tender or cryptocurrency exists—even though those transactions are usually forbidden by the publisher."[359]

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355. What Is Money Laundering?, Fin. Crimes Enf't Network, https://www.fincen.gov/what-money-laundering [https://perma.cc/2XL3-GYAR] (last visited Oct. 12, 2025); see also Jean-Loup Richet, U.N. Off. on Drugs & Crime, Laundering Money Online: A Review of Cybercriminals' Methods (2013), https://arxiv.org/pdf/1310.2368.pdf [https://perma.cc/86SY-ZPWV] (warning that online games were becoming a haven for money laundering).

356. A fraudster "can open different player accounts on several online gaming platforms and 'use those accounts to buy gaming assets with illegally obtained funds.' They can then send the assets to other accounts . . . [and] convert them to fiat currency using third-party markets." Paul O'Donoghue, Video Game Currencies Enabling 'Proliferation of Money Laundering,' Says US Govt Agency, AML Intel. (Apr. 10, 2024), https://www.amlintelligence.com/2024/04/news-video-game-currencies-enabling-proliferation-of-money-laundering-says-us-govt-agency/ [https://perma.cc/AUU4-D74T] (quoting CFPB Report, supra note 66, at 32); see also, e.g., Microsoft Corp. v. Gameest Int'l Network Sales Co., No. 17-CV-02883-LHK, 2017 WL 4517103, at *1 (N.D. Cal. Oct. 10, 2017) (describing a scheme in which over $2 million in virtual gaming currencies was fraudulently purchased with stolen credit cards).

357. See, e.g., Microsoft Corp. v. FIFAVIP Co., No. 17-CV-02887-LHK, 2017 WL 4517060, at *1 (N.D. Cal. Oct. 10, 2017) (describing how fraudsters solicit sales of virtual gaming currencies through their websites while using credit cards associated with stolen Microsoft Accounts to facilitate the sales); Money Laundering Through Cryptocurrencies, UN Toolkit on Synthetic Drugs, https://syntheticdrugs.unodc.org/syntheticdrugs/en/cybercrime/launderingproceeds/moneylaundering.html [https://perma.cc/W8AX-TJU3] (last visited Oct. 11, 2025) (describing a similar method of obscuring the source of funds through multiple transactions in the cryptocurrency space).

358. CFPB Report, supra note 66, at 31–32; see also Michael Crider, How to Make Real Money Playing Video Games, How to Geek (May 16, 2017), https://www.howtogeek.com/306389/how-to-make-real-money-playing-video-games/ [https://perma.cc/6744-ADD5] (describing how "[p]layers can . . . get paid in real-world credit via PayPal, Bitcoin, Steam Wallet credit, or even real bank transfers"); Roblox Developer Exchange Terms of Use, supra note 352 (laying out Roblox's rules for cashing out Robux for currency).

359. Matthew Roomberg, The Video Game Industry's Money Laundering Problem: When Do Game Publishers Become Money Transmitters?, 91 Fordham L. Rev. Online 161, 166 (2023), https://fordhamlawreview.org/wp-content/uploads/2023/05/Roomberg_

Fraudsters have bought V-Bucks from the Epic Games official store using stolen credit cards and then sold them on the dark web.[360] In 2018, a German security company uncovered a scheme in which "scammers [on Facebook] use[d] stolen credit cards to buy in-app currencies from mobile games *Clash of Clans*, [*Clash*] *Royale*, and *Marvel Contest of Champions*, then [sold] those currencies . . . for cash."[361]

Platform distributors like Valve can also promote money laundering (intentionally or otherwise). Valve's Steam Community Market allows players to buy and trade items using dollar-denominated Steam Wallet funds.[362] While players cannot transfer Steam Wallet funds directly, they can use them to purchase items from each other on the Steam Community Market.[363] Nominally, there is no way to withdraw funds from a Steam Wallet balance.[364] But Valve's application programming interface (API) enables secondary markets for skins and gaming money.[365] External platforms also provide trading venues where players can post skins when betting on esports or other games.[366]

Vol.-91.pdf [https://perma.cc/P9A2-LAZV] (footnote omitted); id. at 165 ("Although some games allow players to cash out their virtual currency for real-world value, most games, even those that permit trading, do not." (footnotes omitted)); see also J. Gregory Cloward & Brett L. Abarbanel, In-Game Currencies, Skin Gambling, and the Persistent Threat of Money Laundering in Video Games, 10 UNLV Gaming L.J. 105, 106–07 (2020) ("Using video games to launder money is not new.").

360. Anthony Cuthbertson, How Children Playing Fortnite Are Helping to Fuel Organised Crime, The Independent (Jan. 14, 2019), https://www.independent.co.uk/news/fortnite-v-bucks-discount-price-money-dark-web-money-laundering-crime-a8717941.html [https://perma.cc/CLU6-B2VA]; Brad Gershel, Popular Video Game Serves as a Reminder of Regulatory Risks of In-Game/In-App Virtual Currencies, Ballard Spahr LLP, (Jan. 29, 2019), https://www.moneylaunderingnews.com/2019/01/popular-video-game-serves-as-a-reminder-of-the-regulatory-risks-of-in-game-in-app-virtual-currencies/ [https://perma.cc/A8YX-N8BT].

361. Matthew Gault, Scammers Are Using 'Clash of Clans' to Launder Money From Stolen Credit Cards, Vice (July 20, 2018), https://www.vice.com/en/article/scammers-are-using-clash-of-clans-to-launder-money-from-stolen-credit-cards/ [https://perma.cc/PH8E-2PNW].

362. See supra section II.B.1; see also CFPB Report, supra note 66, at 21.

363. Community Market, Steam, https://steamcommunity.com/market/ [https://perma.cc/54MN-8XYA] (last visited Oct. 11, 2025).

364. CFPB Report, supra note 66, at 22.

365. See John Paul Koning, In-Game Virtual Items as a Form of Criminal Money, Moneyness (Nov. 28, 2019), https://www.moneyness.ca/2019/11/in-game-virtual-items-as-form-of.html [https://perma.cc/V5T8-U2MY] (describing how money launderers purchase Call of Duty skins as a "bridge currency," purchasing items on Steam and reselling them on secondary trading venues like OPSkins, Bitskins, and Skins.cash for bank money).

366. CFPB Report, supra note 66, at 22–23. "[S]ome third-party websites entice users with gaming assets, like discounted bundles of game currency or rare virtual items, in exchange for downloading applications, watching advertiser content, or submitting personal details." Id. at 32–33 (citing Matt Burgess, A Huge Scam Targeting Kids With *Roblox* and *Fortnite* "Offers" Has Been Hiding in Plain Sight, Wired (Aug. 14, 2023), https://www.wired.com/story/poison-pdf-scam-fortnite-roblox/ [https://perma.cc/SS8T-

In October 2019, Valve announced it had shut down a money laundering ring built around *Counter-Strike: Global Offensive*, a game developed, published, and sold by Valve.[367] By the end of the year, Valve disclosed that "nearly all" *Counter-Strike* loot box sales on the marketplace were "fraud-sourced."[368] Valve responded to such events ex-post by banning specific accounts[369] but does not appear to have adequately addressed structural concerns. In September 2024, computer scientists Dan Cooke and Angus Marshall analyzed publicly available transactional data from the Steam Community Market.[370] The scholars deployed traditional automated money laundering detection systems used by banking and other businesses, identified irregularities in the frequency and value of transactions, produced evidence of potential money laundering, and identified how the Steam platform more easily supports money laundering than banks.[371]

Similarly, litigation defense has also revealed that nominally closed-loop platforms are likely quite open. In *Doe v. Roblox Corporation*, a 2023 class action lawsuit in the Northern District of California, Roblox successfully excluded more than 300 Roblox accounts from a settlement, as it alleged that accountholders had each "spent over 80,000 Robux (equating to over $1,000)" on virtual items, and appeared to "be engaged in money laundering or other improper behavior."[372] Valve does not verify identities.[373] Most gaming companies necessarily collect some

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92Q9]); see also Justin Carter, Report: Gambling Sites 'Thriving' Due to Use of Steam's Marketplace, Game Developer (Nov. 7, 2022), https://www.gamedeveloper.com/game-platforms/report-valve-s-steam-marketplace-in-deep-relationship-with-third-party-gambling-sites [https://perma.cc/JY85-22RQ] (analyzing a report from investigative gaming journalists).

367. Valve Shuts Down Money Laundering via CS:GO Game, BBC News (Nov. 1, 2019), https://www.bbc.com/news/technology-50262447 [https://perma.cc/3YC5-GLP6].

368. Tim Bradshaw, Video Games Are Easy Channel for Money Launderers, Fin. Times (Jan. 2, 2020), https://www.ft.com/content/1008d340-24f6-11ea-9a4f-963f0ec7e134 (on file with the *Columbia Law Review*) (internal quotation marks omitted) (quoting Valve).

369. See Jody Macgregor, CS:GO Ban Wave Results in Over $2 Million Worth of Skins and Other Items Being Lost, PCGamer (July 1, 2023), https://www.pcgamer.com/csgo-ban-wave-results-in-over-dollar2-million-worth-of-skins-and-other-items-being-lost/ [https://perma.cc/WP8B-J4AL] (reporting that Valve "banned roughly 40 CS:GO accounts for trading, with the result that more than $2 million worth of in-game items have been lost").

370. Dan Cooke & Angus Marshall, Money Laundering Through Video Games, A Criminals' Playground, Forensic Sci. Int'l, Sep. 2024, at 1–6.

371. Id. at 4–6.

372. Plaintiff's Motion in Support of Preliminary Approval of a Class Action Settlement at 6–7, Doe v. Roblox Corp., No. 3:21-cv-03943-WHO (N.D. Cal. filed Mar. 28, 2023).

373. Valve, Privacy Policy Agreement, Steam, https://store.steampowered.com/privacy_agreement/ [https://perma.cc/PA42-ZC85] (last visited Nov. 2, 2025) ("When setting up an Account, Valve will collect your email address and country of residence . . . .

personally identifiable information during online gameplay, including email address(es) and credit card payment information,[374] but players do not need to share money laundering reports with financial regulators.[375] Although Treasury recently identified "emergent money laundering risks associated with sports betting, offshore sports betting, and virtual asset gambling," it has not addressed similar vulnerabilities presented by gaming money systems, or use of gaming money for gambling or other illicit activities.[376]

3. *Financial Instability.* — Unlike rate manipulation and money laundering, financial instability is not a present harm of gaming money. But the structural features of these systems—such as unregulated balances, no obligation to honor redemptions, and opaque accounting—merit attention. Roblox is the only major gaming company whose public disclosures allow direct measurement of gaming money liabilities, because "[s]ubstantially all of [its] bookings are generated from sales of virtual currency" ($6.79 billion in fiscal year 2025), which are initially recorded as deferred revenue ($6.51 billion outstanding as of December 31, 2025).[377] For other companies, the aggregate value of outstanding gaming money balances is either undisclosed or consolidated into broader deferred revenue categories wherein it cannot be identified. Although the Developer Exchange Program (DevEx) permits only a

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We do not require you to provide or use your real name for the setup of a Steam User Account."). But see Shane Kelly, Note, Money Laundering Through Virtual Worlds of Video Games: Recommendations for a New Approach to AML Regulation, 71 Syracuse L. Rev. 1485, 1506 (2021) (noting that in 2019, Linden Labs, developer of *Second Life*, created a money services business (MSB) subsidiary to satisfy BSA/AML requirements); id. at 1507 ("[A]nyone who makes an in-game credit card transaction" must share their "name, address, date of birth, and social security number.").

374. See, e.g., PSN Terms of Service, supra note 279, § 3.6 (noting that Sony may request additional documentation for account creation). See also Julia K. Whitelock, Justin B. Hosie & Jason Esteves, Mo Data, Mo Problems: Data Protection and Privacy Concerns for the Gaming Industry, Hudson Cook (July 10, 2024), https://www.hudsoncook.com/article/mo-data-mo-problems-data-protection-and-privacy-concerns-for-the-gaming-industry/ [https://perma.cc/5H4G-LV3Y] ("Applications and devices may collect users' banking information and track users' location, interaction with games, devices, and other applications (e.g., integrated social media), and biometric data (e.g., eye posture, voice, heart rate).").

375. See Kelly, supra note 373, at 1488 ("[A]gencies do not consider virtual worlds and the currency used therein as having a high enough risk for money laundering to warrant AML regulation and guidance.").

376. See U.S. Dep't of the Treasury, 2024 National Money Laundering Risk Assessment 84 (Feb. 2024), https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf [https://perma.cc/6HF6-KUKU] (dedicating a "Special Focus" section to "online gaming" focused on sports betting but without a connection to video games).

377. Form 10-K, supra note 274, at 72 (reporting bookings of $6,788,430 thousand for fiscal year 2025); id. at F-5 (reporting current deferred revenue of $4,168,971 thousand and long-term deferred revenue of $2,336,959 thousand as of December 31, 2025); see also id. at 81 (explaining that "[d]eferred revenue consists of the unearned portion of bookings for which [Roblox has] not yet satisfied [its] performance obligations").

fraction of users to convert Robux into dollars,[378] the corporation has lowered the eligibility threshold over time, expanded the class of users, and "increased the amount creators can receive in fiat currency based on earned Robux by 8.5%."[379] The DevEx program paid out $1.50 billion in 2025, up from $922.8 million in 2024.[380] Roblox does not have to honor redemptions for these liabilities, which are not notes or deposits.[381] The opacity regarding the outstanding gift card balances of other companies can become a structural problem within the industry. Bankruptcies can destroy gift card value.[382] For instance, when bookseller Borders collapsed in 2011, it extinguished $211 million in outstanding gift card value.[383]

Platform-hosted digital wallets offered by companies like Microsoft, Sony, and Valve issue gaming money and provide the balance infrastructure within the gaming sector, albeit without the consumer protections and regulations typically associated with traditional banking.[384] Digital wallets help gamers make payments outside of the game. In many ways, points in these accounts may resemble bank deposit systems. Like interbank payment systems, the gaming wallet system helps facilitate storing, exchanging, transferring, and gifting funds between gamers.[385] In the case of Microsoft, the financial value issued endogenously flows through the rest of its business activities and, thus, the tech sector and the "real economy."[386]

Sony's wallets have few consumer protections compared to bank accounts or digital wallets like PayPal.[387] Players can only deposit funds in

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378. Id. at 16 (reporting that over 23,500 creators participated in the Developer Exchange Program in 2025, out of 127 million average daily active users); Roblox Developer Exchange Terms of Use, supra note 351 (requiring minimum 100,000 earned Robux, excluding purchased Robux).

379. Form 10-K, supra note 274, at 16 (describing a September 5, 2025 increase to DevEx payout rates); see also id. at 16 (describing Developer Exchange Program eligibility criteria). The DevEx minimum was lowered from 100,000 to 50,000 Robux in January 2022 before being restored. See Developer Exchange Program Requirements Changes, Roblox Creator Hub F. (Jan. 31, 2022), https://devforum.roblox.com/t/developer-exchange-program-requirements-changes/1651282 (on file with the *Columbia Law Review*).

380. Form 10-K, supra note 274, at F-6 (reporting developer exchange fees of $1,503,106 thousand in 2025 and $922,821 thousand in 2024).

381. See Stites & Silber, supra note 172, at 266, 269–70 (comparing FDIC-insured bank deposits to unprotected gift card balances).

382. Id. at 266 (discussing merchant insolvency risk as a structural feature).

383. Sara Randazzo, Unused Borders Gift Cards Spur Fight, Wall St. J. (June 28, 2015), https://www.wsj.com/articles/defunct-gift-cards-spur-fight-1435519412 (on file with the *Columbia Law Review*) (also noting the Supreme Court declined to hear the case).

384. See supra section II.B.2.

385. See supra section II.B.2.

386. See supra section II.B.2.

387. See PSN Terms of Service, supra note 279, § 7.3 ("Funds added to the PSN Wallet are non-refundable and non-transferable except where the law requires. We have no obligation to reverse or refund unauthorized charges made using any payment method

these accounts from bank accounts but may not withdraw them into bank accounts.[388] Gamers cannot convert wallet funds into gift cards or debit card balances.[389] Sony offers digital wallets with dollar-denominated balances that players hold for purchases, but Sony can terminate or suspend accounts and players will typically not receive the funds back.[390] As for Microsoft, unlike bank deposits, players are not legally entitled to redemption of Microsoft Store balances.[391] Redemption in the context of a "run" is contingent on terms of service. Thus, Microsoft is trapping funds on its universal platform by issuing liabilities it does not have to honor.

By selling a gift card, Microsoft issues an IOU (current liability)—which it may never have to honor—for dollar-denominated funds trapped on its platform. Customers purchase gift cards using bank account money; Microsoft presumably adds a current liability to its balance sheet. But consumers can only redeem that current liability in the Microsoft Store.[392] When a consumer tops off the Microsoft Store account with the gift card, Microsoft may cease counting the value as a liability. The company may designate it as revenue, depending on whether or not a consumer spends the balance. By converting gift card value into platform balances, it does not have to account for or honor an IOU.

It is worth noting there is also general confusion in the accounting world about how to classify unredeemed gift cards.[393] "Some states consider unclaimed gift certificates to be abandoned property. New York's abandoned property statute, for example, provides that any unclaimed amount from a gift certificate . . . which remains unclaimed by the owner for five years, is considered legally abandoned, and the amount escheats to the State."[394] By contrast, casino chips have set

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to fund the wallet. Wallet funds . . . deemed abandoned or unused by law will not be returned or restored." (emphasis omitted)).

388. Id. §§ 7.1–7.3 (establishing how players can add funds to their accounts and clarifying that, once added, the funds are not refundable).

389. See id. § 7.2 (stating wallet funds "have no value outside PSN and can only be used to make purchases through PSN Services").

390. See id. §§ 7.1–7.3, 12.2–12.3 (stating that upon account termination "you will not receive a refund for . . . any unused balance in your wallet, except as required by law" (emphasis omitted)).

391. See Microsoft Services Agreement, supra note 278, § 14(a)(vi) ("Game currency and virtual goods may never be redeemed for actual monetary instruments, goods or other items of monetary value from Microsoft or any other party.").

392. See Microsoft Support, Spend the Money in My Microsoft Account, supra note 318 ("You can spend money in your Microsoft account to buy various products, services, software and content from the Microsoft Store.").

393. Abraham Fried, Mark P. Holtzman & Aliza Rotenstein, Lost and Found, J. Acct. (Feb. 1, 2015), https://www.journalofaccountancy.com/issues/2015/feb/accounting-for-gift-cards-revenue-recognition.html [https://perma.cc/FC5A-6MW6] ("[A]ccountants have struggled with how to recognize these unredeemed gift cards as 'breakage income.'").

394. Stites & Silber, supra note 172, at 277.

expiration dates, upon which they convert to income for tax purposes.[395] Casinos adopt a practice similar to recording breakage income by claiming all unredeemed chips are "souvenirs."[396] The Supreme Court has held that the IRS should not count utility deposits with accountholder redemption rights as taxable income.[397] Gaming wallet balances do not seem to fit any of these categories well, and the ambiguity of the accounting is a problem in itself.

The above dynamics call into question whether Microsoft would ever refuse to honor its store balances. In one scenario, Microsoft refuses to honor the balances and suffers a collapse in effective demand due to the system it created. In the other scenario, it faces the risk of a run. One does not have to answer the question of which response Microsoft would make to know if the wallet system will be unstable during a crisis.

In October 2025, Sony, which has long run a regulated bank in Japan, applied to the OCC to charter "Connectia Trust" to issue U.S. dollar-denominated stablecoins, in partnership with infrastructure provider Bastion (backed by Coinbase Ventures).[398] According to press reports, players will be able to use the coins for PlayStation game purchases, subscriptions, and anime content, but it has offered little detail beyond this.[399] Critics, including large banks, have responded that stablecoins are functionally deposits and cite concerns regarding the separation of banking and commerce.[400] In many ways, the application crystallizes the issues discussed in this piece. Granted, this is a regulation of some sort, but the benefits and costs are not yet known. On one hand, Sony itself has now walked through a portal—it will not claim a virtuality defense. But it is unclear whether this is because it no longer needs to

395. See John Bulloch, Note, Income or Liability: How Casinos' Classification of Outstanding Chips Determine Taxability, 5 UNLV Gaming L.J. 121, 124, 141 (2014) ("In the year the chips or tokens are retired, an amount shall be recognized as income for the chips and tokens that have not and will not be redeemed.").

396. Id. at 125.

397. Comm'r v. Indianapolis Power & Light Co., 493 U.S. 203, 214 (1990) ("We hold that such dominion as IPL has over these customer deposits is insufficient for the deposits to qualify as taxable income at the time they are made.").

398. See Application of Sony Bank, supra note 68.

399. Kyle Torpey, Sony Wants to Launch a Stablecoin and So Does Everyone Else, Gizmodo (Dec. 2, 2025), https://gizmodo.com/sony-wants-to-launch-a-stablecoin-and-so-does-everyone-else-2000694582 (on file with the *Columbia Law Review*) ("The token will serve as a payment option for PlayStation games, anime streams, in-game purchases, and subscriptions across Sony's digital platforms.").

400. Letter from Paige Pidano Paridon, Bank Pol'y Inst., to Sebastian R. Astrada Re: Connectia Trust, N.A., Charter Application (2025-Charter-343503) (Nov. 7, 2025), https://bpi.com/wp-content/uploads/2025/11/BPI-comment-letter-re-Connectia-Sony-NTB-Charter-Application-11-7-25-2.pdf [https://perma.cc/WD75-2STF]; Vismaya V, Community Bankers Ask OCC to Block Sony's Crypto Bank Ambitions, Yahoo Finance (Nov. 14, 2025), https://finance.yahoo.com/news/community-bankers-ask-occ-block-104127101.html (on file with the *Columbia Law Review*).

play defense at all, rather than offense. Microsoft has not made a similar announcement, but theories of scale may soon become realities.

III. SHADOWS, GAMES, & MAGIC

Gaming companies pose a unique challenge for regulation. Even if Congress were to pass new legislation to try to ban shadow money writ large, gaming companies operate within private governance structures, claiming intellectual property, contract, and data governance laws shield them from regulation. This Part shows how some (implicit and explicit) defenders of a "magic circle" cast the industry's business practices as existing in a virtual rather than real world.[401] Especially in the early legal literature on video games, some defenders of the magic circle would focus on the absence of physical presence outside a software-mediated environment.[402] Others believe private ordering should govern virtual spaces as realms of fantasy and entertainment.[403] Still others argue constitutional protections for artistic content and expressive speech extend to broader business practices.[404] Each of these contentions is a weak argument against financial regulation, especially when "money" is on the line. The bodies of law governing money, especially, incorporate a different conception of what money is "real" enough to merit governance beyond private law. Practically speaking, the spectrum of convertibility into bank deposits (or theoretically, cash) better establishes parameters for governance.

A. *Virtuality*

From the gamers' perspective, some gaming elements are undoubtedly virtual. Companies write software that encodes specific governance structures and spaces and shapes social and legal relations.[405] Publishers and developers govern their dynamic platforms using terms of

401. See infra sections III.A and III.B.

402. Hickman & Hickman, supra note 56, at 546, 548–49 (discussing physicality, as defined by Edward Castronova, stipulating that gamers may perceive separation from the "real world" (citing Edward Castronova, Virtual Worlds: A First-Hand Account of Market and Society on the Cyberian Frontier 22 (CESifo Working Paper Series No. 618, 2001))).

403. See Huizinga, supra note 55, at 10 (arguing spaces like playgrounds, casinos, stages, and even "the court of justice" are isolated, sacred, temporary spheres, within which special rules apply).

404. See infra section III.A.

405. See, e.g., Przemysław Pałka, Virtual Property: Towards a General Theory 17 (Dec. 20, 2017) (Ph.D. dissertation, European University Institute) (on file with the *Columbia Law Review*) (explaining the "virtual property phenomenon," which it defines "as the situation of users of online platforms, including online gaming apps, getting into relations over virtual items – entities that exist within these platforms – with the providers, other users and third parties"); id. at 141 ("[T]he process of digitalization, understood as a socio-technological phenomenon of widespread internet-connected personal computers and social networks and interactions constructed on top of them, has fundamentally altered [the assumption of a] two-layered [material and social] structure of [] reality.").

intellectual property and contracts that encase (but also reveal) the artificial nature of the boundary between games and the virtual world.

The legal scholarship on video games overwhelmingly focuses on intellectual property.[406] In the United States, much like the laws of money, intellectual property (IP) protections are granted through Article I of the Constitution.[407] Theoretically, IP laws protect the rights of creators, inventors, and consumers. Video games incorporate numerous creative elements, such as "code, manual text, box art, title, game art, music, story, game world, middleware, and graphics."[408] Most importantly for this Article's purposes, however, players actually experience games through an intellectual property license that denies them interests and rights in gaming content, which necessarily includes gaming money on the gaming platform and licensed third-party platforms.[409] These agreements are "click-through contracts" operating within a "'notice-and-choice' regime."[410] The bargain hinges on contemporary, oft-criticized theories of contractual consent.[411]

IP and its instantiating contracts make gaming money unique in specific ways. Gaming publishers cannot restrict the right to resell tangible board game items, but they can limit the right to resell video game items.[412] Property scholars have observed that courts appear shy to restrict the alienability of virtual items.[413] For banking law scholars, especially, this is concerning. The law does not allow banks and other

406. For a recent example, in addition to the literature cited below, see, e.g., BJ Ard, Creativity Without IP? Vindication and Challenges in the Video Game Industry, 79 Wash. & Lee L. Rev. 1285, 1290 (2022) (suggesting that the video game industry provides an opportunity for new conceptions of IP law).

407. See U.S. Const., art. I, § 8, cl. 8 (granting Congress the power to "promote the Progress of Science and useful Arts by securing for limited Times to Authors and Inventors the exclusive Right . . . .").

408. S. Gregory Boyd, Brian Pyne & Sean F. Kane, Video Game Law: Everything You Need to Know About Legal and Business Issues in the Game Industry 19 (2019).

409. See supra notes 57–58 and accompanying text (explaining that gaming companies characterize gaming money as licensed virtual content and disclaim user property, deposit, and convertibility rights); supra notes 279–280 and accompanying text (collecting platform terms stating that virtual items and gaming currency have no cash value and are nontransferable); supra notes 348–352 and accompanying text (describing Roblox's retention of all rights in Robux and its discretionary control over developer exchange).

410. Carrillo, Seeing Through Money, supra note 82, at 1224 (internal quotation marks omitted).

411. See Neil Richards & Woodrow Hartzog, The Pathologies of Digital Consent, 96 Wash. U. L. Rev. 1461, 1463 (2019) (finding current consent-based models "fall far short of the gold standard"); Viljoen, supra note 272, at 597–98 (asserting "there is general scholarly agreement that data governance is in need of repair").

412. See MAI Sys. Corp. v. Peak Comput., Inc., 991 F.2d 511, 518 n.5 (9th Cir. 1993) (concluding customers using licensed software "do not qualify as 'owners'").

413. See Danielle D'Onfro, Contract-Wrapped Property, 137 Harv. L. Rev. 1058, 1073–74 (2024) ("[C]ourts have hesitated to imply a strong prohibition on servitudes into intellectual property law.").

regulated financial institutions to license rather than sell financial instruments and disclaim liability for illicit use.[414] "This disconnect between the law of intangibles and popular understandings of property is a well-documented source of consumer confusion."[415] Professor Danielle D'Onfro argues that NFTs "offer[] a high[]-stakes example" of the urgent need to "[s]ort[] out whether [new digital assets] fall under the law of property or the law of contract."[416] Given the platform power of companies in the system, regulators should be even more concerned about gaming money.

In many cases, game rules override traditional understandings of law. As Professor Joshua Fairfield wrote in his canonical article on law and gaming worlds, "[t]he purpose of the magic circle," or "the supposed metaphorical line between the fantasy realms of virtual worlds and what we consider to be the real world," "is to protect virtual worlds from outside influences—law, real-world economics, real-world money, and the like."[417] In other words, the magic circle metaphor helps to determine whether adverse parties can advocate for rights or appeal to the states for remedy.[418]

Since the beginning of the law and virtuality debates, however, other "scholars [have] dispute[d] the existence of any meaningful line for differentiating online and real-world activities."[419] For Professor Yochai Benkler, "[t]here is no 'governance of a virtual world.'"[420] Rather, "[t]here is simply the question of governance in the relations among users of a class of software platforms that have certain degrees of freedom in their design."[421] The main distinction between gaming companies and other e-commerce enterprises at the time was merely that the computational and artistic qualities of the endeavor were superior.[422]

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414. See supra section I.B.

415. D'Onfro, supra note 413, at 1134.

416. Id. at 1134–35.

417. Fairfield, Magic Circle, supra note 55, at 824–25; see also id. at 837–40 (noting that "[t]he interaction between money and the magic circle deserves special mention, since it is the intrusion of real-world dollars into virtual worlds that precipitated the current spate of virtual-world litigation").

418. Id. at 825 ("Following this reasoning, real-world law is appropriately left out of virtual worlds.").

419. Hickman & Hickman, supra note 56, at 542; see also Fairfield, Magic Circle, supra note 55, at 825 ("The thrust of my argument is simple: There is no 'real' world as distinguished from 'virtual' worlds. Rather, all supposedly 'virtual' actions originate with real people, and impact real people, albeit through a computer-mediated environment.").

420. Yochai Benkler, There Is No Spoon *in* The State of Play: Law, Games, and Virtual Worlds 180, 180 (Jack M. Balkin & Beth Simone Noveck eds., 2006).

421. Id.

422. See id. at 180–82 (discussing differences in commercial experience as opposed to virtual reality); cf. Pałka, supra note 405, at 103 (citing and addressing Benkler, supra note 420, among other legal scholars, arguing that "scholars who engaged in the debate

Although the scholars in the virtuality debate note the presence of money in the context of the commercialization of gaming environments, these scholars wrote before microtransactions dominated the gaming industry. For instance, Benkler observes that the presence of money in video games (with minimal convertibility at the time) necessarily invites the law in some way.[423] Here, however, by "money," Benkler seems to mostly mean profits and the ability to cure a monetizable injury.[424] Following this logic further, however, the problem is not just commercialization but the operation of money qua money. Money serves an enabling function even in private law, enabling the standardization of value in property and contracts. Money makes damages easily calculable, inviting tort and criminal law.[425] Records of monetary transactions render surveillance data for platform operators, law enforcement, and hackers alike. When money flows, the law makes human activity more legible.

B. *Materiality*

The argument that gaming money exists in a virtual space separate from reality is insufficient to defend against financial regulation. Opponents of regulation will need to clarify why we should consider gaming money less real than any other software-mediated money. Like other digital money issuers, they still embed money in material infrastructure and culture—in everyday life. The task is essential to monetary sovereignty and exchange.[426] We can often touch, see, and hear money; these features differ across time and place. We have a physical relationship with digital money that is still grounded in the rest of our earthly existence.[427] Gaming money impacts the regulated financial system within the physical world as well.

That said, we should not associate the materiality of money merely with physicality.[428] All money, whether in analog or digital form, eases

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noticed that there is a new type of object that people get into relations over with other persons, even if they did not call it this way").

423. Benkler, supra note 420, at 182 ("Jack Balkin is right that someone will get hurt, some time, and particularly where there is money at stake the law will come into this space, and do its damage, or maybe its repair.").

424. Id.

425. See Eldar Haber, The Criminal Metaverse, 99 Ind. L.J. 843, 868–69 (2024) (emphasizing that because the metaverse will function as a commercial environment involving real money and property interests, law may address the theft of virtual assets).

426. See Christine Desan, The Monetary Structure of Economic Activity: A Constitutional Analysis, 86 Law & Contemp. Probs. 77, 80 (2024) (detailing how, as a preliminary matter, money concretizes a common sense of value on which to facilitate further economic exchange).

427. See Carrillo, Seeing Through Money, supra note 82, at 1210 (discussing the materiality of money at the user interface, particularly in smartphone applications).

428. See A. Mitchell Innes, The Credit Theory of Money, 31 Banking L.J. 151, 155 (1914) ("The eye has never seen, nor the hand touched a dollar. All that we can touch or see is a promise to pay or satisfy a debt due for an amount called a dollar.").

and tightens constraints on what differently situated people can do practically: It helps make the material conditions of human relations and organization.[429] The features that make gaming money virtual compared to other forms of value that only exist within closed computer environments are not readily apparent. Regulators have hesitated to regulate many forms of cryptocurrencies and digital assets because of a conception of virtuality.[430] We should see gaming money as within the legal regime already governing commercial bank deposits, platform money, cryptocurrencies, gift cards and reward points, and myriad abstract instruments of high finance.[431] From this perspective, the imaginary boundary between virtuality and reality is another axis of unregulated money and banking activity. Gaming companies' extension of monetary systems into a digital world is not an abrupt innovation but an evolution along a legal and technological continuum.

Moreover, by making gaming money intellectual property, gaming companies actually achieve a first step toward functional sovereignty over monetary systems. As Professor Christine Desan writes, "the tokens representing the unit of account must be both durable and difficult to imitate," or they "will be either lost or multiplied without a stakeholder's permission, disturbing the balance between outflow and inflow, supply and demand, tax credit and tax redemption that creates stable value."[432] According to Desan, one major solution to the challenge of creating a token that is "rare, imperishable, and takes skill to work" is to "control the means of producing tokens" so then "the system can function."[433] Like governments that operate printing presses and mints, companies create the instruments materializing the unit of account, but through digital technology and intellectual property law, they can produce completely unique money at nearly zero marginal cost, destroying it as well as creating it at will.[434]

C. *Convertibility*

Monetary regulation has long included oversight of technology at the interface of the monetary system, particularly concerning the convertibility of instruments into government-backed money, which is

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429. See Desan, Money's Design Elements, supra note 13, at 341–42 (arguing money organizes a material world, which allows a group to measure, generate, and distribute resources).

430. See supra Part II.

431. See Awrey, Bad Money, supra note 48, at 1–2 (arguing that most money consists of privately issued claims, from bank deposits and money market instruments to platform-based balances like PayPal and stablecoins).

432. Desan, Making Money, supra note 158, at 52 (offering a legal and historical account of the material nature of money creation strongly informing this Article).

433. Id.

434. Id.

crucial for a currency's acceptance as money.[435] The sovereign governs how money changes hands. The public is likely to adopt private money that people can easily convert to state money.[436] Therefore, governments regulate convertibility with an eye on law, technology, and culture. They often monitor nonbank corporations to prevent them from evolving into full-fledged shadow banks.[437] Regulators should assess how companies enable the convertibility of gaming money and apply tiered regulations based on the permissibility, scope, scale, velocity, and price of convertibility. Convertibility triggers jurisdiction. But the dangers and thus the case for regulation begin when currency flows in, or the company begins to use its own unit of account or otherwise mimic monetary functions.

For many states across time and place, the standardization of convertibility between precious metals, paper notes, and other stores of value was or remains central to the laws of money and banking.[438] Regulation around the technology of convertibility of money is a core component of banking law in the Anglo-American legal tradition.[439] Constitutional politics before the Civil War featured debates over money, banking, and their materials.[440] These debates would continue from the Civil War until the founding of the Federal Reserve System, if mostly at the level of high monetary policy.[441] As discussed in Part II, many people

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435. See id. at 70 (describing the creation of the highly regulated monetary conversion process of "free minting" in thirteenth century England).

436. Id. at 30 ("[A] government can create an ideal commodity money system by identifying the metal content of each coin . . . and converting metal to coin at the demand of users. Coin is easier to use than raw metal, so people will often prefer to take it . . . .").

437. See supra Part II.

438. See Desan, Making Money, supra note 158, at 24 ("'Money' is invented when a community, acting through a stakeholder, denominates in a homogeneous way the disparate contributions received from members, and recognizes them as a medium and mode of payment.").

439. As Professor Lev Menand explained:

> [I]n the 1690s, . . . Parliament and the Crown repudiated their traditional role in managing the money supply . . . . [T]hey fixed the exchange rate between government-issued money, known as pounds, and gold and silver metal, and . . . pledged . . . [not to] alter the exchange rate . . . . Parliament chartered the Bank of England . . . to issue two new forms of money: paper notes and deposit account balances[,] . . . convertible with government-issued money at par.

Lev Menand, The Logic and Limits of the Federal Reserve Act, 40 Yale J. on Regul. 197, 207–08 (2023).

440. See Veazie Bank v. Fenno, 75 U.S. 533, 536–37 (1869) (observing that "[a]t the beginning of the rebellion" a litany of "bank notes issued by numerous independent corporations variously organized under State legislation, of various degrees of credit, and very unequal resources" circulated while the federal government dealt in gold and silver).

441. See Nadav Orian Peer, Negotiating the Lender of Last Resort: The 1913 Federal Reserve Act as a Debate Over Credit Distribution, 15 N.Y.U. J.L. & Bus. 367, 411 (2019) ("When the law authorizes a central bank to act as a lender of last resort against certain assets, it is essentially providing a guarantee that these assets will be easily convertible into legal tender. That guarantee is a highly valuable advantage . . . .").

today, especially within the Gen-X, Millennial, and Gen-Z generations, use less regulated media, such as digital wallets on smartphones, to store value, make payments, and even settle debts.[442]

Other areas of law may contain different conceptions of virtuality and convertibility in video games. For instance, Professor Eric Chaffee has written about the potential application of securities regulation in video games (specifically *Second Life*, one of the earliest to feature convertibility of gaming money) within a broader discussion of securities regulation in virtual space.[443] Chaffee argues that "[b]ased upon the intended scope of the federal securities law, various constitutional law principles, and the importance of allowing experimentation within virtual space," the SEC's jurisdiction must end in the "real world," that *Second Life* stocks have no anchor in the real world, and thus that *Second Life* securities are not securities for federal securities law purposes.[444] Although Linden Labs was one of the first publishers to convert gaming money to bank money directly, Chaffee focuses primarily on the stocks issued within the game and explicitly deems the convertibility of the Linden Dollars into bank deposits to be mostly irrelevant.[445]

By contrast, Professor Christine Kim, approaching virtuality from a tax law perspective, adopts a different perspective on virtuality, arguing that if the IRS does not impose taxation on virtual assets, income, and wealth, it will encourage tax havens in the Metaverse.[446] The IRS has defined a self-imposed boundary regarding the taxation of gaming ecosystems with two-way convertible currencies. To tax cryptocurrency holders, the IRS created a subcategory called "convertible virtual currency" (CVC).[447] Recipients of CVC must report the fair market value of CVC as taxable income, and using CVC for goods or services may incur tax liabilities.[448] In 2019, the IRS indicated it would tax Robux and V-Bucks as CVCs but faced backlash and later retracted this classification.[449]

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442. See Carrillo, Platform Money, supra note 73, at 907–08; supra Part II.

443. See Chaffee, supra note 40, at 1393, 1424–28.

444. Id. at 1397, 1435.

445. Id. at 1422–25; see also Couture, supra note 40, at 235 (responding to Chaffee's argument, countering that the virtual transactions likely trigger federal securities regulation, but they nevertheless deserve a new exemption because application of relevant regulations would likely "stifle creativity within this innovative space").

446. See Kim, supra note 39, at 806.

447. See IRS Notice 2014-21, 2014-16 I.R.B. 938.

448. Id.

449. Brian Fung, IRS Quietly Deletes Guideline that Fortnite Virtual Currency Must Be Reported on Tax Returns, CNN Bus., https://edition.cnn.com/2020/02/13/tech/fortnite-taxes/index (on file with the *Columbia Law Review*) (last updated Feb. 14, 2020).

D. *Comparative Financial Regulation*

Many underexplored intersections between financial regulation and the laws of media, entertainment, and the arts offer comparative analysis for the governance of gaming money. Most notably, these intersections also feature their own regulatory and doctrinal interpretations concerning virtuality, materiality, and convertibility. When regulators have previously opposed technology companies creating private monetary systems, the intensity of scrutiny has matched the potential for convertibility to bank money and cash at scale. First, this section discusses tensions between financial regulation and media, entertainment, and the arts. It then offers a more holistic critique of the likely legal and political defenses of the industry.

1. *Media*. — Social media has undoubtedly changed finance and vice versa. One of the most prominent American fintech companies, Venmo, "arguably became so popular because of its social media features, including a 'global social media' feed detailing payments by people around the world until 2021."[450] In China, Tencent, one of the world's largest video game companies, began as a messaging app, then a gaming company, and then a social media platform before adding the incredibly popular WeChat Pay app.[451]

Major gaming companies have previously avoided liability for some user actions by claiming they only host user-generated expressive content and are thus protected by the Communications Decency Act (CDA) of 1996 and the First Amendment of the U.S. Constitution. Section 230 of the Communications Decency Act (CDA) protects "interactive computer service" providers from liability for the conduct of content producers.[452] Video games are no exception: Section 230 generally defends gaming companies from liability for player wrongdoing on their platforms.[453] In *Colvin v. Roblox*, however, the U.S. District Court for the Northern District of California held that a Section 230 defense did not bar claims regarding Robux under state unfair competition and negligence law because they did not concern Roblox as a "publisher or speaker."[454]

450. Carrillo, Platform Money, supra note 73, at 907 (citing Ian Carlos Campbell, Venmo Drops the Global Social Feed that Could Make Your Payments Visible to Strangers, The Verge (July 20, 2021), https://www.theverge.com/2021/7/20/22585467/venmo-removes-global-social-feed-private-payments) (on file with the *Columbia Law Review*) (announcing the removal of the feed)).

451. China: A Digital Payments Revolution, CGAP (Sep. 2019), https://www.cgap.org/research/publication/china-digital-payments-revolution (on file with the *Columbia Law Review*) (walking through the evolutions of WeChat Pay and Alipay).

452. 47 U.S.C. § 230 (2024).

453. See Daniel Garces, How the Loss of Section 230 Could Affect the Video Game Industry, Fordham Intell. Prop. Media & Ent. L.J. (Mar. 5, 2023), http://www.fordhamiplj.org/2023/03/05/how-the-loss-of-section-230-could-affect-the-video-game-industry/ (on file with the *Columbia Law Review*).

454. Colvin v. Roblox Corp., 725 F. Supp. 3d 1018, 1027 (N.D. Cal. 2024).

Roblox is now facing liability for facilitating child gambling in "online casinos."[455]

Even if Congress repealed section 230, the First Amendment might protect gaming companies from regulation.[456] Courts generally afford video game content the same protections as, for instance, books and movies.[457] In 2011, the Supreme Court struck down legislation regulating violence in video games as abridging the First Amendment rights of children.[458] As Justice Antonin Scalia famously wrote for the Court, "Reading Dante is unquestionably more cultured and intellectually edifying than playing Mortal Kombat. But these cultural and intellectual differences are not *constitutional* ones."[459]

Writing in 2005, Professor Jack Balkin predicted that as companies commercialize virtual spaces, "game designers [would] invoke the First Amendment both to protect their artistic vision and to avoid regulation of their business practices."[460] He argued, however, that virtuality should not exempt them from consumer protection laws.[461] "Commodification" invites state action, commodification being "the ability to buy and sell things in virtual worlds using real world currency or in order to obtain real world currency."[462] Real-world commodification "breaches the barrier between the virtual and real worlds" and thus delivers the law.[463] Platform owners can manage this by stating in the EULA that "players . . . have no expectations of property rights in virtual items[] . . . [and] assume all risks of monetary loss."[464] But according to Balkin, they should not be able to both sell items en masse and claim they are also their property per creative expression.[465]

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455. See id. ("Roblox is not facing liability for the content posted on its platform. It is facing liability for allegedly facilitating transactions between minors and online casinos that enable illegal gambling, and for allegedly failing to take sufficient steps to warn minors and their parents about those casinos.").

456. See Mark A. Lemley & Sonali Maitra, Video Game Law 309–32 (2024) (discussing censorship and First Amendment law).

457. See, e.g., Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 802 (2011).

458. Id. at 799–800 (holding that California legislation regulating violence in video games violates the First Amendment rights of young gamers).

459. See id. at 796 n.4.

460. See Jack M. Balkin, Law and Liberty in Virtual Worlds, 49 N.Y.L. Sch. L. Rev. 63, 63–65 (2004); see also, e.g., Candy Lab Inc. v. Milwaukee Cnty., 266 F. Supp. 3d 1139, 1146 (E.D. Wis. 2017) (holding the AR game "Texas Rope 'Em" had "sufficient expressive content" for First Amendment protection).

461. Balkin, supra note 460, at 76–80.

462. Id. at 77.

463. Id.

464. Id. at 78.

465. See id. ("Platform owners, however, cannot have it both ways. They cannot simultaneously encourage the purchase and sale of virtual items and then write the EULA so that all virtual items remain the property of the platform owner.").

When considering any arguments in favor of a magic circle around content providers, regulators should recognize policymakers and scholars have already contemplated the prospect of regulating virtual private money issued by a social media company. When Meta (then Facebook) launched the Diem (then Libra) stablecoin project in 2019, executives promised to work with a suite of Silicon Valley companies—including Coinbase, PayPal, Visa, Mastercard, Stripe, Uber, Spotify, and eBay—to create a "vibrant financial services economy" on the blockchain.[466] Ultimately, policymakers and the banking industry, among other opponents, pushed Meta to shut down the project.[467]

To the Author's knowledge, not once during the Meta Diem debates did a proponent of the project suggest that the laws governing media, speech, and communications would generically encase the project from financial regulation. Opponents expressed concern about global network power and, more specifically, the convertibility of the Diem stablecoins across multiple currency zones and jurisdictions.[468] Ultimately, to effectively compete with banks, the Meta Diem project would have had to ensure that users could rapidly convert currencies using its (permissioned) blockchain, especially during periods of pronounced financial distress.[469] Many feared that Meta could destabilize the global financial system.[470] Overall, policymakers have already prevented the development of a social media shadow bank, based on hypothetical reasoning, before the Diem Project even existed. Following precedent, a video game industry defense to the regulation of gaming money that is rooted in nonliability for media platforms should prove of limited value.

2. *Entertainment.* — Some opponents of regulating the entertainment sector prioritize 'play' or "gameplay" as central to a

466. Nick Statt, Facebook's Calibra Is a Secret Weapon for Monetizing Its New Cryptocurrency, The Verge (June 18, 2019) https://www.theverge.com/2019/6/18/18682838/facebook-digital-wallet-calibra-libra-cryptocurrency-kevin-weil-david-marcus-interview [https://perma.cc/952H-HJET].

467. Meta sold the Diem assets to Silvergate Bank (which later collapsed in the March 2023 banking crisis). See Romain Dillet, Facebook Ditches Diem Stablecoin With Asset Sale to Silvergate, TechCrunch (Jan. 27, 2022), https://techcrunch.com/2022/01/27/facebook-reportedly-ditches-diem-stablecoin-with-asset-sale/ [https://perma.cc/L2RB-A5JA].

468. See, e.g., Katharina Pistor, Written Statement of Proposed Testimony for Examining Facebook's Proposed Cryptocurrency and Its Impact on Consumers, Investors, and the American Financial System: Hearing Before the H. Comm. on Fin. Servs., 116th Cong. 9 (2019), https://www.congress.gov/116/meeting/house/109821/witnesses/HHRG-116-BA00-Wstate-PistorK-20190717-U1.pdf [https://perma.cc/W4YU-GNK2] ("If Libra were to achieve its ideal scale, the network effects of this infrastructure would impede competition for alternatives that might better achieve the laudable goals the Libra White Paper has spelled out.").

469. Id. at 79 ("[T]he holders of Libra coins . . . shall be able to exchange their Libras against (local) fiat currency on demand without suffering major haircuts.").

470. See, e.g., Omarova & Steele, supra note 50, at 1249 (discussing the stability risks of a "superplatform").

virtuality defense.[471] Yet, as a model for reasoning around "play," regulators might look to gambling law, which occupies a peculiar position between the laws of banking, securities, entertainment, and various dimensions of criminal law. Congress has passed several statutes to control online gambling,[472] but states, nations, and tribes are presumptively in charge of gambling law as a general matter.[473] Some states and tribes prohibit online gambling, and plaintiffs have even brought lawsuits against video game companies (including Valve) under those laws.[474] Most state gambling laws do not recognize virtual items, including game items, as having value, but some states and tribes regulate them if players can cash out.[475] A virtual item is more likely to have economic and thus legal value if a player can cash it out for "real-world money" on demand.[476] But according to Professor Sheldon Evans, gambling regulators are not likely to hold gaming companies responsible for transactions that they "contractually prohibit in their EULAs."[477]

Some federal, state, and tribal laws regulate online gambling, explicitly targeting the convertibility of chips to government-backed money. Players can buy chips and use them at other establishments operated by the casino, and casinos may lend chips through casino "markers," which require the recording of ID and an assessment of creditworthiness.[478]

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471. See, e.g., Edward Castronova, The Right to Play, 49 N.Y.L. Sch. L. Rev. 185, 185 (2004) ("Virtual worlds represent a new technology that allows deeper and richer access to the mental states invoked by play, fantasy, myth, and saga. These mental states have immense intrinsic value to the human person, and therefore any threats to the magic circle are also threats to a person's well-being.").

472. See, e.g., Unlawful Internet Gambling Enforcement Act of 2006, Pub. L. No. 109-347, §§ 801–807, 120 Stat. 1884, 1952–1962; Professional and Amateur Sports Protection Act, Pub. L. No. 102-559, 106 Stat. 4227 (1992).

473. See Murphy v. Nat'l Collegiate Athletic Ass'n, 584 U.S. 453, 483 (2018) ("These provisions implement a coherent federal policy: They respect the policy choices of the people of each State on the controversial issue of gambling.").

474. See, e.g., Ali Jones, An Indigenous American Tribe Is Suing Valve for "Actively Encouraging" Illegal Gambling, PCGames (Apr. 16, 2019), https://www.pcgamesn.com/counter-strike-global-offensive/csgo-skin-betting-quinault [https://perma.cc/VQJ2-WZ29] (describing a lawsuit in which the Quinault Nation claimed Valve encouraged gambling on *Counter-Strike: Global Offensive* without abiding by tribal or state gambling law).

475. See Evans, supra note 37, at 409.

476. Id. at 410 ("[C]ourts heavily rely on real-world value and the cash-out rule in assessing the prize/value element. But these cases, especially those involving virtual rewards, make the mistake of assuming that goods can only have real-world import if they can be converted into real-world money.").

477. Id. at 416; see also id. at 382 (describing the limits on real-world money and boundaries on recompense).

478. See, e.g., Nev. Gaming Control Bd., Minimum Internal Control Standards: Cage and Credit 2 (Apr. 1, 2023), https://www.gaming.nv.gov/siteassets/content/divisions/audit/mics/cage-and-credit.pdf [https://perma.cc/HA9Q-35SG] (requiring casinos to

But players cannot convert chips to cash out beyond a bounded casino and hospitality industry system.[479] This system enhances security and fraud prevention, as casinos can trace the movements of their tokens using radio-frequency identification (RFID) technology.[480] The Treasury regulates casinos through the IRS and FinCEN. The IRS has specific accounting rules for casino chips.[481] Moreover, outside of gambling regulation per se, the IRS supervises card clubs and casinos for compliance with anti-money-laundering laws.[482] In this context, the federal government explicitly governs an entertainment space. For the purposes of BSA/AML law, FinCEN licenses casinos and the IRS supervises them.[483]

Under California gambling law, courts have long accepted a version of the magic circle defense holding that virtual items obtained through loot boxes are not "thing[s] of value" under state gambling statutes because they lack real-world transferable value.[484] In *Coffee v. Google,* the court went further, holding that even when players can clearly use informal markets to cash out value, the platform ToS prohibiting transfer or sale is dispositive—contract law patrols the boundary between regulated and unregulated value.[485]

However, in *Colvin*, the plaintiffs alleged that Roblox violated its duty of care by "knowingly and improperly facilitating and profiting from these online casinos."[486] Roblox claimed that gamers buy Robux for enjoyment, much like "movie or amusement park tickets," asserting

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record the gambler's identity, verify "credit worthiness using a method permissible under Regulation 6.120," and obtain approval for credit limits before lending).

479. See, e.g., N.J. Admin. Code § 13:69E-1.6A(f) (2018) ("Each gaming chip and plaque is solely evidence of a debt that the issuing casino licensee owes to the person legally in possession . . . .").

480. Frank Legato, In the Chips, GGB Mag. (Apr. 2, 2010), https://ggbmagazine.com/article/in-the-chips/ [https://perma.cc/D7XB-AKVK] (reporting on the development of RFID and casino tracing technology).

481. See Khadijah McFadden, Note, The Tax Web of Unredeemed Gambling Chips, 97 U. Det. Mercy L. Rev. 95, 95 (2019) (arguing the IRS must provide a reason as to why it excludes unredeemed gambling chips from other gross income).

482. See 31 C.F.R. § 1010.100 (2025).

483. Id. § 1021.100 (defining casinos as financial institutions under BSA/AML law).

484. Taylor v. Apple, Inc., No. 20-cv-03906-RS, 2021 WL 11559513, at *5 (N.D. Cal. Mar. 19, 2021) ("[T]he lack of any real-world transferable value to the items takes them outside the meaning of the statute."); see also Coffee v. Google, LLC, No. 20-cv-03901-BLF, 2022 WL 94986, at *12–13 (N.D. Cal. Jan. 10, 2022) (same); Soto v. Sky Union, LLC, 159 F. Supp. 3d 871, 880 (N.D. Ill. 2016) ("Added enjoyment simply does not have measurable worth, and it cannot be a 'thing of value' under [California Penal Code] section 330b(d).").

485. *Coffee*, 2022 WL 94986, at *13 ("[T]he sale of virtual chips for cash on a secondary market violates the Terms of Use. The virtual chips cannot constitute a 'thing of value' based on this prohibited use." (alteration in original) (internal quotation marks omitted) (quoting Kater v. Churchill Downs Inc., 886 F.3d 784, 788 n.2 (9th Cir. 2018))); see also id. at *12 (taking judicial notice of ToS).

486. Colvin v. Roblox Corp., 725 F. Supp. 3d 1018, 1024 (N.D. Cal. 2024).

plaintiffs had not suffered real "economic loss."[487] The court responded that movie or amusement park tickets have "economic value," in this case, even without a direct convertibility mechanism.[488] The opinion emphasized that gaming currency within platforms is not "virtual," and thus beyond the realm of legal injury: "Those tickets do have economic value, even if they cannot be exchanged for cash."[489] Although *Colvin* does not address regulatory issues, it adopts the premise that gaming money in places of play is not "virtual" in a way that lies beyond the law.

More importantly, and in direct support of this Article's thesis, in December 2025, *De Ridder v. Roblox Corp.* became the first California-law decision to address what this Article terms play money as belonging to the "real world."[490] The court held that Robux are "things of value" because, unlike gaming items, they can be banked across the Roblox platform and exchanged for cash through the Developer Exchange Program.[491] For this court, the magic circle held when there was no conversion mechanism but failed when Roblox supplied it.

Overall, opponents of regulations must clarify why financial regulation would cease at the boundary of entertainment law. According to Balkin, although gaming platforms involve new forms of play, they are similar to shopping at the mall and thus do not deserve constitutional protection.[492] Indeed, Professors Colleen Baker and Christoper Odinet argue that games and entertainment are increasingly going to become part of the everyday digital banking experience.[493]

3. *The Arts.* — The laws of finance, art, and artistic expression have a long, if undertheorized, history,[494] which bears relevance to the regulation of gaming money. Pre-digital art worlds intertwined with regulated banking. For example, the Department of Law Bureau of Investor Protection and Securities enforces the New York Theatrical Syndication Financing Act of 1983 through supervising the financing and ticketing of not only Broadway productions but concerts, sporting events,

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487. Id.

488. Id.

489. Id. at 1024.

490. De Ridder v. Roblox Corp., 811 F. Supp. 3d 1116, 1120–23 (N.D. Cal. 2025).

491. See id. at 1122 ("Robux can be taken out of the game in which they're won and banked for later use on any game or experience on the Roblox platform . . . .").

492. Balkin, supra note 460, at 80 (arguing that "virtual spaces that are designed to be shopping malls and emporia for the purchase and sale of real and virtual goods should be treated as such").

493. Colleen Baker & Christopher K. Odinet, The Gamification of Banking, 2025 U. Ill. L. Rev. 1567, 1571 (arguing "[t]he next phase in the gamification of finance will be in banking: specifically, the *gamification of banking*," which will help banks find and keep new customers and collect more data about them).

494. See Zachary Small, Token Supremacy: The Art of Finance, the Finance of Art, and the Great Crypto Crash of 2022 3–4 (2024) (beginning a book on non-fungible tokens (NFTs), written from a journalistic perspective, by discussing Renaissance bankrolling of the fine arts).

and other entertainment productions.[495] In the digital world, new art lending services have emerged, but regulation remains fragmented.[496] Banks help wealthy individuals use art collections as collateral.[497] Additionally, major auction houses like Sotheby's and Christie's have engaged in digital financial services for decades.[498]

Recently, companies and celebrities have marketed non-fungible tokens (NFTs) as digital art.[499] The entertainment and art industries are the digital asset sector's primary partner in the volatile space.[500] Music, film, and TV companies have issued NFTs "to provide verified access to digital content (e.g., audio, video, or literary works) or to concerts and other events."[501] Consumers may redeem some NFTs for other entertainment goods or services.[502] Christie's reported over $100 million in NFT sales by September 2021 at the height of the boom and folded

495. See N.Y. Arts & Cult. Affs. Law § 23.01 (McKinney 2025) (finding "the integrity of box office operations . . . is a matter affected with a public interest and subject to the supervision of the state for the purpose of safeguarding ticket purchasers"); N.Y. Comp. Codes R. & Regs. tit. 13, § 50.1(b) (2025).

496. See, e.g., Monique Sofo, How to Monetize an Art Collection, Christie's Int'l Real Est.: Luxury Defined (May 10, 2017), https://www.christiesrealestate.com/blog/how-to-monetize-an-art-collection [https://perma.cc/7KXD-YW3F] ("Many serious art collectors are increasingly looking to art-secured financing . . . . Athena Art Finance, based in New York, is the leading independent specialist in this field . . . ."); see also Alessandra Dagirmanjian, Note, Laundering the Art Market: A Proposal for Regulating Money Laundering Through Art in the United States, 29 Fordham Intell. Prop. Media & Ent. L.J. 687, 691 (2019) (noting that no regulatory regime specifically or comprehensively addresses money laundering via art markets); Art-Backed Lending and Liquidity Solutions, MoMAA (June 24, 2025), https://momaa.org/art-backed-lending/?srsltid=AfmBOorPixc0voys5nblLycX4hsVJvOA1-UTnNarW53LEUxdBdPXPA8F [https://perma.cc/ZV9R-ZGZT] ("In the United States, art-backed loans typically fall under standard secured lending regulations, though specific provisions regarding artwork storage, insurance, and valuation have emerged.").

497. See Fine Art Financing, J.P. Morgan Private Bank, https://privatebank.jpmorgan.com/nam/en/services/lending/specialty-lending/fine-art-financing [https://perma.cc/YKF5-49L5] (last visited Oct. 12, 2025) ("[J.P. Morgan] can help you expand your [art] collection, fund new investments or pursue other financial goals without disrupting your investment strategy.").

498. See Jorge Contreras, The Art Auctioneer: Duties and Assumptions, 13 Hastings Commc'ns & Ent. L.J. 717, 741 (1991) (explaining Sotheby's lending practice of financing part of the buyer's purchase price); see also, e.g., Sotheby's Goes High-Tech, CBS News (Jan. 20, 1999), https://www.cbsnews.com/news/sothebys-goes-high-tech/ [https://perma.cc/4G2W-YHK9] (on file with the *Columbia Law Review*) (describing Sotheby's first major online auction in 1999).

499. See Sofia Aizenman, Note, The Art World of Digital Assets: How Non-Fungible Tokens Create a Loophole in Anti-Money Laundering Regulations, 44 Cardozo L. Rev. 1179, 1208 (2023) ("NFTs are widely understood as a form of digital art . . . .").

500. See Andrew Appleby, Taxing Tokens, 91 Tenn. L. Rev. 321, 343 (2024) ("Music and entertainment have also emerged as prevailing use cases for NFTs.").

501. Id.

502. Id. at 344 ("[T]he NFT may be redeemed for goods or services at an event, including merchandise, food, and beverage.").

NFT sales into its general business following the bust.[503] Auction houses turned to Twitter (now X) and Discord (a gaming communications platform) as communications changed during the pandemic.[504] In 2022, Christie's launched a venture capital arm for art and cryptocurrency.[505] Sotheby's has its own NFT marketplace, Sotheby's Metaverse.[506] The NFT cultural phenomenon has created a stream of articles arguing for and against regulation.[507]

During the NFT boom in 2020 and 2021, the SEC adopted a cautious approach without taking a firm stance.[508] In September 2023, the Commission settled with an NFT issuer, Stoner Cats NFT,[509] finding that NFTs issued by a team of Hollywood producers were unregulated securities per its test from *SEC v. W.J. Howey Co.*[510] But the SEC did not

503. Ella Feldman, Christie's Helped Drive the Art World's NFT Craze. Now, the Auction House Is Shutting Down Its Digital Art Division, Smithsonian Mag. (Sep. 9, 2025), https://www.smithsonianmag.com/smart-news/christies-helped-drive-the-art-worlds-nft-craze-now-the-auction-house-is-shutting-down-its-digital-art-division-180987306/ [https://perma.cc/LE6Z-GEHU]; see also Press Release, Christie's, Christie's Surpasses $100 Million in NFT Sales (Sep. 28, 2021), https://www.christies.com/presscenter/pdf/10210/Christie%27s%20Surpasses%20$100M%20in%20NFT%20Sales_RELEASE_9-28-2021_10210_1.pdf (on file with the *Columbia Law Review*).

504. See Elizabeth Howcroft, The New Masters: How Auction Houses Are Chasing Crypto Millions, Reuters (Nov. 9, 2021), https://www.reuters.com/business/finance/new-masters-how-auction-houses-are-chasing-crypto-millions-2021-11-08 [https://perma.cc/L6DY-CJH3] (discussing auction houses' use of social media to arrange NFT purchases); Eileen Kinsella, Is This the Next Art-Market Bubble? A Unique NFT for the Popular 'Nyan Cat' GIF Just Sold for a Whopping $560,000, Artnet (Feb. 22, 2021), https://news.artnet.com/market/nyan-cat-nft-sells-for-560000-1945679 (on file with the *Columbia Law Review*) (describing an NFT auction streamed on Twitch).

505. Kelly Crow, Christie's Launches Venture-Capital Arm Focused on Tech in Art, Crypto, Wall St. J. (July 18, 2022), https://www.wsj.com/articles/christies-venture-capital-nft-11657916141 [https://perma.cc/8DMM-2PAH].

506. Digital Art, Sotheby's, https://www.sothebys.com/en/departments/digital-art [https://perma.cc/2M86-G44F] (last visited Oct. 12, 2025).

507. See, e.g., Joshua A.T. Fairfield, Tokenized: The Law of Non-Fungible Tokens and Unique Digital Property, 97 Ind. L.J. 1261, 1293 (2022) (arguing that NFTs are "digital personal property" and should be regulated as such); Andrew Lom, Rachael Hashmall, Glen Barrentine, Kevin J. Harnisch & Magdalena Oropeza, US SEC Continues to Pursue Aggressive and Arbitrary Regulation of NFTs, Norton Rose Fulbright (Sep. 2023), https://www.nortonrosefulbright.com/es-419/knowledge/publications/7cd6583a/us-sec-continues-to-pursue-aggressive-and-arbitrary-regulation-of-nfts [https://perma.cc/AK63-RQCR] (arguing against the SEC's current method of NFT regulation).

508. See Thomas Lee Hazen, Rational Investing or Speculative Fever?: SPACs, Robinhood, and Digital Assets—Securities Markets or Casinos?, 101 N.C. L. Rev. 553, 595 (2023) (noting that the SEC did not bring an enforcement action treating NFTs as securities until 2023).

509. Id. at 596 (discussing Stoner Cats, the first enforcement action).

510. Id. at 595–97, 596 n.163 (noting the findings of the SEC order against Stoner Cats); Eric Hall, SEC Settlement With Stoner Cats May Signal Agency's Intent to Assert Its Authority Over Unregistered Securities in the NFT Space, DLA Piper (Sep. 26, 2023), https://www.dlapiper.com/en/insights/publications/intellectual-property-news/2023/

provide a point-by-point analysis of the elements of the *Howey* test for precedent.[511] Ultimately, the SEC approach warns of how gaming companies may shield gaming money by claiming financial instruments are works of art, if not claiming they are in some way unreal.

Here, regulators might look at the Treasury's treatment of the intersection between art and finance for lessons concerning pitfalls. The art industry is a nominally self-regulated industry, but it is especially susceptible to money laundering.[512] The Treasury has not clarified the status of NFT issuers regarding anti-money-laundering laws.[513] This ambiguity is strange, as NFTs present "additional layer[s] of secrecy" and obscurity to the art money laundering process.[514] Patrons can purchase NFTs with other cryptocurrencies and "exchange numerous tokens using coins linked to different accounts," posing further regulatory challenges.[515] FinCEN has similarly excluded gaming money from its reach and, like the IRS, has opted not to extend its conception of "convertible virtual currency" to gaming money.[516] This approach presumes that gaming money operates within "closed-loop" systems.[517]

IV. GOVERNING GAMING MONEY

For any substantive governance of gaming money to succeed, regulators must overcome the virtuality defense. Internationally, other regulators have explicitly done so. For instance, in March 2025, the European Union's Consumer Protection Cooperation Network issued Key Principles on In-Game Virtual Currencies declaring that some forms of gaming money constitute "digital representations of real-world monetary value."[518] As one industry reporter described it, game

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sec-settlement-with-stoner-cats-may-signal-agencys-intent-to-assert-its-authority [https://perma.cc/S23B-5TSR] ("SEC applied the Supreme Court's *Howey* test, determining that Stoner Cats NFTs constituted 'investment contracts.'").

511. See In re Stoner Cats 2, LLC, S.E.C. Release No. 11233, 2023 WL 5956272, at *2 (Sep. 13, 2023) ("[Stoner Cats 2, LLC] offered and sold the Stoner Cats NFTs as investment contracts, and therefore securities, pursuant to the test laid out by the U.S. Supreme Court in SEC v. W.J. Howey Co., 328 U.S. 293, 298–99 (1946) . . . .").

512. Aizenman, supra note 499, at 1180; see also id. at 1196–98 (noting that the art industry's self-regulated nature "mak[es] it a business more susceptible to criminals successfully transferring dirty money through million-dollar art sales without legal consequences").

513. See id. at 1181 (remarking on the exclusion of NFTs from BSA/AML laws).

514. Id. at 1180–81.

515. Id.

516. See Kelly, supra note 373, at 1488–95, 1410 (arguing that "FinCEN should consider requiring video game developers who host virtual worlds and marketplaces for in-world currency to form a supervisory board").

517. Roomberg, supra note 359, at 174 (arguing that closed-loop games are unlikely to trigger money transmitter regulation).

518. Consumer Protection Cooperation Network, Key Principles on In-Game Virtual Currencies 1 (2025), https://commission.europa.eu/document/download/8af13e88-

developers and regulators had long agreed that in-game currencies legally exist within a "closed loop," meaning they have no real monetary value outside the context of the game within which they are situated, and are akin to "theme park currencies."[519]

The absence of a magic circle does not mean some business models deserve less scrutiny than others. But the virtuality defense operates with different intensity across each type of gaming money outlined in Part II—play money, store money, and gift cards. The defense can hardly be said to apply to gift cards and should not apply to store money given proper financial accounting and disclosure. The defense retains some traction, however, with respect to play money, and the involvement of any type of gaming money casts an aura of unseriousness.

A. *Default Authorities*

While government regulation can provide flexibility through standards rather than strict rules, there must still be clear criteria between prohibited and unprohibited gaming money activities and qualitative and quantitative thresholds for concern.[520] Gaming companies deploy forms of play money, store money, and gift cards as if they are not financial liabilities, but licensed content, achieving functional monopoly over token production, exchange rates, and alienability that other shadow money issuers lack. Despite this encasement, agencies should closely supervise and regulate platform-based companies that convert gaming money to currency or support conversion at scale.

Before January 2025, the CFPB was well-positioned to lead in this space and draw the lines.[521] The CFPB can take legal action against a wide array of financial services businesses.[522] In Part I, this Article

6540-436c-b137-9853e7fe866a_en [https://perma.cc/UR7E-5EBD] (defining in-game virtual currencies as "digital representations of real-world monetary value" when "they serve no purpose other than, or for which other functions are secondary to providing for a method of payment").

519. George E. Osborn, Fight Breaks Out Over EU's New In-Game Currency Rules, Video Games Indus. Memo (Apr. 17, 2025), https://www.videogamesindustrymemo.com/p/fight-breaks-out-over-eus-new-in [https://perma.cc/7NYT-66PD] (internal quotation marks omitted).

520. See Hickman & Hickman, supra note 56, at 556–57 ("Nevertheless, if meaningful regulation is to be accomplished, some dividing line between acceptable and unacceptable spheres of regulation is necessary.").

521. See e.g., CFPB Report, supra note 66, at 3 ("The Consumer Financial Protection Bureau (CFPB) is monitoring non-traditional markets where financial products and services may be offered, including the use of virtual currencies in games and virtual worlds.").

522. The CFPB can take action against a "covered person," which is "any person that engages in offering or providing a consumer financial product or service[] and . . . any affiliate of [such] a person . . . if [the] affiliate acts as a service provider to [the covered] person." 12 U.S.C. § 5481(5)–(6) (2024). A "consumer financial product or service" is "offered . . . primarily for personal, family, or household purposes." Id.

discussed how over the past two decades, the CFPB has become the gap-filling banking regulator over consumer-facing shadow money issuers. That said, as of the writing of this Article, CFPB supervision is essentially defunct, and the existence of the institution itself is in question.[523]

Until then, state regulators might have to take the lead in this regulatory ecosystem, especially if federal regulators within reach do not take action. Given the business activity of gaming companies, the California Department of Financial Protection and Innovation (DFPI), a banking and consumer financial protection regulator, is likely the most important, as California remains an industry hub.[524] In 2023, California enacted the Digital Financial Assets Law (DFAL), becoming one of the first U.S. states to implement a virtual currency-specific regulatory regime.[525] "Beginning July 1, 2026, . . . [t]he DFAL prohibits an entity from engaging in digital financial asset business activity unless the entity holds a license from the DFPI."[526] "The new law promotes consumer and investor protection by creating a robust regulatory framework, including supervision and enforcement authority, for certain crypto activities," and other digital financial business activity.[527] Critically, DFPI's treatment of gaming money may validate the convertibility threshold this Article proposes. The statute excludes from its definition of "digital financial asset" any "value issued and usable only within an online . . . game platform"[528]—codifying the virtuality defense for play money that remains inside the magic circle—but nevertheless adopting the proper category of analysis. Venture capital firm Andreessen Horowitz has

523. Jeff Kauflin, How Trump's Hatchet Man is Destroying Consumer Protections, Forbes (Jan. 7, 2026), https://www.forbes.com/sites/jeffkauflin/2025/11/03/trumps-gutting-of-the-consumer-financial-protection-bureau-is-leaving-the-public-vulnerable-to-abuses/ [https://perma.cc/AB2S-HYJM] ("Russell Vought's dismantling of the Consumer Financial Protection Bureau is putting the public at risk in areas ranging from auto loans and digital payments to credit cards and credit reports.").

524. See Julia Stoll, Video Game Industry in the United States—Statistics & Facts, Statista (Dec. 17, 2025), https://www.statista.com/topics/8790/video-game-industry-in-the-united-states/ (on file with the *Columbia Law Review*) (noting that many of the largest gaming companies in the United States are in California and that California has the highest in-state video game industry output).

525. Digital Financial Assets, Dep't of Fin. Prot. & Innovation, https://dfpi.ca.gov/regulated-industries/digital-financial-assets/ [https://perma.cc/ERX6-MU4P] (last updated Dec. 16, 2024).

526. Id. (emphasis omitted).

527. Id.

528. Cooley, California Enacts Two New Virtual Currency Laws (Oct. 19, 2023), https://www.cooley.com/news/insight/2023/2023-10-19-california-enacts-two-new-virtual-currency-laws [https://perma.cc/DEH9-LC89]. See also Cal. Fin. Code § 3102(g)(2)(B) (2026) (excluding from "digital financial asset" definition "[a] digital representation of value issued by or on behalf of a publisher and used solely within an online game, game platform, or family of games sold by the same publisher or offered on the same game platform"); id. § 3102(i)(3).

argued the law is so broad as to encompass gaming money and has requested an exemption for gaming companies.[529]

B. *The Spectrum of Governance*

This Article argues that the ultimate fix is legislative at the federal level, and if anything, it presents an opportunity to refocus the discourse of financial regulation around "money" as a category, as opposed to banking, financial services, or even legal tender. Legislation could instantiate various forms of regulation with distinct strength and reach.

As the political economy of the administrative state and financial regulatory agencies is in total flux, here we focus on how to move forward conceptually, not procedurally. New legislation could apply "strong-form regulation" to some companies, for instance, by establishing rules analogous to those governing banks, which is to say, financial institutions encroaching on money creation powers. For example, Congress could ban gaming companies from issuing gaming money without charters.[530] It could also impose exchange rate adjustment requirements on Roblox, just as it does for credit card banks.[531] Congress could require Valve to keep records identifying account holders and file suspicious activity reports, as the Treasury requires for banks and other financial institutions.[532] Legislation could also impose bank-like liquidity requirements on Sony and Microsoft.

In many respects, however, these laws are a poor fit for low-powered money. "[T]he hydraulic effects of bank regulation and the relentless forces of regulatory arbitrage" often "undercut" ex-ante rules, especially at what we see as the perimeter of the financial system.[533] We now live in a universe of pluralistic money, of hybrid monies, once again issued by multiple corporations aside from banks, in which technology companies have integrated banking and commerce.[534]

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529. Letter from Andreessen Horowitz to Clothilde V. Hewlett, Comm'r, Dep't of Fin. Prot. & Innovation (Jan. 12, 2024), https://dfpi.ca.gov/wp-content/uploads/sites/337/2024/02/Andreessen-Horowitz-a16z-1.12.24.pdf [https://perma.cc/Z9EJ-CTAT].

530. Many proposals for financial reform aim to end shadow banking through use of the charter. See Arthur E. Wilmarth, Jr., Taming the Megabanks: Why We Need a New Glass–Steagall Act 335–36 (2020) (concluding a historical survey of crises with an argument for a "New Glass–Steagall Act," isolating commercial banking from private financial markets, generally, as well as more expansive nonbank business activities).

531. See 12 C.F.R. § 240 (2025) (requiring accurate, timely recording of foreign exchange transaction data, including exact timestamps, price, and currency pair).

532. Id. § 208.62 (requiring the filing of a Suspicious Activity Report when a bank detects a violation of federal law).

533. Awrey, Bad Money, supra note 48, at 57–58.

534. See, e.g., Jérôme Blanc, Making Sense of the Plurality of Money: A Polanyian Attempt, *in* Monetary Plurality in Local, Regional, and Global Economies 48, 59–63 (Georgina M. Gómez ed., 2018) (discussing the multiplicity of monies that have been established in recent decades by various institutions and groups).

We can plot this stage of unregulated finance along a continuum, at the end of which lawmakers seek and destroy new forms of money. Historically, the most intrusive approach has been to ban new forms of money, even without signs of convertibility. For instance, Congress tried, and failed, to ban nineteenth-century paper scrip worth less than $1.[535] Today, financial technology and cryptocurrency companies succeed at regulatory evasion in part by issuing small denominations within a supposedly closed loop of companies.[536] There is also a risk of dispersion following a ban, which may be problematic for the IRS.[537] For instance, gamers could move currency to accounts held by others in tax havens.[538] Gamers could use Virtual Private Networks to suggest they are in other countries with lax regulations.[539]

Weak-form regulation (within the supervisory ambit) may involve creating "sandboxes" in which companies may experiment with gaming money but under the eye of supervisors. Video games offer a unique laboratory environment to experiment with different tools. Some regulators create sandboxes in which agencies shield companies from the reach of most regulations for a short period.[540] Yet this Article has argued that the expanding convertibility of gaming money into currency and bank deposits warrants more than sandbox observation of private ordering. Thus, this Part focuses on differences between various strong- and medium-form approaches, arguing for medium-form approaches at this stage of gaming money development.

C. *Legislative Upgrade*

This Article favors medium-form regulation in the form of a federal Gaming Money Act, which would entail special licensing, supervision, and tailored gaming money requirements, reflecting law's core concern with money creation and sovereign privileges, adapted for a new technological context. Below, this Article offers a sketch of medium-form

535. See supra Part II; see also Timberlake, Private Production, supra note 145, at 439 (explaining that Congress attempted to eliminate fractional private notes, but paper scrip nonetheless continued to circulate in the 19th century).

536. See supra Part I.

537. Laurent Belsie, An Unintended Consequence of Limiting FX Borrowing by Banks, Nat'l Bureau of Econ. Rsch. (Nov. 21, 2018), https://www.nber.org/digest/dec18/unintended-consequence-limiting-fx-borrowing-banks?page=1&perPage=50 [https://perma.cc/RF3F-R9DD] (discussing the dispersion that takes place after tighter FX borrowing rules are established).

538. See Kim, supra note 39, at 806 (noting that without clear taxation rules for virtual economies, the Metaverse could function as a "new tax haven," as users may transfer and hide value via digital assets).

539. See id. at 836 ("[I]t is not hard to imagine a world where users would manipulate their IP addresses using virtual private networks (VPNs) so that it would always seem as though they were located in jurisdictions that had the best tax rates.").

540. See Hilary J. Allen, Regulatory Sandboxes, 87 Geo. Wash. L. Rev. 579, 592–601 (2019) (comparing sandboxes around the world).

regulation, establishing special gaming money licensing and supervision. This Article then proposes three core requirements, which regulators can modulate or supplement.

First, legislation should set standards for exchange rates, including fixing rates for particular periods, establishing expiration dates, clarifying accounting treatment, and mandating protections and duties regarding users. Second, legislation should require companies to authenticate and verify the identities of adult gamers who exchange gaming money. Although gaming companies need not file reports on suspicious activity, they should have records on hand for the U.S. Treasury (the IRS and FinCEN). Third, companies internalizing payment systems by issuing and holding store money must "ring-fence" or otherwise structurally separate gaming money activities from the rest of the corporate balance sheet and prepare for either a run on inventory or manage an angry customer base that stands to lose the stored value in the platform system.[541]

1. *Licensing & Supervision.* — Federal regulators have considered extending bank charters to fintech companies for some time and have now explicitly done so with the GENIUS Act.[542] Policymakers, scholars, and advocates are already debating the appropriateness of these new stablecoin charters.[543] But legislation could also design new licenses (rather than charters) for new forms of money.[544] National licensing already exists for money transmitters, and the regulatory burden is much less onerous than a charter.[545] Gaming companies would need these licenses to issue gaming money or support its convertibility. Congress could set asset or liability thresholds for supervision and other metrics. The licenses should be agnostic to the gaming technology used rather than risking the flight of gaming money to specific devices and not others.

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541. See Steven L. Schwarcz, Ring-Fencing, 87 S. Cal. L. Rev. 69, 72 (2013) [hereinafter Schwarcz, Ring-Fencing] (noting there are competing definitions of ring-fencing, but it typically means "legally deconstructing a firm in order to more optimally reallocate and reduce risk").

542. See Guiding and Establishing National Innovation for U.S. Stablecoins (GENIUS) Act, Pub. L. No. 119-27, § 16(d), 139 Stat. 419, 462 (2025) [hereinafter GENIUS Act] (to be codified at 12 U.S.C. § 5915(d)) (requiring a state charter to engage in the business of money transmissions through a permitted payment stablecoin issuer).

543. See, e.g., Timantha Goff, How Misuse of the Trust Bank Charter Model Will Lead to More Financial Woes for Communities, Nat'l Cmty. Reinvestment Coal. (Dec. 11, 2025), https://ncrc.org/how-misuse-of-the-trust-bank-charter-model-will-lead-to-more-financial-woes-for-communities/ [https://perma.cc/BZ65-STJ3] ("NCRC has recently formally opposed several national trust bank charter applications from stablecoin and cryptocurrency firms due to their often unregulated and exploitative operations and the larger implications on community development.").

544. See Zaring, supra note 97, at 1454–55 (discussing New York's past practices issuing licenses for virtual currency exchanges).

545. See Awrey, Bad Money, supra note 48, at 46–48 (providing a general outline of the regulations "money service businesses" face at the state and federal levels compared to MMFs and banks).

Within a broader vision of regulation, gaming money charters militate toward the recentering of charters and licenses within financial regulation as a general matter. Professor Saule Omarova has proposed a federal licensing regime for high finance instruments, much like federal pharmaceutical regulation.[546] Omarova "starts with a simple premise: [I]f we cannot effectively regulate and control systemic risk associated with the increasing complexity in financial markets, we need to reduce and control the overall level of complexity in the system."[547] She argues that "the most radical and direct method of reducing systemic risk is to insert [ex-ante] regulatory controls at the point of product development, before the risk is introduced into the financial system."[548]

A similar mechanism may be necessary for gaming money (and many other low-powered instruments). In this framework, regulators would first examine whether gaming money crosses a threshold demanding chartered banking regulation (or perhaps chartered stablecoin regulation). If the agency found that the company was not engaged in money creation, it could either issue a license, refer supervision to another financial regulator, or leave the gaming money system to private ordering.[549]

2. *Rate Controls.* — Strong-form regulation might apply old rules to new companies. Regulators monitor how banks control exchange rates between bank deposits, foreign currency, partner-issued prepaid debit card balances, reward points, and cashback deals to ensure fair practices and instill confidence in the financial system.[550] Congress could impose exchange rate adjustment requirements on companies like Roblox similar to those the OCC has crafted for Capital One and Discover.[551] When banks issue gift cards or other instruments with their unit of account, however, they create high-powered money (bank credit) tied to "low-powered money" (points).[552] We should consider gaming money following a similar pattern but with even lower-powered money at a presumably smaller scale.

Under medium-form regulation, regulators should supervise gaming companies to prevent rate manipulation when converting gaming money to bank deposits and currency. For instance, regulators should monitor

546. See Saule T. Omarova, License to Deal: Mandatory Approval of Complex Financial Products, 90 Wash. U. L. Rev. 63, 66–68 (2012).

547. Id. at 66.

548. Id.

549. There is a doctrinal stream in banking law that suggests banking regulation takes priority over securities regulation in the context of instrument classification. See, e.g., Marine Bank v. Weaver, 455 U.S. 551, 558 (1982) (contrasting the "virtually guaranteed" returns on FDIC-insured certificates of deposit with other fixed-rate debt investments in which the investor assumes the risk of the borrower's insolvency).

550. See supra Part I.

551. See supra Part I.

552. See supra Part I (regarding gift cards).

Roblox for exchange rate practices between gaming money and currency. Holistic supervision would include examination of Apple and Google, which take a 30% cut for Roblox purchases via their apps.[553] This approach would still leave room for gaming money, allow people to play games (especially for a living), and safely convert gaming money to bank deposits or currency. A related approach focuses on consumer-facing remedies, which feature rules regarding error resolution, access to account information, and the disclosure of exchange rates, including fees.[554]

Gaming money provides an opportunity to manage the interface between consumer financial protection and banking regulation: It illuminates how these two objectives intersect in regulating new forms of shadow money and banking. From a combined perspective, Congress should enable regulators to mandate companies to issue gaming money fixing rates for specific periods, following the OCC's mandate of forty-five days' notice of change in conversion rates concerning credit card rewards.[555] If companies offer gaming money as part of credit card rewards deals, they are partners with banks in higher-powered money creation.[556] The practice points to even more significant issues about "rent-a-bank" and cobranded credit extension that may concern prudential regulators.

Here, one might claim Congress is singling out the gaming industry for popular business practices. Yet the lesson of gaming money should be to scrutinize it further and regulate similar practices. Recently, the CFPB and Department of Transportation have raised concerns regarding frequent flyer miles, which suggest some problems similar to gaming money.[557] In May 2024, they held a joint hearing to discuss ongoing

553. See Higgins, supra note 28.

554. See Electronic Fund Transfers (Regulation E), 12 C.F.R. § 1005 (2025) (establishing the basic "rights, liabilities, and responsibilities" of consumers using electronic fund transfer services, including procedures for error resolutions, requirements for issuing periodic receipts and statements of transfers, and disclosure of information relating to transfer fees and exchange rates). In January 2025, the CFPB sought public comment for a proposed interpretive rule on how Regulation E applies to gaming platforms. See Electronic Fund Transfers Through Accounts Established Primarily for Personal, Family, or Household Purposes Using Emerging Payment Mechanisms, 90 Fed. Reg. 3723 (proposed Jan. 15, 2025).

555. See supra section I.A.

556. See Consumer Financial Protection Circular 2024-07: Design, Marketing, and Administration of Credit Card Rewards Programs, 89 Fed. Reg. 106,277, 106,277–79 (Dec. 30, 2024) (describing credit card rewards programs that partner with third-party merchants, and explaining that as a result of this partnership, merchants may be subject to CFPB enforcement actions when they engage in "unfair, deceptive, or abusive acts" or practices related to their programs).

557. See Press Release, Rohit Chopra, Dir., CFPB, Statement of CFPB Director Rohit Chopra Regarding the Transportation Department's Probe Into Airline Rewards Programs (Sep. 5, 2024), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-regarding-the-transportation-departments-probe-into-airline-rewards-

concerns about transparency and complexity.[558] Like gaming companies, airlines also control the value of points at redemption by altering the rates between points, miles, and total spending.[559] In many cases, however, the airlines sell points to regulated banks, which then issue them according to credit card expenditure.[560] Unlike gaming companies, airlines attempt to sell miles in a relatively decentralized network, including to car rental companies, hotels, restaurants, and coffee shops.[561] Congress should address how industries create money and new financial practices through private point systems.

3. *"Know Your Customer" Requirements.* — Regulators should supervise gaming companies to ensure they maintain information regarding adult players participating in the gaming money system. "Know Your Customer" (KYC) requirements warrant careful calibration, but the justification is structural, not instrumental. The federal government should not impose identification requirements for gaming generally, but the legal framework governing monetary sovereignty requires accountability at the interface between private money and government money. Treasury already requires digital wallet providers such as Venmo and CashApp, as well as cryptocurrency companies, casinos, arthouses, antiquities dealers, and other companies to keep records, and if necessary, file reports regarding users.[562] Gaming companies performing the same conversion function operate outside this framework entirely. There is no particular reason why the Treasury should ignore companies like Valve. Although Valve does not create illicit

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programs/ [https://perma.cc/PZC7-AK5D] (issuing a statement about the Department of Transportation's inquiry into "potential unfair, deceptive, or anticompetitive practices" against consumers by airline rewards programs); see also Ari Goldfine, Note, The Financialization of Frequent Flyer Miles: Calling for Consumer Protection, 77 Vand. L. Rev. 233, 245 (2024) (arguing "airlines' power over points is more extensive than that of a central bank over a currency," as airlines control the value, accumulation, and expiration of points (emphasis omitted)).

558. Press Release, Rohit Chopra, Prepared Remarks of CFPB Director Rohit Chopra at the Joint Hearing on Airline and Credit Card Rewards Programs, CFPB (May 9, 2024), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-cfpb-director-rohit-chopra-at-the-joint-hearing-on-airline-and-credit-card-rewards-programs/ [https://perma.cc/YG88-TBEX].

559. See Ganesh Sitaraman, Airlines Are Just Banks Now, The Atlantic (Sep. 21, 2023), https://www.theatlantic.com/ideas/archive/2023/09/airlines-banks-mileage-programs/675374/ (on file with the *Columbia Law Review*) (arguing airlines have become "more like financial institutions that happen to fly planes on the side").

560. Id.

561. See Justin Bachman, Airlines Make More Money Selling Miles Than Seats, Bloomberg (Mar. 31, 2017), https://www.bloomberg.com/news/articles/2017-03-31/airlines-make-more-money-selling-miles-than-seats (on file with the *Columbia Law Review*) (describing the business of selling miles to a range of industries).

562. See 31 C.F.R. §§ 1010.100, 1010.200, 1010.230(b), 1010.410 (2025) (defining financial institutions and entities subject to the regulation and setting out the requirements of financial institutions to verify and maintain records related to their clients' identifying information).

markets for skin betting, it permits them, supplying its API—specifically its programming code—with minimal accountability.[563] One can acknowledge the value of open-source code in innovation while still maintaining concerns about incentives and liability. Valve and third-party platforms share a user base.[564] Valve evades liability while promoting the markets it knows feature money laundering, fraud, and other illicit activity.[565]

Under strong-form regulation, Congress (or perhaps the Treasury) could impose complete BSA/AML requirements on gaming companies, mandating they abide by KYC rules identifying account holders and file reports on any activity the monitor finds suspicious. However, this Author has joined other scholars in criticizing the expansiveness of this regime, which channels data to law enforcement with minimal privacy safeguards and little to show in terms of preventing money laundering by the wealthy and privileged.[566] In practice, gaming companies would have to share a significant amount of rich, granular data with criminal law enforcement.[567] Gaming money regulation provides an opportunity for more nuanced data governance. The Gaming Money Act should impose identification requirements on gaming companies without replicating the infrastructure that has failed elsewhere, at least in terms of privacy concerns.

Under medium-form regulation, Congress could establish a "tiered KYC" regime for accountholders, requiring different levels of identification, authentication, and verification based on perceived risk, which has been widely used in other countries around the world.[568]

563. See Anne Mette Thorhauge & Rune K.L. Nielsen, Epic, Steam, and the Role of Skin-Betting in Game (Platform) Economies, 21 J. Consumer Culture 52, 62 (2021) (explaining how allowing skin betting benefits Valve's business strategy); Shaun Assael, Skin in the Game, ESPN (Jan. 20, 2017), https://www.espn.com/espn/feature/story/_/id/18510975/how-counter-strike-turned-teenager-compulsive-gambler [https://perma.cc/2M4W-6JQK] (explaining how Valve's open API enables players to transfer skins to online casinos).

564. People Make Games, supra note 305 (arguing many people who buy skins on these sites want to showcase them in games, and Valve would likely lose users and hurt its bottom line if the secondary markets disappeared).

565. See supra Part II.

566. See Carrillo, Seeing Through Money, supra note 82, at 1269–71 (criticizing the effectiveness of the regime in preventing money laundering by major financial institutions, while harming immigrant communities and poor people of color through mass surveillance); see also Judge & Kashyap, supra note 20, at 3 ("The United States' current anti-money laundering (AML) regime is expansive, expensive and one of America's most important domestic public-private initiatives. . . . [S]everal indicators suggest it is falling far short of what is possible.").

567. See Carrillo, Seeing Through Money, supra note 82, at 1268–69 (noting that companies under the KYC regime "share[] SARs data with other law enforcement agencies and private sector partners").

568. See, e.g., Isa Alade & Zehra G. Kavame Eroglu, Disruptive Innovations or Enhancing Financial Inclusion: What Does Fintech Mean for Africa?, 56 Vand. J.

Gamers would share basic identity information, which many already share by purchasing a console, computer, or phone and making debit and credit card purchases. They would have to supply an identification document to verify their identity. Gamers would then undergo a two-step verification process tied to a phone or email account.

Account identification requirements for minors are thorny. They deserve serious consideration, which this Article cannot encapsulate. However, surveilling the financial activity of minors is not the same as surveilling adults, and the risks of making mistakes are higher. The proposed Gaming Money Act limits KYC to adult players as a precautionary principle. Severe matters of abuse, although intermediated by gaming money, are matters for law enforcement.[569] At the same time, there are legitimate concerns about using government data, especially concerning children. On one hand, Congress could follow China in mandating gaming companies use facial recognition technology to limit how much time minors could play games and prevent abuse.[570] The United Kingdom requires gaming platforms to implement "highly effective age assurance" while leaving the method to the platform rather than mandating the use of facial recognition technology.[571] But this approach could lead to serious unintended consequences. The FTC's recent actions against gaming companies for using dark patterns to deceive children into making purchases show the dangerous power of financial surveillance over gamers,[572] and it is difficult to imagine a government dragnet approach not entailing the same risks.

Transnat'l L. 673, 738–39 (2023) (discussing tiered KYC requirements as tools of financial inclusion).

569. See Romo, supra note 30 (discussing ongoing findings and allegations regarding abuse on *Roblox*).

570. See Ben Egliston, The Unnerving Rise of Video Games that Spy on You, Wired (Feb. 1, 2022), https://www.wired.com/story/video-games-data-privacy-artificial-intelligence/ [https://perma.cc/8S86-69UY] (noting China's new facial recognition policy in its gaming industry).

571. Ofcom, Guidance on Highly Effective Age Assurance at 8–9 (2025), https://www.ofcom.org.uk/siteassets/resources/documents/consultations/category-1-10-weeks/statement-age-assurance-and-childrens-access/part-3-guidance-on-highly-effective-age-assurance.pdf [https://perma.cc/5Z3F-JS37]; see also Online Safety Act 2023, c. 50, §§ 12–13 (UK), https://www.legislation.gov.uk/ukpga/2023/50/contents [https://perma.cc/9846-FL7S].

572. In 2022, Epic Games settled with the FTC over allegations of violating the Children's Online Privacy Protection Act and deceiving players into making unintentional purchases. Press Release, FTC, Fortnite Video Game Maker Epic Games to Pay More Than Half a Billion Dollars Over FTC Allegations of Privacy Violations and Unwanted Charges (Dec. 19, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/fortnite-video-game-maker-epic-games-pay-more-half-billion-dollars-over-ftc-allegations [https://perma.cc/WDH4-MJG9] ("In a separate administrative complaint, the FTC alleged that Epic used dark patterns to trick players into making unwanted purchases and let children rack up unauthorized charges . . . .").

4. *Ring-Fencing*. — By maintaining millions of unregulated, unaccounted balances outside of the chartered banking system, the companies keep money creation and supply away from the eyes of regulators. They follow the path of railroads and mining companies that issued scrip with a promise of redemption for goods and services but maintained a private unit of account for denominating those prices.[573] By requiring users to hold balances on their platforms in the event of insolvency, they put gamers in a position of loss without redemption. Still, they also create fragility and potential financial contagion.

A strong-form approach may ban the issuance of some gaming money or the existence of infrastructure. Companies with significant platform power and private monetary systems, such as gaming companies and airlines, present problems regulators must take seriously as more corporations store balances outside the banking system.[574] Congress or an agency could establish financial liquidity requirements if balances are redeemable, or require a plan for making sure the balances can be somehow honored in the event of the total collapse of the corporation. Like companies that issued scrip at the end of the nineteenth century and the beginning of the twentieth century, however, gaming companies do not promise that customers can withdraw funds; store balances should still be redeemable in goods and services.[575] Customers concerned about their funds in the store accounts may run on inventory in this scenario. The parallel to financial liquidity requirements, if a company is to issue store money at scale, is to create liquidity requirements for goods and services.

Although an agency could attempt to calibrate specific regimes to manage complex variables, such as ensuring sufficient stocks of goods to survive a stress scenario, the most straightforward approach is to require companies that have chosen to create store money systems to "ring-fence" the operation in new subsidiaries, structurally separating gaming money from the broader operations of the company. In practice, lawmakers may require companies to ring-fence certain activities to "mitigate systemic risk and the too-big-to-fail problem inherent in large financial institutions."[576] Congress has already crafted segregation requirements for stablecoin issuers under the GENIUS Act.[577] Gift cards compound the risk, concentrating seasonal liabilities.[578] On a related note, the Gaming Money Act should also require consistency between consumer contracts and regulatory filings. If a company reports gaming

573. See supra section I.C.

574. See supra section I.C.

575. See supra section I.C.

576. Schwarcz, Ring-Fencing, supra note 541, at 72 n.10, 103.

577. See GENIUS Act, supra note 542, § 4(a)(2) (requiring reserves to be held separately from operational funds).

578. See supra section II.C.3 (discussing insolvency risk and seasonal concentration of gift card revenue).

money balances as liabilities to the SEC, whether play money, store money, or gift card money, it cannot simultaneously disclaim those balances as carrying no monetary value, no property interest, and no deposit-like character in its terms of service.

In this case, agencies should supervise the general practice of issuing store money but establish bright lines within the broader, flexible ambit of gaming money regulation. The subsidiaries should hold gaming money licenses instead of parent companies. They would maintain separate balance sheets, meaning customers could still receive compensation if the company were to fail. Moreover, the legislature should prohibit the subsidiaries from engaging in the broader functions of banking, such as maturity transformation, or, at the core, money creation. Through cobranded credit cards, Microsoft and Sony create credit throughout the economy for which they are not responsible, which can contribute to overextension of debt, harming individuals and businesses.[579] At the least, agencies should separate that practice from the payments infrastructure of the gaming industry.

CONCLUSION

This Article has shown how gaming companies are issuing a nascent form of "shadow money," encroaching on a privilege reserved for the government and government-chartered banks. This unregulated practice leads to harms cognizable within the fragmented set of laws governing "money," including rate manipulation, money laundering, and firm and industry-level opacity and instability, exposing counterparties to risk and harm. Gaming money—as a form of "shadow money"—yields familiar, structural harms. Like nineteenth-century railroad, canal, and mining companies, twenty-first-century gaming companies issue small-denomination money for redemption in goods to evade financial regulation. Like crypto companies, gaming companies have built private monetary systems targeting specific demographics, steadily expanding acceptability and scale.

Unlike other shadow money issuers, gaming companies can invoke a distinctive defense, drawing a "magic circle" around gaming money and decrying government overreach into a "virtual world." This Article rejects that defense, drawing on how regulators already approach the intersections of money, media, entertainment, and the arts. The laws governing money do not ask whether money is "real," but whether its issuance encroaches on sovereign authority. The label "virtual" does no legal work here.

Regulators should instead govern gaming companies along a spectrum of convertibility—from chartered banking regulation for companies engaged in full-scale money creation, to Gaming Money Act

579. See supra Part II.

licensing for companies that convert gaming money to currency and bank deposits at scale, to private ordering for companies that do not sufficiently support monetary conversion to merit licensing. Agencies have consistently supervised entities that materially support the conversion of private money into currency and bank deposits at scale. Congress should pass a Gaming Money Act, establishing licensing and supervision, tailored rate controls, customer identification requirements, and structural separation calibrated to convertibility.

In the long run, gaming money matters because the arbitrage is the strongest signal yet that the regulatory system as we have known it is not geared to address the technological evolution of shadow money and a rapidly growing set of structural challenges presented by powerful tech firms. The most important gaming companies, such as Microsoft, Apple, and Google, are titanic conglomerates, not whimsical entrepreneurs. Wall Street financial institutions are considering gaming money systems.[580] Sony has already applied for a national trust bank charter to issue stablecoins, which will likely transform the sector further.[581] Prominent gaming influencers are acquiring financial services companies to serve their young audiences.[582] Gaming introduces most children in the United States to the very idea of money. The regulatory gap concerns the future in a very explicit way.

A host of laws governing "money" operate around a silent, elusive concept of "money" that no statute settles. As companies create new forms of shadow money, regulators improvise. The Gaming Money Act would address gaming money's particular harms, but the broader definitional gap demands a different answer. For now, vigilance is critical even when new forms of money appear to be oddities, unworthy of serious regulation, or—to put it crudely—just part of a game.[583]

580. See, e.g., J.P. Morgan, supra note 260 ("As the [gaming] industry continues to grow and evolve, the integration of seamless, embedded financial systems will be a crucial element of its success.").

581. See supra note 68 and accompanying text.

582. See Amanda Silberling, MrBeast's Company Buys Gen Z-Focused Fintech App Step, TechCrunch (Feb. 9, 2026), https://techcrunch.com/2026/02/09/mrbeasts-company-buys-gen-z-focused-fintech-app-step/ [https://perma.cc/8TT7-D3EJ] (describing how Jimmy Donaldson, or "MrBeast," "the most-subscribed creator on YouTube," has purchased Step, a financial services app for teens).

583. See Awrey & Judge, supra note 41, at 2350–53 (arguing a "holistic mindset" surveys "emerging, systemic issues that have not yet congealed enough to be salient using a more conventional lens").

THE STRATEGIC MOOTNESS GAP

*Brandi M. Lupo**

There is a gap in mootness doctrine that allows defendants to strategically "moot" their way out of class litigation. Before a class is certified, a defendant can resolve the named plaintiff's individual claim and then argue there is nothing left to litigate. This tactic, often referred to as "picking off" or "buying off" the plaintiff, can kill a class action before it begins, leaving systemic misconduct unchallenged and the broader class without recourse. Courts and scholars have long recognized this problem. But their responses have remained too narrow and too improvised to address the broader doctrinal opening that makes pick-offs possible in the first place.

This Article provides a comprehensive framework for understanding and responding to picking off. First, it identifies the gap in mootness doctrine—what this Article calls the "strategic mootness gap"—that leaves courts without a principled basis for responding to pick-offs even when they recognize them for what they are. Second, it maps the strategic mootness gap, examining not just the forced monetary payments that dominate existing scholarship but also cases featuring injunctive remedies and settlement offers that are "too good to refuse."

Finally, this Article proposes a solution: a "picking off" exception to mootness that addresses defendant-driven conduct which undermines the class certification process. This exception provides courts with an analytical framework for identifying when individualized relief improperly forecloses class treatment, while preserving space for legitimate early dispute resolution.

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INTRODUCTION

Consider the following scenario: A married couple is trying to settle in the United States.[1] Only one spouse is a U.S. citizen.[2] They apply for a family visa—a pathway to permanent residency for the noncitizen spouse—and wait almost two years without receiving a decision.[3] After hearing stories from other couples experiencing the same delay, they suspect discrimination by the local immigration office.[4] They join with other couples to file a class action lawsuit, alleging unlawful and discriminatory delays in visa adjudication.[5]

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1. This scenario mirrors the facts of Cruz v. Farquharson, 252 F.3d 530, 531–32 (1st Cir. 2001).

2. Id.

3. See id. (describing family visas, or "immediate relative" visa petitions, as a request for "permanent residence in the United States").

4. Id. at 532.

5. Id.

Then, just weeks after the lawsuit is filed, the government locates and approves each couple's application, resolving years of unexplained delay with sudden dispatch.[6] The government then moves to dismiss the case as moot, insisting the couples no longer have a personal stake in the outcome. The couples and their lawyers are certain that others continue to face delays. They oppose the government's motion and move for class certification.[7] The question is: Should the court allow the class claims to proceed or dismiss the entire case as moot?

Under current Supreme Court doctrine, nothing stands in the way of dismissal. The traditional mootness exceptions—the "capable of repetition yet evading review" exception[8] and voluntary cessation[9] exception—do not apply. Both require some possibility that the plaintiff will again face the challenged harm.[10] But since these couples are on track for permanent residency, they are unlikely to encounter future visa delays. The class action exception, which lets class claims continue even if the lead plaintiff's case becomes moot, applies only after a class is certified.[11] Because class certification has not occurred, this exception offers no protection.

For proposed but not-yet-certified class actions, only one exception might save the class claims: the inherently transitory exception. This lesser-known exception allows a plaintiff with a moot claim to continue seeking class certification if: (1) the claim is so fleeting that no named plaintiff could maintain it long enough for certification and (2) there is a constant class of persons suffering the deprivation alleged by the plaintiff.[12] While this exception may appear to fit the couples' situation, a crucial limitation exists: The Supreme Court has signaled the exception applies only to claims that naturally expire—not to those deliberately mooted through litigation tactics.[13] Here, the couples' claims did not naturally lapse; they were (seemingly) extinguished by the government's

6. Id.

7. Id.

8. See Erwin Chemerinsky, Federal Jurisdiction § 2.5.3 (9th ed. 2025) [hereinafter Chemerinsky, Federal Jurisdiction] (internal quotation marks omitted) (describing this exception as "[p]erhaps the most important exception to the mootness doctrine").

9. See id. at 139–40 (discussing voluntary cessation).

10. See, e.g., Fed. Bureau of Investigation v. Fikre, 144 S. Ct. 771, 777–79 (2024) (highlighting the possibility of recurrence in a voluntary cessation case); Roe v. Wade, 410 U.S. 113, 125 (1973) (describing the possibility of recurrence in a "capable of repetition, yet evading review" case (internal quotation marks omitted) (quoting Southern Pac. Terminal Co. v. Interstate Com. Comm'n, 219 U.S. 498, 515 (1911))).

11. Sosna v. Iowa, 419 U.S. 393, 399 (1975); see also Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.5 (discussing mootness in class actions).

12. Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); *Sosna*, 419 U.S. at 402 n.11. But see Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.5 (treating *Gerstein* as an application of the Court's "flexible approach to mootness doctrine in class action suits" rather than as establishing a distinct exception).

13. Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76–77 (2013).

intentional decision to resolve the plaintiffs' cases just after the lawsuit was filed. As a result, the litigation might end, not because the alleged systemic misconduct has stopped, but because the government mooted the named plaintiffs' claims just in time to avoid judicial scrutiny of its broader practices.

This scenario illustrates what this Article calls the "strategic mootness gap." In this Article's framework, mootness has two species. Mootness can occur naturally ("inherent mootness") or through deliberate action ("strategic mootness").[14] It also can arise in different procedural contexts—in individual cases, precertification class actions or postcertification class actions. These distinctions interact, and for most of their intersections, mootness doctrine has a response. But one intersection remains conspicuously unaddressed: strategic mootness in precertification class actions. This gap effectively allows defendants to immunize themselves from class liability by selectively resolving individual claims before class certification.

The strategic mootness gap in Supreme Court mootness exception doctrine can be represented in a simple chart:

14. This Article is not the first to distinguish between inherent and strategic mootness. Matthew Hall made the distinction in *The Partially Prudential Doctrine of Mootness*, an article that sought to explain the theoretical underpinnings of mootness doctrine at large. See Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562, 577, 580 (2009) (discussing the distinct problems of "inherently short-lived cases" and "insincere reform"). The focus of this Article is different. Rather than delving deeply into mootness theory, this Article uses the inherent–strategic distinction to identify and address a gap in mootness exception doctrine.

FIGURE 1. MOOTNESS EXCEPTIONS AND THE STRATEGIC MOOTNESS GAP

	Inherent Mootness	Strategic Mootness
Individual Action[15]	The case is not moot if the claim is *capable of repetition yet evading review.* *Example:* Pregnancy litigation[16]	The case is not moot if the defendant *voluntarily ceased* the challenged activity, unless the defendant can prove complete eradication of the alleged violation's effects and no reasonable expectation of recurrence. *Example:* Individual challenge to placement on the No-Fly List[17]
Precertification Class Action	The proposed class claims are not moot if the claim is *inherently transitory.* *Example:* Pretrial detention conditions litigation[18]	**The strategic mootness gap**
Certified Class Action	Class action exception[19]	Class action exception *or* Settlement approval under Federal Rule of Civil Procedure 23(e)

This Article identifies and addresses the strategic mootness gap. This examination arrives at a critical moment as recent developments have narrowed the procedural tools available for securing structural and systemic relief. Just last term, in *Trump v. CASA*, the Supreme Court sharply restricted universal injunctions, placing renewed weight on the class action as the central vehicle for nationwide remedies.[20] Yet the path to class certification has grown longer and more demanding as courts have imposed heightened scrutiny and more rigorous evidentiary

15. A non-solid line separates the individual and precertification-context exceptions because individual exceptions can still apply in the precertification context. If a plaintiff's claim does not fall within any individual exception, the court must then consider the precertification exception(s).

16. See Roe v. Wade, 410 U.S. 113, 125 (1973).

17. See Fed. Bureau of Investigation v. Fikre, 144 S. Ct. 771, 775, 777–79 (2024).

18. See Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975).

19. See Sosna v. Iowa, 419 U.S. 393, 399 (1975).

20. 145 S. Ct. 2540, 2548 (2025).

requirements.[21] While some cases challenging uniform policies may still proceed quickly,[22] many class actions now require extensive discovery before issuing a certification ruling.[23] In this environment, what happens in the lead-up to class certification can make or break the possibility of aggregate relief.[24] If defendants can end a case during the

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21. The class action retrenchment has been well documented. See, e.g., Stephen B. Burbank & Sean Farhang, Class Actions and the Counterrevolution Against Federal Litigation, 165 U. Pa. L. Rev. 1494, 1517–28 (2017) (describing the recent class action retrenchment by the Roberts Court); Erwin Chemerinsky, Closing the Courthouse Doors, 90 Denv. U. L. Rev. 317, 318 (2012) (arguing that a series of the Supreme Court's class action decisions were all about "closing the courthouse doors"); Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 380 (2005) ("Mass tort class actions represent an early casualty in the shift of judicial attitudes against collective litigation activity in general . . . ."); Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 731 (2013) (arguing that "[n]umerous courts have become skeptical about certifying class actions"); Suzette M. Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. Forum 56, 59 (2017), https://harvardlawreview.org/wp-content/uploads/2017/12/vol131_Malveaux.pdf [https://perma.cc/S4XK-72XT] (noting that "the Court's contemporary jurisprudence has made it more difficult for litigants challenging discrimination to act collectively"); David Marcus, The Public Interest Class Action, 104 Geo. L.J. 777, 789–95 (2016) (examining a new and hostile era for the class action); Arthur R. Miller, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 Emory L.J. 293, 296–98 (2014) (describing a trend toward intensified scrutiny of class certification requests); A. Benjamin Spencer, Class Actions, Heightened Commonality, and Declining Access to Justice, 93 B.U. L. Rev. 441, 487 (2013) (explaining that "heightened commonality nicks away at access" to justice).

22. See David Marcus, The Class Action After *Trump v. CASA*, 73 UCLA L. Rev. Discourse 2, 18 (2025), https://www.uclalawreview.org/the-class-action-after-trump-v-casa/ [https://perma.cc/J24S-DXX2] (explaining that although class certification has generally become more protracted, challenges to uniform policies alleged to be categorically unlawful do not demand the same extensive evidentiary showings).

23. Id.; see also Elizabeth J. Cabraser, The Class Abides: Class Actions and the "Roberts Court," 48 Akron L. Rev. 757, 769 (2015) (describing how "the Rule 23 determination" has been pushed "ever-closer to trial"); Suzette M. Malveaux, The Power and Promise of Procedure: Examining the Class Action Landscape After *Wal-Mart v. Dukes*, 62 DePaul L. Rev. 659, 670 (2013) [hereinafter Malveaux, Power and Promise] (noting that the judicial resolution of merits questions during the certification process results in a more burdensome and costly period of discovery); The Bitter and Sweet of the *Wal-Mart/Comcast/Halliburton* Triumvirate: More Grounds for Defeating Class Certification, but More Exposure to Discovery, Jones Day (Jan. 2015), https://www.jonesday.com/en/insights/2015/01/the-bitter-and-sweet-of-the-iwalmartcomcasthalliburtoni-triumvirate-more-grounds-for-defeating-class-certification-but-more-exposure-to-discovery [https://perma.cc/YV8F-4E8X] ("To date, most courts confronting class discovery issues have expanded the scope of plaintiffs' precertification discovery to include merits-based inquiries.").

24. See, e.g., Mila Sohoni, *Trump v. CASA* and the Future of the Universal Injunction, SCOTUSblog (July 2, 2025), https://www.scotusblog.com/2025/07/trump-v-casa-and-the-future-of-the-universal-injunction/ [https://perma.cc/FW6P-7PD2] ("Another important boundary to Friday's decision is that the court does not revisit the federal courts' power to issue preliminary injunctions that protect putative classes—that is, classes that are not yet certified."); Steve Vladeck, 162. What Does the Birthright Citizenship Ruling Portend?, One First (June 27, 2025), https://www.stevevladeck.com/p/162-what-does-the-birthright-citizenship [https://perma.cc/JZB6-62MM] ("[T]he viability of this alternative legal

precertification window, they can preempt the very mechanism *CASA* identified as the legitimate procedural vehicle for broad relief.[25]

The stakes come into sharper focus when one recalls what class litigation is uniquely positioned to achieve. Class actions serve as a crucial equalizer in the legal system. They empower individual plaintiffs, particularly those with limited resources, to join forces, share costs, and unite against bigger, better-funded defendants.[26] For defendants, a class action poses a significant threat. A minor and inconsequential claim in an individual lawsuit can transform into a larger, more visible, and more expensive matter when pursued as a class action.[27] Defendants therefore are highly motivated to end cases *before* they are certified as class actions.[28] If a defendant can evade a class action altogether by promptly addressing the grievances of a few individual plaintiffs, why wouldn't it?

The strategic mootness gap empowers defendants to take advantage of the unequal playing field characteristic of the precertification stage. By "picking off" or "buying off" the named plaintiffs before a class is formally certified, a defendant can sidestep judicial review of its actions and avoid class-wide liability for its wrongdoing. The strategic mootness gap thus fosters improper gamesmanship, generates inefficient case-by-case adjudication, allows systemic harms to go unaddressed, and

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procedure for blocking federal policies on a nationwide basis really depends upon just how available nationwide class actions turn out to be in practice—not just in general, but at the *outset* of litigation, as well.").

25. In addition to *CASA*, another case decided last term may have signaled judicial appetite for addressing parts of the strategic mootness gap. In *A.A.R.P. v. Trump*, the Court confirmed that courts may protect absent class members before class certification through classwide preliminary injunctive relief. 145 S. Ct. 1364, 1369–70 (2025). In doing so, the Court explicitly rejected the government's attempt to defeat class treatment "by promising . . . to treat named plaintiffs differently" from absent class members. Id. While *A.A.R.P.* addressed a distinct procedural question involving a remedy not available in every case, the Court's reasoning speaks directly to the concern animating this Article: that defendants should not be permitted to manipulate the precertification period to avoid classwide accountability.

26. See, e.g., Catherine Fisk & Erwin Chemerinsky, The Failing Faith in Class Actions: *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion*, 7 Duke J. Const. L. & Pub. Pol'y (Special Issue) 73, 74–76 (2011) ("[C]ourts and legislatures developed the class action as a procedural device to protect individuals from exploitation by large entities."); Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 143 (1974) (explaining that the class action is a device to raise the stakes for defendants and move claimants into a position where they enjoy similar strategic advantages); see also Troy A. McKenzie, "Helpless" Groups, 81 Fordham L. Rev. 3213, 3213 (2013) (noting the role of the "helpless group" in the history of modern class litigation).

27. See Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. Pa. L. Rev. 103, 105–07 (2006) (arguing that deterrence of wrongdoing is a more important goal than compensation).

28. See Robin D. Adelstein & Eliot Fielding Turner, US: Settling Class Actions, *in* The Settlements Guide 79, 80 (Mark H. Hamer ed., 2021) (describing class certification as "a natural inflection point in most class actions").

prevents courts from settling important legal questions. And by allowing defendants to exploit the pre–class certification power imbalance, the gap perpetuates disparities in access to justice that the class action should be uniquely positioned to confront. Ultimately, the strategic mootness gap undermines one of the most powerful procedural tools that small plaintiffs have to address exploitation by larger defendants.[29]

To be sure, some may regard this critique of the strategic mootness gap as rooted in a "romantic" image of class action litigation.[30] Certainly, not every class lawsuit is a David and Goliath story. The anti–class action narrative emphasizes that, at least in some cases, class actions are driven by well-funded lawyers more interested in their profits and reputations than in client welfare.[31] Many named plaintiffs, for their part, are rationally uninterested in the long haul of a class action.[32] A plaintiff with a small damages claim (typical of an aggregated-damages class action) has little motivation to continue a case after their own has been remedied.[33] And a plaintiff seeking injunctive relief (typical of an injunctive civil rights class action) may be desperate to protect their own well-being over pursuing some benefit for the greater good.[34] If a defendant decides to remedy a plaintiff's individual claim, many plaintiffs would readily and rationally walk away from further litigation.

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29. See Fed. R. Civ. P. 23 (authorizing class actions where individual joinder is impracticable and collective litigation is superior to case-by-case adjudication); see also Myriam Gilles, Class Warfare: The Disappearance of Low-Income Litigants From the Civil Docket, 65 Emory L.J. 1531, 1535 (2016) (arguing that "[f]or low-income groups in particular, aggregating claims has provided significant access to justice").

30. See Linda S. Mullenix, Ending Class Actions as We Know Them: Rethinking the American Class Action, 64 Emory L.J. 399, 406–17 (2014) [hereinafter Mullenix, Ending Class Actions] (contrasting the class action's "romantic narrative" with its "darker counternarrative").

31. See, e.g., John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 882–83 (1987) (describing "opportunistic" behavior by attorneys); Mullenix, Ending Class Actions, supra note 30, at 413–17 (describing class action litigation's defense-side narrative).

32. See John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 425 (2000) (discussing "rationally apathetic" class members). It should be noted that recent scholarship has identified the emergence of more "participatory class actions," largely driven by the fact that class actions are increasingly centralized in multidistrict litigation proceedings. Elizabeth J. Cabraser & Samuel Issacharoff, The Participatory Class Action, 92 N.Y.U. L. Rev. 846, 850–51 (2017).

33. See, e.g., Maureen Carroll, Class Action Myopia, 65 Duke L.J. 843, 861 (2016) (discussing economic incentives in aggregated-damages class actions).

34. See, e.g., Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 471–72 (1976) (describing tension between individual clients' interests in educational quality and lawyers' commitment to integration as serving the greater good).

What a plaintiffs' lawyer might condemn as a strategic "picking off" could be viewed by a named plaintiff as simply "making whole."[35]

Despite this complexity, the strategic mootness gap has gone underexamined. Scholars and courts have long recognized the phenomenon of defendants "picking off" named plaintiffs to avoid class liability.[36] But much of the existing scholarship treats the pick-off as a narrow procedural problem rather than a structural vulnerability that cuts across precertification class litigation broadly.[37] Recent scholarship has also examined the government's distinctive ability to moot individual claims, often in contexts in which defendants can unilaterally end litigation.[38] But this work largely overlooks how these dynamics operate in the class action context—where strategic mooting can systematically prevent class certification. This Article builds on both bodies of work to address strategic mootness as a doctrinal gap: one that allows defendants to end cases before courts can determine whether class treatment is appropriate.[39]

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35. Wilson v. Gordon, 822 F.3d 934, 959–60 (6th Cir. 2016) (Sutton, J., dissenting).

36. See Samuel Issacharoff & Peter Zimroth, An Oral History of Rule 23: An Interview With Professor Arthur Miller, 74 N.Y.U. Ann. Surv. Am. L. 105, 107 (2018) (describing the development of Rule 23(b)(2) itself as a response to the "pick-off-the-plaintiff" problem). The Advisory Committee on Civil Rules has also discussed the pick-off problem. See infra sections III.A.2, IV.B (discussing judicial and rulemaker responses to the pick-off problem).

37. See, e.g., Joseph M. Hnylka, Continuing to Litigate After You Have Won: Courts Defy Article III to Avoid Mooting TCPA Class Actions, Despite Defendants' Rule 68 Offers of Complete Relief, 64 Drake L. Rev. 381, 391–95 (2016) (discussing Rule 68 offers of judgment); David Hill Koyzka, Note, Preventing Defendants From Mooting Class Actions By Picking Off Named Plaintiffs, 53 Duke L.J. 781, 789 (2003) (same); Johnathan Lott, Comment, Moot Suit Riot: An Alternative View of Plaintiff Pick-Off in Class Actions, 2013 U. Chi. Legal F. 531, 533 (same); see also Katrina Christakis, Jeff Pilgrim & James Morrissey, "So You're Telling Me There's a Chance!": The Post-*Campbell-Ewald* Possibility of Mooting a Class Action by "Tender" of Complete Relief, 71 Consumer Fin. L.Q. Rep. 237, 242, 244–49 (2017) (exploring whether a defendant can "foist payment on an obstinate plaintiff" after *Campbell-Ewald*); Scott T. MacGuidwin, Note, Mooting Unilateral Mootness, 121 Mich. L. Rev. 641, 645 (2023) (arguing for the elimination of unilateral mootness).

38. See, e.g., Joseph C. Davis & Nicholas R. Reaves, The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine, 129 Yale L.J. Forum 325, 326–29 (2019), https://yalelawjournal.org/pdf/DavisandReaves_ThePointIsntMoot_3f4xopmf.pdf [https://perma.cc/S5V7-P8E2] (arguing against a presumption in favor of the government in voluntary cessation cases); Daniel Bruce, Note, Manufacturing Sovereign State Mootness, 63 Wm. & Mary L. Rev. 287, 290 (2021) (advocating for a presumption in favor of government defendants); Michele C. Nielsen, Comment, Mute and Moot: How Class Action Mootness Procedure Silences Inmates, 63 UCLA L. Rev. 760, 764–65 (2016) (discussing the precertification mootness issues that arise in prisoner litigation given the government's unique control over the prisoner's claim).

39. One of the most significant treatments of precertification mootness is Richard K. Greenstein's *Bridging the Mootness Gap in Federal Court Class Actions*, 35 Stan. L. Rev. 897 (1983). Greenstein critiques the Supreme Court's inconsistent reasoning in class action mootness cases and reframes what courts have treated as a mootness problem as, instead, a

This Article proceeds as follows. First, in Parts I and II, it identifies the strategic mootness gap. Part I frames the gap as a matter of theory by establishing that the gap creates precisely the scenario that existing mootness exceptions address: when the plaintiff's personal stake disappears but the underlying legal issue remains unresolved.[40] When defendants pick off putative class representatives, they eliminate individual claims but leave systemic problems untouched—exactly the kind of "personal stake mootness" that courts routinely save through exceptions.[41] Part II then traces the gap as a matter of doctrine, showing how the Supreme Court has developed exceptions for inherently transitory claims and certified class actions, yet has never extended those exceptions to cover proposed class actions deliberately mooted before certification. The result is a doctrinal framework that is both underinclusive and internally incoherent.

Second, in Part III, the Article maps what strategic mootness looks like in practice across multiple areas of law. Courts and commentators have tended to frame the issue narrowly, focusing on cases in which defendants attempt to moot class actions through Rule 68 offers of judgment or monetary tenders—particularly in consumer protection litigation. This lens responds to developments on the Supreme Court's docket. But it also reduces strategic mootness to a technical conflict between procedural rules, obscuring the broader phenomenon. In fact, strategic mootness plays out in diverse legal contexts and through a range of defendant tactics—from asylum seekers being offered individual processing two days after filing a complaint over asylum process access,[42] to Medicaid applicants who were enrolled in Medicaid after alleging unlawfully delayed eligibility determinations.[43]

Part III thus examines this broader landscape, illustrating the breadth of the strategic mootness gap. It shows that while some lower courts have acknowledged the phenomenon, their responses have been inconsistent. In the absence of a clear doctrinal framework, courts have applied existing mootness exceptions unevenly, often straining their logic to account for new pick-off strategies. This Part also explores how,

question of standing governed by Rule 23 prudential considerations. See id. at 898. While Greenstein does not address strategic conduct by defendants, his account anticipates several of the concerns that underlie the strategic mootness gap. This Article builds on that foundation but identifies a distinct problem: the exploitation of doctrinal gaps by defendants seeking to avoid class-wide liability. It reframes the issue as a form of litigation gamesmanship and proposes a targeted doctrinal response.

40. This Article assumes that a plaintiff's personal stake is moot after a pick-off and focuses on whether a mootness exception should permit the putative class claims to continue. For discussion of whether plaintiffs retain personal interests in class certification, see Rachel Bayefsky, Remedies and Respect: Rethinking the Role of Federal Judicial Relief, 109 Geo. L.J. 1263, 1277 (2021).

41. Hall, supra note 14, at 566, 599.

42. See Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1304 (S.D. Cal. 2018).

43. See Wilson v. Gordon, 822 F.3d 934, 944–51 (6th Cir. 2016).

beyond doctrinal confusion, the strategic mootness gap threatens several core procedural values: judicial economy, deterrence, access to justice, and the courts' ability to resolve important legal questions. This analysis thus frames the strategic mootness gap as a systemic threat to the integrity of class action litigation.

Finally, Part IV offers a possible response to the strategic mootness gap in the form of a new mootness exception called the "picking off exception." Under this exception, defendants who resolve named plaintiffs' claims before certification would bear the burden of showing that their conduct does not undermine the viability of the class certification process. This approach draws from the logic of existing mootness exceptions but recalibrates them to address strategic behavior in the precertification window. If implemented, it could offer courts a practical tool to protect class adjudication and deter procedural gamesmanship.

Ultimately, the strategic mootness gap raises fundamental questions about the limits of justiciability, the role of power imbalances and gamesmanship in class litigation, and the viability of the class action device as a whole. This Article takes up these questions, offering both a structural account of the problem and a doctrinal path forward.

I. THEORIZING MOOTNESS EXCEPTIONS

This Part introduces mootness doctrine and situates the doctrine's exceptions within an ongoing debate about mootness's theoretical foundations. It then explores when an exception to mootness—such as the one this Article proposes—is justified.

The standard account of mootness links the doctrine to Article III, which limits federal courts to deciding "Cases" or "Controversies."[44] The Case or Controversy Clause requires that an actual controversy exist "at all stages of review, not merely at the time the complaint is filed."[45] Mootness doctrine safeguards Article III by searching for any intervening event that may have rendered a case hypothetical during the pendency of a lawsuit.[46] If events after the filing of the lawsuit resolve the matter, no controversy between adverse litigants remains.[47] Courts regularly invoke

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44. U.S. Const. art. III, § 2, cl. 1; see also Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.1 ("The Supreme Court frequently has explained that the mootness doctrine is derived from Article III's prohibition against federal courts issuing advisory opinions."); 33 Wright & Miller's Federal Practice & Procedure § 8347 (2d ed. 2018) [hereinafter Wright & Miller, 2d ed.] (noting the mootness doctrine's connection to Article III).

45. Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160 (2016) (quoting Arizonans for Off. English v. Arizona, 520 U.S. 43, 67 (1997)).

46. See id. at 160–61, 166.

47. Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.1; 33 Wright & Miller, 2d ed., supra note 44, § 8347.

Article III in mootness decisions, often describing moot cases as falling outside their Article III jurisdiction.[48]

This account of mootness has encountered significant scholarly and judicial dissent. Critics focus on three shortcomings. First, the connection between mootness and Article III lacks historical grounding. The Supreme Court did not explicitly link mootness to Article III until 1964, and even then, it did so in a footnote to a case not decided on mootness grounds.[49] Scholars have called this connection a "remarkably casual"[50] and "novel pronouncement" without meaningful historical support.[51]

Second, judicial treatment of mootness has proved internally inconsistent. While courts often frame the doctrine as a rigid constitutional command, they simultaneously describe mootness in "flexible" terms[52] and cite its "uncertain and shifting contours" and lack of "fixed content."[53] In practice, courts routinely weigh prudential considerations—like judicial economy, fairness, and the public interest—when deciding whether to dismiss on mootness grounds.[54]

Third, the existence of several well-established exceptions to mootness undermines any notion of a hard constitutional rule. Constitutional requirements do not usually permit exceptions based on policy considerations or judicial convenience. If mootness were truly a mandatory constitutional rule, then its exceptions—like the capable of repetition yet evading review exception, the voluntary cessation exception, and the class action exception—simply could not exist.[55]

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48. E.g., *Campbell-Ewald Co.*, 577 U.S. at 160.

49. See Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

50. Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 611 (1992).

51. Hall, supra note 14, at 572. The Supreme Court is divided on the history, with some Justices defending and others questioning the historical justification for linking mootness to the Constitution. Compare Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) ("[I]t seems very doubtful that the earliest case I have found discussing mootness . . . was premised on constitutional restraints . . . ."), with id. at 340 (Scalia, J., dissenting) (explaining that early "courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms").

52. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980).

53. Id. at 401 (internal quotation marks omitted) (first quoting Flast v. Cohen, 392 U.S. 83, 97 (1968); then quoting Poe v. Ullman, 367 U.S. 497, 508 (1961) (plurality opinion)).

54. See City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000) (gamesmanship); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (judicial economy); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (public interest).

55. See, e.g., *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring) (explaining that if Article III "underlies the mootness doctrine, the 'capable of repetition, yet evading review' exception . . . would be incomprehensible"); Erwin Chemerinsky, A Unified Approach to Justiciability, 22 Conn. L. Rev. 677, 692–94 (1990) ("If mootness is an article III requirement, then how can the Court create broad exceptions based on the desire to facilitate judicial review . . . ?").

Scholars have developed competing theories to explain the mootness exceptions. One theory holds that mootness exceptions can only be understood through prudential considerations.[56] Proponents of this theory have thus called for either the complete or partial "deconstitutionalization" of the doctrine.[57] Another theory suggests that "mootness and its exceptions could be reconciled through hybridization," meaning the constitutional doctrine of mootness incorporates certain prudential considerations.[58] Still another theory maintains a purely constitutional account of the doctrine and contends that many of the so-called mootness exceptions are "not really exceptions at all" because they "are consistent with the requirement that a plaintiff have suffered harm or be sufficiently likely to suffer harm in the future."[59]

Despite these disagreements over theory, there is notable consensus about the application of mootness exceptions. Professor Matthew Hall has identified a useful typology that divides mootness doctrine into two categories: (1) "issue mootness," in which the underlying legal question is no longer "live," and (2) "personal stake mootness," in which the parties lack a legally recognized interest in the outcome.[60] This distinction, Hall argues, is key to understanding the relationship between mootness and Article III. Many scholars agree that the mootness exceptions primarily address personal stake mootness rather than issue mootness, regardless of their perspectives on the theoretical basis of the doctrine.[61] As Hall himself (who advocates for a partially prudential model of mootness) has observed, "courts often treat issue mootness and personal stake mootness quite differently—invariably dismissing 'issue moot' cases while treating as discretionary the decision whether to dismiss 'personal stake moot' cases."[62] And Professor Tyler Lindley (who defends a constitutional model of mootness) has also found the distinction "conceptually helpful in framing potential justifications for the exceptions."[63]

56. See Hall, supra note 14, at 563–64 (explaining that "as articulated and applied," the exceptions "are based on prudential considerations, such as protection of judicial efficiency and authority, the preference for sufficiently-motivated parties, and avoidance of party gamesmanship"); Lee, supra note 51, at 628 ("But the baseline doctrines of standing and mootness are generally predicated on the dispute resolution model, whereas many of the exceptions reflect the public values vision or, at least, the inevitability of public law litigation.").

57. See Hall, supra note 14, at 600 (articulating a "partially prudential model of mootness"); Lee, supra note 51, at 655 (promoting "outright deconstitutionalization").

58. Scott Dodson, Hybridizing Jurisdiction, 99 Calif. L. Rev. 1439, 1476 (2011).

59. Tyler B. Lindley, The Constitutional Model of Mootness, 48 BYU L. Rev. 2151, 2158 (2023).

60. Hall, supra note 14, at 565, 599; see also U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) ("[M]ootness has two aspects.").

61. See, e.g., Hall, supra note 14, at 566; Lee, supra note 51, at 623; Lindley, supra note 59, at 2210 n.282.

62. Hall, supra note 14, at 566, 608 n.221.

63. Lindley, supra note 59, at 2210 n.282.

That is, all recognized mootness exceptions require some possibility of the issue recurring.[64] If the issue cannot recur (and thus is truly issue moot), no exception can prevent the case's dismissal due to mootness. But if only the plaintiff's personal stake has become moot while the underlying legal issue remains, an exception might apply and the case may be able to proceed.[65]

Consider the voluntary cessation exception as an example. When a defendant voluntarily stops challenged behavior, the case is not automatically moot.[66] Instead, the defendant carries the burden of showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[67] If this showing is made, the court can conclude that the underlying legal issue has been resolved, rendering the case "issue moot" and subject to dismissal.[68] If the defendant fails to meet its burden, however, the legal issue persists, and the exception will allow the case to proceed.[69]

The class action exception is another example of how courts treat personal stake mootness and issue mootness differently. Once a class is certified, a case does not become moot just because the named plaintiff's individual claim has been resolved. Instead, the class action exception will allow the case to continue so long as a controversy exists "between a named defendant and a member of the class represented by the named plaintiff."[70] But if the underlying legal issue has been fully resolved for the entire class (meaning no class member retains a live claim), the case becomes issue moot and must be dismissed.[71]

These exceptions reveal a consistent pattern: Mootness exceptions exist when a plaintiff loses their personal stake in the case but the underlying legal controversy remains unresolved. Courts hesitate to dismiss such "personal stake moot" cases, recognizing that unresolved legal questions (especially those likely to recur) demand resolution even after the original plaintiff's interest has lapsed. This logic holds the doctrine

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64. See, e.g., Hall, supra note 14, at 608 n.221 ("The three major [mootness] exceptions . . . are solely applicable in cases of personal stake mootness, as each of them applies only where recurrence is at least reasonably likely . . . ."); Lindley, supra note 59, at 2158 (describing the two types of exceptions to mootness).

65. See Hall, supra note 14, at 608 n.221.

66. Lindley, supra note 59, at 2162.

67. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (citing United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

68. See Hall, supra note 14, at 619 n.266.

69. The capable of repetition yet evading review exception also requires some possibility of recurrence to apply. See, e.g., United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540–41 (2018).

70. Sosna v. Iowa, 419 U.S. 393, 402 (1975).

71. See id. (stating that the controversy "may" continue to exist between the defendant and members of the class).

together—until it doesn't. It is precisely where this pattern breaks down that the strategic mootness gap emerges.

II. IDENTIFYING THE STRATEGIC MOOTNESS GAP

This Part traces the development of the mootness exceptions and, in doing so, highlights a significant gap in mootness doctrine. The Supreme Court's early mootness decisions focused on what happens when a plaintiff loses their personal stake in a traditional, bilateral lawsuit. These early decisions can be understood as developing exceptions to mootness in two situations: when mootness is *inherent*, because the claim is too short-lived to be fully litigated, and when it is *strategic*, because a defendant deliberately moots the case to avoid review.[72]

By the 1970s, as class litigation gained prominence, the Court began to consider how the mooting of a named plaintiff's individual claim might affect the broader class's claims. The Court quickly concluded that class certification protects a class from both the inherent and strategic mooting of its named plaintiff's case.[73] At the same time, however, the Court struggled with mootness in the context of proposed but not-yet-certified class actions.[74] It eventually addressed inherent mootness in this context by recognizing the "inherently transitory" exception, which applies when claims become moot so quickly that no plaintiff could reasonably be expected to reach certification.[75]

Yet the Court has never squarely addressed strategic mootness in the context of a precertification class action. When presented with opportunities to resolve this issue, the Court has repeatedly declined to do so, deciding cases on other grounds and expressly leaving the question open.[76] Moreover, some of the current Justices have cast doubt on whether and to what extent a court can or should save a proposed class action from a defendant's litigation strategy.[77] That unresolved question—whether and how courts can respond to strategic behavior that targets a class action before certification—is the strategic mootness gap.[78]

A. *The Inherent–Strategic Mootness Distinction*

The Supreme Court's earliest mootness exceptions emerged in the context of individual litigation and produced two enduring rules.[79] In

72. See infra section II.A.
73. See infra section II.B.
74. See infra section II.C.
75. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980).
76. See infra section II.C.
77. See infra section II.C.
78. See infra section II.D.
79. This Article does not include the collateral consequences exception to mootness—an "exception" used primarily to preserve a criminal defendant's appeal after

Southern Pacific Terminal Co. v. Interstate Commerce Commission, the Supreme Court coined the phrase "capable of repetition, yet evading review" to describe harms that are naturally fleeting and could recur for the plaintiff, but always fail to last long enough to permit full judicial review.[80] In *United States v. W. T. Grant Co.*, the Court recognized the "voluntary cessation" exception, which allows courts to hear cases mooted by a defendant's decision to cease the challenged conduct mid-litigation.[81]

These two exceptions address distinct categories of mootness.[82] The capable of repetition yet evading review exception addresses inherent mootness or situations in which the mootness arises from the nature of the claim itself and not the defendant's actions.[83] Pregnancy litigation is the classic example; the claim usually runs its course before any court can resolve it, yet it may return again for the same plaintiff.[84] Without an exception, no such issue would ever reach judicial review.

The voluntary cessation exception, by contrast, targets strategic mootness or mootness that stems from the defendant's actions.[85] The exception reflects judicial skepticism toward self-serving and "[i]nsincere [r]eform"[86]: If defendants could unilaterally end the challenged conduct, secure dismissal, and then "return to [their] old ways,"[87] courts would be powerless to address repeat violations. To prevent that, the Supreme Court imposes a demanding burden. The defendant must make it "absolutely clear that [its] allegedly wrongful behavior could not reasonably be expected to recur."[88] It demands "certainty" that a case is truly moot before it can be dismissed.[89]

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release from incarceration and probation—because it is "qualitatively different" from the mootness exceptions discussed here. Hall, supra note 14, at 576–77 n.61.

80. 219 U.S. 498, 515 (1911); see also 13C Wright & Miller's Federal Practice & Procedure, § 3533.8 (3d ed. 2025) [hereinafter Wright & Miller, 3d ed.] (explaining the development of the "capable of repetition, yet evading review" doctrine, originating from the *Southern Pacific Terminal Co.* decision).

81. 345 U.S. 629, 632 (1953).

82. See Hall, supra note 14, at 577, 580 (making a similar distinction).

83. See Hall, supra note 14, at 577–78 ("[T]he exception for claims that are capable of repetition, yet evading review . . . permit[s] review of moot cases that raise issues that are likely to recur and are so inherently short-lived that each occurrence is likely to be rendered moot before review can be completed.").

84. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973) ("Pregnancy provides a classic justification for a conclusion of nonmootness.").

85. See Hall, supra note 14, at 580–81 ("Where defendant's own actions have mooted the plaintiff's claim for relief, courts have naturally been quite reluctant to deny judicial review . . . .").

86. See Hall, supra note 14, at 580 (discussing the "[i]nsincere [r]eform" problem).

87. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (internal quotation marks omitted) (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982)).

88. Id.

89. *Aladdin's Castle*, 455 U.S. at 289. A promise by the defendant to not reengage in the challenged behavior is not enough on its own to end a case. United States v. W.T. Grant

Though responding to different sources of mootness, both exceptions reflect the animating principle outlined in Part I: Mootness doctrine bends when a plaintiff's personal stake disappears but the legal issue lives on. So long as there remains a meaningful possibility that the same plaintiff will face the same harm again, courts often allow adjudication to proceed, regardless of whether the claims expire naturally or by defendant action.

B. *The Class Action Exception*

A traditional individual lawsuit with two opposing sides presents a relatively clear context for understanding and applying mootness doctrine. But with the surge in class action lawsuits in the 1970s,[90] new questions about mootness arose. Lawsuits brought on behalf of a class are supposed to be representative in nature—to transcend any single person's claim. What then should happen when a class representative's personal stake in a case grows moot, but the broader issue persists for the class?

The foundational class action mootness case, the Supreme Court's 1975 ruling in *Sosna v. Iowa*, involved a certified class challenging a one-year residency requirement for obtaining a divorce.[91] By the time the case reached the Court, the named plaintiff had satisfied the one-year requirement and had divorced elsewhere.[92] The Court nonetheless allowed the class claims to proceed.[93] The Justices reasoned that the district court's decision to certify the class gave it a legal status independent of the named plaintiff.[94] This independence allowed the class's claims to survive even when the named plaintiff's individual claims became moot.

While *Sosna* established a mootness exception for class actions, its outer limits remained uncertain. Since *Sosna* involved a challenge to an

Co., 345 U.S. 629, 633 (1953). Courts must also consider the defendant's sincerity; the effectiveness of the corrective action taken; and, depending on the specific situation, the nature of the defendant's past conduct. Id.

90. See David Marcus, The History of the Modern Class Action, Part I: *Sturm und Drang*, 1953–1980, 90 Wash. U. L. Rev. 587, 598 (2013) [hereinafter Marcus, History of the Class Action] (explaining that "class action doctrine under the modern Rule 23 coalesced in the 1970s"); David Marcus, The Short Life and Long Afterlife of the Mass Tort Class Action, 165 U. Pa. L. Rev. 1565, 1570 (2017) ("The class action figured importantly in a more general debate that raged in the 1970s about the legitimate size of litigation's institutional footprint."); Linda S. Mullenix, Aggregate Litigation and the Death of Democratic Dispute Resolution, 107 Nw. U. L. Rev. 511, 519 (2013) ("Between 1966 and the mid-1970s, federal courts were transformed by the influx of massive class action cases seeking remediation for alleged violations of various constitutional, federal, and state laws.").

91. 419 U.S. 393, 395, 397 (1975).

92. Id. at 398 n.7.

93. Id. at 402.

94. Id. at 399.

inherently short-lived one-year residency requirement, many commentators questioned whether the class action exception applied only if the underlying claim suffered from inherent mootness.[95] The Court answered this question a year later in *Franks v. Bowman Transportation Co.*, which involved a class action seeking money damages for racially discriminatory employment policies—not an inherently short-lived claim.[96] In reaching its decision, the Supreme Court clarified that "nothing in [the *Sosna* opinion] . . . holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'"[97] Instead, a case could proceed so long as it retained sufficient adverseness to "sharpen[] the presentation of issues" for the court.[98] Once a class was properly certified, the Court explained, a live and concrete controversy would continue to exist between the unnamed class members and a defendant, regardless of the named plaintiff's personal stake in the matter.[99]

In other words, class certification marks a magic moment for mootness doctrine. Once a class is certified, it can stand on its own, without need for a named plaintiff's stake in the matter.[100] The class, endowed with an independent legal persona, retains its procedural vitality.

But if class certification is so critical for mootness doctrine, what should happen if a district court incorrectly denies class certification? Can a named plaintiff appeal the denial, even if their own claim subsequently becomes moot? The Court addressed this question in two

95. William B. Rubenstein, 1 Newberg and Rubenstein on Class Actions § 2:10 (6th ed. 2022) [hereinafter Newberg & Rubenstein, Class Actions] ("[W]as *Sosna* nothing more than a holding that 'transitory claims' could be litigated by a mooted named plaintiff or was there something about class certification itself that enabled an exception to mootness even in nontransitory cases?"); 7AA Wright & Miller, 3d ed., supra note 80, § 1785.1 ("[T]he Court's reference to the fact that the case presented an issue that otherwise might evade appellate review, raised the question whether a class action had to satisfy that standard in order to avoid dismissal."). But see *Sosna*, 419 U.S. at 416 n.4 (White, J., dissenting) ("The Court apparently also does not view certification as the key to its holding since it mentions in dicta that some class actions will not be moot even though the named representatives' claims become moot prior to certification.").

96. 424 U.S. 747, 750–51, 777 n.38 (1976) (explaining that "the dissent of necessity addresses issues not present[]").

97. Id. at 755 (quoting *Sosna*, 419 U.S. at 399–401); see also id. at 781 (Powell, J., concurring in part and dissenting in part) ("[T]his controversy is not moot, and . . . in the context of a duly certified class action the 'capable of repetition, yet evading review' criterion . . . in [*Sosna*] is only a factor in . . . whether to reach the merits of an issue, rather than an Art. III 'case or controversy' requirement.").

98. Id. at 755 (internal quotation marks omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

99. Id. at 755–57.

100. Note that this statement concerns justiciability. Federal Rule of Civil Procedure 23 may require more to maintain a class. See infra section IV.C.3 (distinguishing justiciability analysis from adequacy-of-representation analysis).

cases decided on the same day in 1980: *United States Parole Commission v. Geraghty*[101] and *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*.[102] In both cases, the Court held that a plaintiff can appeal a class certification denial after the plaintiff's individual claim becomes moot.[103] The Court's reasoning in the two cases differed, however, reflecting whether the mootness was inherent or strategic in nature.

Geraghty was in some sense an inherent mootness case. The plaintiff had sought to certify a class challenging the federal parole release guidelines. After the district court denied class certification, the plaintiff appealed.[104] Before briefs were submitted, however, the plaintiff's claim expired as a matter of course (when he was mandatorily released from prison).[105] The problem was that the traditional inherent mootness exception—the capable of repetition yet evading review doctrine—did not clearly save his claim. There was no reasonable expectation the plaintiff himself would have the same claim again,[106] and some incarcerated individuals would inevitably receive sentences long enough to see their case through the appellate stage.[107] Still, the Supreme Court found the plaintiff had a right to appeal the class certification issue.[108] After highlighting the difference between personal stake mootness and issue mootness,[109] the Court noted the "flexible character" of mootness doctrine.[110] The Court reasoned that even when a plaintiff's individual claim expires "on the merits," "[t]he proposed representative retains a 'personal stake' in obtaining class certification."[111] This interest in representing the class, the Court explained, "is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."[112] The Court noted its decision was necessary "to achieve the primary benefits of class suits."[113] And importantly, the Court expressly limited its decision to the appeal of a class certification denial and reserved the question whether a

101. 445 U.S. 388, 407 (1980).

102. 445 U.S. 326, 340 (1980).

103. *Geraghty*, 445 U.S. at 404 ("[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied."); *Roper*, 445 U.S. at 339 ("To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.").

104. *Geraghty*, 445 U.S. at 393–94.

105. Id. at 394.

106. See id. at 398.

107. Geraghty v. U.S. Parole Comm'n, 579 F.2d 238, 251 (3d Cir. 1978).

108. *Geraghty*, 445 U.S. at 404.

109. Id. at 396.

110. Id. at 400.

111. Id. at 404.

112. Id. at 403.

113. Id.

plaintiff with a moot individual claim would still be a "proper representative" for the class moving forward.[114]

Roper,[115] in contrast, was more of a strategic mootness case. The plaintiffs sought to certify a class of credit card holders charged certain usurious fees by their bank.[116] After the district court denied class certification, and while the plaintiffs' appeal of that denial was pending, the defendant offered each named plaintiff the maximum amount authorized by law.[117] The plaintiffs declined to accept the offers, but the district court—over the plaintiffs' objections—entered judgment in the bank's favor.[118] On the plaintiffs' appeal from the class certification denial, the bank claimed the case was moot.[119] In deciding whether the plaintiffs' class certification appeal could move forward, the Supreme Court offered some of its strongest language against strategic mootness:

> To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs *would be contrary to sound judicial administration*. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously *would frustrate the objectives of class actions*; moreover it would *invite waste of judicial resources* by stimulating successive suits brought by others claiming aggrievement. It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs.[120]

Despite this forceful condemnation of "picking off" tactics, *Roper* did not turn on strategic mootness. Instead, the Court concluded the plaintiffs had retained a personal stake in the case: "an economic interest in class certification."[121] In aggregated-damages cases in particular, the Court held that named plaintiffs have an interest in "the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery."[122]

114. Id. at 407.

115. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

116. Id. at 327–28.

117. Id. at 329–30.

118. Id.

119. Id. at 330.

120. Id. at 339 (emphasis added).

121. Id. at 333.

122. Id. at 338 n.9. The Supreme Court has called into question the continuing validity of the holding in *Roper* in light of Lewis v. Continental Bank Corp., 494 U.S. 472, 480 (1990) ("[An] interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim . . . ."). See Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 78 n.5 (2013) ("Because *Roper* is

The different analytical approaches in *Geraghty* and *Roper* suggest hesitation in the Court's class action mootness doctrine. Neither case saw the Court fully at ease with temporarily suspending mootness doctrine's personal stake requirement to allow a plaintiff without a personal stake to pursue an appeal. Instead, the Court reached for some semblance of a continuing personal stake: in *Geraghty*, a right to pursue certification akin to the private attorney general concept, and in *Roper*, an economic interest in class certification.[123]

C. *The Puzzle of Proposed Class Actions*

For reasons similar to those that challenged the Supreme Court in *Geraghty* and *Roper*, proposed class actions present a puzzle for mootness doctrine. On the one hand, under *Sosna*, the class action exception does not apply.[124] In the precertification stage of a class action, the class does not (yet) exist separate from the lead plaintiff. The class's future existence thus depends entirely on the lead plaintiff's personal stake in the matter and the validity of their claim. On the other hand, class litigation is supposed to exist beyond any single person's claim, and class certification is not usually something that can happen immediately upon the filing of a complaint.[125] Mootness doctrine strains under this tension, offering no clear answer when an individual's claims become moot before certification can be reached, especially where the moot claim is unlikely to recur for an individual person but persists for a broader group of people.

The Court's first, and clearest, articulation of pre–class certification mootness doctrine appeared in a footnote in *Gerstein v. Pugh*, a 1975 case involving detained individuals raising claims concerning their pretrial detention.[126] The plaintiffs were granted class certification in the district court, but by the time the case reached the Supreme Court, a question arose about whether the certification was proper.[127] Under *Sosna*, a class action would be moot if no named plaintiff had a live claim at the time of

distinguishable on the facts, we need not consider its continuing validity in light of [*Lewis*] . . . .").

123. Notably, *Geraghty* was a more closely decided case than *Roper*. Compare U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (five-member majority and four in dissent), with *Roper*, 445 U.S. 326 (1980) (six-member majority, one concurrence, and two in dissent).

124. Sosna v. Iowa, 419 U.S. 393, 399, 402–03 (1975).

125. Cabraser, supra note 23, at 769 (noting that modern class certification often requires discovery and occurs later in the pretrial process); Malveaux, Power and Promise, supra note 23, at 670 (same).

126. 420 U.S. 103, 105–06 (1975).

127. Id. at 111 n.11. Notably, *Gerstein*'s holding was foreshadowed in *Sosna*. See *Sosna*, 419 U.S. at 402 n.11 (recognizing that in certain circumstances, class certification may relate back to the complaint's filing when named plaintiffs' claims become moot before certification).

class certification.[128] But in *Gerstein*, the plaintiffs' claims became moot when their pretrial detentions ended, and the record wasn't clear whether this happened before or after class certification.[129] Still, the Court held the case remained live. Because of the temporary and unpredictable length of pretrial detention, it was unlikely "any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class."[130] The Court concluded the case could move forward because "the constant existence of a class of persons suffering the deprivation [was] certain."[131]

Gerstein set forth a new mootness exception—the "inherently transitory exception"—for precertification class actions affected by inherent mootness. Rather than requiring a named plaintiff with a live claim to exist at the time of class certification, à la *Sosna*, *Gerstein* allows a case to move forward "when the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill."[132] The exception differs from the capable of repetition yet evading review exception because it does not require a showing that the named plaintiff would face the same situation again.[133] Instead, the plaintiff can point to the constant existence of a class of people suffering the alleged harm to fulfill the personal stake inquiry.[134]

Gerstein said nothing, though, about precertification class actions that suffer from strategic mootness. What should happen if the named plaintiff's individual claim is mooted not by natural expiration but by the defendant's strategic action? Could a defendant avoid a class action by resolving the named plaintiffs' individual claims before a class could be certified?

The Supreme Court first encountered the strategic mootness question in 2013, nearly forty years after the Court's *Gerstein* decision. *Genesis Healthcare Corp. v. Symczyk* featured a proposed collective action brought by an employee under the Fair Labor Standards Act (FLSA).[135] Before the collective action certification process was complete, the defendant offered the employee full satisfaction of her individual claim under Federal Rule of Civil Procedure 68.[136] The company then moved to dismiss on mootness grounds.[137] The employee claimed the company's use of a Rule 68 offer made the case "inherently transitory" because the

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128. *Sosna*, 419 U.S. at 402.

129. *Gerstein*, 420 U.S. at 111 n.11.

130. Id.

131. Id.

132. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1538–40 (2018).

133. See Salazar v. King, 822 F.3d 61, 73 n.8 (2d Cir. 2016) (distinguishing the capable of repetition yet evading review and the inherently transitory exceptions).

134. Id.; see also *Gerstein*, 420 U.S. at 111 n.11.

135. 569 U.S. 66, 69 (2013).

136. Id. at 69–70.

137. Id. at 70.

company was trying to "pick off" named plaintiffs before certification.[138] The Court disagreed.[139] Under "[a] straightforward application of well-settled mootness principles," the Justices concluded the case was moot.[140] The Court stressed that "Rule 23 actions are fundamentally different from collective actions under the FLSA."[141] Thus, the class action mootness cases—like *Sosna*, *Geraghty*, and *Roper* (including *Roper*'s dictum on picking off)—did not apply.[142]

As to the inherently transitory exception, the Court said it likely did not apply in strategic mootness cases.[143] The exception, the Court explained, "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy."[144] Finally, even if the inherently transitory exception could apply to strategically mooted FLSA collective actions, it would not apply to the plaintiffs' claims.[145] The plaintiffs sought money damages, and "[u]nlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review."[146] Again, the Supreme Court was careful to limit its holding to FLSA cases.[147] Nonetheless, courts and practitioners began to look at the inherently transitory exception's reach in a new light.[148]

The Court had a second chance to address the strategic mootness gap three years later, in *Campbell-Ewald Co. v. Gomez*.[149] The plaintiff had filed a proposed Rule 23 class action lawsuit against a marketing company for alleged violations of the Telephone Consumer Protection Act.[150] Before the motion for class certification filing deadline, the marketing company made a Rule 68 offer to settle the named plaintiff's individual claim.[151] The plaintiff rejected the offer, but the defendant

138. Id. at 75–76.

139. Id. at 70, 75.

140. Id. at 73.

141. Id. at 74.

142. Id. at 74, 78.

143. Id. at 76.

144. Id. at 76–77.

145. Id. at 77.

146. Id.

147. Id. at 78.

148. See, e.g., Wilson v. Gordon, 822 F.3d 934, 946–47 (6th Cir. 2016) (addressing *Genesis Healthcare* in a strategic mootness case); Maier v. J.C. Penney Corp., No. 13CV163 JLS, 2014 WL 12139073, at *1 (S.D. Cal. Jan. 22, 2014) (same); see also Jenny R. Chou & Kim E. Rinehart, Supreme Court Update: *Genesis Healthcare Corp. v. Symczyck* (11-1059), *Kiobel v. Royal Dutch Petroleum Co.* (10-1491), and *Boyer v. Louisiana* (11-9953), Wiggin & Dana (Apr. 30, 2013), https://www.wiggin.com/publication/supreme-court-update-genesis-healthcare-corp-v-symczyk-11-1059-kiobel-v-royal-dutch-petroleum-co-10-1491-and-boyer-v-louisiana-11-9953/ [https://perma.cc/S3R8-92F8].

149. 577 U.S. 153 (2016).

150. Id. at 156.

151. Id. at 157–58.

moved to dismiss anyway.[152] The Supreme Court did not address the strategic mootness gap. Instead, the Court held the case was not moot, relying on "basic principles of contract law" to conclude an unaccepted settlement offer cannot moot an individual's complaint.[153] Because the plaintiff retained an individual personal stake in the litigation, reliance on class action mootness doctrine was unnecessary.[154]

Campbell-Ewald drew two dissenting opinions. Chief Justice John Roberts, joined by Justices Antonin Scalia and Samuel Alito, contended that the majority's decision gave too much power to plaintiffs.[155] "[A] plaintiff is not the judge of whether federal litigation is necessary," he wrote, "and a mere *desire* that there be federal litigation—for whatever reason—does not make it *necessary*."[156] Chief Justice Roberts found solace in limiting the case to its facts; while an offer of complete relief might be insufficient to moot a case under the majority's opinion, he suggested actual payment of complete relief might lead to a different result.[157] Justice Alito wrote separately to propose ways a defendant might unilaterally moot a plaintiff's claim: by making actual payment to the plaintiff, tendering a certified check to the plaintiff, or depositing payment with the district court or in a bank account in the plaintiff's name.[158] *Campbell-Ewald Co. v. Gomez* thus did not deter defendants from devising strategies for picking off class representatives to avoid class actions. Indeed, the dissents actively preserved the strategic mootness gap, offering defendants a playbook of alternative tactics that might succeed where *Campbell-Ewald*'s unaccepted offer had failed.

D. *The Strategic Mootness Gap Restated*

The upshot is this: Mootness exceptions exist to prevent dismissal when a plaintiff loses their personal stake but the underlying legal issue remains unresolved. Courts have crafted tailored exceptions for inherent mootness, where claims naturally expire before resolution, and for strategic mootness, where defendants seek to sidestep review through their own conduct. In class actions, courts have extended these principles: When a certified class representative's claim becomes moot, the class's ongoing interest allows the case to proceed. And even in proposed class actions, the Supreme Court has recognized the challenge of inherent mootness and adopted the inherently transitory exception to address it.

152. Id. at 158.
153. Id. at 163.
154. Id. at 156.
155. Id. at 175, 179 (Roberts, C.J., dissenting).
156. Id. at 179.
157. Id. at 180.
158. Id. at 186 (Alito, J., dissenting).

But the Court has yet to confront strategic mootness in precertification class actions. This silence leaves a critical vulnerability: Defendants can selectively resolve named plaintiffs' claims before certification, effectively blocking class formation and dodging systemic accountability. Worse still, the Court has not only declined to fill this gap but has also cast doubt on whether courts should protect proposed class actions from defendants' litigation tactics. In recent opinions, some Justices have gone so far as to encourage defendants to moot both individual and class claims through unilateral action.[159]

The doctrinal gap has concrete consequences. As the next Part shows, defendants have seized the opening, devising increasingly sophisticated tactics to exploit the gap. Lower courts, left without clear guidance, have responded inconsistently. And the resulting uncertainty threatens the core values class actions are meant to safeguard.

III. EXPLAINING THE STRATEGIC MOOTNESS GAP

Having now identified the strategic mootness gap, this Part explains why the gap exists and why it merits correction. It begins by uncovering the Supreme Court's and the broader legal discourse's myopia toward the problem.[160] It then maps the true scope of strategic mootness, revealing a broader array of strategic mootness tactics than typically acknowledged.[161] Next, this Part surveys how lower courts, recognizing the stakes, have struggled to respond within the confines of existing doctrine, often improvising ad hoc solutions.[162] Finally, this Part makes the case for reform. Left unresolved, the strategic mootness gap risks weakening class actions and undermining core procedural values.[163]

A. *Strategic Mootness Gap Myopia*

The Supreme Court's failure to address the strategic mootness gap reflects a dual oversight. Courts have generally failed to see the gap as a doctrinal problem worthy of direct resolution. And courts and commentators have failed to fully grasp what strategic mootness looks like in practice.

1. *Missing the Gap.* — Since expressing concern about defendants picking off class actions in *Roper*, the Supreme Court has paid little attention to pre-class certification strategic mootness. Even more, in its more recent decisions—*Symczyk* and *Campbell-Ewald*—the Court has both walked back some of its strongest anti-strategic mootness language and avoided broader questions about defendants' ability to moot class claims

159. See supra section II.C (discussing *Symczyk* and *Campbell-Ewald*).
160. See infra section III.A.
161. See infra section III.B.
162. See infra section III.C.
163. See infra section III.D.

before certification.[164] Why has the strategic mootness gap persisted for decades, and why does the Court seem reluctant to address it?

Several explanations seem plausible. First, the strategic mootness gap looks different today than in the past. When the Supreme Court decided a series of class action mootness cases in the 1970s,[165] the law allowed class certification much earlier in the litigation. Since then, the Court has raised the bar for class certification, often requiring more extensive discovery before a class can be certified.[166] This shift has lengthened the period between filing and certification, giving defendants a much longer window to strategically moot cases.

Compounding the problem, a 2003 amendment to Rule 23(e), which governs court approval of class action settlements, expanded strategic mootness opportunities.[167] Before the amendment, many courts required some form of judicial oversight over any settlement in a case filed as a class action, even if a class had not yet been certified.[168] That meant a named plaintiff generally could not accept an individual settlement without the court considering the interests of the potential class. The 2003 revision made clear that court approval is required only for settlements in *certified* class actions.[169] Hence defendants gained greater ability to moot precertification class actions by settling individually with the named plaintiff.[170]

Another explanation for the strategic mootness gap lies in the unlikelihood of a strategic mootness case reaching the Supreme Court. The improbability stems not only from the general difficulty of securing Supreme Court review,[171] but also from the nature of strategic mootness remedies. When a putative class representative receives full individual relief, they have less incentive to continue litigating. Serving as class representative demands considerable time, resources, and risk, and there

164. See Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016) (limiting discussion to named plaintiff's continuing interest in the case); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 78 n.5 (2013) (suggesting that *Roper* may no longer be good law).

165. See supra section II.B.

166. See supra note 125.

167. See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 13 (2002), https://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf [https://perma.cc/F6LS-Q3EL] (summarizing the proposed changes to Rule 23(e)).

168. 12 Wright & Miller, 3d ed., supra note 80, § 3001.1 (describing the pre-2003 "majority rule").

169. Fed. R. Civ. P. 23(e).

170. 12 Wright & Miller, 3d ed., supra note 80, § 3001.1 (noting that the "tactical use of offers to moot class actions depended to a significant extent on the 2003 amendment to Rule 23(e)").

171. See Journal of the Supreme Court of the United States, at II (Oct. 2022), https://www.supremecourt.gov/orders/journal/Jnl22.pdf [https://perma.cc/X966-5UH4] (showing that the Supreme Court grants less than one percent of petitions for writs of certiorari annually).

is usually little reward for the effort.[172] Even with a willing plaintiff, the high cost of class action litigation, coupled with the uncertainties of class certification, may discourage plaintiff's counsel from pursuing class certification after individual relief is attained. Most strategic mootness cases likely end quietly with no plaintiff willing to continue litigating.[173]

As for the cases in which plaintiffs resist strategic mootness, courts typically prioritize a different inquiry: whether the named plaintiff retains a continuing individual personal stake. This sequencing makes sense; it is logical to prioritize the threshold question of the plaintiff's individual stake before reaching questions about the class claims' continued viability. Take *Campbell-Ewald* for example.[174] Rather than basing its decision on the plaintiff's proposed class claims, the Supreme Court focused solely on whether a rejected offer of relief could moot the plaintiff's individual claims.[175] Once it found that the plaintiff still had a personal stake in the case, it refrained from resolving what might happen to the class claims if that individual stake had been mooted.

This focus on individual personal stake can distract from the underlying strategic mootness gap. *Geraghty* and *Roper* illustrate how the Supreme Court has historically steered clear of addressing the precertification strategic mootness issue directly, opting instead to focus on matters of individual personal stake. In both cases, the Court broadened the notion of personal stake—in *Geraghty*, by likening the right to certification to the right of a private attorney general, and in *Roper*, by expanding it to include an economic interest in certification.[176] This approach avoided the more provocative question of whether and when an individual with a personally moot claim can persist in seeking class certification.

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172. While incentive awards for named plaintiffs are common in class action settlements, they are always reviewed for excessiveness, and a circuit split has emerged regarding their permissibility. See Jay Tidmarsh & Tladi Marumo, Good Representatives, Bad Objectors, and Restitution in Class Settlements, 48 BYU L. Rev. 2221, 2228 (2023) (theorizing the benefits and risks of incentive awards in light of the circuit split); see also Jason Jarvis, Note, A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits, 115 Nw. U. L. Rev. 919, 936–37 (2020) (arguing that courts do not adequately evaluate the justifications and dangers of incentive awards).

173. Cf. Nancy Gertner, Losers' Rules, 122 Yale L.J. Online 109, 113–16 (2012), https://yalelawjournal.org/essay/losers-rules [https://perma.cc/5P87-EZX8] (discussing asymmetries in judicial decisionmaking patterns, wherein defendants receive written decisions when they prevail and plaintiffs do not).

174. Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016).

175. Id. at 162–63.

176. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) ("This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." (citing Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980)); *Roper*, 445 U.S. at 332–33 ("Neither the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification.").

Finally, the strategic mootness gap presents difficult questions that courts often prefer to avoid. Allowing defendants to moot cases through strategic action could undermine the class action mechanism and leave systemic issues unaddressed.[177] But preventing defendants from resolving individual disputes may seem to discourage the very behavior courts typically want to promote: voluntary settlement and remediation of harm.[178] If defendants provide full relief to the named parties, why should they still face prolonged litigation?[179]

When viewed from the Court's increasingly skeptical stance toward class actions, pick-off tactics may even appear as a natural—and desirable—market correction: a way to settle individual cases quickly and limit sprawling litigation. Combined with growing docket pressure, these structural incentives help explain why the Court has repeatedly declined to confront the strategic mootness gap head-on.

2. *Missing the Gap's Breadth.* — Equally significant is the limited way strategic mootness has been framed in legal discourse. For decades, legal commentary on the issue had been rules-centric, with scholars framing strategic mootness primarily as a technical conflict between two rules of procedure. Rule 68 of the Federal Rules of Civil Procedure allows defendants to make formal settlement offers that shift litigation costs to plaintiffs who reject them and then fail to obtain better results at trial. Rule 23, meanwhile, governs class actions and aims to enable representative litigation on behalf of groups. Scholars and rulemakers had long expressed concern that Rule 68—designed to encourage early settlement—could pressure named plaintiffs into accepting individual relief that may undermine the goals of Rule 23.[180] This concern fueled a wave of reform efforts and scholarship that treated strategic mootness in class actions almost exclusively as a Rule 68 problem.[181]

177. See infra section III.D (exploring the consequences of the strategic mootness gap).

178. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 376–77 (1982) ("In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation.").

179. The dissent in *Campbell-Ewald* expressed these concerns. See 577 U.S. at 179 (Roberts, C.J., dissenting) ("But a plaintiff is not the judge of whether federal litigation is necessary, and a mere *desire* that there be federal litigation—for whatever reason—does not make it *necessary*.").

180. See Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 51–52 (1985) (summarizing the debate around Rule 68's application to class actions).

181. Specifically, in 1983 and 1984, the Advisory Committee on Civil Rules recommended an amendment to Rule 68 to exclude the rule's application from class actions. Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, reprinted in 102 F.R.D. 407, 432–37 (1984). The amendment did not succeed. Simon, supra note 180, at 51–52. Then, after the 2003 amendment to Rule 23(e) changed how class action

This framing took center stage when Rule 68 tactics reached the Supreme Court in *Symczyk* and *Campbell-Ewald*. Scholarly attention turned to the specific question the Court considered: whether an *unaccepted* Rule 68 offer could moot a named plaintiff's claim.[182] When the *Campbell-Ewald* majority answered no, it seemed to resolve the Rule 68 question—but only partially.[183] The decision also highlighted new vulnerabilities. Justice Alito's dissent provided what many viewed as a roadmap for defendants, listing alternative strategies—such as unilaterally "hand[ing] the plaintiff a certified check or deposit[ing] the requisite funds in a bank account in the plaintiff's name"[184]—that might still force mootness.[185]

The Advisory Committee on Civil Rules took note. In early 2016, just after the *Campbell-Ewald* decision, the Subcommittee on Rule 23 convened to assess the unresolved questions surrounding pick-off tactics.[186] The Subcommittee discussed several possible amendments to address the problem[187] but ultimately concluded that "there are sufficient questions about the present circumstances to make proposing an amendment now inappropriate."[188] It opted instead to continue studying the issue.[189]

The Subcommittee's decision to continue studying the issue identified a crucial need for a broader understanding of picking off as it actually occurs in practice. But that broader account has not emerged. Academic and popular commentary has continued to center on the types of tactics and cases that have dominated the Supreme Court's consideration: those involving clear dollar values and unilateral payments,

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settlements were reviewed and increased opportunities for precertification strategic mootness, see supra note 169 and accompanying text, legal commentators produced extensive analysis of Rule 68's deployment as a strategic weapon by class action defendants. See, e.g., M. Andrew Campanelli, Note, You Can Pick Your Friends, But You Cannot Pick Off the Named Plaintiff of a Class Action: Mootness and Offers of Judgment Before Class Certification, 4 Drexel L. Rev. 523, 525 (2012) (focusing on Rule 68 offers of judgment); see also Koyzka, supra note 37, at 789 (same); Lott, supra note 37, at 531 (same). This academic attention underscores Rule 68's central role in contemporary debates over precertification strategic mootness.

182. Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 156 (2016); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 80–82 (2013) (Kagan, J., dissenting).

183. *Campbell-Ewald*, 577 U.S. at 156.

184. Id. at 186 (Alito, J., dissenting).

185. See Robert H. Klonoff, Class Actions in the Year 2026: A Prognosis, 65 Emory L.J. 1569, 1571 (2016) ("The Supreme Court's decision in *Campbell-Ewald v. Gomez* will not deter defendants in their efforts to design strategies for picking off class representatives through offers of judgment." (footnote omitted)).

186. Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules, *in* Agenda Book of the Advisory Committee on Civil Rules 127, 127–30 (Feb. 5, 2016) [hereinafter Advisory Committee Agenda Book].

187. This Article returns to these proposals in section IV.B.

188. Rule 23 Subcommittee Report, *in* Advisory Committee Agenda Book, supra note 186, at 108.

189. See id.

typically in aggregated-damages cases.[190] This focus has contributed to a persistent framing of strategic mootness as a forced-payment problem.

Strategic mooting spans far beyond monetary offers. It includes a wide array of procedural tactics—often less visible than the forced-payment strategies spotlighted in *Campbell-Ewald*—and cuts across diverse substantive areas. As the Subcommittee's deliberations suggested, recognizing this broader pattern is essential to understanding how strategic mootness actually functions and why current doctrine has struggled to respond.

B. *Strategic Mootness in Practice*

This section maps the diverse ways strategic mootness manifests across different types of litigation, revealing a phenomenon far more varied than commonly understood. While some instances look like classic pick-offs, with defendants dangling Rule 68 offers or sending unsolicited checks, others are harder to spot. Strategic mootness can unfold in the shadows of administrative discretion or through carefully timed grants of relief. What unites these scenarios is not any particular tactic, but a common result: the elimination of a possible class before class certification because of some action taken by the defendant.

Strategic mootness typically unfolds along two key dimensions: the type of relief at stake and the mechanism by which defendants provide it. Relief type necessarily depends on the type of remedy sought by the plaintiff. Monetary remedies involve cash payments or their equivalent (as commonly seen, for example, in Rule 23(b)(3) aggregated-damages class actions), while nonmonetary remedies usually involve changes to defendant conduct (as commonly seen in Rule 23(b)(2) injunctive civil-rights class actions). The delivery mechanism describes how defendants provide the remedy to named plaintiffs. Unilateral tactics involve defendants' provision of relief without the plaintiff's agreement, while bilateral tactics require some form of plaintiff consent or participation.

Below, Figure 2 identifies four types of picking off remedies, offering examples of each.

190. See, e.g., Christakis et al., supra note 37, at 253 (describing the benefits to defendants who successfully moot class claims); Hnylka, supra note 37, at 388 (discussing Rule 68 offers of complete relief); Alan B. Morrison, Response, *Campbell-Ewald Co. v. Gomez*: A (Temporarily) Failed Pick Off, Geo. Wash. L. Rev. On the Docket (Jan. 22, 2016), https://www.gwlr.org/campbell-ewald-co-v-gomez-a-temporarily-failed-pick-off/ [https://perma.cc/L778-VERP]; Allison Grande, TCPA Defendants Down, But Not Out, With 'Pick-Off' Ruling, Law360 (June 22, 2017), https://www.law360.com/articles/937402/tcpa-defendants-down-but-not-out-with-pick-off-ruling (on file with the *Columbia Law Review*) (describing a Seventh Circuit case addressing a Rule 67 pick-off tactic); Christine M. Reilly & Andrew Case, Supreme Court Holds for Plaintiff on Rule 68 Issue, but Suggests Alternatives for Mootness, Manatt (Jan. 21, 2016), https://www.manatt.com/insights/newsletters/tcpa-connect/supreme-court-holds-for-plaintiff-on-rule-68-issue [https://perma.cc/59QH-NDAL].

FIGURE 2. STRATEGIC MOOTNESS GAP TACTICS

	Monetary	Nonmonetary
Unilateral	The defendant forces a financial remedy on the plaintiff. *Examples:* ▪ Corporation makes Rule 67 deposit of requested relief ▪ Company sends a check or issues a direct deposit to the plaintiff	The defendant provides injunctive remedy to the plaintiff without plaintiff's affirmative acceptance. *Examples:* ▪ Benefits office approves delayed benefits application ▪ Internal Revenue Service expedites requested tax refund
Bilateral	The defendant offers a financial remedy and the plaintiff affirmatively accepts it. *Example:* ▪ Negotiated settlement payout	The defendant offers an injunctive remedy and the plaintiff affirmatively accepts it. *Examples:* ▪ Government offers access to asylum process if plaintiff appears at the border ▪ City offers housing to plaintiff experiencing homelessness

The aim here is not to perfectly capture every variation of strategic mootness. Nor are the lines between categories pristine. Still, this breakdown reveals meaningful patterns in how courts approach different forms of picking off, and it clarifies how the stakes and power dynamics vary across contexts.

Unilateral monetary resolution represents the most familiar form of strategic mootness and the one that dominates current scholarly discussions.[191] In these cases, a defendant seeks to end a class action by unilaterally providing the named plaintiff with complete financial relief. The practice has proliferated in the consumer protection space, where statutory damage caps make the required payment amounts easy to

191. See supra section III.A.2.

calculate.[192] A paradigmatic example involves a putative class action brought under the Fair Debt Collection Practices Act.[193] In these cases, the corporation might deposit the maximum statutory penalty with the court or send a check to the individual plaintiff, thereby extinguishing the individual claim. After unilaterally resolving the plaintiff's claim, the defendant moves to dismiss the case—including the putative class claims—as moot.

Courts have developed a variety of approaches to unilateral monetary resolution. Most begin, as in *Campbell-Ewald*, by focusing on the plaintiff's continuing personal stake.[194] Courts are split on what relief moots an individual plaintiff's claims. Some courts require a plaintiff's actual receipt of funds, holding (for example) that a Rule 67 deposit with the court can't alone moot claims since the plaintiff never actually receives the money.[195] Other courts have held that sending a check to the plaintiff suffices to moot an individual's case, regardless of whether the plaintiff cashes it.[196] Still, courts have proved reluctant to let forced individual relief cut short potential class actions, recognizing that doing so could compromise the viability of the class device. As a result, many courts permit class claims to move forward even after the individual claim becomes moot.[197]

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192. See S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069-PBS, 2016 WL 1441791, at *6 (D. Mass. Apr. 12, 2016) (noting the prevalence of strategic mootness tactics in Telephone Consumer Protection Act (TCPA) litigation and observing that "[s]ummer has arrived" for such practices), abrogated on other grounds by Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81 (1st Cir. 2021).

193. E.g., Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004), abrogated by Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016); McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019); see also Chen v. Allstate Ins. Co., 819 F.3d 1136 (9th Cir. 2016) (involving the Telephone Consumer Protection Act); *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *8 (same).

194. See supra section III.A.1.

195. See, e.g., Radha Geismann, M.D., P.C. v. ZocDoc, Inc., 909 F.3d 534, 541 (2d Cir. 2018) (reasoning that a Rule 67 deposit with a court still "leaves a plaintiff 'emptyhanded'"); Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541, 545 (7th Cir. 2017) (finding "no principled distinction between attempting to force a settlement on an unwilling party through Rule 68 . . . and attempting to force a settlement on an unwilling party through Rule 67"). But see Leyse v. Lifetime Ent. Servs., LLC, 171 F. Supp. 3d 153, 156 (S.D.N.Y. 2016), aff'd, 679 F. App'x 44 (2d Cir. 2017) (holding that "a defendant's deposit of a full settlement with the court, and consent to entry of judgment against it, will eliminate the live controversy before a court" (citing Tanasi v. New All. Bank, 786 F.3d 195, 200 (2d Cir. 2015))).

196. See, e.g., LaSpina v. SEIU Pa. State Council, No. 18-2018, 2019 WL 4750423, at *12 n.8 (M.D. Pa. Sep. 30, 2019) (finding that a direct deposit into plaintiff's bank account coupled with uncashed checks was sufficient to moot a putative class action); *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *4–5 (holding that a defendant's tender of a check in excess of statutory damages rendered a putative class representative's individual claim moot).

197. See, e.g., *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *7 (applying the inherently transitory exception despite the mootness of the named plaintiff's individual claims).

In contrast, *bilateral monetary resolution* involves a defendant offering, and a plaintiff accepting, a financial settlement. In many ways, this is the least controversial form of picking off. Unlike unilateral tactics, bilateral resolution respects the plaintiff's autonomy and typically results in the plaintiff abandoning the case and class. It is, in essence, the standard litigation settlement—an agreement between parties to resolve a dispute without further adjudication. As a result, most of these cases end quietly, with little judicial scrutiny and minimal doctrinal development around the underlying class claims.

Occasionally, however, a plaintiff who accepts an individual settlement seeks to continue representing the class. Courts usually reject these efforts, holding that voluntary settlement forfeits the right to pursue certification.[198] Still, the surface appearance of consensual settlement can mask troubling dynamics. As Professor Owen Fiss has observed, settlements can result less from genuine agreement and more from disparities in power, resources, and abilities.[199] These concerns are amplified in the precertification class action context, in which named plaintiffs bear the burden of potential class representation alone. A plaintiff facing financial precarity or urgent personal need may view even a modest settlement offer as impossible to reject. In such circumstances, consent may obscure the lack of a meaningful alternative.[200]

Unilateral nonmonetary resolution occurs when a defendant addresses the plaintiff's nonmonetary claim without any plaintiff involvement. This tactic appears in regulatory or civil rights contexts, in which defendants (often government actors) hold the keys to the requested relief. The visa case described in the introduction—in which plaintiffs filed a putative class action challenging discriminatory delays in the visa review process—offers a good example.[201] There, the government could simply approve the plaintiffs' pending visa petitions and then move to dismiss the entire case as moot. Another example may be a putative class action brought by a noncitizen challenging their detention in cage-like facilities.[202] There, the government might strategically transfer the named plaintiff once

198. E.g., Moreland v. Prudential Ins. Co., No. 20-cv-04336-RS, 2023 WL 6450421, at *5 (N.D. Cal. Sep. 29, 2023); McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019).

199. See Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1076–78 (1984) ("[S]ettlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally.").

200. Bilateral monetary resolution also raises important questions about the obligations of named plaintiffs to absent class members, since these individual settlements occur without judicial oversight of their fairness. For an introduction to the scope of the precertification fiduciary duty owed by class counsel, see generally Nick Landsman-Roos, Note, Front-End Fiduciaries: Precertification Duties and Class Conflict, 65 Stan. L. Rev. 817 (2013).

201. Cruz v. Farquharson, 252 F.3d 530, 532 (1st Cir. 2001).

202. E.g., P.J.E.S. v. Wolf, 502 F. Supp. 3d 492, 509 (D.D.C. 2020).

they are identified in the lawsuit and then seek dismissal of the entire case.[203]

Unilateral nonmonetary resolution raises unique evidentiary and analytical challenges because it is often hard to discern whether the defendant's actions represent strategic behavior or coincidental relief. Unlike unilateral monetary resolution, in which defendants might cut a check to a specific plaintiff in a clearly strategic manner, unilateral nonmonetary resolution can happen in ways that may appear organic. For example, an application might simply reach the top of the pile without the defendant's deliberately fast-tracking the plaintiff's case.[204] The result is a blurred line between administrative happenstance and deliberate mootness strategy. This ambiguity makes it harder for courts to detect gamesmanship, even when the facts strongly suggest it.

Bilateral nonmonetary resolution, by contrast, requires the plaintiff to affirmatively accept the offered injunctive relief. In these situations, defendants cannot unilaterally impose the requested remedy, and thus plaintiffs preserve a measure of autonomy. As with bilateral monetary resolution, many observers may conclude that once a plaintiff accepts the offered relief, they should be precluded from pursuing class certification. There are situations, however, where "acceptance" is far more ambiguous. For example, a government might offer an asylum seeker access to the asylum process but require the individual to be physically present at the border to receive the assistance.[205] Or a city might offer housing to a person experiencing homelessness, but the aid requires the person's cooperation in accepting the housing. In these situations, the urgency of the relief being offered makes refusal impossible. The power dynamics overwhelmingly favor the defendant, leaving plaintiffs little meaningful choice.

This mapping reveals the limits of treating "picking off" as a monolithic tactic. The phenomenon reaches far beyond the consumer protection and aggregated-damages cases that have dominated legal discourse. From cases involving complete defendant control to scenarios marked by plaintiffs' constrained choices, each category introduces distinct power dynamics and legal uncertainties. The resulting diversity has forced lower courts into a patchwork of improvised responses.

203. Id. (finding that the government's actions "reveal[] an intent to make Plaintiff's claim . . . inherently transitory") (internal quotation marks omitted) (quoting J.D. v. Azar, 925 F.3d 1291, 1309 (D.C. Cir. 2019)).

204. Compare *Cruz*, 252 F.3d at 535 (finding no evidence of a "scurrilous pattern and practice of thwarting judicial review"), with Wilson v. Gordon, 822 F.3d 934, 951 (6th Cir. 2016) (finding evidence of "ad hoc process" designed to remedy the named plaintiffs' claims).

205. See, e.g., Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1291 (S.D. Cal. 2018) (decided on other grounds).

C. *Lower Court Confusion*

Confronted with strategic mootness in many forms—from corporate defendants cutting checks for named plaintiffs to government agencies selectively expediting administrative relief—lower courts have improvised a range of doctrinal responses. Lacking clear guidance from the Supreme Court, they have stretched existing exceptions beyond their traditional bounds, experimenting with tools not designed for these scenarios. The result is a fragmented legal landscape marked by overlapping, inconsistent approaches that generate confusion for litigants and leave putative class actions unevenly protected across jurisdictions.

Some courts have stretched the inherently transitory exception, originally developed to address naturally fleeting claims, into the strategic mootness context.[206] Rather than focusing on the temporal nature of the named plaintiff's claim, these courts examine the defendant's power to pick off lead plaintiffs.[207] This extension appears almost exclusively in cases involving unilateral defendant action.[208] Courts reason that unilateral mootness tactics replicate the dynamics of naturally transitory claims: In both scenarios, plaintiffs lack control over when their claims expire and face the same risk of evaded judicial review.[209]

This approach has found critics, who argue it conflates natural claim expiration with deliberate conduct by defendants.[210] The inherently transitory exception traditionally applies when claims are so naturally time-sensitive that it is "doubtful" any plaintiff could maintain a live controversy long enough to reach class certification.[211] In contrast, when defendants moot cases through targeted relief, there is no guarantee they will continue the practice. They may abandon the strategy or lack resources to sustain it, leaving open the possibility that future plaintiffs could obtain certification rulings.[212] Moreover, following *Symczyk*, which stressed that the exception was designed for inherently time-sensitive

206. See, e.g., Unan v. Lyon, 853 F.3d 279, 287 (6th Cir. 2017); Chen v. Allstate Ins. Co., 819 F.3d 1136, 1143–44 (9th Cir. 2016).

207. *Chen*, 819 F.3d at 1148.

208. See id. at 1147–48. This exception has been invoked in cases for monetary relief and nonmonetary relief. See id. at 1148 (damages placed in escrow); Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993) (benefits application approval).

209. See Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981) ("By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached.").

210. See, e.g., Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76–77 (2013) (noting that the doctrine developed to address naturally "fleeting" claims and not claims mooted by defendant strategy).

211. *Zeidman*, 651 F.2d at 1049–50 (observing that the distinction between cases mooted by "nature" and by "purposive action" is "significant").

212. Id.

claims, some judges have grown cautious about extending it to cover defendant-driven mootness.[213]

Other courts have seized on language in *Roper* to justify a broader reading of the class action exception. The Sixth Circuit, for instance, has invoked *Roper* to explain that defendants should not be able to "strategically avoid[] litigation by settling or buying off individual named plaintiffs."[214] Although *Roper* involved mootness after a certification denial, the Sixth Circuit has found no meaningful difference between that posture and a case in which the defendant "picks off" a named plaintiff while a certification motion is still pending.[215] In both scenarios, the court reasoned, "the defendant is on notice that the named plaintiff wishes to proceed as a class, and the concern that the defendant therefore might strategically seek to avoid that possibility exists."[216]

This approach also has limits. Some courts reject any *Roper*-based exception outright, noting it relies primarily on dicta and extends the class action exception well beyond Supreme Court precedent.[217] But even among courts willing to entertain this broader reading, the approach often proves underinclusive. It is typically confined to cases in which a class certification motion is already pending[218]—leaving a significant gap in protection. That formal motion requirement overlooks the very period when strategic mootness often occurs: before plaintiffs have a chance to seek certification, when defendants may strike preemptively to avoid discovery.[219] In this way, the approach fails to capture much of the conduct it aims to address.

Noting the limitations of existing doctrine, some courts have begun developing their own versions of a novel "picking off" exception. The

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213. This is especially true in cases requesting monetary rather than injunctive relief. 569 U.S. at 77 ("Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations. Nor can a defendant's attempt to obtain settlement insulate such a claim from review . . . ."); see also, e.g., Wilson v. Gordon, 822 F.3d 934, 946–47 (6th Cir. 2016) (distinguishing *Symczyk*); *Chen*, 819 F.3d at 1143 (same, but applying the inherently transitory exception in a case for damages); Grice v. Colvin, No. GJH-14-1082, 2016 WL 1065806, at *5 (D. Md. Mar. 14, 2016) (holding that the inherently transitory rule only applies to naturally fleeting claims).

214. Unan v. Lyon, 853 F.3d 279, 285 (6th Cir. 2017) (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).

215. *Wilson*, 822 F.3d at 947.

216. Id.

217. See, e.g., Haddock v. United States, 161 Fed. Cl. 6, 18 n.11 (Fed. Cl. 2022) ("The idea that a strategy of 'picking off' named plaintiffs in a class action triggers a mootness exception seems to have originated with language in [*Roper*], that [*Symczyk*] later characterized as dicta." (citing to 445 U.S. 326; 569 U.S. at 77–78)).

218. See Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011) ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.").

219. See infra section IV.C.2.

Third Circuit, which pioneered this approach, applies it to claims "acutely susceptible to mootness" through the defendant's actions, provided the plaintiff has not unduly delayed seeking class certification.[220] Recognizing the vagueness of that standard, other courts have sought to sharpen it by incorporating inquiries into defendant intent. In these courts, judges may assess whether an exception is warranted based on indicia of strategic behavior, including suspicious timing,[221] ad hoc relief for named plaintiffs,[222] or recurring efforts to pick off new plaintiffs.[223]

These efforts mark a promising recognition of the unique problems posed by the strategic mootness gap. But they also raise concerns. The Third Circuit's formulation, though flexible, is underdeveloped and open-ended. It offers little guidance on how "acute susceptibility" should be assessed, creating uncertainty about when the exception applies. And efforts to analyze defendant intent introduce other challenges.[224] Defendants rarely admit to problematic strategic behavior, and plaintiffs often lack access to the kinds of evidence, such as internal deliberations or policies, that might show procedural manipulation. As a result, courts may hesitate to find intent absent clear proof of bad faith.[225]

Still, for all their varied approaches, many courts are ultimately responding to the same structural risk. Though they have improvised different doctrinal solutions, there is broad convergence on the core problem: that defendants will use precertification settlements or dismissals to wholly avoid class-wide accountability. This lively doctrinal experimentation reflects growing judicial awareness that the strategic mootness gap poses a serious threat to the integrity of aggregate litigation. Courts' willingness to stretch or rework existing mootness principles signals an appetite for clearer, more coherent doctrine—a task taken up in Part IV.

220. Duncan v. Governor of V.I., 48 F.4th 195, 206 (3d Cir. 2022); see also Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004) (developing the picking off exception in the Third Circuit).

221. See Sos v. State Farm Mut. Auto. Ins. Co., No. 21-11769, 2023 WL 5608014, at *12 (11th Cir. Aug. 30, 2023) (noting evidence of pick-off tactics where the defendant, after failed settlement attempts, sent checks to the plaintiff on the eve of a status conference on class certification).

222. See, e.g., Wilson v. Gordon, 822 F.3d 934, 950–51 (6th Cir. 2016) (finding the state's use of a newly created, ad hoc procedure to moot the named plaintiffs' claims supported application of a picking off exception).

223. See, e.g., P.J.E.S. v. Wolf, 502 F. Supp. 3d 492, 509 (D.D.C. 2020) (finding that the government's intent to frustrate litigation—evidenced by the transfer of any child named by counsel—rendered the plaintiffs' claims inherently transitory).

224. Intent-based inquiries in this context are also somewhat detached from litigation's practical reality. Defendants often have clear incentives to avoid class certification, making it unrealistic to treat strategic intent as an exceptional or rare occurrence.

225. See, e.g., Cruz v. Farquharson, 252 F.3d 530, 535 (1st Cir. 2001) (finding insufficient evidence that the defendant engaged in a pattern or practice aimed at avoiding judicial review).

But the argument for reform extends beyond the need for doctrinal clarity. As the next section demonstrates, the strategic mootness gap undermines several fundamental procedural values that class actions are designed to serve.

D. *Consequences*

The strategic mootness gap presents a significant incongruence within mootness law. Class action mootness doctrine explicitly addresses inherent mootness for precertification class actions but is silent on precertification strategic mootness. Thus, a plaintiff whose individual claim is mooted "naturally" may continue pursuing class certification (under the inherently transitory exception), but one whose individual claim is deliberately mooted by the defendant's actions is left with no clear path to pursue class certification. This distinction lacks a principled rationale.

Beyond doctrinal inconsistency, the strategic mootness gap enables the kind of procedural gamesmanship[226] that courts have long sought to prevent. Consider the voluntary cessation exception: Courts have long recognized that when a defendant voluntarily stops challenged conduct, the case may still proceed when there is a risk the conduct will recur.[227] Strategic mootness in the precertification context poses a similar yet often more acute problem. In many cases, the concern is not merely that a defendant *might* repeat the challenged conduct in the future. Instead, the conduct is ongoing, affecting others in the proposed class. By resolving the named plaintiff's claim while continuing the disputed practice, the defendant can evade judicial review not just temporarily, but indefinitely.[228]

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226. The term "gamesmanship," though surprisingly undertheorized in legal scholarship, is often used to describe problematic (though not necessarily impermissible) litigation behavior. Here, this Article uses the term to refer to strategic behavior against which the legal system may have reason to guard itself—specifically, conduct that so undermines foundational values of the justice system that it threatens the legitimacy of legal outcomes. For an illuminating discussion of litigation gamesmanship in the civil context, including when and why it is tolerated or constrained, see generally Edith Beerdsen, Gamesmanship in Civil Litigation, 60 Ga. L. Rev. 1, 28–62 (2025) (surveying the use of the term "gamesmanship" by federal judges and proposing that courts use the concept "(1) as part of an analysis of a statute's intent or purpose; (2) as a canon of construction; and (3) as an implied mental-state requirement"); Edith Beerdsen, Strategy for Strategy's Sake, 103 N.C. L. Rev. 733, 735, 796–800 (2025) (arguing that "strategy functions as a procedural value in its own right"). For an equally insightful treatment of strategic behavior in the criminal context, see John D. King, Gamesmanship and Criminal Process, 58 Am. Crim. L. Rev. 47, 48–49 (2020) (defining gamesmanship as "a strategy designed for winning regardless of the factual and legal merits of the case").

227. See supra section II.A.

228. See Stewart v. Cheek & Zeehandelar, LLP, 252 F.R.D. 384, 386 (S.D. Ohio 2008) (explaining that by allowing defendants to pick off plaintiffs during the precertification stage, defendants can "essentially opt-out of Rule 23" and avoid liability for class-wide relief (internal quotation marks omitted) (quoting Schaake v. Risk Mgmt. Alternatives, Inc., 203 F.R.D. 108, 112 (S.D.N.Y. 2001))).

The strategic mootness gap also undermines several other fundamental procedural values:

Judicial economy. Class actions can promote judicial economy by consolidating many individual claims into a single proceeding, avoiding the inefficiency and expense of repetitive litigation. As the Supreme Court has emphasized, Rule 23 is "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions," and to prevent a "needless duplication of" actions.[229] Rather than forcing courts to adjudicate dozens or hundreds of nearly identical cases—each involving the same legal theories, factual patterns, and defendant conduct—class certification prevents "the multiplicity of activity" that burdens judicial resources.[230] This efficiency serves both private and public interests: Individual parties can avoid duplicative motion and discovery practice, while courts can resolve widespread disputes without the administrative burden of managing multiple cases.

The strategic mootness gap directly undermines these efficiencies. By allowing defendants to "pick off" lead plaintiffs, the gap forces other plaintiffs to bring separate individual actions, "frustrat[ing] the principal function of a class suit."[231] Each plaintiff must litigate the same issues previous plaintiffs have raised, generating the duplicative proceedings Rule 23 was meant to eliminate.

Deterrence. Class actions also serve a crucial deterrent function by imposing meaningful consequences for widespread misconduct. When defendants face potential liability to an entire class rather than isolated individual claims, the stakes become great enough to influence institutional behavior and discourage future violations.[232] This deterrent effect operates on two levels: specifically, by discouraging the defendant from repeating the harmful conduct, and generally, by signaling to other potential wrongdoers that systematic misconduct will trigger legal consequences.[233] Individual lawsuits, by contrast, often impose only minimal costs that defendants can easily absorb as a cost of doing business, particularly when the individual harm is small relative to the defendant's resources.[234]

The strategic mootness gap significantly weakens this deterrent function. By allowing defendants to extinguish class claims through individualized relief, it permits them to continue harmful conduct while incurring only the minimal cost of occasional individual remedies.

229. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550, 554 (1974).

230. Id. at 551.

231. Id.

232. Gilles & Friedman, supra note 27, at 105–07.

233. Brian T. Fitzpatrick, Civ. Just. Rsch. Initiative, Do Class Actions Deter Wrongdoing? 2–3 (2022), https://civiljusticeinitiative.org/wp-content/uploads/2023/10/Class_Actions_Deter_Wrongdoing.pdf [https://perma.cc/YX7B-4XT9].

234. Gilles & Friedman, supra note 27, at 105–07.

Defendants can essentially treat individual payouts as a licensing fee for ongoing misconduct, confident they can avoid the collective liability that gives class actions their deterrent force. This dynamic is particularly troubling when low-value, high-volume harms render individual litigation economically unfeasible while the aggregate harm is substantial. Without the threat of class-wide liability, defendants have little incentive to modify their behavior, undermining one of the key benefits of class actions.

The public interest. The strategic mootness gap also undermines the "public interest in having the legality of practices settled."[235] While "baseline" mootness doctrine reflects a narrow view of litigation as resolving disputes between individual litigants, mootness exceptions acknowledge that some cases implicate broader public values, including the need for legal clarity and systemic accountability.[236] Class actions similarly embrace this public dimension of adjudication.[237] They are designed not just to redress individual harms, but to confront systemic misconduct, promote institutional accountability, and clarify the law in ways that benefit the public at large.

The strategic mootness gap allows defendants to circumvent this public function. By avoiding class certification through targeted relief, defendants can prevent systemic legal questions from reaching resolution, limiting adjudication to its dispute-settling function and sidelining its broader role in clarifying the law. This tactic not only deprives the public of judicial guidance on important issues but also allows potentially unlawful practices to continue unchallenged. Hence the gap undermines the very public values that both mootness exceptions and the class action device are designed to protect.

Access to justice. Class actions also serve a vital access to justice function by enabling individuals with limited resources to challenge powerful defendants on more equal footing.[238] When a government or corporation inflicts a small harm on many people, individuals often do

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235. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (citing United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 309–10 (1897)).

236. Lee, supra note 51, at 628 ("[T]he baseline doctrines of standing and mootness are generally predicated on the dispute resolution model, whereas many of the exceptions reflect the public values vision . . . .").

237. See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291 (1976) (noting that injustices are growing increasingly systemic); Suzette M. Malveaux, The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today, 66 Kan. L. Rev. 325, 332 (2017) (examining the connection between class action litigation and the 1960s civil rights movement); Marcus, History of the Class Action, supra note 90, at 590 (identifying a public "regulatory conception" of Rule 23); see also Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 73–75 (7th ed. 2015) (describing the "law declaration function" of adjudication).

238. See Galanter, supra note 26, at 143.

not pursue litigation because the costs outweigh the potential recovery.[239] A damages class action makes litigation economically feasible by allowing individuals to aggregate their claims and spread costs.[240] Similarly, someone enduring discrimination may lack the resources to challenge systemic injustice.[241] But an injunctive civil-rights class action "recognize[s] the financial and political powerlessness" of individuals and enables them to join forces with others to seek meaningful redress.[242] The united front of a class exerts real pressure on defendants.[243]

The strategic mootness gap allows defendants to exploit individual plaintiffs before the playing field is leveled.[244] In the precertification stage, the named plaintiff faces the defendant alone, without the collective power of a certified class. The defendant, for its part, sees a small problem that could become a much bigger, costlier problem if not promptly addressed. Defendants therefore have a strong incentive to resolve individual claims early and eliminate the threat of a larger class action. In doing so, they leave intact the exact inequality that class actions were designed to remedy.

IV. ADDRESSING THE STRATEGIC MOOTNESS GAP

We are left with a variety of strategic mootness tactics and a mix of judicial approaches to the behavior. On one hand, lower courts have repeatedly demonstrated a desire to address strategic mootness and defendant gamesmanship in the context of proposed class actions. On the other hand, the Supreme Court has cast doubt on whether existing mootness exception doctrine can address the strategic mootness gap, and some justices seem to be encouraging the very conduct that the lower courts are trying to constrain. The result is a doctrinal patchwork that is fractured, inconsistent, and ripe for exploitation.

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239. Carroll, supra note 33, at 861 ("[B]y offering the potential for a larger overall recovery . . . , [Rule 23(b)(3)] can create an economic incentive to litigation where none existed before.").

240. Id.

241. See Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C. L. Rev. 211, 253 (1992) (describing how class actions, compared to individual suits, "provide a more level litigation playing field by permitting the sharing of legal resources and expenses").

242. Id.

243. Id. at 253–54 (explaining how class action can "strengthen individual plaintiffs" and provide "enormous settlement leverage" to them).

244. For broader discussion of how defendants strategically exploit procedural doctrines to disadvantage individual plaintiffs, see generally Helen Hershkoff & Luke Norris, The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline, 122 Mich. L. Rev. 1 (2023) (exploring ways that corporate parties strategically manipulate jurisdiction).

This Part proposes a solution by outlining a coherent picking off exception.[245] It addresses key criticisms surrounding the exception by delineating its boundaries and identifying its limitations.[246] This Part concludes with a series of cases and hypotheticals, illustrating how courts might approach the strategic mootness gap analysis.[247]

A. *Toward a Coherent Picking Off Exception*

This Article proposes a solution: a coherent doctrinal standard that courts can apply when a defendant provides individualized relief to a named plaintiff before class certification. A defendant can moot class claims through individualized relief only if it can show either (1) that similarly situated plaintiffs could reasonably be expected to reach class certification despite the defendant's conduct *or* (2) that the underlying violation has been remedied comprehensively, leaving no similarly situated individuals with live claims. This formulation of the rule draws from the picking off exception's neighboring exceptions (the inherently transitory and voluntary cessation exceptions) to form a coherent doctrine.

Why place the burden on the defendant? As with the voluntary cessation exception, the burden should rest on the defendant because it is the party whose actions are in question. When the "only conceivable basis for a finding of mootness" stems from the defendant's actions, the Court requires assurances *from the defendant* that it will not resume the challenged behavior after the case ends.[248] Courts have long expressed skepticism when a defendant continues to defend the validity of a challenged practice and would presumably be free to reinstate it if the case were dismissed.[249] In the context of a proposed class action, these concerns apply with equal or greater force.[250] Keeping the burden on the defendant deters improper gamesmanship, safeguards the time and resources plaintiffs invest in challenging allegedly unlawful practices, and serves the public interest by settling the legality of the defendant's practices.

The first inquiry—whether other individual plaintiffs could reasonably be expected to reach class certification despite the defendant's conduct—focuses on whether the defendant's actions materially impair the viability of class litigation. Put another way, the

245. See infra sections IV.A–.B.

246. See infra section IV.C.

247. See infra section IV.D.

248. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 188 (2000).

249. See, e.g., Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944) ("Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.").

250. See supra section III.D.

question is not whether the class could be certified, but whether the defendant's conduct systematically prevents any plaintiff from obtaining a certification decision. The test adapts the feasibility concern at the heart of the inherently transitory exception (i.e., whether any plaintiff can maintain a live claim long enough to reach class certification) but shifts the focus from the fleeting nature of claims to defendant-created barriers. Courts may consider, among other factors, the ease with which the defendant could eliminate individual claims,[251] the nature of the remedy provided,[252] and any patterns of similar conduct in other cases.[253] As developed further below,[254] this test turns in part on whether the defendant provides a remedy unilaterally or whether the plaintiff voluntarily accepts it. This approach aims to reconcile the parties' litigation interests with the procedural values that class actions are designed to protect.

The second inquiry borrows from the voluntary cessation doctrine complete relief prong. Even if a defendant's conduct threatens class formation, a case can be dismissed if the defendant has addressed the underlying violation for the putative class as a whole. The aim here is to distinguish between cases that are issue moot (and thus appropriately dismissed because no legal controversy remains) and personal stake moot (and thus should proceed because the underlying legal issue persists). Defendants might make this showing by pointing to structural reforms, permanent cessation of the challenged practice, or the provision of relief to all similarly situated individuals. Consider, for example, a lawsuit that prompts a defendant not only to remedy that plaintiff's harm but also to adopt broader reforms that address the violation for all similarly situated individuals. In that scenario, the relief reflects a genuine resolution—not a tactic to avoid class certification or insulate the underlying conduct from judicial review—and the class claims might properly be deemed moot.[255]

251. See, e.g., Weiss v. Regal Collections, 385 F.3d 337, 347, 349 (3d Cir. 2004) (focusing on unilateral mootness tactics), abrogated by Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981) (focusing on the "financial feasib[ility] [of] pay[ing] off successive named plaintiffs").

252. See, e.g., Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1291 (S.D. Cal. 2018) (seeking access to the asylum process at the U.S.–Mexico border).

253. See, e.g., S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069-PBS, 2016 WL 1441791, at *6 (D. Mass. Apr. 12, 2016) (noting pattern of pick-off attempts in TCPA cases), abrogated on other grounds by Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81 (1st Cir. 2021).

254. See infra section IV.C.1.

255. One critique of this inquiry is that it is the plaintiffs' burden (not the defendant's) to prove there are other similarly situated plaintiffs in the first place. But any concern about potential unfairness to the defendant is overstated. The comprehensive remedy inquiry should focus on cases where defendants claim to have implemented comprehensive, class-wide solutions—changes so sweeping that they purport to remedy the violation for everyone. In such cases, defendants are essentially conceding that a broad

While this proposal incorporates many of the objective factors lower courts already weigh in strategic mootness cases, it departs from existing approaches by offering both new language and a new framework for analysis. There are several reasons for providing a new exception. First, creating a separate picking off exception addresses courts' reluctance to apply existing doctrine to strategic mootness scenarios. Courts have struggled with strategic mootness cases precisely because they do not fit neatly within traditional mootness exceptions. A dedicated picking off exception decreases confusion and provides courts with a clear tool designed specifically for strategic mootness situations.

Second, this framework draws cleaner doctrinal boundaries than current "picking off" exceptions. For example, the Third Circuit's "acutely susceptible to mootness" language[256] blurs the line between strategic and inherent mootness, while the Sixth Circuit's approach has yet to operate independently of the inherently transitory exception,[257] thus suggesting the absence of a principled distinction between the two.

Third, this framework examines the structural consequences of defendant conduct rather than defendant intent. Intent is often opaque and difficult to prove. Even more, it is beside the point. Whether defendants act from pure or strategic motives—whether, for example, they seek to remedy a harm in good faith or to avoid litigation and class-wide exposure—the critical question is whether their conduct systematically prevents class formation. By shifting attention to that structural effect, this framework helps courts identify practices that threaten the broader procedural values class actions are meant to protect.

B. *Alternative Rules-Based Solutions*

Another possible question is why pursue a doctrinal fix rather than an amendment to the Federal Rules. The idea is not without precedent. At its 2016 meeting, the Advisory Committee on Civil Rules—

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class of affected individuals existed, making it appropriate to evaluate at the mootness stage whether their remedial actions truly addressed the class-wide harm. If parties are genuinely disputing the precise contours of a potential class, those questions should be reserved for class certification proceedings, not resolved through mootness dismissal. See infra section IV.D.1 (applying proposal to example).

256. *Weiss*, 385 F.3d at 347.

257. See, e.g., Unan v. Lyon, 853 F.3d 279, 285 (6th Cir. 2017) ("The plaintiffs argue that two such exceptions apply in this case, namely, the 'picking off' exception and the 'inherently transitory' exception."); Wilson v. Gordon, 822 F.3d 934, 947 (6th Cir. 2016) (concluding that the inherently transitory exception to mootness applies where the duration of a plaintiff's claim is tenuous and the defendant is able to quickly resolve the injury after litigation commences but before a district court can reasonably rule on a class certification motion).

specifically, the Rule 23 Subcommittee—considered several amendments aimed at addressing the pick-off problem.[258] These included:

- amending Rule 68 to exclude its application in class or derivative actions;[259]
- restoring part of pre-2003 Rule 23(e) and requiring court approval for settlements not only in certified but putative class actions;[260]
- creating a "window of opportunity" for plaintiffs' counsel to "recruit a substitute class representative" if the original becomes inadequate; and[261]
- the "Cooper Sketch," offered by Professor Edward Cooper, which would limit dismissals based on tenders of relief to cases where class certification had already been denied.[262]

Each proposal reflects the complexity of addressing the pick-off problem, and each would likely curb some forms of strategic mootness. But they also face limitations. Amending Rule 68, while helpful, would leave untouched the wide array of non-Rule 68 pick-off tactics—including those outlined in Justice Alito's *Campbell-Ewald* dissent.[263] Expanding Rule 23(e) might introduce useful judicial oversight. But without more specific standards, the review risks becoming a perfunctory exercise, especially if courts are burdened with reviewing even relatively uncontroversial and unopposed precertification settlements.[264]

The "recruit a substitute" proposal has some appeal. Experienced class action attorneys often have networks and relationships that help them identify potential representatives. And solicitation rules, which limit class counsel's ability to "recruit" new class representatives,[265] are not insurmountable barriers for resourceful counsel.[266] But this solution

258. Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules (Feb. 5, 2016), *in* Advisory Committee Agenda Book, supra note 186, at 127–28.

259. Id. at 126.

260. Id. at 121–22.

261. Id. at 123–25.

262. Id. at 119–20.

263. Id. at 126.

264. Cf. Civil Rules Advisory Committee Draft Minutes (Nov. 5, 2015), *in* Advisory Committee Agenda Book, supra note 186, at 47–48 (discussing concern that establishing a "laundry list" of factors for evaluating precertification settlements would devolve into perfunctory "check-list" compliance without meaningful case-by-case analysis).

265. See 6 Newberg & Rubenstein, Class Actions, supra note 95, § 19:6 ("The primary concern arising from communications between putative class counsel and absent class members precertification is one of solicitation."). In contrast, defense counsel may approach and enter into settlements with individual potential class members prior to class certification. Id. § 19:7.

266. See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for

faces several challenges. For one, it's reactive rather than proactive, addressing strategic mootness only after defendants have already succeeded in eliminating the original representative. It also assumes, as one court put it, "an absurd situation in which plaintiffs' attorneys [have] an endless supply of willing class representatives to file complaints identical to the class action complaints that would be dismissed as defendants buy off named representatives one by one."[267] This is especially the case in situations involving vulnerable plaintiffs, who may be reluctant to come forward.[268] And even when substitute plaintiffs can be found, the process allows defendants to systematically drain resources and discourage future litigation.[269]

The Cooper Sketch offers perhaps the most tailored response to the pick-off problem: It prohibits defendants from using "tender[s]" to terminate a case until the court has ruled on class certification.[270] This proposal directly responds to *Campbell-Ewald* (and the dissent), adopting the "tender" terminology that emerged as significant in some of the justices' analyses.[271] That said, its framing appears tailored to that narrow context. As written, it does not clearly extend to strategic mootness tactics involving nonmonetary forms of relief, which fall outside traditional notions of "tender."[272]

In these ways, a doctrinal solution may offer the adaptability that rule-based reforms sometimes lack. Rule-based solutions risk being both over-inclusive (capturing legitimate dispute resolution) and under-inclusive (missing novel approaches that defendants will inevitably develop).[273] Doctrine, by contrast, may better enable courts to respond to

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Reform, 58 U. Chi. L. Rev. 1, 5 (1991) (noting that the ethics rules governing class counsel "are routinely circumvented with only the thinnest veneer of compliance").

267. Jancik v. Cavalry Portfolio Servs., LLC, No. 06-3104, 2007 WL 1994026, at *4 (D. Minn. July 3, 2007).

268. See Strict Scrutiny, SHOCKING DECISION: Supreme Court Clears the Way for More Trump Lawlessness (YouTube, June 27, 2025), https://www.youtube.com/watch?v=bvIauDu5vx4 (on file with the *Columbia Law Review*) (discussing how certain individuals—such as undocumented people—may face legal risks or other barriers to serving as class representatives, thus limiting the availability of class actions in some contexts).

269. See Macey & Miller, supra note 266, at 86 ("Everyone understands that attorneys support the litigation, and that if the case is unsuccessful the attorney will not ask for reimbursement of costs from the representative plaintiff.").

270. Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules (Feb. 5, 2016), *in* Advisory Committee Agenda Book, supra note 186, at 119–20.

271. Id. at 120; see also Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 169–70 (2016) (Thomas, J., concurring in the judgment) (advocating that the Court rest its decision on the concept of "tender").

272. Advisory Committee Agenda Book, supra note 186, at 119 (noting that tender "must be made on terms that ensure actual payment").

273. For example, had the proposed Rule 68 amendment passed in the 1980s, it would not have addressed the full scope of picking-off tactics seen today, which promptly moved past Rule 68 after *Campbell-Ewald.* See supra section III.A.2.

evolving pick-off strategies while remaining attentive to the structural dynamics that make strategic mootness problematic. Indeed, courts are already working to adapt existing mootness principles across a range of procedural and substantive settings. A well-defined doctrinal framework can channel that effort, offering clear guidance without sacrificing the responsiveness needed to address fact-specific or novel strategies.

Importantly, doctrinal solutions can operate alongside rule-based reforms rather than displacing them. A clear doctrinal standard can address the problem in the near term and complement future reform efforts, ensuring that both courts and rulemakers approach strategic mootness with a fuller understanding of its practical stakes.

C. *The Boundaries of the Picking Off Exception*

What are the boundaries of the picking off exception? Lower courts that have recognized any version of this exception have struggled to define its limits.[274] This section draws those boundaries by addressing key critiques of the proposed picking off exception.

1. *Settlement incentives.* — One possible critique of the picking off exception is that it might disincentivize defendants from promptly settling cases with plaintiffs. If defendants could find themselves litigating a class action, what would motivate them to offer named plaintiffs a settlement?

To balance the litigants' interests and encourage good-faith settlement, this Article's proposed test treats unilateral and bilateral relief differently. Unilateral relief—where defendants impose remedies without plaintiff consent—typically cannot satisfy the first inquiry (i.e., that similarly situated plaintiffs could still reach class certification). When defendants moot claims unilaterally, it is unreasonable to expect other plaintiffs to reach class certification before encountering similar tactics.[275] Defendants could simply repeat the unilateral process with any future potential class representative. Thus, unless the defendant can show the underlying legal violation has been comprehensively resolved for the entire putative class,[276] unilateral mooting should not render the case moot.[277]

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274. See supra section III.C.

275. See, e.g., Weiss v. Regal Collections, 385 F.3d 337, 347, 349 (3d Cir. 2004) (focusing on unilateral mootness tactics), abrogated by *Campbell-Ewald*, 577 U.S. at 156; see also Wilson v. Gordon, 822 F.3d 934, 943 n.2 (6th Cir. 2016) (noting that the impact of unilateral settlements on mootness is "an area of considerable complexity that has divided our sister circuits").

276. See infra section IV.D.1 (applying proposal to example).

277. The notion that a defendant's unilateral remedy should not moot a case has garnered support in recent years. See, e.g., MacGuidwin, supra note 37, at 645 (calling to "eliminate the mootness doctrine entirely" in unilateral mootness cases); Nielsen, supra note 38, at 800–01 (arguing similarly in the prisoner litigation context). Moreover, *A.A.R.P. v. Trump*—the Supreme Court's recent decision granting preliminary injunctive

By contrast, bilateral resolutions—where plaintiffs voluntarily accept the offered relief—warrant different treatment. Courts that have addressed bilateral "pick-off" cases usually have held that a named plaintiff's acceptance of relief bars invocation of a mootness exception.[278] As one judge explained, "Where a plaintiff voluntarily accepts an offer to be made whole on all individual claims, the concerns about defendants exercising unilateral power to 'pick off' named class members is not implicated."[279] This reasoning aligns with the proposed test's approach. Under the picking off exception proposed in this Article, a plaintiff's voluntary acceptance of an individual remedy is prima facie evidence that other plaintiffs could reach class certification. The logic is straightforward: If future plaintiffs can decline similar offers and continue to pursue class certification, then the defendant's conduct is not systematically preventing class formation.

Plaintiffs can rebut the presumption of mootness caused by bilateral resolution in two ways. For one, they can show that their "voluntary" acceptance of relief did not reflect genuine choice and in fact was compelled or functionally unavoidable. For example, if a plaintiff lacks a viable alternative to accepting relief, it may be unrealistic to expect future plaintiffs to resist similar offers.[280] Or if defendants routinely secure early acceptances with little resistance, that pattern may signal that future named plaintiffs will be functionally unable to reach class certification.[281] Alternatively, a plaintiff could show that the settlement has created a structural barrier that prevents future class formation. Consider, for

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relief to members of a not-yet-certified class—was in many ways a unilateral action case. 145 S. Ct. 1364, 1369–70 (2025) (involving the government's threat to unilaterally remove putative class members prior to class certification).

278. See, e.g., Moreland v. Prudential Ins. Co., No. 20-cv-04336-RS, 2023 WL 6450421, at *4 (N.D. Cal. Sep. 29, 2023); see also McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019) (holding that a plaintiff who plans to accept individual relief cannot preserve class claims by filing a placeholder class certification motion). One wrinkle is that some courts have found that once a putative class representative has moved for class certification, they may have a continuing individual interest in an incentive award or shifting a portion of fees and expenses incurred as the purported class representative to class members. Compare Ruppert v. Principal Life Ins. Co., 705 F.3d 839, 844 (8th Cir. 2013) (finding that voluntary settlement moots the case, including proposed class claims), and Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88, 100 (4th Cir. 2011) (same), with Narouz v. Charter Commc'ns, LLC, 591 F.3d 1261, 1264–65 (9th Cir. 2010) (finding that a plaintiff has a continued interest in incentive award); Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1043–44 (7th Cir. 2007) (finding that "acceptance of the offer did not resolve the dispute between the unnamed class members and the defendant and so did not render the case moot"); Richards v. Delta Air Lines, Inc., 453 F.3d 525, 528–29 (D.C. Cir. 2006) (finding that a plaintiff has a continued interest in shifting fees to class members).

279. *Moreland*, 2023 WL 6450421, at *4.

280. See infra section IV.D.3 (highlighting a case with similar pressures toward settlement).

281. See infra section IV.D.2 (exploring an example of routine settlements making certification difficult).

example, a defendant who offers relief just before the statute of limitations runs, therefore leaving no time for another plaintiff to step in (and thus effectively ensuring that no one can ever reach class certification).[282] When bilateral settlements involve compelled acceptance, systematic targeting, or other structural barriers, they create risks similar to unilateral cases.

To be clear, bilateral resolution creates a presumption that the case is moot. In many instances, such agreements will not implicate the structural risks that justify a picking off exception. But courts should view with skepticism those cases marked by circumstances suggesting that class formation remains functionally unattainable. The point is not to unsettle bona fide settlement practices, but to prevent systemic evasion of accountability masked as consensual resolution. This framework, though imperfect, seeks to preserve settlement incentives for genuine dispute resolution while guarding against strategic behavior that undermines the integrity of class litigation.

2. *Motion timing.* — Another key question about the picking off exception concerns timing: Must plaintiffs formally move for class certification before the exception applies, or can it apply as soon as a proposed class action complaint is filed?

Lower courts have long divided on this issue. One approach requires a class certification motion to be pending at the time of mootness for the court to apply the exception. Courts in this camp—particularly the Seventh Circuit[283]—emphasize that leading Supreme Court class action decisions (*Sosna*, *Gerstein*, *Geraghty*, and *Roper*) all involved cases where certification motions were either pending or already decided.[284] A second approach focuses more on whether plaintiffs have had a fair chance to seek class certification.[285] This analysis, grounded in language from *Campbell-Ewald v.*

282. See China Agritech v. Resh, 138 S. Ct. 1800, 1804 (2018) (holding that while "*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or . . . if the class fails," it "does not permit the maintenance of a follow-on class action past expiration of the statute of limitations").

283. See Damasco v. Clearwire Corp., 662 F.3d 891, 896–97 (7th Cir. 2011), overruled by Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015); see also Adkisson v. Eagleson, No. 22-C-63, 2023 WL 5580735, at *6 (N.D. Ill. Aug. 29, 2023) (recognizing that *Chapman*'s partial overruling of *Damasco* "left intact" the requirement that a motion for class certification be pending to defeat defendants' mootness strategies).

284. See, e.g., U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 393 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 329 (1980); Gerstein v. Pugh, 420 U.S. 103, 111 n.11 (1975); Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975) (questioning what should happen in "cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court *can reasonably be expected to rule on a certification motion*" (emphasis added)).

285. See, e.g., Richardson v. Bledsoe, 829 F.3d 273, 286 (3d Cir. 2016) ("[T]his mootness exception should apply only in situations where the mooting of the individual claim 'occurred at so early a point in litigation that the named plaintiff could not have been expected to file a class certification motion.'" (quoting Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir. 2011))); Stein v. Buccaneers Ltd.

Gomez,[286] seeks to balance two competing interests: protecting plaintiffs who have no realistic chance to move for certification before their claims are mooted, while guarding against plaintiffs who unduly delay seeking certification.

This Article's proposed picking off exception does not require a pending motion for class certification. Conditioning the exception on such a motion would leave the entire pre-motion period unprotected. As courts have pushed certification further into the litigation timeline (often near trial and after substantial discovery),[287] the pre-certification stage has become an especially vulnerable period—one in which strategic mooting could thrive. Plaintiffs concerned about being picked off usually cannot feasibly move for class certification early in a lawsuit. And when defendants can easily eliminate claims before plaintiffs can realistically seek certification, few cases will ever reach that stage.[288] While courts could require placeholder certification motions,[289] such barebones motions often create judicial waste and administrative inefficiencies.[290]

P'ship, 772 F.3d 698, 707 (11th Cir. 2014) ("What matters is that the named plaintiff acts diligently to pursue the class claims."); *Lucero*, 639 F.3d at 1249 ("[W]e conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint . . . .").

286. See Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 165 (2016) ("While a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." (citation omitted) (citing Sosna v. Iowa, 419 U.S. 393, 399 (1975))).

287. See Cabraser, supra note 23, at 762 (noting that the class certification process has become more contested following the decision in *Wal-Mart Stores v. Dukes*); Gerson H. Smoger & David M. Arbogast, The Post-*Dukes* "Rigorous Analysis" and Pre-Certification, 82 Geo. Wash. L. Rev. Arguendo 104, 110 (2014), https://www.gwlr.org/smoger_arbogast/ [https://perma.cc/24EY-92RU] ("[A]lthough prior to *Dukes* commonality was considered the easiest requirement to satisfy under Rule 23(a), following *Dukes* plaintiffs seeking to certify a class have begun to find it the most contested."(footnote omitted)); Jenny R. Yang, The Impact of *Wal-Mart v. Dukes*, ALI-CLE Course Materials (2012) ("Plaintiffs are also relying on more tailored statistics, and often increased discovery, to satisfy the new standards the Court set forth."); see also Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., Managing Class Action Litigation: A Pocket Guide for Judges 6 (2005) ("As experience with Rule 23 evolved, however, judges began to rule on motions to dismiss and even motions for summary judgment before turning to class certification.").

288. See Jancik v. Cavalry Portfolio Servs., LLC, No. 06-3104, 2007 WL 1994026, at *4 (D. Minn. July 3, 2007) (finding that allowing defendants to moot a case, "even before scheduling orders are issued and plaintiffs have the applicable motion deadlines in front of them, would be bad policy and would effectively eviscerate the effectiveness of class actions").

289. See, e.g., Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011) (finding the pick-off exception unnecessary because a "simple solution to the buy-off problem" is for class plaintiffs "to move to certify their class at the same time that they file their complaint"); see also Adkisson v. Eagleson, No. 22-C-63, 2023 WL 5580735, at *4 (N.D. Ill. Aug. 29, 2023) (noting that *Damasco*'s placeholder motion suggestion has not technically been overruled, and is an appropriate suggestion in cases facing a similar buy-off concern).

290. See Fauley v. Drug Depot, Inc., No. 15-C-10735, 2016 WL 11730950, at *2 (N.D. Ill. Aug. 16, 2016) (discouraging placeholder motions, "as they come with administrative

Should courts nevertheless inquire into whether plaintiffs have unduly delayed seeking certification? Not necessarily. The question of delay is better understood as a matter of case management, not mootness doctrine. Courts have ample tools to ensure diligent prosecution: scheduling orders, discovery timelines, certification deadlines, and (when necessary) dismissal for failure to prosecute.[291] If a plaintiff is slow-walking class litigation, the proper remedy lies in active judicial management, not the stripping away of mootness protections.

3. *Attorney power.* — A third question concerns the role of plaintiffs' counsel in strategic mootness cases. Specifically, doesn't allowing attorneys to continue pursuing class claims after the named plaintiff loses personal stake give counsel too much power?

Concerns about "headless class actions," or class lawsuits without clients, are not unique to the picking off exception.[292] Scholars have long worried that class counsel may have greater interests in outcomes than their clients,[293] with some judges criticizing mootness doctrine as "a concession to the notion that a class suit belongs to no one so much as the plaintiff's lawyer."[294]

But the picking off exception actually preserves more oversight than other contexts. Both precertification mootness exceptions—the inherently transitory exception and the proposed picking off exception—offer a safeguard other contexts do not: Rule 23(a)(4). That requirement, which asks whether the named plaintiff and counsel

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costs and create an unhelpful drag on efficiency and judicial economy"); Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 880 F. Supp. 2d 689, 695 (D. Md. 2012) ("[O]ne policy concern regarding pick-offs is that they create a perverse incentive to prematurely file motions for conditional class certification.").

291. See William W. Schwarzer & Alan Hirsch, The Elements of Case Management 1–2 (3d ed. 2019).

292. Comment, The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake, 39 Md. L. Rev. 121, 150, 170 (1979); see also Girardeau A. Spann, Simple Justice, 73 Geo. L.J. 1041, 1053–54 (1984) ("The headless class actions demonstrate that technical niceties about mootness need not be dispositive.").

293. See, e.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 671–72 (1986) (discussing "the conflicts that arise between the interests of [plaintiff's] attorneys and their clients"); Susan P. Koniak & George M. Cohen, In Hell There Will Be Lawyers Without Clients or Law, 30 Hofstra L. Rev. 129, 132 (2001) (discussing ethical problems in class action representation); see also William P. Barrett, I Have No Clients, Forbes Mag., Oct. 11, 1993, at 52 ("I have the greatest practice of law in the world . . . . I have no clients." (internal quotation marks omitted) (quoting William Lerach)).

294. Satterwhite v. City of Greenville, 557 F.2d 414, 426 (5th Cir. 1977) (Gee, J., dissenting), vacated by Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978) (en banc); see also Elizabeth A. Grimes, Note, *Satterwhite v. City of Greenville* and Breathing New Life Into the Headless Title VII Class Action, 32 Stan. L. Rev. 743, 744 (1980).

"fairly and adequately protect the interests of the class,"[295] operates as a natural moment of heightened scrutiny in class litigation, when courts assess whether the proposed representatives are equipped to represent the class.[296] In short, the concern about "headless" class actions is properly addressed at the class certification stage, not through mootness doctrine.[297]

The picking off exception can ultimately promote better ethical alignment between counsel and their clients. Before certification, counsel technically owes duties both to the named plaintiff and to the prospective class,[298] though the precise contours of the latter obligation remain unsettled.[299] When defendants extend early settlement offers, counsel may face conflicting responsibilities: a duty to advocate for the named plaintiff's immediate interests, and a broader obligation to safeguard the class's potential claims. The picking off exception reduces this ethical tension by preserving the possibility of class-wide relief, enabling counsel to advise their clients based on genuine best interests rather than being forced to choose between competing loyalties.

D. *Application to Examples*

This section applies the picking off exception described above to concrete examples with the goal of illustrating how courts might approach and analyze different mootness fact patterns.

1. *Unilateral Remedies Across Contexts.* — Unilateral remedies, in which defendants provide relief without plaintiff consent, present the clearest case for applying the picking off exception. Consider the case mentioned in the introduction, a First Circuit action regarding alleged discriminatory delays in a federal immigration office's processing of visa applications.[300] Four visa applicants and their spouses endured a twenty-two-month wait without receiving a decision on their visa applications.[301] Within ten weeks of their bringing a putative class action challenging the

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295. Fed. R. Civ. P. 23(a)(4).

296. While a class representative's adequacy can be challenged after the Rule 23 analysis, such arguments run against the grain of the court's prior determination. See, e.g., Cohen v. Brown Univ., 16 F.4th 935, 948 (1st Cir. 2021) (finding class representatives still adequate in a Title IX university athletic program case despite the passage of twenty years and their no longer being eligible to compete).

297. See Sosna v. Iowa, 419 U.S. 393, 403 (1975) (distinguishing the question of whether a plaintiff "is entitled to litigate the interests of the class she seeks to represent" from the question of whether she can "fairly and adequately protect the interests of the class").

298. See 6 Newberg & Rubenstein, Class Actions, supra note 95, § 19:2 ("[T]here is little doubt that an attorney pursuing a class suit has some duty to the prospective class and generally must act in the class's best interests.").

299. See Landsman-Roos, supra note 200, at 820 (discussing the questions around the precertification fiduciary duties an attorney has to class members).

300. See Cruz v. Farquharson, 252 F.3d 530, 532 (1st Cir. 2001).

301. Id. at 532 & n.1.

delays, the government identified, processed, and granted each named plaintiff's application.[302] Then the government moved to dismiss on mootness grounds, and the district court granted the motion.[303] The First Circuit affirmed, holding no mootness exception applied.[304]

Under the proposed test, the government would face a heavy burden to justify dismissal. It could try to show that similarly situated plaintiffs could reasonably be expected to reach class certification despite its conduct. The easiest way to make this showing would be to demonstrate that the plaintiffs voluntarily agreed to settle their claims, suggesting that future plaintiffs could instead choose to reject such relief and proceed to certification.[305] But when a defendant wields unilateral control over a plaintiff's claim—as was the case here, when the government resolved the visa applications on its own initiative—this showing becomes more difficult. The ability to eliminate individual claims without consent poses a structural barrier to certification, effectively foreclosing the class mechanism.

The government therefore would need to rely on the second prong: proving the underlying violation has been comprehensively remedied for the putative class, so no similarly situated individuals remain with live claims. The government could try to show that systemic reforms have addressed the underlying delays for all visa applicants, not just the named plaintiffs. But crucially, the burden to make that showing should rest with the defendant. Only the defendant itself has access to the internal data, procedures, and timelines necessary to show comprehensive resolution.

The First Circuit's analysis demonstrates the problems with current approaches that place the burden on the plaintiff. The court said the plaintiffs needed to show the defendants were engaged in "a scurrilous pattern and practice of thwarting judicial review" by speedily adjudicating the visa applications of people who brought lawsuits.[306] "[T]he plaintiffs' experience, in and of itself," the court added, was not enough to make that showing.[307] This standard sets the bar too high. Plaintiffs often lack access to the internal government data and decisionmaking processes needed to prove systemic conduct. And even absent "scurrilous" behavior, the government's unilateral control over visa adjudication creates a risk that future class claims will be mooted before they reach certification. The concern is structural: When defendants wholly control both the harm and the fix, the class mechanism can easily be short-circuited, regardless of intent.

302. Id.

303. Id. at 532–33.

304. Id. at 535–36.

305. See supra section IV.C.1.

306. *Cruz*, 252 F.3d at 535.

307. Id.

Consider a different scenario from a Medicaid case in the Sixth Circuit. Certain Medicaid recipients in Michigan were mistakenly assigned Emergency Services Only Medicaid instead of comprehensive benefits due to a system-wide computer error.[308] Two days after the plaintiffs filed a class action complaint and motion for class certification, Michigan officials fixed the named plaintiffs' assignments.[309] Over the next year, the state worked to permanently correct the computer error.[310] Along the way, it manually reprocessed over sixteen thousand cases as part of its remediation efforts.[311]

Under the proposed picking off exception, Michigan would likely fail the first part of the test for the same reasons as in the visa case. Since Michigan can provide unilateral relief—by processing the plaintiffs' applications—it cannot reasonably be expected that any future individual plaintiff's claim can survive through certification.

The analysis would then turn to the second prong: whether Michigan had comprehensively remedied the underlying violation. On this point, the record is mixed. Michigan offered evidence of a system-wide fix and extensive manual reprocessing.[312] If these efforts successfully resolved the root cause of the error and ensured continued accuracy in future Medicaid assignments, that might suffice to show that no class members remained with live claims—making dismissal appropriate. But if those efforts fell short, and significant numbers of affected individuals continued to experience erroneous coverage, dismissal would not be warranted.

It's worth noting that the Sixth Circuit panel was divided on this issue. The majority found that Michigan's systemic fix had not fully resolved the problem, citing post-fix data showing ongoing errors and affidavits documenting persistent administrative issues.[313] The dissenting judge disagreed, emphasizing that plaintiffs had not identified any putative class members with live claims and that occasional errors did not render the controversy ongoing.[314] Under the proposed framework, this would be a determination for the court to resolve. Though fact-intensive, such inquiries are common in mootness doctrine—for example, in evaluating whether relief is complete and irrevocable under the voluntary cessation exception—and are necessary to prevent premature dismissal of viable class claims.[315]

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308. Unan v. Lyon, 853 F.3d 279, 282 (6th Cir. 2017).

309. Id. at 284.

310. Id.

311. Id.

312. Id.

313. Id. at 287.

314. Id. at 294 (Sutton, J., dissenting).

315. See, e.g., John F. Muller, Comment, *Olmstead v. L.C.* and the Voluntary Cessation Doctrine: Toward a More Holistic Analysis of the "Effectively Working Plan", 118 Yale L.J.

2. *Bilateral remedies and patterns of settlement.* — Bilateral remedies, in which plaintiffs voluntarily accept defendants' offers, require more nuanced analysis under the proposed picking off exception. While voluntary acceptance provides prima facie evidence that future plaintiffs can reach certification, patterns of settlement can override this inference and reveal systemic obstacles to class treatment.

Consider a modified version of a case from the U.S. District Court for the District of Massachusetts.[316] After a plaintiff received a number of junk faxes in violation of the Telephone Consumer Protection Act (TCPA), it brought a proposed class action against the defendant.[317] The TCPA has a statutory maximum penalty of $1,500 per unsolicited fax.[318] So shortly after the complaint was filed, the defendant tendered a bank check to the plaintiff covering treble damages and costs.[319] In response—and here is the modification—the plaintiff accepted the offer.[320]

Applying the proposed strategic mootness exception, the defendant could point to the plaintiff's voluntary acceptance of compensation as proof that future plaintiffs could reach certification. Future potential class representatives could simply reject such offers and proceed to class certification. Moreover, by voluntarily settling, plaintiffs forfeit the right to seek class certification.[321] Under this view, the parties' bilateral settlement moots the class claims.

This analysis could change, though, based on the defendant's conduct across cases or claimants. If the defendant has repeatedly made similar settlements to eliminate potential class representatives—and those settlements have succeeded—class treatment might still be appropriate.[322] The defendant's repeated success may show that plaintiffs

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1013, 1020 n.46 (2009) (noting the "fact-intensive" character of voluntary cessation decisions).

316. S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069-PBS, 2016 WL 1441791 (D. Mass. Apr. 12, 2016), abrogated by Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81 (1st Cir. 2021).

317. Id. at *1.

318. Id.

319. Id.

320. In *South Orange Chiropractic Center, LLC v. Cayan LLC*, the plaintiff did not actually accept the offer. Id. The defendant—seeking to take advantage of a loophole in *Campbell-Ewald*—offered to deposit a check with the court in satisfaction of all of the plaintiff's individual claims (and more). Id. The district court held that even without the plaintiff's express acceptance of the payment, this action mooted the plaintiff's claim. Id. at *5. This holding was later abrogated in part by the First Circuit. See *Bais Yaakov of Spring Valley*, 12 F.4th at 94–95 (holding that the tender of a check does not moot a plaintiff's claims if the plaintiff did not actually or constructively receive the money).

321. See Moreland v. Prudential Ins. Co., No. 20-cv-04336-RS, 2023 WL 6450421, at *5 (N.D. Cal. Sep. 29, 2023); McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019).

322. See, e.g., Wilson v. Gordon, 822 F.3d 934, 959 (6th Cir. 2016) (Sutton, J., dissenting) (dissenting from the majority's conclusion that the case was not moot despite the state's commitment to provide remedy to named plaintiffs and one hundred others

face systemic pressure that makes rejection of similar offers unrealistic. And repeated use of such tactics suggests the defendant will keep deploying this strategy to avoid class treatment. Even if individual plaintiffs voluntarily accept compensation, the broader pattern may demonstrate systemic obstacles to class certification.

What if the pattern of settlements is not defendant-specific but industry-wide? Evidence of "a widespread whac-a-mole practice aimed at picking off a named plaintiff before class certification"[323] could complicate the picking off analysis, as it would suggest broader structural dynamics beyond a single defendant's behavior.

Under the picking off exception proposed in this Article, patterns of settlement within an industry can be considered in the analysis. While holding individual defendants responsible for industry-wide practices raises fairness concerns (and while defendant-specific conduct is significantly more probative), the systemic use of cheap settlements across an industry can raise routine obstacles to certification. If defendants across an industry can eliminate class actions through individualized payments, future plaintiffs cannot reasonably expect their claims to survive through certification regardless of which specific defendant they sue. Moreover, individual defendants operating within such an industry culture have little incentive to deviate from successful strategic practices, suggesting the conduct likely will continue. Permitting such widespread settlement tactics to short-circuit class litigation would undermine judicial efficiency and deterrence by enabling defendants to avoid accountability at scale.

This approach would not render the exception limitless or permit every settling plaintiff to continue pursuing class certification as a matter of right. The picking off exception would apply only where specific patterns of behavior demonstrate systemic obstacles to certification. In many litigation contexts, plaintiffs may voluntarily accept settlements without broader implications.

3. *Bilateral Remedies and "Too Good to Refuse" Offers.* — Consider, too, offers plaintiffs cannot realistically reject. When defendants offer essential or life-changing relief—such as access to critical benefits, immigration relief, or urgent medical care—voluntary acceptance is questionable. These "too good to refuse" offers show how bilateral remedies can function like unilateral relief despite the appearance of choice.

For example, in 2017, six asylum seekers brought a putative class action against Customs and Border Protection and Homeland Security

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through a bargained-for agreement); see also Unan v. Lyon, 853 F.3d 279, 286 (6th Cir. 2017) (finding that defendant mooted the named plaintiff's spouse's claim after discovering his potential class membership to "avoid litigation by selectively resolving the claims of any potential representatives").

323. *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *6.

officials, alleging illegal denial of access to the asylum process.[324] A mere two days later, the government agreed to process the named plaintiffs and their children and permit them to access the asylum process.[325] In the next weeks, most of the plaintiffs appeared at the border and received the requested relief.[326]

Applying the proposed picking off exception, the government could argue the plaintiffs voluntarily accepted relief, proving future plaintiffs could reach certification. Future asylum seekers could "simply" reject such offers and proceed to class certification. But this conclusion ignores the nature of the relief offered. Many requests for asylum are urgent by definition.[327] An offer of immediate processing provides asylum seekers with an option too good to refuse. They simply lack the luxury of declining or delaying the chance to access the asylum process.

The ease with which the government could eliminate any later plaintiff's claims—"as soon as the case is filed and long before a court could reasonably be expected to rule on a motion for class certification"[328]—diminishes any chance future plaintiffs could reach certification. When defendants control access to essential relief that plaintiffs cannot realistically reject, the bilateral nature of the remedy becomes largely illusory. Future potential class representatives facing similar desperate circumstances cannot expect to survive to certification when defendants possess both the power and the incentive to provide individual relief no rational person would decline.

This scenario highlights the power imbalances often at play in precertification class litigation. As Professor Fiss has argued, consent cannot be equated with justice when parties face stark disparities in bargaining power.[329] While some remedies may appear bilateral, they can function as de facto unilateral tools if vulnerable plaintiffs cannot afford to reject them. The picking off exception must account for these realities rather than treating all voluntary acceptance as genuine choice.

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Like any doctrinal innovation, the exception proposed in this Article would require further refinement. Contested questions might include: What distinguishes a truly voluntary settlement from one shaped by

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324. See, e.g., Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1291 (S.D. Cal. 2018).

325. Id. at 1304.

326. Id. at 1295.

327. See Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (codified at 8 U.S.C. § 1521 (2024)) ("The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . .").

328. *Al Otro Lado*, 327 F. Supp. 3d at 1304.

329. See Fiss, supra note 199, at 1076–78 (describing how "[t]he disparities in resources between the parties can influence the settlement").

overly coercive pressure? At what point do a defendant's actions constitute systematic interference with class certification? How should courts account for power disparities, timing constraints, and the nature of the relief offered?

While the discussion above has attempted to sketch some guiding principles and bright lines, there will inevitably be close cases. At times, the proposed exception may fail to preserve otherwise meritorious class actions. This points toward the potential value of supplementary Rules-based solutions. At other times, the exception might prove overinclusive and allow cases to proceed that would have been better off being resolved individually. Still, the alternative—permitting individualized relief to routinely end class actions—poses a deep threat to procedural fairness and systemic accountability.[330] Ultimately, confronting strategic mootness through doctrine is not about perfecting the class action mechanism, but about ensuring it remains a viable tool for collective justice.

CONCLUSION

This Article has aimed to expose the strategic mootness gap. It has highlighted patterns and inconsistencies in courts' treatment of the strategic mootness gap, analyzed reasons why the gap should be addressed, and offered a proposal in the form of a new exception to mootness. In sketching the specifics of this proposal, this Article has sought to illuminate the difficult questions courts face when considering whether and how to address strategic mootness in the proposed class action context.

The strategic mootness gap has broad implications for federal court theory and practice. First, it calls into question the integrity of the class action device. By allowing defendants to pick off named plaintiffs and avoid judicial review, the gap undermines the class action as a tool for collective redress and accountability. Second, the strategic mootness gap raises concerns about the judiciary's ability to adapt to evolving strategies employed by parties in litigation. As the burden on plaintiffs seeking class certification has increased, defendants have found ways to exploit gaps in existing procedural frameworks, allowing them to avoid class-wide judgment and accountability. This raises the question: As law inevitably evolves, should procedural safeguards adapt alongside it? Third, the strategic mootness gap highlights a tension in mootness theory between personal stake and private interest in a matter and the broader public interest in resolving systemic issues. Mootness exceptions in the putative

330. Cf. Brian T. Fitzpatrick, The End of Objector Blackmail?, 62 Vand. L. Rev. 1623, 1663–64 (2009) (arguing that preserving collective benefits for absent class members justifies restricting private settlements that would eliminate those benefits, even if the restriction occasionally captures legitimate individual settlements).

class context push mootness law to its limits, challenging purist notions of justiciability.

The picking off exception proposed in this Article is meant to safeguard the integrity of class action litigation by preventing defendants from undermining class claims through the mooting of individual plaintiffs' claims. Though it introduces new doctrinal language, the exception adapts familiar principles from existing mootness exceptions to achieve analytical consistency. While it draws some bright-line rules, it also maintains flexibility for courts to balance the litigants' competing interests based on case-specific circumstances.

Ultimately, the strategic mootness gap requires careful attention by courts and policymakers. This Article has analyzed current and potential practices around the strategic mootness gap to advance the conversation about how courts might balance procedural fairness, settlement incentives, and systemic accountability.

NOTES

CONFRONTING STATE-SANCTIONED REPRODUCTIVE ABUSE: THE PROMISE OF STATE CONSTITUTIONAL RIGHTS TO SAFETY POST-*DOBBS*

*Makayla Haussler**

Since the Supreme Court's 2022 decision in Dobbs v. Jackson Women's Health Organization*, the landscape of abortion access in the United States has been plagued by uncertainty and growing inequality across geographic, racial, and socioeconomic lines. As many states have passed new laws drastically restricting abortion access, reproductive rights litigators have increasingly turned to state courts and constitutions as vehicles for legal redress. The stories of individual patients who have suffered under these laws have been front and center in this new wave of advocacy, but the experiences of domestic violence survivors have been largely absent from the legal narrative. This Note makes the case for understanding domestic abuse as a reproductive justice issue that is exacerbated by post-*Dobbs *abortion restrictions. It argues that existing state constitutional law arguments rooted in privacy, equality, and autonomy fail to encapsulate the full scope of the harms suffered by survivors living under abortion restrictions and proposes bringing actions under state constitutional rights to safety to better address those harms. Using early gestational restrictions and parental involvement laws as case studies, this Note lays out a path for bringing such actions.*

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INTRODUCTION

When Evie found out she was pregnant, she was twenty-one and living out of her car in Florida after escaping a physically abusive relationship.[1] With help from an abortion fund, she drove twelve hours to Illinois for an abortion, where she discovered that she was twenty-four weeks pregnant, too far along for that clinic to perform the procedure.[2] Shocked, she returned to Florida, only to later fly back to Illinois for an abortion at a different clinic.[3]

Gabriella Gonzalez travelled from Texas to Colorado for an abortion in May 2023.[4] The morning after she returned, her ex-boyfriend shot her in the head, allegedly because he disagreed with her decision to

1. Opinion, This Is Post-*Roe* America, N.Y. Times (Oct. 17, 2024), https://www.nytimes.com/interactive/2024/10/17/opinion/dobbs-roe-abortion-stories.html [https://perma.cc/5KKX-NAMG].

2. Id. Evie's problem was not that abortion was illegal in Illinois at that gestational age, but rather that the clinic lacked the equipment and other resources necessary to perform an abortion that late in her pregnancy. Id.

3. Id.

4. Emily Olson, A Texas Woman Was Killed by Her Boyfriend After Getting an Abortion, Police Say, NPR (May 13, 2023), https://www.npr.org/2023/05/13/1176007305 [https://perma.cc/S9YZ-B4GP].

terminate her pregnancy.[5] At the time of Gabriella's murder, her ex-boyfriend was wanted by police for beating and strangling her two months earlier.[6]

Evie's and Gabriella's stories are just two of many from the years following the Supreme Court's 2022 decision in *Dobbs v. Jackson Women's Health Organization* that exemplify the myriad geographic, economic, and logistical struggles the decision has created for people who need an abortion.[7] Since *Dobbs*, thirteen states have completely banned abortion,[8] criminal prosecutions of pregnancy-related charges have reached an all-time high,[9] and abortion medication has come under attack.[10]

All these policies pose unique risks to domestic violence survivors. But threats to medication abortion, which accounted for 63% of all abortions in the United States in 2023, are especially destabilizing.[11] Abortion medication—typically a regimen of two drugs, mifepristone and misoprostol[12]—is now the primary way that people living in states with total abortion bans access abortion.[13] Adolescents in states with parental

5. Id.

6. Id.

7. See, e.g., New Abortion Laws Changed Their Lives. 8 Very Personal Stories, NPR (June 23, 2023), https://www.npr.org/sections/health-shots/2023/06/23/1183878942 [https://perma.cc/A4LY-FWKV] (detailing how *Dobbs* has affected women across the country, including one Louisiana woman who had to wait weeks to fly to a Northern state for an abortion).

8. After *Roe* Fell: U.S. Abortion Laws by State, Ctr. Reprod. Rts., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/3WU6-QFV3] (last updated Mar. 2026) [hereinafter Abortion Laws by State].

9. See Wendy A. Bach & Madalyn K. Wasilczuk, Pregnancy Just., Pregnancy as a Crime: A Preliminary Report on the First Year After *Dobbs* 2 (2024), https://www.pregnancyjusticeus.org/wp-content/uploads/2024/09/Pregnancy-as-a-Crime.pdf [https://perma.cc/AU89-KQB2] (finding that "[i]n the first year after *Dobbs*, at least 210 pregnant people faced criminal charges for conduct associated with pregnancy, pregnancy loss, or birth," the highest number in a single year since data has been collected on this subset of cases).

10. See Julie Rovner, Why Medication Abortion Is the Top Target for Anti-Abortion Groups in 2026, KFF Health News: HealthBent (Jan. 23, 2026), https://kffhealthnews.org/news/article/mifepristone-medication-abortion-pill-trump-fda/ [https://perma.cc/D72A-W9NE] (describing ongoing agitation against the FDA, which anti-abortion activists allege "is dragging its feet on a promised review of the abortion pill and the Biden administration's loosened requirements around its availability").

11. Press Release, Guttmacher Inst., Medication Abortions Accounted for 63% of All US Abortions in 2023, an Increase From 53% in 2020 (Mar. 19, 2024), https://www.guttmacher.org/news-release/2024/medication-abortions-accounted-63-all-us-abortions-2023-increase-53-2020 [https://perma.cc/7PQZ-9TTJ].

12. Medical Abortion, Clev. Clinic, https://my.clevelandclinic.org/health/treatments/21899-medical-abortion [https://perma.cc/47L8-VUK4] (last updated Jan. 16, 2024).

13. See Isaac Maddow-Zimet & Kimya Forouzan, Full-Year 2025 Estimates Show Overall Stability in Abortion Incidence, Decreased Travel and Increased Telehealth Provision, Guttmacher Inst. (Mar. 2026), https://www.guttmacher.org/report/full-year-

involvement laws and other abortion restrictions have accounted for the biggest increase in demand post-*Dobbs*.[14] Anti-abortion activists—and some conservative Supreme Court Justices—therefore view medication abortion as a way of circumventing abortion bans.[15]

After the Supreme Court held that an organization of anti-abortion physicians did not have standing to challenge the FDA's mifepristone regulations,[16] the attorneys general of Missouri, Kansas, and Idaho filed an amended complaint in the Northern District of Texas alleging that the regulations violate the FDA's "legal obligations to protect the health, safety, and welfare of women and girls."[17] As of May 2026, the litigation has been transferred to the U.S. District Court for the Eastern District of Missouri, and the DOJ has moved to stay or, alternatively, dismiss the proceedings while it conducts its own review of the mifepristone guidelines.[18] A similar lawsuit filed by Louisiana was fast-tracked to the Supreme Court after the Fifth Circuit issued a nationwide injunction against the FDA's telehealth regulations for mifepristone.[19] As of the time

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estimates-show-overall-stability-abortion-incidence-decreased-travel-increased-telehealth-provision [https://perma.cc/6CY6-DLFM] (noting that the "decline in travel out of state for care coincided with a large increase in telehealth provision . . . provided by clinicians residing in states with telehealth shield laws").

14. Dana M. Johnson, Jennifer E. Starling, Rebecca Gomperts, Adolescent and Young Adult Re quests for Medication Abortion Through Online Telemedicine, JAMA Health F., Feb. 2026, at 1, 4.

15. See Danco Laby's, LLC v. Louisiana, 146 S. Ct. 1192, 1193 (2026) (mem.) (Thomas, J., dissenting) (arguing that the manufacturers of mifepristone "are not entitled to a stay of an adverse court order based on lost profits from their criminal enterprise"); id. (Alito, J., dissenting) (describing the telehealth provision of mifepristone as "a scheme to undermine [the Court's] decision in *Dobbs*"); Holly Honderich, Supreme Court Rejects Challenge to Abortion Drug Mifepristone, BBC (June 13, 2024), https://www.bbc.com/news/articles/c2qq1wqw3w2o [https://perma.cc/UJ8J-XU4A] (stating that anti-abortion physicians brought a lawsuit challenging the telemedicine provision of mifepristone because it has "acted as an effective workaround to the bans, with thousands of pills flowing into restrictive states through the mail").

16. See Food & Drug Admin. v. All. for Hippocratic Med., 144 S. Ct. 1540, 1565 (2024) (concluding that the plaintiffs could not "demonstrate that FDA's relaxed regulatory requirements likely would cause them to suffer an injury in fact").

17. Amended Complaint ¶ 50, Missouri v. U.S. Food & Drug Admin., No. 2:22-cv-00223-Z (N.D. Tex. filed Oct. 11, 2024) (on file with the *Columbia Law Review*).

18. See Missouri v. U.S. Food & Drug Admin., No. 4:25-cv-01580-CMS (E.D. Mo. docketed Oct. 23, 2025); see also Federal Defendants' Motion to Stay or, Alternatively, Dismiss, *Missouri*, No. 4:25-cv-01580-CMS (E.D. Mo. filed Mar. 6, 2026), https://litigationtracker.law.georgetown.edu/wp-content/uploads/2025/10/State-of-Missouri-et-al.-v.-Food-and-Drug-Administration-et-al_2026_3_6_DEFENDANTS-MOTION-TO-STAY.pdf [https://perma.cc/46HD-DAJE].

19. Ann E. Marimow, Supreme Court Allows Abortion Pill Access by Mail to Continue, N.Y. Times (May 14, 2026), https://www.nytimes.com/2026/05/07/us/politics/supreme-court-abortion-pills-louisiana.html (on file with the *Columbia Law Review*) (last updated May 15, 2026).

of publication, the regulations were still in place under a stay the Court issued pending further litigation.[20]

States have also used legislation to target abortion pills, with Louisiana being the first state to classify mifepristone and misoprostol as "controlled dangerous substances," making possession of them without a valid prescription punishable by up to five years in jail and a fine of up to five thousand dollars.[21] Louisiana has since indicted two doctors, one from New York and one from California, for mailing abortion pills to patients in Louisiana.[22]

While there are few studies on the rate at which domestic violence survivors utilize medication abortion,[23] the dynamics of coercive control suggest that they have a particularly strong interest in the pills remaining easily accessible. Abortion pills give survivors a way to manage their abortion privately at a time and place of their choosing[24] and can be mailed to all fifty states.[25] Medication abortion is a cost-effective alternative[26] for survivors who might otherwise struggle to surmount the

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20. Id.

21. Sara Cline & Laura Ungar, Abortion Pills Will Be Controlled Substances in Louisiana Soon. Doctors Have Concerns, AP News, https://apnews.com/article/abortion-pill-louisiana-misoprostol-pregnancy-mifepristone-69a52fcdb711a833ae14edf6f56afc0c [https://perma.cc/G75D-3JNH] (last updated Sep. 30, 2024) (internal quotation marks omitted). Classifying abortion pills as controlled substances will further fuel abortion criminalization. See Bach & Wasilczuk, supra note 9, at 18 (describing how possession of abortion medication has already been used as evidence in four prosecutions, including three homicide charges).

22. Emily Cochrane & Pam Belluck, Louisiana Indicts Another Out-of-State Doctor Over Abortion Pills, N.Y. Times (Jan. 13, 2026), https://www.nytimes.com/2026/01/13/us/louisiana-abortion-pills-california-indictment.html (on file with the *Columbia Law Review*).

23. One 2011 study found that 23% of patients seeking a medication abortion had experienced domestic violence. Lauren Roth, Jeanelle Sheeder & Stephanie B. Teal, Predictors of Intimate Partner Violence in Women Seeking Medication Abortion, 84 Contraception 76, 77 (2011). But this figure is likely outdated since medication abortion has become much more popular in the last fifteen years. See supra note 11 and accompanying text.

24. See Ushma D. Upadhyay, Leah R. Koenig, Karen Meckstroth, Jennifer Ko, Ena Suseth Valladares & M. Antonia Biggs, Effectiveness and Safety of Telehealth Medication Abortion in the USA, 30 Nature Med. 1191, 1196 (2024) (finding that telemedicine provision of abortion medication gives patients more privacy and circumvents other logistical barriers to accessing care while being as safe and effective as in-clinic care).

25. Abortion Pills by Mail in Every State, Plan C, https://www.plancpills.org/ [https://perma.cc/4MDM-4SWE].

26. The average cost of a first trimester procedural abortion at Planned Parenthood is six hundred dollars. Attia, How Much Does an Abortion Cost?, Planned Parenthood (Apr. 13, 2025), https://www.plannedparenthood.org/blog/how-much-does-an-abortion-cost (on file with the *Columbia Law Review*). Abortion pills are available online for as little as five dollars. E.g., Abortion Pill Providers in New York, Plan C, https://www.plancpills.org/abortion-pill/new-york#pharmacies [https://perma.cc/A2BE-9WS4] (last visited Feb. 3, 2026). Financial assistance from abortion funds can help defray the costs of either procedural or medication abortion. Fast Facts About Abortion Funds,

financial and logistical hurdles necessary to travel for an in-clinic abortion.[27]

Survivors are also likely to bear the brunt of criminal enforcement efforts, which have reached a new intensity since *Dobbs*.[28] In 26% of prosecutions for self-managed abortions, the case was brought to law enforcement by a partner, family member, or friend, revealing the potential for trusted loved ones to initiate investigations.[29] As discussed in section I.B.4, manipulating the legal system to harm or control a partner, including by making or threatening to make false reports to the police or child protective services,[30] is a form of domestic violence. Over half of criminal prosecutions for pregnancy-related conduct also involve investigations by child protective services, which provide information that is then used to initiate or support the criminal case.[31] Abortion criminalization is therefore particularly dangerous for domestic violence survivors. The more avenues states create for investigating pregnancy outcomes, the more opportunities abusive partners or family members will have to use the legal system as a tool of reproductive coercion. Early evidence suggests that abusers are already "weaponiz[ing] the possible criminality of accessing abortion, or wrongfully tell[ing] a victim that if they do access abortion, they themselves could go to jail, or they'll report them to the police."[32] In one 2023 survey, 5% of domestic violence survivors indicated that their abuser had threatened to report them to law enforcement for "considering or having an abortion."[33]

Nat'l Network Abortion Funds, https://abortionfunds.org/abortion-funds-fast-facts/ [https://perma.cc/3UM3-EJ6C] (last visited Mar. 1, 2026).

27. See infra section III.A.1.

28. See Bach & Wasilczuk, supra note 9, at 2 ("[T]he 210 prosecutions initiated in this one-year period represent . . . the largest single-year number since researchers began tracking these cases.").

29. Laura Huss, Farah Diaz-Tello & Goleen Samari, If/When/How, Self-Care, Criminalized: The Criminalization of Self-Managed Abortion From 2000 to 2020, at 30 (2023), https://ifwhenhow.org/wp-content/uploads/2023/10/Self-Care-Criminalized-2023-Report.pdf [https://perma.cc/9LLU-UCX7].

30. See Heather Douglas & Emma Fell, Malicious Reports of Child Maltreatment as Coercive Control: Mothers and Domestic and Family Violence, 35 J. Fam. Violence 827, 832 (2020) (discussing how anonymous child abuse reporting enables abusive former partners to make false allegations against survivors).

31. See Pregnancy Just., Pregnancy as a Crime: An Interim Update on the First Two Years After *Dobbs* 5 (2025), https://www.pregnancyjusticeus.org/wp-content/uploads/2025/09/Pregnancy-as-a-Crime-An-Interim-Update-on-the-First-Two-Years-After-Dobbs.pdf [https://perma.cc/SY36-VHX7].

32. Kylie Cheung, Domestic Violence Hotline Reports 99% Increase in Calls Post-*Roe*, Jezebel (July 14, 2023), https://www.jezebel.com/domestic-violence-hotline-reports-99-increase-in-calls-1850641660 [https://perma.cc/D2WJ-J9HV].

33. Nat'l Domestic Violence Hotline with If/When/How, Reproductive Coercion and Abuse Report 14 (2024), https://www.thehotline.org/wp-content/uploads/media/2024/06/reproductive-coercion-and-abuse-report-final.pdf [https://perma.cc/V89Z-7A2L].

For all the havoc it has wrought, *Dobbs* has also ushered in a new era of the reproductive justice legal movement that is more focused on putting a human face on the painful consequences of abortion restrictions, with patients who have been denied care like Amanda Zurawski[34] and Kate Cox[35] becoming household names. But domestic violence survivors' experiences living under abortion restrictions have largely been missing from this discourse, even as evidence that restrictive abortion laws enable abusive behavior mounts.[36] While abortion restrictions have had devastating consequences for people of all life backgrounds, crafting a legal argument that centers survivors' experiences exposes how these laws enable both state and interpersonal violence against pregnant people.

This Note argues that abortion restrictions' disproportionate effects on survivors can be used to mount new legal challenges to abortion bans under state constitutions' right-to-safety provisions. Part I lays the foundation for this argument by developing the empirical connection between domestic violence and reproductive justice. Part II summarizes state courts' existing approaches to assessing challenges to abortion restrictions and explains why these theories alone do not adequately protect survivors' reproductive rights. Finally, Part III develops right-to-safety arguments grounded in survivors' experiences with two different kinds of abortion restrictions: early gestational limits with unworkable exceptions and parental involvement laws.

I. DOMESTIC VIOLENCE AS A REPRODUCTIVE JUSTICE ISSUE

This Part lays out how reproductive injustice and domestic violence have become increasingly intertwined since *Dobbs*. While the Court's

34. Zurawski, who was denied an abortion in Texas after experiencing a preterm, prelabor rupture of membranes, was the lead plaintiff in a lawsuit that sought to clarify the scope of Texas's "medical emergency" exception. The Plaintiffs and Their Stories: *Zurawski v. State of Texas*, Ctr. Reprod. Rts. (Nov. 14, 2023), https://reproductiverights.org/zurawski-v-texas-plaintiffs-stories-remarks/ [https://perma.cc/MN27-ED45]; Seeking Clarity on Emergency Exceptions to Texas's Abortion Bans, Ctr. Reprod. Rts., https://reproductiverights.org/cases/zurawski-v-state-texas/ [https://perma.cc/738P-ZZGB] (last visited Feb. 24, 2026) (internal quotation marks omitted).

35. Cox, also a Texas resident, sought a court order that would allow her to terminate a nonviable pregnancy. Eleanor Klibanoff, Kate Cox's Case Reveals How Far Texas Intends to Go to Enforce Abortion Laws, Tex. Trib. (Dec. 13, 2023), https://www.texastribune.org/2023/12/13/texas-abortion-lawsuit/ [https://perma.cc/P527-QE9M]. A Texas district court granted the order, but Cox still had to travel out of state for an abortion after the state attorney general appealed. Id.

36. See, e.g., Cheung, supra note 32 (noting that calls to the National Domestic Violence Hotline about reproductive coercion and abuse nearly doubled in the year after *Dobbs*).

abortion jurisprudence has long affected domestic violence survivors,[37] the proliferation of gestational age bans and other restrictions after *Dobbs* has decimated access to abortion across the country. Abortion is completely banned, with attendant civil or criminal penalties, in thirteen states, with four more banning all abortions after six weeks from a person's last menstrual period[38] and two others enforcing a twelve-week ban.[39]

Section A draws the connection between reproductive justice and domestic violence in a post-*Dobbs* world by describing reproductive abuse and coercion as integral parts of domestic violence. Section B relies on public health studies of domestic violence's effects on pregnancy outcomes and how reproductive choices influence patterns of abuse to argue that survivors are disproportionately harmed by abortion restrictions and have a unique safety need for unencumbered access to abortion.

A. *Domestic Violence and Reproductive Coercion*

Domestic violence "is a pattern of behaviors used to gain or maintain power and control" in a relationship.[40] While many people associate domestic violence with physical abuse, it also encompasses emotional, financial, and digital abuse; sexual and reproductive coercion; and stalking.[41] Reproductive coercion, which the National Domestic Violence Hotline defines as "threats or acts of violence against a partner's reproductive health or reproductive decision-making," can include tampering with birth control, removing a condom during intercourse without permission, forcing a partner to get an abortion or

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37. See Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 893 (1992) (invalidating Pennsylvania's spousal notification requirement because "[m]any may fear devastating forms of psychological abuse from their husbands, including verbal harassment, threats of future violence, the destruction of possessions, physical confinement to the home, the withdrawal of financial support, or the disclosure of the abortion to family and friends").

38. "Last menstrual period" (LMP), the most common measure of pregnancy duration, refers to the date of the pregnant person's most recent period. Jennifer Weiss-Wolf, When 'Six Weeks' Is Actually Two: Understanding Periods Is Essential to Fighting Abortion Bans, Brennan Ctr. Just. (Nov. 9, 2021), https://www.brennancenter.org/our-work/analysis-opinion/when-six-weeks-actually-two-understanding-periods-essential-fighting [https://perma.cc/77SF-ET6V]. When using LMP, a pregnancy is often calculated as beginning before conception has occurred, meaning that LMP-based bans start the clock well before someone could find out they are pregnant. Id. Someone with a standard twenty-eight-day menstrual cycle will be considered four weeks pregnant on the first day of their missed period, giving people living in states with a six-week ban only two weeks to detect a pregnancy and get an abortion. Id.

39. Abortion Laws by State, supra note 8.

40. Types of Abuse, Nat'l Domestic Violence Hotline, https://www.thehotline.org/resources/types-of-abuse/ [https://perma.cc/9BAJ-DU9H] (last visited Feb. 3, 2026) (emphasis omitted).

41. Id.

continue a pregnancy, and threatening to expose someone's abortion to law enforcement, family, friends, or employers.[42] While some have tried to justify abortion restrictions by claiming that "forced abortions" are a common form of domestic violence,[43] these claims are not backed up by data, and the studies most commonly relied on to support them have been retracted.[44] Claims that forced abortion is widespread also conflict with results from the Turnaway Study, a five-year longitudinal study that compared the life outcomes of women who received or were denied an abortion in the United States, which found that 95% of women who had an abortion felt it was the right decision throughout the entire study period.[45]

The strength of the relationship between reproductive coercion and abortion access is on much stronger empirical footing. In one study, 53.4% of patients at five California family planning clinics were domestic violence survivors, with 35% of those patients experiencing pregnancy coercion (12.6%), birth control sabotage (8.3%), or both (13.8%).[46] Just 15% of patients who had never experienced other types of domestic violence experienced reproductive coercion.[47] A similar study found that 34% of survivors had a partner who "limited their ability to decide whether or not to have children."[48]

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42. Reproductive Coercion, Nat'l Domestic Violence Hotline, https://www.thehotline.org/resources/reproductive-coercion/ [https://perma.cc/8CLV-5XSP] (last visited Feb. 3, 2026).

43. See, e.g., Julianne McShane, Anti-Abortion Activists Are Peddling Another Lie About Abortion Pills—And We Debunked It, Mother Jones (Mar. 20, 2024), https://www.motherjones.com/politics/2024/03/abortion-mifepristone-supreme-court-domestic-violence-abuse/ [https://perma.cc/A9XX-CEG7].

44. See, e.g., Retraction Notice, Health Servs. Rsch. & Managerial Epidemiology, Feb. 2024, at 1, 2 ("Two subject matter experts undertook an independent post-publication peer review . . . . [B]oth experts identified fundamental problems with the study design and methodology, unjustified or incorrect factual assumptions, material errors in the authors' analysis of the data, and misleading presentations of the data that . . . render the authors' conclusion unreliable.").

45. See Corinne H. Rocca, Goleen Samari, Diana G. Foster, Heather Gould & Katrina Kimport, Emotions and Decision Rightness Over Five Years Following an Abortion: An Examination of Decision Difficulty and Abortion Stigma, Soc. Sci. & Med., Mar. 2020, at 1, 6 ("Over time, the odds of women saying the abortion was right for them increased gradually and insignificantly each year among those who had no difficulty [choosing abortion] . . . only the trajectory of those reporting the decision was very difficult increased significantly over time . . . .").

46. Elizabeth Miller, Michele R. Decker, Heather L. McCauley, Daniel J. Tancredi, Rebecca R. Levenson, Jeffrey Waldman, Phyllis Schoenwald & Jay G. Silverman, Pregnancy Coercion, Intimate Partner Violence and Unintended Pregnancy, 81 Contraception 316, 319 fig. 1 (2010).

47. Id.

48. Joanna Cook & Susan Bewley, Acknowledging a Persistent Truth: Domestic Violence in Pregnancy, 101 J. Royal Soc'y Med. 358, 360 (2008) (citing Jeanne E. Hathaway, Georgianna Willis, Bonnie Zimmer & Jay G. Silverman, Impact of Partner Abuse on Women's Reproductive Lives, 60 J. Am. Med. Women's Ass'n 42, 42 (2005)).

Domestic violence survivors are also much more likely to become pregnant unintentionally than people who are not abused. In the California study, pregnancy coercion and birth control sabotage in abusive relationships increased the risk of unintended pregnancy nearly two-fold compared to the risk level of patients who were not abused.[49] Another study found that physically abused women had a 1.6 times higher risk of unintended pregnancy, and women who had been both sexually and physically abused had a 3.3 times higher risk.[50] Data from the Pregnancy Risk Assessment Monitoring System (PRAMS) similarly found that nearly 70% of pregnancies among women who were being physically abused were unwanted or mistimed.[51] PRAMS also showed that the correlation between domestic violence and unintended pregnancy works both ways: Patients with an unwanted pregnancy were 4.1 times more likely to be physically abused than those whose pregnancy was intended.[52]

The public health literature therefore robustly supports the conclusions that domestic violence survivors are significantly more likely to become pregnant unintentionally and that those with unintended pregnancies are more likely to be victims of abuse. Since 95% of abortions involve mistimed or unwanted pregnancies,[53] it should come as no surprise that approximately one-in-five abortion patients are domestic violence survivors.[54]

B. *The Importance of Abortion Access for Domestic Violence Survivors*

Domestic violence against pregnant people is an epidemic in the United States, with approximately 324,000 pregnant women suffering

49. Miller et al., supra note 46, at 319.

50. Swee May Cripe, Sixto E. Sanchez, Maria Teresa Perales, Nally Lam, Pedro Garcia & Michelle A. Williams, Association of Intimate Partner Physical and Sexual Violence With Unintended Pregnancy Among Pregnant Women in Peru, 100 Int'l J. Gynecology & Obstetrics 104, 106 (2008).

51. Julie A. Gazmararian, Melissa M. Adams, Linda E. Saltzman, Christopher H. Johnson, F. Carol Bruce, James S. Marks, S. Christine Zahniser & the PRAMS Working Group, The Relationship Between Pregnancy Intendedness and Physical Violence in Mothers of Newborns, 85 Obstetrics & Gynecology 1031, 1034 (1995).

52. Id. at 1035.

53. Kathryn Kost, Isaac Maddow-Zimet & Ashley C. Little, Pregnancies and Pregnancy Desires at the State Level: Estimates for 2017 and Trends Since 2012, Guttmacher Inst. (2021), https://www.guttmacher.org/report/pregnancy-desires-and-pregnancies-state-level-estimates-2017 [https://perma.cc/A8RW-LKKA].

54. See Lauren Sobel, Madison Bernstein, Namita Arunkumar, Jennifer Fortin, Isabel Fulcher, Youri Hwang & Alisa B. Goldberg, The Impact of Lifetime Intimate Partner Violence on Abortion Method Choice, Contraception, Mar. 2025, at 1, 3 (finding that, of abortion patients in Massachusetts, 21% had experienced domestic violence in their lives and 8% had experienced domestic violence in the last year).

abuse each year.[55] Although domestic violence is more common among pregnant people than preeclampsia or gestational diabetes—two widely known risks to maternal health[56]—the connection between domestic violence and pregnancy remains undertheorized. This section discusses how, beyond the simple convergence of domestic violence and unwanted pregnancy, the escalation of abuse during pregnancy, delays in accessing prenatal care, severe injuries and gynecological problems, and desire to cut ties with an abusive partner all make survivors disproportionately likely to seek abortion care.

1. *Pregnancy Often Intensifies Domestic Violence.* — The epidemic of domestic violence against pregnant people has predictable, tragic results. Pregnant women in the United States are more than twice as likely to die from homicide than from any other cause, including maternal hypertensive disorders, hemorrhage, and infection.[57] Pregnancy-related homicide, defined as a homicide during or within one year after pregnancy, disproportionately affects Black women and women under the age of twenty-five.[58] While mortality data is not detailed enough for researchers to track whether murdered pregnant people had previously experienced domestic violence, two-thirds of pregnancy-associated homicides occur in the home, suggesting that many of these deaths are

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55. Comm. on Health Care for Underserved Women, Am. Coll. of Obstetricians & Gynecologists, Committee Opinion: Intimate Partner Violence, 119 Obstetrics & Gynecology 412, 413 (2012).

56. Martin R. Huecker, Kevin C. King, Gary A. Jordan & William Smock, Domestic Violence, Nat'l Libr. Med., https://www.ncbi.nlm.nih.gov/books/NBK499891/ [https://perma.cc/6P7N-VDPD] (last updated Apr. 9, 2023). Domestic violence is also a key risk factor for developing preeclampsia and gestational diabetes. See Carmen Pheiffer, Stephanie Dias & Sumaiya Adam, Intimate Partner Violence: A Risk Factor for Gestational Diabetes, 17 Int'l J. Env't Rsch. & Pub. Health, no. 21, 2020, at 1, 2 (noting that domestic violence survivors are at a greater risk of developing gestational diabetes because of their high stress levels); Sixto E. Sanchez, Chunfang Qiu, Maria T. Perales, Nelly Lam, Pedro Garcia & Michelle A. Williams, Intimate Partner Violence (IPV) and Preeclampsia Among Peruvian Women, 137 Eur. J. Obstetrics & Gynecology & Reprod. Biology 50, 52 (2008) ("Women who reported to have ever experienced IPV during pregnancy had a 2.4-fold increased risk of preeclampsia when compared with women who reported never being abused during pregnancy . . . .").

57. See Maeve Wallace, Veronica Gillispie-Bell, Kiara Cruz, Kelly Davis & Dovile Vilda, Homicide During Pregnancy and the Postpartum Period in the United States, 2018–2019, 138 Obstetrics & Gynecology 762, 765 (2021) (finding that the pregnancy-associated homicide mortality ratio, defined as deaths during pregnancy and within one year postpartum, is 3.62 deaths per 100,000 live births).

58. Id. Black women and women under thirty are also more likely to seek abortion care than women of other racial or age groups. See Stephanie Ramer, Antoinette T. Nguyen, Lisa M. Hollier, Jessica Rodenhizer, Lee Warner & Maura K. Whiteman, Abortion Surveillance—United States, 2022, Surveillance Summaries, Nov. 2024, at 1, 5–6 (finding that women in their twenties accounted for 56.5% of all abortions and Black women for 39.5%).

caused by a partner or family member.[59] The data also does not indicate pregnancy outcomes, meaning that the murders of those who had a miscarriage or abortion within the year preceding their death may not be tagged as pregnancy related.[60]

Pregnancy can also escalate abuse by destabilizing the relationship's existing power dynamics. Financial stress is associated with increased rates of domestic violence,[61] and impending parenthood is a massive financial commitment that may stretch a couple's budget and place more responsibilities on the abuser.[62] Pregnancy, and especially an unwanted or unplanned pregnancy, may spark negative emotions in an abuser, including "jealous[y] that the attention is shifting from them to the pregnancy," "frustrat[ion] at the increased responsibilities[,] or ang[er] that their partner's body is changing."[63]

All of these factors can lead to violence escalating during pregnancy[64] or to changes in the types of violence perpetrated against the pregnant person.[65] For example, in one study of two prenatal clinics, 34% of patients reported that their partner had tried to strangle them and described strangulation as "'a favorite during pregnancy,' as it

59. See Wallace et al., supra note 57, at 766 (finding that the prevalence of pregnant women being murdered in their homes "implicat[es] the likelihood of involvement by persons known to the victim"). A different study found that, of pregnant women who reported abuse during screenings at a prenatal clinic, 22% had scores on a standard mortality risk assessment that "indicated an increased risk for homicide." Linda Bullock, Tina Bloom, Jan Davis, Erin Kilburn & Mary Ann Curry, Abuse Disclosure in Privately and Medicaid-Funded Pregnant Women, 51 J. Midwifery & Women's Health 361, 367 (2006).

60. Wallace et al., supra note 57, at 767.

61. See Carol B. Cunradi, Raul Caetano & John Schafer, Socioeconomic Predictors of Intimate Partner Violence Among White, Black, and Hispanic Couples in the United States, 17 J. Fam. Violence 377, 385–86 (2002) (noting that low socioeconomic status is linked to higher rates of domestic violence for all races); Daniel Schneider, Kristen Harknett & Sara McLanahan, Intimate Partner Violence in the Great Recession, 53 Demography 471, 494 (2016) (explaining that economic stress is linked to domestic violence because "a loss of control in one domain (the economy) leads men to assert greater control in another domain (their intimate relationships)").

62. See Mark Lino, Kevin Kuczynski, Nestor Rodriguez & TusaRebecca Schap, USDA, Expenditures on Children by Families, 2015, at ii (2017), https://fns-prod.azureedge.us/sites/default/files/resource-files/crc2015-march2017.pdf [https://perma.cc/MAV7-CVAW] (estimating that the average expense to raise a child from birth through age seventeen is $233,610).

63. Pregnancy and Abuse: How to Stay Safe for Your 9 Months, Nat'l Domestic Violence Hotline, https://www.thehotline.org/resources/pregnancy-and-abuse-how-to-stay-safe-for-your-9-months/ [https://perma.cc/6YCV-GJUH] (last visited Feb. 2, 2026).

64. See Fiona Buchanan & Cathy Humphreys, Coercive Control During Pregnancy, Birthing and Postpartum: Women's Experiences and Perspectives on Health Practitioners' Responses, 36 J. Fam. Violence 325, 326 (2021) ("[T]he frequency and severity of domestic violence during pregnancy was twice as high as when women were not pregnant.").

65. See Paula J. Adams Hillard, Physical Abuse in Pregnancy, 66 Obstetrics & Gynecology 185, 187 (1985) (noting that 40% of pregnant victims "reported multiple sites of injury, including face, arms, abdomen, breasts, and back").

doesn't leave cuts and avoids striking the fetus."[66] This is particularly troubling as strangulation can cause death even days after the incident from "strokes, blood clots, or aspiration" and can cause traumatic brain injuries, which have long-lasting effects like "vision and hearing problems, seizures, ringing ears, memory loss, headaches, and blacking out."[67] Nonlethal strangulation is also one of the most powerful predictors of future homicide, with women who have previously been strangled by a partner being 7.48 times more likely to be killed.[68] Abusers may also use violence or threats to try to control pregnancy outcomes. In a 2023 study, 13% of domestic violence survivors reported that their abuser had used or threatened violence during their pregnancy with the intention of ending the pregnancy, and 9% said that violence or threats of violence were used to try to prevent them from having an abortion.[69]

Domestic violence survivors face unique risks during pregnancy that give them a particularly strong safety interest in having access to a full slate of reproductive healthcare, including abortion. Given the associations between pregnancy, escalating violence, and homicide, ending a pregnancy can be a way of hedging against the substantial risk of suffering more severe physical abuse while pregnant, allowing survivors to better protect themselves. Restrictive abortion laws are exacerbating this crisis: Anti-abortion states have a 75% higher peripartum homicide rate than states that are neutral toward or protective of abortion rights.[70] While it is too soon to have reliable data on how *Dobbs* has affected pregnancy-related homicide rates,[71] it is

66. Bullock et al., supra note 59, at 367. While the Bullock study uses the term choking, which refers to an internal blockage of the windpipe, this Note uses the term strangulation, which is when outside pressure is applied to the neck, for the sake of accuracy. See Strangulation & Risk Factors, Resilience: Advocs. for Ending Violence (Dec. 13, 2022), https://resiliencemi.org/cye22/ [https://perma.cc/5YZ4-8X4V].

67. Rachel Louise Snyder, No Visible Bruises: Domestic Violence and Traumatic Brain Injury, New Yorker (Dec. 30, 2015), https://www.newyorker.com/news/news-desk/the-unseen-victims-of-traumatic-brain-injury-from-domestic-violence (on file with the *Columbia Law Review*).

68. Nancy Glass, Kathryn Laughon, Jacquelyn Campbell, Carolyn Rebecca Block, Ginger Hanson, Phyllis W. Sharps & Ellen Taliaferro, Non-Fatal Strangulation Is an Important Risk Factor for Homicide of Women, 35 J. Emergency Med. 329, 333 tbl. 2 (2008).

69. Nat'l Domestic Violence Hotline with If/When/How, supra note 33, at 13.

70. Grace Keegan et al., State-Level Analysis of Intimate Partner Violence, Abortion Access, and Peripartum Homicide: Call for Screening and Violence Interventions for Pregnant Patients, 238 J. Am. Coll. Surgeons 880, 883 (2024). States were classified as restrictive, neutral, or protective based on the Guttmacher Institute's database of state abortion policies. Id. at 882.

71. The most recent public data from the National Violent Death Reporting System—the CDC's comprehensive, nationwide database of violent deaths—is from 2022, the year *Dobbs* was decided. Kaitlin Forsberg, Kameron J. Sheats, Janet M. Blair, Brenda L. Nguyen, Esther Amoakohene, Carter J. Betz & Bridget H. Lyons, Surveillance for Violent Deaths—National Violent Death Reporting System, 50 States, the District of Columbia, and Puerto Rico, 2022, Surveillance Summaries, June 2025, at 1, 2.

reasonable to expect the discrepancy between restrictive and nonrestrictive states to have grown even more since *Dobbs* because many restrictive states have since banned abortion at earlier gestational stages than was previously permitted, as discussed in section III.A. And early data does suggest that *Dobbs* is exacerbating reproductive abuse: In the year after *Dobbs* was decided, the National Domestic Violence Hotline received nearly twice as many calls about reproductive coercion and abuse as it did in the year before the decision.[72]

2. *Survivors Are More Likely to Seek Prenatal Care Later in Pregnancy.* — Survivors are also disproportionately harmed by abortion bans because they are more likely than other pregnant people to either delay prenatal care until the second trimester or later or to receive no prenatal care at all.[73] Delaying prenatal care until the second trimester will make it difficult for those living in one of the nineteen states that ban abortion in the first trimester to access abortion care.[74] These difficulties will be even more acute for people who do not seek any medical care until the third trimester. They are highly unlikely to be able to get an abortion since only ten U.S. jurisdictions allow third-trimester abortions,[75] and just four have clinics that can perform abortions that late in pregnancy.[76]

Even when survivors seek prenatal care, they are more than twice as likely as patients who are not being abused to frequently miss prenatal appointments.[77] Restricting access to reproductive healthcare is also a common form of reproductive abuse, with 22% of survivors of reproductive coercion reporting that their abuser tried to or did

72. Cheung, supra note 32.

73. See Mary M. Goodwin, Julie A. Gazmararian, Christopher H. Johnson, Brenda Colley Gillbert, Linda E. Saltzman & the PRAMS Working Group, Pregnancy Intendedness and Physical Abuse Around the Time of Pregnancy: Findings From the Pregnancy Risk Assessment Monitoring System, 1996–1997, 4 Maternal & Child Health J. 85, 88–89, 88 tbl. II (2000).

74. Abortion Laws by State, supra note 8.

75. See Allison McCann & Amy Schoenfeld Walker, Tracking Abortion Laws Across the Country, N.Y. Times, https://www.nytimes.com/interactive/2024/us/abortion-laws-roe-v-wade.html (on file with the *Columbia Law Review*) (last updated Mar. 9, 2026) (listing Alaska, Colorado, Maryland, Michigan, Minnesota, New Jersey, New Mexico, Oregon, Vermont, and Washington, D.C., as the jurisdictions with no gestational limit).

76. See Later Abortion Initiative, Ibis Reprod. Health, Referrals for Abortion Care After 24 Weeks (2024), https://laterabortion.org/sites/default/files/documents/lai_referrals_sheet_10.3.2024.pdf [https://perma.cc/EAL2-ET9X] (listing clinics in Colorado, Illinois, Maryland, and Washington, D.C.). The third trimester starts at twenty-eight weeks. Third Trimester, Clev. Clinic, https://my.clevelandclinic.org/health/articles/third-trimester [https://perma.cc/9LRF-UXNL] (last updated Mar. 15, 2024).

77. See Susan Cha & Saba W. Masho, Intimate Partner Violence and Utilization of Prenatal Care in the United States, 29 J. Interpersonal Violence 911, 918 (2014) (finding that pregnant survivors are more than twice as likely as patients who were not abused to miss more than half their prenatal appointments or to begin prenatal care after the fourth month of pregnancy).

accompany them to OB/GYN appointments and 12% reporting that their abuser forced them to cancel or change their appointments.[78] People who miss appointments or are unable to speak openly with their doctor due to an abuser's presence are similarly unable to find out about their reproductive healthcare options and will also likely forgo crucial domestic violence screenings.[79]

3. *Survivors Have More Health Problems During Pregnancy.* — Pregnant survivors are also over 25% more likely than those who have not been abused to experience injuries or pregnancy complications that require hospitalization or a visit to the emergency room.[80] This includes both pregnancy-related morbidities such as "preterm labor, vaginal bleeding, severe nausea," and urinary tract infections and complications that can affect the viability of continuing a pregnancy, including "high blood pressure, placental problems, diabetes, [and] premature rupture of membranes."[81] Pregnant people who are hospitalized for assault have significantly higher risks of placental abruption and hemorrhage.[82]

When these medical emergencies arise, abortion is a common form of stabilizing treatment.[83] Even when it is possible to continue a pregnancy under intensive medical supervision, doing so has been found to increase the risk of postpartum hemorrhage, sepsis, unplanned hysterectomy, pulmonary embolism, and other severe complications.[84] Given that pregnant survivors are more likely to need a medically stabilizing abortion, they have a particularly strong safety interest in abortion being easily available.

4. *Carrying a Pregnancy to Term Prolongs Abusive Relationships.* — Finally, pregnancy outcomes are highly correlated with a pregnant person's ability to leave their abuser. The Turnaway Study found that,

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78. Nat'l Domestic Violence Hotline with If/When/How, supra note 33, at 17.

79. Physicians are less likely to be able to offer resources when survivors miss appointments because many "women do not disclose abuse the first time they are asked." Comm. on Health Care for Underserved Women, supra note 55, at 414.

80. Jay G. Silverman, Michele R. Decker, Elizabeth Reed & Anita Raj, Intimate Partner Violence Victimization Prior to and During Pregnancy Among Women Residing in 26 U.S. States: Associations With Maternal and Neonatal Health, 195 Am. J. Obstetrics & Gynecology 140, 144 tbl. II (2006).

81. Id. at 144–45.

82. Dina El Kady, William M. Gilbert, Guibo Xing & Lloyd H. Smith, Maternal and Neonatal Outcomes of Assaults During Pregnancy, 105 Obstetrics & Gynecology 357, 361 tbl. 3 (2005).

83. See Ariel Sklar, Jeanelle Sheeder, Anne R. Davis, Carrie Wilson & Stephanie B. Teal, Maternal Morbidity After Preterm Premature Rupture of Membranes at <24 Weeks' Gestation, 226 Am. J. Obstetrics & Gynecology 558.e1, 558.e3 (2022) (finding that 48.1% of pregnant people who developed premature rupture of membranes chose abortion and that 26.9% of those who initially chose to continue the pregnancy ultimately had an abortion).

84. See id. at 558.e4, 558.e7 ("[T]he rate of severe maternal morbidity was twice as high in the expectant management group . . . .").

among pregnant women who wanted one, "having an abortion was associated with a reduction over time in physical violence from the [man involved in the pregnancy]," while "having a baby from an unwanted pregnancy appears to result in sustained physical violence over time."[85] Pregnant women who are denied an abortion also take longer to end an abusive relationship than women who had an abortion.[86] This discrepancy is unsurprising since the financial, psychological, and lifestyle changes that accompany the birth of a child—coupled with the fact that leaving an abusive relationship heightens the risk of violence[87]—make fleeing with a new baby a daunting prospect.

Even when people who carry an unwanted pregnancy to term end an abusive relationship, they are "more likely to have sustained contact with" the abuser over time, in some cases prolonging the abuse for years after the relationship has ended.[88] While one might optimistically believe that it would be easy for a survivor to get full custody, courts are often hesitant to believe abuse allegations. Courts credit under half of mothers' claims of domestic abuse against fathers, and mothers lose custody in 23% of cases in which they allege domestic abuse.[89] Abusers often wield the family court system as a tool of legal abuse by filing frequent, harassing custody motions and making false reports to child protective agencies.[90] Since children and family legal processes are used to control survivors even after an abusive relationship ends, survivors have a long-term safety interest in being able to choose abortion to avoid the potential of lifelong abuse.

II. SHORTCOMINGS OF EXISTING LEGAL THEORIES

This Part outlines three of the most prevalent legal theories that have been used to challenge state abortion restrictions—rights to privacy,

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85. Sarah C.M. Roberts, M. Antonia Biggs, Karuna S. Chibber, Heather Gould, Corinne H. Rocca & Diana Greene Foster, Risk of Violence From the Man Involved in the Pregnancy After Receiving or Being Denied an Abortion, BMC Med., Sep. 29, 2014, at 1, 5.

86. Id.

87. See Walter S. DeKeseredy & Martin D. Schwartz, Dangerous Exits: Escaping Abusive Relationships in Rural America 16 (2009) ("23 percent [of women killed by a domestic partner] were leaving or trying to leave their partner during or just prior to their death . . . . Women who exit or try to leave relationships in the United States are also at high risk of being the targets of [nonlethal] violence . . . .").

88. Roberts et al., supra note 85, at 5; see also Kathryn J. Spearman, Viola Vaughan-Eden, Jennifer L. Hardesty & Jacquelyn Campbell, Post-Separation Abuse: A Literature Review Connecting Tactics to Harm, 21 J. Fam. Trauma Child Custody & Child Dev. 145, 151–52 (2024) (discussing how abusers often "use children to coerce or control" their former partners after a relationship has ended).

89. Joan S. Meier, U.S. Child Custody Outcomes in Cases Involving Parental Alienation and Abuse Allegations: What Do the Data Show?, 42 J. Soc. Welfare & Fam. L. 92, 96 (2020).

90. See Vivienne Elizabeth, Custody Stalking: A Mechanism of Coercively Controlling Mothers Following Separation, 25 Feminist Legal Stud. 185, 189 (2017).

equality, and autonomy—and argues that, while they have been successful in different contexts, none of them adequately addresses the unique harms suffered by domestic violence survivors. While these claims are by no means exclusive, with advocates often bringing several arguments at once,[91] for the purposes of this Part cases have been sorted based on which type of reasoning predominates in the court's analysis. These established theories will and should continue to play an important role in the post-*Dobbs* legal landscape, but, as this Part explains, the right to safety can complement them by emphasizing the existential threat abortion bans pose to pregnant survivors and opening the possibility of an affirmative right to abortion as a means of obtaining safety.

A. *Privacy Arguments*

Roe v. Wade grounded the right to an abortion in the right to privacy,[92] leaving the right on uneasy footing from the outset since the federal Constitution does not explicitly protect the right to privacy.[93] But eleven states explicitly protect privacy in their constitutions,[94] putting privacy arguments on much stronger footing.

Montana has developed one of the strongest reproductive and sexual privacy rights in the country, dating back to the 1990s. In assessing gay Montanans' privacy challenge to the state's criminalization of same-sex intimacy in *Gryczan v. State*, the Montana Supreme Court interpreted the state's privacy right as broader than the federal one.[95] The *Gryczan* court struck down the ban, holding that "while society may not approve of the sexual practices of homosexuals," gay Montanans could still "fully and properly expect that their consensual sexual activities will not be subject to the prying eyes of others or to governmental snooping or regulation."[96]

Two years later, the court extended this line of reasoning to reproductive rights in *Armstrong v. State*, a challenge to the requirement that only physicians could perform abortions.[97] Limiting its discussion of

91. See, e.g., Wrigley v. Romanick, 988 N.W.2d 231, 238 (N.D. 2023) (summarizing the plaintiffs' claims under the North Dakota Constitution's Liberty and Due Process Clauses).

92. See 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

93. See, e.g., John Hart Ely, The Wages of Crying Wolf: A Comment on *Roe v. Wade*, 82 Yale L.J. 920, 949 (1973) (critiquing the Court's privacy reasoning in *Roe* because "it is not a constitutional principle and the Court has no business imposing it").

94. See Jessica Bulman-Pozen & Miriam Seifter, State Constitutional Rights and Democratic Proportionality, 123 Colum. L. Rev. 1855, 1866 n.53 (2023) (listing Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, New Hampshire, South Carolina, and Washington as the states with constitutional privacy protections).

95. 942 P.2d 112, 121 (Mont. 1997).

96. Id. at 122.

97. 989 P.2d 364, 367–68 (Mont. 1999).

the privacy right to the right to choose a pre-viability abortion,[98] the court held that the rights to make medical decisions in consultation with a healthcare provider and to procreative autonomy are protected by the right to privacy.[99] Rather than following the federal undue burden standard, the state would have to show a compelling interest to justify infringing on someone's reproductive autonomy.[100] There, the state could not meet that standard because it "has no more compelling interest or constitutional justification for interfering with the exercise of this right [to a pre-viability abortion] than it would if [the pregnant woman] chose to carry the fetus to term."[101]

Montana's reproductive privacy jurisprudence has also been used to increase minors' access to abortion. In August 2024, the Montana Supreme Court struck down the state's parental consent law, which required minors to obtain their parents' permission before having an abortion but did not mandate parental involvement in other kinds of pregnancy-related healthcare.[102] The court recognized that minors enjoy the same reproductive privacy rights as adults and subjected the law to a strict scrutiny analysis, ultimately rejecting the state's arguments that the law was necessary to protect minors' health, prevent sexual abuse, promote parental rights, and guard against immature decisionmaking.[103]

State privacy arguments, exemplified by Montana's procreative privacy jurisprudence, have gone further in protecting reproductive rights than the *Roe* framework, though they have not avoided all of *Roe*'s weaknesses. First, many privacy cases reproduce *Roe*'s trimester framework in recognizing a right to only a pre-viability abortion.[104] This

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98. See id. at 368 ("[T]he statutory amendments at issue prevent a woman from obtaining a lawful medical procedure—a pre-viability abortion—from a health care provider of her choosing." (footnote omitted)).

99. See id. at 376 ("Nor is there any reason to conclude . . . that a woman's right to obtain a pre-viability abortion . . . would not be encompassed within the protection of Montana's constitutional right of individual privacy.").

100. See id. at 375 ("[The Montana Constitution] requires more than that the State simply not impose an undue burden . . . . Rather, . . . the government must demonstrate a 'compelling state interest' for infringing this right." (quoting *Gryczan*, 942 P.2d at 122)).

101. Id. at 377.

102. Planned Parenthood of Mont. v. State, 554 P.3d 153, 158 (Mont. 2024), cert. denied, 145 S. Ct. 2627 (2025) (mem.). Montana still has a parental notification law, which is currently being challenged in a separate lawsuit. Blair Miller, Montana Supreme Court Strikes Down Abortion Parental Consent Law, Daily Montanan (Aug. 14, 2024), https://dailymontanan.com/2024/08/14/montana-supreme-court-strikes-down-abortion-parental-consent-law/ [https://perma.cc/9QND-H4HX].

103. See *Planned Parenthood of Mont.*, 554 P.3d at 165, 168–72 (acknowledging that protecting minors from sexual abuse is a compelling state interest but finding that the parental consent law does not further that interest because "[a]ll [it] does is permit the parent to refuse consent to a pregnancy that has already occurred").

104. See, e.g., Planned Parenthood of Mont. v. State, 557 P.3d 440, 456–58, 461 (Mont. 2024) (upholding a preliminary injunction against several restrictions on public funding for abortion because they infringe on a person's right to a pre-viability abortion);

limitation will disproportionately affect survivors because they are more likely to postpone prenatal care until later in pregnancy[105] and are at greater risk of developing the types of severe medical conditions that require an abortion later in pregnancy.[106] Second, there is a natural tension in basing a claim for survivors' reproductive rights in a privacy framework, given that privacy "reinforces the patriarchal idea that there is a rational and implicitly gendered legal distinction between public and private"[107] and has historically shielded domestic violence from public concern "as part of the private sphere of family life."[108] When it comes to considering the reproductive oppression survivors face, privacy can only address half of the problem: While survivors undeniably have a privacy right to make reproductive decisions independent of an abuser, a negative privacy right falls short of holding the state accountable for the ways that its policies enable reproductive coercion in individual relationships and directly lead to negative health outcomes for survivors.

B. *Equality Arguments*

State courts have also relied on equality analyses to evaluate abortion rights claims. Though these arguments never took hold at the federal level,[109] they have had much greater success in the states, due in no small part to the fact that twenty-nine states explicitly ensure sex equality in their constitutions through state Equal Rights Amendments (ERAs).[110]

Dating back to the 1980s, states have struck down abortion restrictions on equal protection grounds. In 1986, the Connecticut Superior Court held that the state must offer Medicaid funding for medically necessary abortions because excluding them while covering all other medically necessary procedures is a form of sex discrimination.[111]

Armstrong, 989 P.2d at 384 (holding that the right to privacy "protects a woman's right . . . to obtain a specific lawful medical procedure, a pre-viability abortion").

105. See supra section I.B.2.

106. See supra section I.B.3.

107. Grace Kavinsky, Comment, An Opportunity for Feminist Constitutionalism: Abortion Under State Equal Rights Amendments, 75 Stan. L. Rev. 1209, 1215 (2023).

108. See Elizabeth M. Schneider, The Violence of Privacy, 23 Conn. L. Rev. 973, 974, 998 (1991) ("The rationale of privacy legitimates and supports violence against women; woman-abuse reveals the violence of privacy. Privacy justifies the refusal of the state to intervene . . . .").

109. The Supreme Court struck a major blow to federal equality arguments in *Geduldig v. Aiello* by holding that excluding coverage for pregnancy-related conditions from disability insurance did not violate the Equal Protection Clause because "[t]here is no risk from which men are protected and women are not." 417 U.S. 484, 496–97 (1974).

110. Ting Ting Cheng & Naomi Young, Putting State Equal Rights Amendments to Work, St. Ct. Rep. (Dec. 5, 2024), https://statecourtreport.org/our-work/analysis-opinion/putting-state-equal-rights-amendments-work [https://perma.cc/UZ5A-V3EX].

111. Doe v. Maher, 515 A.2d 134, 159 (Conn. Super. Ct. 1986) (citing Fischer v. Dep't of Pub. Welfare, 502 A.2d 114 (Pa. 1985), overruled by Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 309 A.3d 808 (Pa. 2024)).

Other states' courts have similarly relied on state ERAs in finding that limits on public funding for medically necessary abortions discriminate on the basis of sex.[112] One issue with these early state decisions is that relief was generally limited to "medically necessary" abortions, creating confusion over what abortions are medically necessary[113] and excluding the vast majority of people who have abortions because a pregnancy is unwanted.[114]

Equality arguments have also been used to strike down abortion bans or expand protections for reproductive rights since *Dobbs.* In August 2024, the Utah Supreme Court upheld a preliminary injunction against the state's total abortion ban because the law contradicted the "plain language" of the state's ERA, which proclaims that men and women "shall enjoy equally all civil, political and religious rights and privileges."[115] State courts have also continued to apply ERAs to public funding restrictions. In 2024, the Pennsylvania Supreme Court reversed its previous, restrictive interpretation of the state's ERA in *Allegheny Reproductive Health Center v. Pennsylvania Department of Human Services,* holding that any law "that differentiate[s] between the sexes for any reason" violates the ERA.[116] On remand, the lower court applied the new ERA and equal protection analyses and invalidated the Medicaid coverage ban because the state had no compelling interest to justify this burden on the fundamental right to reproductive autonomy.[117]

As it stands now, state ERA jurisprudence has two main weaknesses when it comes to fully addressing the reproductive rights of domestic violence survivors. First, existing ERA cases oftentimes preserve the distinction between medically necessary and elective abortions, leading to line-drawing problems that will disproportionately affect survivors, who are more likely to experience both unintended pregnancy and severe pregnancy complications.[118] Second, state ERAs have failed to protect minors' reproductive rights because courts have interpreted

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112. See, e.g., State v. Planned Parenthood of Alaska, Inc., 28 P.3d 904, 911 (Alaska 2001) (striking down a ban on funding for medically necessary abortions because "DHSS provides necessary medical care to all Medicaid-eligible Alaskans except women who medically require abortions"); N.M. Right to Choose/NARAL v. Johnson, 975 P.2d 841, 856 (N.M. 1998) (holding that excluding medically necessary abortions from public funding is presumptively unconstitutional because it "employs a gender-based classification that operates to the disadvantage of women").

113. For further discussion of the problems created by abortion ban exceptions, see infra section III.A.1.

114. See Kost et al., supra note 53 (noting that 95% of abortions "involve pregnancies that individuals wanted either later or not at all").

115. Planned Parenthood Ass'n of Utah v. State, 554 P.3d 998, 1038 (Utah 2024) (internal quotation marks omitted) (quoting Utah Const. art. IV, § 1).

116. 309 A.3d at 885–86.

117. Allegheny Reprod. Health Ctr. v. Pa. Dep't of Hum. Servs., 2026 WL 1053998, at *17 (Pa. Commw. Ct. Apr. 20, 2026).

118. See supra sections I.A, I.B.3.

these provisions as allowing abortion restrictions that are based on characteristics other than sex, which especially harms young survivors of sexual abuse and reproductive coercion.[119] In *Hope Clinic for Women, Ltd. v. Flores*, the Illinois Supreme Court upheld a parental notification law against an ERA challenge, stating that it did not "create[] a sex-based classification or . . . discriminat[e] against pregnant minors who choose an abortion [based on] their gender" because the law differentiated between minors and adults of the same sex.[120] The right to safety must supplement equality arguments to ensure that the rights of minors and those with unwanted, rather than medically emergent, pregnancies are protected.

C. *Liberty and Autonomy Arguments*

Yet other states have relied on their constitutions' liberty or autonomy provisions when considering state abortion laws. Thirty-three state constitutions have natural or inalienable rights clauses that provide more explicit protections for residents' liberties than the U.S. Constitution, giving liberty-based arguments for reproductive rights a stronger textual basis.[121]

In 2023, the North Dakota Supreme Court upheld a preliminary injunction against the first iteration of the state's abortion ban, which made it a "class C felony for a person, other than the pregnant female upon whom the abortion was performed, to perform an abortion" but created an affirmative defense for abortions that, in a physician's professional judgment, are necessary to save the pregnant person's life.[122] Red River Women's Clinic, the state's last abortion clinic, argued that the North Dakota Constitution's statement that "[a]ll individuals are by nature equally free and independent and have certain inalienable rights, among which are . . . enjoying and defending life and liberty" protected

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119. See infra section III.B.1.

120. 991 N.E.2d 745, 771 (Ill. 2013). The law was repealed in 2022. Parental Notice of Abortion Act (PNA) and the Judicial Bypass Coordination Project, ACLU Ill., https://www.aclu-il.org/en/pna [https://perma.cc/U554-V7RP] (last updated May 31, 2022).

121. Inalienable rights clauses use similar language, with a typical clause protecting "certain inalienable rights . . . [including] liberty." Ala. Const. art. I, § 1. For other inalienable rights clauses, see, e.g., Alaska Const. art. I, § 1; Ark. Const. art. II, § 2; Cal. Const. art. I, § 1; Colo. Const. art. II, § 3; Fla. Const. art. I, § 2; Idaho Const. art. I, § 1; Ill. Const. art. I, § 1; Ind. Const. art. I, § 1; Iowa Const. art. I, § 1; Kan. Bill of Rights § 1; Ky. Const. § 1; Me. Const. art. I, § 1; Mass. Const. pt. I, art. 1; Mo. Const. art. I, § 2; Mont. Const. art. II, § 3; Neb. Const. art. I, § 1; Nev. Const. art. I, § 1; N.H. Const. pt. I, art. 2; N.J. Const. art. I, § 1; N.M. Const. art. II, § 4; N.C. Const. art. I, § 1; N.D. Const. art. I, § 1; Ohio Const. art. I, § 1; Okla. Const. art. II, § 2; Pa. Const. art. I, § 1; S.D. Const. art. VI, § 1; Utah Const. art. I, § 1; Vt. Const. ch. I, art. 1; Va. Const. Art. I, § 1; W. Va. Const. art. III, § 1; Wis. Const. art. I, § 1; Wyo. Const. art. I, § 2.

122. See Wrigley v. Romanick, 988 N.W.2d 231, 234–35 (N.D. 2023) (quoting N.D. Cent. Code § 12.1-31-12 (repealed 2023)).

a fundamental right to abortion.[123] Looking to North Dakota's history, the court found that the clinic was likely to succeed on the merits because "the right of a woman to receive an abortion to preserve her life or health was implicit in North Dakota's concept of ordered liberty before, during, and at the time of statehood" and sustained the preliminary injunction without reaching the substantive constitutional argument.[124]

After that decision, the North Dakota legislature amended the ban to slightly expand the rape, incest, and medical emergency exceptions.[125] Red River Women's Clinic challenged the ban again, requesting that it be struck down for vagueness and for violating North Dakotans' fundamental constitutional rights.[126] In response to the state's history and tradition argument, the trial court noted that the constitution's inalienable rights clause did not apply to women until 1984 and that, given this exclusionary history, "the sentiments of the past, alone, need not rule the present for all time."[127] Relying on the state constitution's guarantee of a broad liberty right, the court held that "implicit in the right to personal autonomy . . . is a woman's right and responsibility to decide what her pregnancy demands of her in the context of her life and in the context of her health."[128] Since the state had not expressed a sufficiently strong or narrowly tailored interest to overcome the woman's liberty interest in choosing a pre-viability abortion, the court struck down North Dakota's ban as unconstitutional.[129] The ban was reinstated in late 2025 on procedural grounds: The North Dakota Constitution requires that a supermajority of four-out-of-five state supreme court justices agree

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123. Id. at 238 (quoting N.D. Const. art. I, § 1).

124. See id. at 240–42, 245.

125. See Trisha Ahmed & Geoff Mulvihill, North Dakota's Latest Try at Abortion Ban Could Face Lawsuit, AP News (Apr. 25, 2023), https://apnews.com/article/abortion-north-dakota-ban-exceptions-da5a7b70eb8757cb563529881f3c4b40 [https://perma.cc/2GRL-ELB9] ("Abortion is legal in pregnancies caused by rape or incest, but only in the first six weeks of pregnancy. Abortion is allowed later in pregnancy only in specific medical emergencies.").

126. See Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-cv-01608, 2024 WL 6935253, at *1 (N.D. Dist. Ct. Sep. 12, 2024), rev'd, 28 N.W.3d 850 (N.D. 2025) (per curiam).

127. See id. at *7 ("[The framers of the North Dakota Constitution] would not have recognized the interests at issue in this case because, at that time, women were not treated as full and equal citizens. The reality is that 'individuals' did not draft and enact the North Dakota Constitution. Men did.").

128. Id. at *9; see also id. ("Prior to viability, a woman must retain the ultimate control over her own destiny, her own body, and ultimately the path of her life. A woman's choice of whether . . . to carry a pregnancy to term shapes the very nature and future course of her life, on nearly every possible level.").

129. See id. at *10–12 ("It is also unclear . . . why the Legislature chose six weeks or less as the cutoff . . . . Unborn human life is no different at six weeks gestational age or less as the result of sexual abuse . . . than [when it is] the result of consensual sexual activity.").

to find a law unconstitutional, and just three justices voted to strike down the ban.[130]

While reproductive choice is key to survivors reclaiming freedom from abuse,[131] the liberty argument—which hinges on the *state* not limiting reproductive choices—cannot fully account for the fact that survivors' ability to choose freely is not just constrained by government policy but by the dynamics of coercive control. Survivors have a liberty interest in being able to access healthcare without interference, and making their own reproductive decisions without gaslighting or threats of violence, and avoiding being forcibly impregnated through birth control sabotage, but these all lie in the realm of private action. The liberty argument's focus on the intrusive nature of state action will not disrupt the interpersonal dynamics that restrain survivors' choices. Any theory that is to properly address survivors' reproductive rights must be able to integrate these dual burdens. Given the analytical gaps in rights to privacy, equality, and autonomy when it comes to fully protecting survivors' reproductive rights, the right to safety has an important role to play in the post-*Dobbs* legal landscape.

III. THE RIGHT TO SAFETY CAN ADVANCE SURVIVORS' REPRODUCTIVE RIGHTS

Sixteen state constitutions enshrine a right to "pursue" or "obtain" safety.[132] States as politically and geographically diverse as California, Iowa, New Mexico, North Dakota, Ohio, and Vermont protect the "inalienable right[]" of "pursuing and obtaining safety."[133] Similarly, Montana's constitution protects citizens' right to "seek[] their safety, health and happiness in all lawful ways."[134] Crucial for the reproductive rights of domestic violence survivors, the right to safety requires considering "an individual's relationship to others,"[135] facilitating an analysis of how a policy makes citizens vulnerable to both state power and interpersonal violence.

While courts have largely held that happiness and safety clauses do not foreclose state regulation of activities individuals might find bring

130. *Access Indep. Health Servs.*, 28 N.W.3d at 850–51; see also N.D. Const. art. VI, §§ 2, 4.

131. See supra section I.B.4.

132. See Cal. Const. art. I, § 1; Colo. Const. art. II, § 3; Idaho Const. art. I, § 1; Iowa Const. art. I, § 1; Ky. Const. § 1; Me. Const. art. I, § 1; Mass. Const. pt. I, art. 1; Mont. Const. art. II, § 3; Nev. Const. art. I, § 1; N.J. Const. art. I, § 1; N.M. Const. art. II, § 4; N.D. Const. art. I, § 1; Ohio Const. art. I, § 1; Vt. Const. ch. I, art. 1; Va. Const. art. I, § 1; W. Va. Const. art. III, § 1.

133. See Joseph R. Grodin, Rediscovering the State Constitutional Right to Happiness and Safety, 25 Hastings Const. L.Q. 1, 3 (1997) (listing Colorado, Nevada, and New Jersey as other states whose constitutions contain the same language).

134. See Mont. Const. art. II, § 3.

135. Grodin, supra note 133, at 28.

them pleasure or a sense of security,[136] the right has gotten some limited play in abortion cases. In invalidating North Dakota's abortion ban, the district court invoked the state's right to safety but did not take its analysis any further than the conclusory statement that the ban "deprives [women] of the right to pursue and obtain safety and happiness."[137] Similarly, in *Women's Health Center of West Virginia, Inc. v. Panepinto*, the Supreme Court of Appeals of West Virginia relied in part on the state's right to "pursu[e] and obtain[] happiness and safety"[138] to strike down a ban on public funding for medically necessary abortions based on the prevalence of severe pregnancy complications among low-income patients.[139] But the crux of the court's decision rested on a different state constitutional provision that requires the state to "'preserve its neutrality when it provides a vehicle' for the exercise of constitutional rights," which the court characterized as an equal protection argument.[140] In other cases, plaintiffs have raised a right-to-safety argument in their briefs,[141] only for the court to ignore that line of reasoning entirely.[142]

Right-to-safety arguments will be most influential in states that have both the right and restrictive abortion laws, whether they take the form of early gestational bans, parental involvement requirements, or waiting

136. See id. at 23–24 (discussing cases that failed to invalidate laws related to drug use, liquor sales, marijuana criminalization, and income taxes).

137. See Access Indep. Health Servs., Inc. v. Wrigley, No. 08-2022-cv-01608, 2024 WL 6935253, at *10 (N.D. Dist. Ct. Sep. 12, 2024), rev'd, 28 N.W.3d 850 (N.D. 2025) (per curiam).

138. W. Va. Const. art. III, § 1.

139. See 446 S.E.2d 658, 665 (W. Va. 1993) (concluding that "the denial of funding for abortions that are determined to be medically necessary both can and most likely will affect the health and safety of indigent women"), superseded by constitutional amendment, W.V. Const. art. VI, § 57.

140. See id. at 666 (quoting United Mine Workers of Am. Int'l Union v. Parsons, 305 S.E.2d 343, 354 (W. Va. 1983)).

141. See, e.g., Brief in Support of Motion for Preliminary Injunction at 8–9, Planned Parenthood of Mont. v. State, No. DV21-00999 (Mont. Dist. Ct. Oct. 7, 2021), 2021 WL 9056126 (arguing that criminalizing abortion at or after twenty weeks' gestation violates the state's right to safety).

142. See, e.g., *Planned Parenthood of Mont.*, 2021 WL 9038524, at *9–11 (addressing the plaintiffs' privacy, equal protection, and due process claims, but not their right-to-safety claim). In other cases, right-to-safety arguments have been relegated to concurring or dissenting opinions. See, e.g., Planned Parenthood Great Nw. v. State, 522 P.3d 1132, 1229 (Idaho 2023) (Stegner, J., dissenting) ("It is clear to me that the constitutional rights of life, liberty, safety, and happiness, taken together, demonstrate that the right to terminate a pregnancy 'is implicit in Idaho's concept of ordered liberty.'" (quoting Reclaim Idaho v. Denney, 497 P.3d 160, 181 (Idaho 2021))); Cameron v. EMW Women's Surgical Ctr., 664 S.W.3d 633, 676 (Ky. 2023) (Keller, J., concurring in part and dissenting in part) ("[T]he [anti-abortion] statutes arguably strip a pregnant patient of her rights to self-determination and pursuit of safety, and in so doing, are not narrowly tailored to the interest of protecting human life.").

periods.[143] But some states that fit this profile have interpreted their right to safety as a negative right, potentially limiting the right's ability to expand abortion access. In the context of welfare assistance, the Ohio Court of Appeals has held that its constitution protects "an inalienable right to *seek* and obtain happiness and safety without undue state interference" but stops short of placing an "obligation upon the state to *provide* that happiness and safety."[144] Even this more limited reading, which views the right to safety as a "restriction on the exercise of governmental powers,"[145] can still be used to further survivors' reproductive rights. Plaintiffs could argue that restrictive abortion laws infringe on their ability to independently protect their safety by prohibiting them from accessing abortion altogether, restricting access to certain types of abortion procedures (like medication abortion), or forcing them to involve an abusive parent in their reproductive decisions. In states that have recognized a government responsibility for ensuring citizens' safety (or have not expressly ruled it out), plaintiffs could take the argument even further by asserting that the state must take affirmative steps to protect survivors from reproductive coercion and other risks associated with pregnancy, for example by expanding public funding for abortions or increasing supportive resources related to reproductive coercion.

This Part argues that, while the right to safety has been underutilized in reproductive rights cases to date, it is uniquely well positioned to advance the needs of domestic violence survivors living under abortion restrictions and address the shortcomings of other, more common legal theories. The right to safety resolves the tension inherent in relying on privacy by recognizing the life-and-death stakes of survivors' reproductive rights.[146] Safety rights also avoid the pitfalls of state ERA arguments by allowing for factors other than sex to be considered, especially age. Finally, the right to safety sidesteps liberty arguments'

143. A few of the states with abortion restrictions despite having a right to safety include Idaho, Kentucky, and West Virginia, which have completely banned abortion; Iowa, which bans abortion after six weeks; North Dakota, which requires that both parents consent to a minor's abortion; and Ohio, which imposes a twenty-four-hour waiting period. See Abortion Laws by State, supra note 8; see also Idaho Const. art. I, § 1; Iowa Const. art. I, § 1; Ky. Const. § 1; N.D. Const. art. I, § 1; Ohio Const. art. I, § 1; W. Va. Const. art. III, § 1.

144. Daugherty v. Wallace, 621 N.E.2d 1374, 1379 (Ohio Ct. App. 1993).

145. Id.

146. Many forms of reproductive coercion also implicate survivors' privacy rights, creating opportunities for advocates to bring claims rooted in both privacy and safety. For example, an abuser may open a shipment of abortion pills without permission, find out their partner was searching for abortion clinics online through checking their browser history, or discover they visited a clinic by tracking their car. See, e.g., Kashmir Hill, Your Car Is Tracking You. Abusive Partners May Be, Too., N.Y. Times (Dec. 31, 2023), https://www.nytimes.com/2023/12/31/technology/car-trackers-gps-abuse.html (on file with the *Columbia Law Review*) (describing how abusers are using cars' remote tracking features to stalk their partners).

shortcomings by recognizing the interplay of state and interpersonal violence in survivors' experiences of abortion restrictions. This Part uplifts survivors' experiences with these policies by developing right-to-safety challenges against two of the most problematic kinds of abortion restrictions: early gestational limits with vague exceptions and parental involvement laws.

A. *Extreme Gestational Bans With Unworkable Exceptions*

The starkest policy shift post-*Dobbs* has been the number of states that have either completely banned abortion or passed early gestational limits. When *Dobbs* was decided, abortion automatically became illegal in thirteen states that had enacted "trigger laws,"[147] while many other states adopted bans that would have been illegal under *Roe*'s viability standard.[148] As the legal landscape constantly shifts, realities on the ground can solidify abortion deserts, leaving care out of reach even when an abortion ban is later invalidated. For example, a North Dakota judge's decision to strike down the state's abortion ban in September 2024 had little practical effect—even before the ban was eventually reinstated on procedural grounds[149]—because there were no abortion clinics left in the state.[150]

The proliferation of bans post-*Dobbs* caused the proportion of patients having to travel out of state for abortion care to skyrocket: In 2023, 20% of abortion patients had to travel to another state, compared with just 10% in 2020.[151] The prevalence of interstate travel not only

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147. See Jesus Jiménez, What Is a Trigger Law? And Which States Have Them?, N.Y. Times (May 4, 2022), https://www.nytimes.com/2022/05/04/us/abortion-trigger-laws.html (on file with the *Columbia Law Review*) (describing trigger laws in Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming).

148. See Abortion Laws by State, supra note 8 (showing that, in addition to the thirteen states with total bans, four states ban abortion after six weeks, two states after twelve weeks, three states after fifteen weeks, and one state after eighteen weeks).

149. Access Indep. Health Servs., Inc. v. Wrigley, 28 N.W.3d 850, 850–51 (N.D. 2025) (per curiam).

150. See Carter Sherman, Judge Strikes Down North Dakota's Ban on Abortion, The Guardian (Sep. 12, 2024), https://www.theguardian.com/us-news/2024/sep/12/north-dakota-abortion-ban-judge-strikes-down [https://perma.cc/8FUQ-WTVQ] (noting that Red River Women's Clinic, which was the only clinic remaining in North Dakota when the lawsuit was filed in 2022, had relocated to Minnesota before the injunction was issued). But the decision had the potential to help patients who needed life- or health-saving abortions get care in hospitals. See id. ("Although the North Dakota ban technically allowed abortions in some emergencies, its wording was so sweeping that doctors in the state frequently felt like they could not help patients unless they got dangerously sick . . . .").

151. Kimya Forouzan, Amy Friedrich-Karnik & Isaac Maddow-Zimet, The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care, Guttmacher Inst. (Dec. 7, 2023), https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care

burdens patients who must leave their home state[152] but also causes delays for residents of the states to which people travel.[153] Clinics in key regional access states are under strain as the number of clinics declines or holds steady even as the number of abortions performed in the state rises rapidly. In the year after *Dobbs*, Illinois abortion clinics saw a 191% increase in out-of-state patients.[154] In North Carolina, one clinic closed between 2020 and 2023, despite the number of abortions in the state spiking by 44%.[155] Even in states where abortion remains legal, the average distance to a clinic increased from twenty-five miles before *Dobbs* to eighty-six miles in April 2023.[156]

While early gestational limits have made it more difficult to access abortion across the board, limiting abortion to early pregnancy especially disadvantages domestic violence survivors, who, before *Dobbs*, made up a quarter of those having abortions just before their state's gestational

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[https://perma.cc/8FXH-4RQR]. Despite the COVID-19 pandemic, the 2020 figures are nearly identical to those from 2019, leading researchers to conclude that the "surge in travel has largely been driven by post–*Roe v. Wade* abortion bans and restrictions." Id.

152. See Benjamin Rader, Ushma D. Upadhyay, Neil K.R. Sehgal, Ben Y. Reis, John S. Brownstein & Yulin Hswen, Estimated Travel Time and Spatial Access to Abortion Facilities in the US Before and After the *Dobbs v Jackson Women's Health* Decision, 328 JAMA 2041, 2044–45 (2022) (finding that after *Dobbs*, 33.3% of reproductive-aged females lived more than sixty minutes from an abortion facility, compared to just 14.6% pre-*Dobbs*, and that the average travel time to an abortion facility increased by 247.2 minutes in states with total or six-week bans).

153. See Caitlin Gilbert, Caroline Kitchener & Janice Kai Chen, How Florida's Abortion Law Is Affecting East Coast Abortion Clinics, Wash. Post (May 24, 2024), https://www.washingtonpost.com/nation/2024/05/24/abortion-clinics-wait-time-florida-law/ (on file with the *Columbia Law Review*) (finding that "[w]ait times for abortion appointments have increased at approximately 30 percent of clinics across North Carolina, Virginia, Maryland and Washington, D.C., the areas closest to Florida where abortion remains legal after six weeks of pregnancy," compared to before Florida enacted its six-week ban); Laura Ungar, It's Taking Longer to Get an Abortion in the US. Doctors Fear Riskier, More Complex Procedures, AP News, https://apnews.com/article/abortion-care-wait-times-us-roe-dobbs-7b0a328bb34b0acb3d37e359a63712fc [https://perma.cc/HT39-DTDB] (last updated Dec. 9, 2023) (reporting that, as of September 2023, "11 states had median appointment wait times of more than five business days and four states had waits of at least eight business days, not counting weekends or holidays").

154. Mikaela H. Smith, Danielle Young, Hanz Dismer, Valla Diskin, Lee Hasselbacher, Katherine Rivlin, Danielle Bessett & Alison H. Norris, Clinic Adaptations and Changes in Abortion Use After *Dobbs* in Illinois, July 2021–June 2023, 116 Am. J. Pub. Health 359, 362 (2026).

155. Rachel K. Jones, Candace Gibson & Jesse Philbin, The Number of Brick-and-Mortar Abortion Clinics Drops, as US Abortion Rate Rises: New Data Underscore the Need for Policies that Support Providers, Guttmacher Inst. (June 2024), https://www.guttmacher.org/report/abortion-clinics-united-states-2020-2024 [https://perma.cc/9JYV-L7R2].

156. Selena Simmons-Duffin & Shelly Cheng, How Many Miles Do You Have to Travel to Get Abortion Care? One Professor Maps It, NPR (June 21, 2023), https://www.npr.org/sections/health-shots/2023/06/21/1183248911 [https://perma.cc/9W3U-LQ8R].

limit.[157] This section begins by discussing how survivors are disproportionately affected by gestational bans, and particularly by the absence of workable exceptions, before explaining how the right to safety could be used to challenge these bans outright.

1. *Disproportionate Harms to Survivors.* — Early gestational bans disproportionately burden survivors' reproductive autonomy and safety. Survivors are hit especially hard by clinic closures because they are less likely to have the financial and personal autonomy necessary to travel. According to the National Domestic Violence Hotline, financial abuse—which includes restricting a partner's access to bank accounts or income, monitoring spending, impeding their ability to work, and opening credit lines in their name without permission[158]—"has grown by an average of 13% annually" since 2016.[159] This lack of financial independence can leave survivors without the means to pay for childcare, transportation, and lodging, let alone the abortion procedure itself. Survivors who have access to a debit or credit card may struggle to keep an abortion private from a partner who is tracking their spending. Even absent financial abuse, there is a toxic feedback loop between domestic violence and poverty: Survivors are more likely to live in poverty,[160] but abuse also fuels economic precarity, including after a survivor has left the abusive relationship.[161] Survivors are therefore less likely than other pregnant people to have reliable, independent access to the economic resources necessary to travel to obtain an abortion.

Dobbs's fallout has also revealed that most exceptions to abortion bans are effectively inoperative. While, in theory, even states with total abortion bans at least have an exception to prevent the death of the

157. Diana Greene Foster, The Turnaway Study 78–79 (2020).

158. What Is Economic Abuse?, Surviving Econ. Abuse, https://survivingeconomicabuse.org/what-is-economic-abuse [https://perma.cc/234Q-6PCQ] (last visited Feb. 4, 2026).

159. Nat'l Domestic Violence Hotline, COVID-19 Year in Review (2021), https://www.thehotline.org/wp-content/uploads/media/2021/12/One-Year-COVID19-Report.pdf [https://perma.cc/Z5MB-9F2F].

160. See Amy E. Bonomi, Britton Trabert, Melissa L. Anderson, Mary A. Kernic & Victoria L. Holt, Intimate Partner Violence and Neighborhood Income: A Longitudinal Analysis, 20 Violence Against Women 42, 52 (2014) (discovering that "intimate partner violence rates were highest in the poorest neighborhoods"); Michelle N. Harris & Rebecca H. Konkel, Safer or Endangered at Home?: An Examination of Neighborhood Effects on Family Violence Before, During, and After the COVID-19 Safer-at-Home Order, 49 Am. J. Crim. Just. 842, 853 (2024) ("[E]ach one unit increase in the level of concentrated poverty within a given block group was associated with . . . 18 times more family violen[ce] incidents.").

161. Eldin Fahmy, Emma Williamson & Christina Pantazis, Joseph Rowntree Found., Evidence and Policy Review: Domestic Violence and Poverty 11 (2016), https://research-information.bris.ac.uk/ws/portalfiles/portal/80376377/JRF_DV_POVERTY_REPORT_FINAL_COPY_.pdf [https://perma.cc/WP9L-Y8VM] ("[E]conomic insecurity . . . can also trap people in abusive relationships[] and levy a significant financial penalty on those escaping partner violence and abuse.").

pregnant person, and many others have exceptions to preserve the pregnant person's health,[162] in practice, pregnant people experiencing medical emergencies are unable to access care in these states. In Idaho, where the total abortion ban contains an exception to save the pregnant person's life, people with life-threatening conditions are "transferred out of state unless they are at imminent risk of death," delaying care with disastrous results for those "who are not stable enough to transfer" but are not yet sick enough to receive an abortion in Idaho "because it is not yet needed to prevent the patient's *death*."[163] Across the country, from Texas, to Tennessee, to Oklahoma, to Florida, to Iowa, patients experiencing medical emergencies are unable to access care despite the presence of a health or life exception because of vague statutory language and doctors' fears of professional or criminal consequences.[164]

162. See Mabel Felix, Laurie Sobel & Alina Salganicoff, A Review of Exceptions in State Abortion Bans: Implications for the Provision of Abortion Services, KFF, https://www.kff.org/womens-health-policy/issue-brief/a-review-of-exceptions-in-state-abortions-bans-implications-for-the-provision-of-abortion-services/ [https://perma.cc/KQ4L-WRNC] (last updated June 6, 2024) (listing twenty states with a life exception to their abortion bans, of which six do not have a health exception). While Texas's abortion ban technically includes a health exception, the Texas Supreme Court's decision in *State v. Zurawski* conflates the life and health exceptions by applying the health exception to only "life-threatening physical condition[s]." See 690 S.W.3d 644, 664 (Tex. 2024) ("The statute requires that the mother have a 'life-threatening physical condition.' 'Life-threatening' means 'capable of causing death [or] potentially fatal.'" (alteration in original) (first quoting Tex. Health & Safety Code Ann. § 170A.002(b)(2) (2025); then quoting Life-Threatening, Merriam-Webster, https://www.merriam-webster.com/dictionary/life-threatening [https://perma.cc/9FHG-CMLR] (last visited Feb. 4, 2026))).

163. Brief of St. Luke's Health System as Amicus Curiae in Support of Respondent at 14–15, Moyle v. United States, 144 S. Ct. 2015 (2024) (per curiam) (Nos. 23-726, 23-727), 2024 WL 1190875.

164. See, e.g., Melissa Chan, Tennessee Court Weighs Challenge to Abortion Ban's Narrow Medical Exception, NBC News (Apr. 4, 2024), https://www.nbcnews.com/news/us-news/tennessee-court-weighs-challenge-abortion-bans-narrow-medical-exceptio-rcna146416 [https://perma.cc/RAT5-VCBD] (reporting that doctors in Tennessee are hesitant to provide abortion care even in medical emergencies because "ambiguous and nonmedical [statutory] terminology leaves doctors uncertain about when they can render care without being prosecuted"); Jen Christensen, Amid Contradictory Laws, Hospitals in One State Were Unable to Explain Policies on Emergency Abortion Care, Study Finds, CNN (Apr. 25, 2023), https://www.cnn.com/2023/04/25/health/emergency-abortion-confusion-okahoma (on file with the *Columbia Law Review*) ("65%—22 of the 34 hospitals—were unable to provide information about policies, procedures or the support provided to doctors when it is clinically necessary to terminate a pregnancy to save the life of a pregnant patient."); Lauren Mascarenhas, Texas Abortion Law's Wording Is Causing Dangerous Confusion Over Emergency Medical Exceptions, Critics Say, CNN, https://www.cnn.com/2023/12/15/us/texas-abortion-ban-emergency-medical-exception (on file with the *Columbia Law Review*) (last updated Dec. 15, 2023) ("The fact that all of the 34 abortions recorded in Texas . . . were performed in hospitals, as opposed to less than 1% in previous years, suggests that exceptions are being made only in the most dire cases, when a pregnant person is dying or in imminent risk of death . . . ."); Regan McCarthy, Why Providers Say Abortion Ban Exceptions Continue to Cause Confusion, NPR (June 14, 2024), https://www.npr.org/2024/06/06/nx-s1-4995739

Survivors bear the brunt of these unworkable exceptions because they are more likely to experience the sorts of medical emergencies that may necessitate a health- or life-saving abortion.[165]

Survivors are also disproportionately harmed by the inconsistent application of rape and incest exceptions, which anti-abortion activists have fought against since *Dobbs*.[166] Nearly three million American women have experienced rape-related pregnancy, and women who are raped by a current or former intimate partner are five times more likely to become pregnant from rape compared to people who are raped by a stranger or an acquaintance.[167] Over half of rape-related pregnancies also involve at least one form of reproductive coercion.[168] The availability of rape and incest exceptions is one of the most variable aspects of the post-*Dobbs* landscape: Of the twenty-one states with total bans or early gestational limits, only eleven have rape and incest exceptions.[169] Just five of the fourteen states with total abortion bans have rape and incest exceptions,

[https://perma.cc/KNS7-XLDW] (describing how Florida physicians are struggling to decide when it is appropriate to provide abortion in medical emergencies beyond the three conditions enumerated in the state's regulations); Erin Murphy, Doctors Warn Exceptions to Iowa's New Abortion Law Impractical, The Gazette (July 21, 2024), https://www.thegazette.com/state-government/doctors-warn-exceptions-to-iowas-new-abortion-law-impractical/ [https://perma.cc/CM3Y-7FP4] (conveying doctors' concerns that the health and life exceptions in Iowa's new abortion ban "will be difficult, if not impossible, to apply in real-life medical emergencies").

165. See supra section I.B.3.

166. See Kavitha Surana, Some Republicans Were Willing to Compromise on Abortion Ban Exceptions. Activists Made Sure They Didn't., ProPublica (Nov. 27, 2023), https://www.propublica.org/article/abortion-ban-exceptions-trigger-laws-health-risks [https://perma.cc/D2RT-5HKE] (discussing how anti-abortion groups have lobbied against adding rape and incest exceptions to abortion bans, including defeating an amendment to North Dakota's ban that would have allowed child rape victims to have abortions).

167. See Kathleen C. Basile, Sharon G. Smith, Yang Liu, Marcie-jo Kresnow, Amy M. Fasula, Leah Gilbert & Jieru Chen, Rape-Related Pregnancy and Association With Reproductive Coercion in the U.S., 55 Am. J. Preventive Med. 770, 772–73 (2018) ("Among rape victims who reported [rape-related pregnancy], more than three quarters (77.3%) reported that the perpetrator was a current or former [intimate partner].").

168. See id. at 773 (finding that 38.9% of survivors experiencing rape-related pregnancy had a partner who had "tried to get them pregnant when they did not want to" or "stop them from using birth control," compared to 12.4% of survivors who did not become pregnant); see also id. (reporting that 44% of survivors experiencing rape-related pregnancy had a partner who "refused to use a condom," compared to 16.1% of those who weren't impregnated).

169. Mabel Felix, Laurie Sobel & Alina Salganicoff, A Closer Look at Rape and Incest Exceptions in States With Abortion Bans and Early Gestational Restrictions, KFF (Aug. 7, 2024), https://www.kff.org/policy-watch/rape-incest-exceptions-abortion-bans-restrictions/ [https://perma.cc/F82Z-UM24] [hereinafter Felix et al., Rape and Incest Exceptions].

all of which are limited to early in the first trimester.[170] Five of these states mandate that a sexual assault is reported to law enforcement, and three also require that the survivor give a copy of the police report to their physician.[171] Requiring law enforcement involvement significantly impairs survivors' ability to avail themselves of a rape or incest exception, as it is estimated that just under 24% of sexual assaults are reported to the police each year.[172]

The failure of rape and incest exceptions is borne out by the numbers. Only nine abortions were performed under Indiana's rape and incest exception in 2024, the first full year its total ban was in effect.[173] And while West Virginia reported twenty-three abortions between January 2023 and June 2024, none were provided under its rape and incest exception.[174] These exceptions' impracticality also leaves domestic violence survivors—who are significantly more likely to experience rape-related pregnancy than those who are not abused[175]—in the lurch. The dynamics of abusive relationships further impede survivors' ability to overcome the logistical hurdles created by early gestational limits, and the disproportionate likelihood that survivors would need to avail themselves of a practically unavailable health, life, or rape exception gives them a unique position from which to challenge these policies under the right to safety.

2. *Right-to-Safety Challenges.* — Up until now, many challenges to abortion ban exceptions have been aimed at broadening or clarifying the exceptions' scope, rather than arguing that the ban should be invalidated because the exceptions are meaningless.[176] While not all

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170. See id. (noting that Idaho's rape and incest exception only extends until fourteen weeks LMP, Indiana's to twelve weeks LMP, Mississippi's and North Dakota's to six weeks LMP, and West Virginia's to eight weeks LMP, or fourteen weeks LMP for minors).

171. Id.

172. Susannah N. Tapp & Emilie J. Coen, DOJ, Criminal Victimization, 2024, at 7 tbl. 4 (2025), https://bjs.ojp.gov/document/cv24.pdf [https://perma.cc/9FY8-XHUP]. Survivors often hesitate to report to the police out of fear of retaliation from the perpetrator (20%), not being believed by police (13%), or as a psychological coping mechanism to downplay the rape as "not important enough to report" (8%). Statistics: The Criminal Justice System, RAINN, https://rainn.org/statistics/criminal-justice-system (on file with the *Columbia Law Review*) (last updated Aug. 28, 2025).

173. Madelyn Hanes, First Full Year Under Indiana's Ban Reveals 146 Abortions Occurred in 2024, Ind. Cap. Chron. (May 14, 2025), https://indianacapitalchronicle.com/briefs/first-full-year-under-indianas-ban-reveals-146-abortions-occurred-in-2024/ (on file with the *Columbia Law Review*).

174. Felix et al., Rape and Incest Exceptions, supra note 169.

175. See supra notes 167–168 and accompanying text.

176. See, e.g., Complaint for Declaratory Judgment and Injunctive Relief at 7, Adkins v. State, No. CV01-23-14744 (Idaho Dist. Ct. filed Sep. 11, 2023) (requesting a "declaratory judgment clarifying the scope of Idaho's Medical Exceptions"); Plaintiffs' Motion for Temporary Injunction at 1, Blackmon v. State, No. 23-1196-I (Tenn. Ch. Ct. filed Jan. 8, 2024) ("A declaratory judgment is necessary to give physicians the clarity they need to provide medically necessary abortion care to their patients without fear of imprisonment

states with extreme gestational limits have rights to safety, several do,[177] and the right could be used to mount a compelling challenge in those states.

First, advocates could argue that inoperable health and life exceptions endanger the safety of all people who can become pregnant, though, as discussed above, survivors shoulder a particularly high risk. A person is unsafe when they cannot promptly access emergency medical treatment due to the bureaucratic red tape and institutional risk aversion that vague exceptions fuel.[178] These risks are intensified when, as in Idaho, essential care is further delayed by the need to airlift patients out of state to avoid potential liability.[179] While domestic violence is a risk factor for suffering severe injuries or developing serious complications that may require a medically stabilizing abortion,[180] pregnancy is, across the board, a significantly greater risk to someone's safety than abortion.[181] The primary injury suffered when someone is denied a health- or life-saving abortion is not one to their decisional privacy interests or autonomy, but that their safety has been imperiled by the state—and, in the case of domestic violence survivors, by their abuser.

The right to safety can also be used to challenge abortion bans on the basis that unworkable rape or incest exceptions endanger survivors. When a domestic violence survivor is pregnant as the result of rape, abortion is a crucial tool they can use to restore their safety by mitigating existing harms and defending against further reproductive and sexual abuse. Over half of people who become pregnant because of rape are victims of reproductive abuse, and most states with rape or incest exceptions require that a survivor make a police report.[182] While rape survivors are generally hesitant to report to the police,[183] the dynamics of coercive control suggest that domestic violence survivors will struggle

and loss of their medical licenses."); Plaintiffs' Original Petition for Declaratory Judgment and Application for Permanent Injunction ¶ 5, Zurawski v. State, 690 S.W.3d 644 (Tex. 2024) (No. D-1-GN-23-000968), 2023 WL 2403722 (asking that the court grant "a declaratory judgment clarifying the scope of Texas's Emergent Medical Condition Exception to its abortion bans").

177. See supra note 143 and accompanying text.

178. See supra note 164 and accompanying text.

179. See Julie Luchetta, Idaho's Biggest Hospital Says Emergency Flights for Pregnant Patients Up Sharply, NPR (Apr. 26, 2024), https://www.npr.org/2024/04/25/1246990306/more-emergency-flights-for-pregnant-patients–in-idaho [https://perma.cc/D5JG-ZAUS] (noting that St. Luke's Health System had to airlift six patients out of state for emergency abortions in the first three months after the U.S. Supreme Court lifted an injunction on Idaho's ban on emergency abortions).

180. See supra sections I.B.1, I.B.3.

181. See Elizabeth G. Raymond & David A. Grimes, The Comparative Safety of Legal Induced Abortion and Childbirth in the United States, 119 Obstetrics & Gynecology 215, 216 (2012) (finding that the risk of death associated with carrying a pregnancy to term is fourteen times higher than the risk of abortion-related death).

182. See supra notes 167–171 and accompanying text.

183. See supra note 172 and accompanying text.

even more to meet the reporting requirement. Apologizing or promising to change are tactics that abusers use to manipulate survivors and keep them in a relationship,[184] and a survivor may not want to risk getting the perpetrator in trouble or disrupting family dynamics if they believe the abuse might stop.[185] Furthermore, reporting requirements may expose survivors to further violence, as abuse often escalates after law enforcement involvement.[186] Even if one abides by a negative-right conception of the right to safety, complete abortion bans or gestational limits with no workable exceptions deprive survivors of the ability to independently obtain a medical treatment that can be key to ensuring their short- and long-term safety.

B. *Parental Involvement Laws*

While minors' access to abortion will suffer sharply under any kind of abortion restriction due to their lack of access to the money and independence needed to travel for an abortion,[187] even before *Dobbs* most states had already passed laws specifically targeting minors. Known as parental involvement laws, these laws require a minor to either provide notice to or get consent from one or both parents (or another legal guardian) before they can have an abortion.[188] As of April 2026, thirty-nine states or territories have parental involvement laws in effect,[189] with

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184. See Hannah Craig & Amanda Kippert, What Is the Cycle of Abuse?, Domestic Shelters, https://www.domesticshelters.org/articles/identifying-abuse/what-is-the-cycle-of-abuse [https://perma.cc/72BY-KHNG] (last updated Sep. 21, 2022) (describing how an abuser will often "apologize for their behavior, try to excuse it[,] . . . or blame it on the victim").

185. Cf. Michael Planty, Lynn Langton, Christopher Krebs, Marcus Berzofsky & Hope Smiley-McDonald, DOJ, Female Victims of Sexual Violence, 1994–2010, at 7 (2016), https://bjs.ojp.gov/content/pub/pdf/fvsv9410.pdf [https://perma.cc/TY7V-MQ4C] (finding that 7% of victims didn't report their rape because they didn't want to get the perpetrator in trouble, while 20% didn't report because they feared reprisals from the perpetrator).

186. See Leigh Goodmark, Nat'l Domestic Violence Hotline, Law Enforcement Experience Report 8 (2022), https://www.thehotline.org/wp-content/uploads/media/2022/09/2209-Hotline-LES_FINAL.pdf [https://perma.cc/2RKJ-8J9D] (reporting that 39% of survivors felt less safe after calling the police).

187. When Texas passed its six-week abortion ban in 2021, the state's abortion rate decreased by 45%, but abortions among adolescents declined by 66%. Lauren Ralph & Lee Hasselbacher, Adolescents and Abortion Restrictions: Disproportionate Burdens and Critical Warnings, 73 J. Adolescent Health 221, 221 (2023); see also Dana Goldstein & Ava Sasani, What New Abortion Bans Mean for the Youngest Patients, N.Y. Times (July 16, 2022), https://www.nytimes.com/2022/07/16/us/abortion-bans-children.html (on file with the *Columbia Law Review*) (last updated July 25, 2022) (sharing the story of an eleven-year-old girl who took her first flight from Texas to Colorado to receive an abortion).

188. Kimya Forouzan, Minors' Access to Abortion Care, Guttmacher Inst., https://www.guttmacher.org/state-policy/explore/parental-involvement-minors-abortions [https://perma.cc/C7LW-ZSN9] (last updated Jan. 30, 2026).

189. Abortion Laws by State, supra note 8 (toggling the map to "In Effect" and "Parental Involvement"). Four additional states—Alaska, Minnesota, Montana, and New

ten having a notification requirement,[190] twenty requiring parental consent,[191] and nine mandating both notice and consent.[192] While the Supreme Court has held that parental involvement cannot be used to give a parent "an absolute, and possibly arbitrary, veto over"[193] a minor's abortion decision, these laws are constitutional so long as the minor can circumvent parental involvement through an alternative procedure known as judicial bypass.[194]

Parental involvement laws also compound the effects of other kinds of abortion restrictions, including gestational limits, for young survivors. Before Illinois repealed its parental involvement law, young people pursuing judicial bypass waited an average of six days for their court hearing and another six days between their hearing and abortion appointment.[195] This wait can put people over the limit for when abortion medication is effective[196] and has increased the proportion of second trimester abortions among minors.[197] Given that 36% of pregnant

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Jersey—have parental notification laws that are currently enjoined. Id. (toggling the map to "Enjoined Laws" and "Parental Involvement").

190. These include Colorado, Delaware, Iowa, Maryland, Nevada, New Hampshire, South Dakota, the U.S Virgin Islands, West Virginia, and Wyoming. Id. (toggling to "Parental Notification Requirement" and subtracting the number of states that require both notice and consent).

191. These include Alabama, Arizona, Arkansas, Georgia, Idaho, Indiana, Kansas, Louisiana, Maine, Massachusetts, Michigan, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, Rhode Island, South Carolina, Texas, and Wisconsin. See id. (toggling to "Parental Consent Requirement" and subtracting the number of states that require both notice and consent).

192. These include Florida, Guam, Kentucky, Mississippi, Missouri, Oklahoma, Tennessee, Utah, and Virginia. See id. (toggling to "Parental Notification and Consent Requirement" and then adding states whose notice and consent mandates appear on the map separately).

193. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976).

194. Bellotti v. Baird, 443 U.S. 622, 643 (1979) (plurality opinion). Judicial bypass requires that the minor convince a judge that they are either "mature enough and well enough informed to make [their] abortion decision, in consultation with [their] physician, independently of [their] parents' wishes" or that "even if [they are] not able to make the decision independently, the desired abortion would be in [their] best interests." Id. at 643–44.

195. Lauren J. Ralph, Lorie Chaiten, Emily Werth, Sara Daniel, Claire D. Brindis & M. Antonia Biggs, Reasons for and Logistical Burdens of Judicial Bypass for Abortion in Illinois, 68 J. Adolescent Health 71, 74 (2021) [hereinafter Ralph et al., Reasons for and Logistical Burdens of Judicial Bypass]. The wait is even longer for those traveling from out of state. Id. (finding that out-of-state minors waited 10.6 days on average for their court hearing).

196. Margaret Wurth & Emily Werth, Hum. Rts. Watch & ACLU Ill., "The Only People It Really Affects Are the People It Hurts": The Human Rights Consequences of Parental Notice of Abortion in Illinois 5 (2021), https://www.hrw.org/sites/default/files/media_2021/03/us0321_web.pdf [https://perma.cc/DCP8-TSD7].

197. Lauren J. Ralph, Erin King, Elise Belusa, Diana Greene Foster, Claire D. Brindis & M. Antonia Biggs, The Impact of a Parental Notification Requirement on Illinois Minors' Access to and Decision-Making Around Abortion, 62 J. Adolescent Health 281,

minors do not discover their pregnancy until after six weeks' gestation,[198] further delays caused by judicial bypass can restrict what abortion methods are available, increase the cost of care, require further travel, and, in states with early gestational limits, bar a minor from legally accessing abortion in their state altogether.[199]

After *Dobbs*, two states—Idaho and Tennessee—passed laws criminalizing helping a minor travel to get an abortion out of state without parental consent, and a similar bill was introduced in Congress in January 2026.[200] While these so-called "abortion trafficking" laws portend troubling new consequences for young survivors, this section focuses on parental involvement laws, even though they predate *Dobbs*, for a few reasons. First, while the passage of abortion trafficking laws has made headlines, as of April 2026 there are no reported cases of people being prosecuted under these laws,[201] so there is little empirical data on how they are affecting minors' access to abortion. Second, only two states currently have abortion trafficking laws, but thirty-nine states or territories have a parental involvement law,[202] making it one of the most common kinds of abortion restrictions. Even many states that are generally considered supportive of abortion rights, including Colorado and Massachusetts, have parental involvement laws,[203] and 42% of female adolescents live in states that have parental involvement laws but lack total abortion bans.[204] And third, when combined with the fact that

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285 (2018) [hereinafter Ralph et al., The Impact of a Parental Notification Requirement] (finding that, after Illinois enacted a parental notification requirement, the proportion of second trimester abortions among minors increased by 3%).

198. Lauren J. Ralph, Diana Greene Foster, Rana Barar & Corinne H. Rocca, Home Pregnancy Test Use and Timing of Pregnancy Confirmation Among People Seeking Health Care, Contraception, Mar. 2022, at 10, 15 tbl. 4.

199. See Ralph et al., The Impact of a Parental Notification Requirement, supra note 197, at 286.

200. Ashley Suter, New Bill Would Make Transporting Minor Across State Line for Abortion a Federal Offense, News Channel 8 (Jan. 21, 2026), https://www.wfla.com/news/florida/new-bill-would-make-transporting-minor-across-state-lines-for-abortion-a-federal-offense (on file with the *Columbia Law Review*); Anna Claire Vollers, Helping a Minor Travel for an Abortion? Some States Have Made It a Crime., Stateline (Aug. 23, 2024), https://stateline.org/2024/08/23/helping-a-minor-travel-for-an-abortion-some-states-have-made-it-a-crime/ (on file with the *Columbia Law Review*) (explaining how similar bills have been introduced, but failed to pass, in Alabama, Mississippi, and Oklahoma).

201. An Idaho mother and her eighteen-year-old son were charged with transporting the son's fifteen-year-old girlfriend to Oregon to have an abortion, but prosecutors charged them with second-degree kidnapping, not with abortion trafficking. Carter Sherman, Idaho Mother and Son Charged With Kidnapping Over Out-of-State Abortion, The Guardian (Nov. 1, 2023), https://www.theguardian.com/us-news/2023/nov/01/idaho-mother-son-kidnap-charges-abortion [https://perma.cc/4L6L-NS39].

202. See supra notes 187–192 and accompanying text.

203. See supra notes 190–191.

204. Laura D. Lindberg, Julie Maslowsky & Paz Baum, Implications of Abortion Restrictions for Adolescents, 179 JAMA Pediatrics 675, 675 (2025).

minors are more likely to discover pregnancy later, the delays associated with judicial bypass and states' failures to adopt exceptions tailored to young survivors[205] mean that parental involvement laws result in a de facto abortion ban for minors who do not want to—or cannot—involve their parents.

1. *Disproportionate Harms to Survivors.* — Pregnant adolescents are disproportionately affected by the intersection of domestic violence and reproductive rights, as they could experience abuse or reproductive coercion in a romantic or family relationship, or both. Teens in abusive romantic relationships are four to six times more likely to get pregnant than their peers.[206] Adolescents are also more likely than adults to become pregnant as a result of birth control sabotage or rape.[207] Birth control sabotage is especially prevalent among adolescents who experience some other form of domestic violence from their partner.[208] Since adolescents in abusive relationships are more likely to get pregnant and experience reproductive coercion, they bear the brunt of parental involvement laws' onerous requirements.

Parental involvement laws also disproportionately harm young survivors of family violence. Before Illinois enacted its parental notification law, 85% of minors were already involving a parent in their abortion decision,[209] with younger adolescents being the most likely to do so.[210] These high rates of voluntary parental involvement suggest that youth who wish to make their decision independently have good reasons for doing so. Laws that force parental involvement leave young survivors who fear the initiation or recurrence of physical, emotional, or reproductive abuse to navigate the judicial bypass process. Half of those in judicial bypass proceedings were afraid that their parents would force

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205. See Surana, supra note 166 (discussing multiple states' failures to enact exceptions for child rape survivors).

206. Ambra Born, Relationship Violence and Teenage Parents, 11 J. Infant Child & Adolescent Psychotherapy 368, 368 (2012).

207. See Ctr. for Impact Rsch., Domestic Violence and Birth Control Sabotage: A Report From the Teen Parent Project 18 (2000), https://www.issuelab.org/resources/363/363.pdf [https://perma.cc/7V3U-U66S] (describing how over half of adolescent mothers reported birth control sabotage); Melissa M. Holmes, Heidi S. Resnick, Dean G. Kilpatrick & Connie L. Best, Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women, 175 Am. J. Obstetrics & Gynecology 320, 322 (1996) (reporting that 21% of rape-related pregnancies occurred among youths twelve to fifteen years old, and 27% among sixteen and seventeen year olds).

208. See Ctr. for Impact Rsch., supra note 207, at 19 ("[O]f those young women reporting domestic violence at the hands of their boyfriends, 66% experience some form of birth control sabotage from them as well.").

209. Wurth & Werth, supra note 196, at 1.

210. See Stanley K. Henshaw & Kathryn Kost, Parental Involvement in Minors' Abortion Decisions, 24 Fam. Planning Persps. 196, 200 tbl. 3 (1992) (finding that 90% of minors aged fourteen or younger involved at least one parent in their abortion decision, compared with 74% of fifteen-year-olds, 59% of sixteen-year-olds, and 51% of seventeen-year-olds).

them to continue the pregnancy, 41% feared they would be kicked out of their family home or cut off financially, and 13% anticipated physical or emotional abuse.[211] These fears have been borne out by experience: The parents of one girl who wanted an abortion forced her to continue her pregnancy by taking away her car keys, blockading her from leaving the home, and threatening to report her to the police as a runaway if she left to have an abortion.[212] Forcing someone to continue an unwanted pregnancy is a paradigmatic form of reproductive coercion,[213] but in this case it is being perpetrated by the minor's parents rather than a romantic partner.

Finally, parental involvement laws place a heavy burden on survivors of childhood sexual abuse (CSA). Nearly half of CSA survivors do not disclose their abuse until adulthood, and 45% experience intrafamilial CSA in which the perpetrator is a parent, step-parent, sibling, or extended family member living with the survivor.[214] A child notifying their parent that they want an abortion would, understandably, spark questions about how the child became pregnant, and CSA survivors may wish to avoid exposing the abuse by seeking an abortion independently.[215] But the judicial bypass process would also require the child to answer prying questions about their health, why they do not want to parent, or why they are not choosing adoption, the answers to which could also reveal the abuse they are facing.[216] CSA survivors have no good options under parental involvement laws.

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211. Ralph et al., Reasons for and Logistical Burdens of Judicial Bypass, supra note 195, at 74; see also Wurth & Werth, supra note 196, at 26 ("One social worker who regularly counsels pregnant young people . . . said the reason most young people she encountered chose judicial bypass was because 'their parents are religious and would never accept them getting an abortion.'" (quoting a social worker)); Kate Coleman-Minahan, Amanda Jean Stevenson, Emily Obront & Susan Hays, Young Women's Experiences Obtaining Judicial Bypass for Abortion in Texas, 64 J. Adolescent Health 20, 21–22 (2019) (finding that the risk of physical or emotional abuse was also a primary motivator for teens pursuing judicial bypass in Texas).

212. Wurth & Werth, supra note 196, at 41–42.

213. See supra notes 40–42 and accompanying text.

214. Delphine Collin-Vézina, Mireille De La Sablonnière-Griffin, Andrea M. Palmer & Lisa Milne, A Preliminary Mapping of Individual, Relational, and Social Factors that Impede Disclosure of Childhood Sexual Abuse, Child Abuse & Neglect, May 2015, at 123, 127–28.

215. See Noémie Allard-Gaudreau, Sebastien Poirier & Mireille Cyr, Factors Associated With Delayed Disclosure of Child Sexual Abuse: A Focus on the Victim's Having Been Led to Perform Sexual Acts on the Perpetrator, Child Abuse & Neglect, Jan. 2024, at 1, 2 (finding that children who have been sexually abused by a family member do not come forward because of threats, a sense of loyalty toward or desire to protect the perpetrator, or a fear that doing so would negatively affect family dynamics). This dynamic is compounded when there is another form of abuse in the home—like domestic violence by one parent against the other—because it creates a sense of constant danger and tension. See Collin-Vézina et al., supra note 214, at 129.

216. See Wurth & Werth, supra note 196, at 50–51 (describing the invasive questioning in judicial bypass hearings); Coleman-Minahan et al., supra note 211, at 23

2. *Right-to-Safety Challenges.* — The plethora of challenges young survivors face under parental involvement laws presents opportunities for arguments utilizing both positive and negative conceptions of the right to safety. These challenges cannot be solved with existing privacy, equality, or liberty provisions because minors' rights to privacy and autonomy are more limited than those of adults[217] and state ERAs are focused on gender, whereas parental involvement laws target people based on age.[218] Pregnant adolescents are more likely to experience severe pregnancy complications, including hypertensive disorders and eclampsia, than pregnant adults,[219] with younger adolescents being the most likely to face adverse health consequences.[220] The conclusive evidence on the negative health effects of teen pregnancy is bolstered by the American Academy of Pediatrics' conclusion that "most minors 14 to 17 years of age are as competent as adults to provide consent to abortion, are able to understand the risks and benefits of the options, and are able to make voluntary, rational, and independent decisions."[221] When denied an abortion, adolescents may attempt to induce an abortion through dangerous physical methods like physical force, ingesting large amounts of household cleaners, or starvation,[222] making the safety risks of cutting

(relaying the stigmatizing comments Texas teens faced from guardians ad litem and judges in the judicial bypass system).

217. See, e.g., Hope Clinic for Women, Ltd. v. Flores, 991 N.E.2d 745, 761–62 (Ill. 2013) (holding that Illinois's parental notification law did not unreasonably intrude on minors' privacy because they "often lack the maturity and experience to make important decisions on their own").

218. See, e.g., id. at 771 ("[W]e fail to see how the Act creates a sex-based classification . . . . The discrimination which is alleged is between different classes of persons of the same gender.").

219. Yael Eliner, Moti Gulersen, Amita Kasar, Erez Lenchner, Amos Grünebaum, Frank A. Chervenak & Eran Bornstein, Maternal and Neonatal Complications in Teen Pregnancies: A Comprehensive Study of 661,062 Patients, 70 J. Adolescent Health 922, 924–25 (2022).

220. See Beth L. Pineles, Anthony D. Harris & Katherine E. Goodman, Adverse Maternal and Delivery Outcomes in Children and Very Young (Age ≤13 Years) US Adolescents Compared With Older Adolescents and Adults, 328 JAMA 1766, 1767 (2022) (finding that 18.5% of pregnant ten- to thirteen-year-olds had preeclampsia compared to 16.2% of fourteen- to seventeen-year-olds and 15.7% of eighteen- and nineteen-year-olds); see also Stephanie Nolen, What Pregnancy and Childbirth Do to the Bodies of Young Girls, N.Y. Times (July 18, 2022), https://www.nytimes.com/2022/07/18/health/young-girls-pregnancy-childbirth.html (on file with the *Columbia Law Review*) ("The critical issue is that the pelvis of a child is too small to allow passage of even a small fetus . . . [resulting in] 'long labor[] [or] obstructed labor,' . . . sometimes causing pelvic inflammatory disease and the rupture of tissue between the vagina and the bladder and rectum . . . ." (quoting Ashok Dyalchand, Dir., Inst. of Health Mgmt. Pachod)).

221. Comm. on Adolescence, Am. Acad. of Pediatrics, The Adolescent's Right to Confidential Care When Considering Abortion, Pediatrics, Feb. 2017, at 1, 3.

222. Lauren Ralph, M. Antonia Biggs & Katherine Ehrenreich, A Qualitative Analysis of Young People's Experiences With Self-Managed Abortion, 74 J. Adolescent Health S14, S14 (Supp. 2024) (reporting that adolescents turn to physically dangerous methods of self-

off access to abortion especially acute. While advocates of parental involvement laws claim that these laws protect young people,[223] all they do is needlessly risk the health and safety of young survivors who are more than capable of deciding for themselves.

Parental involvement laws also limit minors' ability to reclaim their safety by countering reproductive coercion and other forms of abuse. Fear of being forced to continue an unwanted pregnancy is the most common reason minors do not involve their parents in their abortion decision, and having to explain a pregnancy to parents is particularly daunting to CSA survivors.[224] Given the high proportion of teenage pregnancies that result from sexual coercion or assault, advocates can also argue that, for adolescents in abusive romantic relationships, the ability to independently choose an abortion is closely tied to the longevity of that relationship, with those who carry to term being more likely to remain with the abuser in the long-run, a devastating prospect for young people at such a pivotal point in their lives.[225]

Advocates can use these negative outcomes to mount arguments that reflect negative- and positive-right applications of the right to safety. Utilizing a negative rights framework, advocates could argue that parental involvement laws limit pregnant adolescents' ability to independently preserve their safety by avoiding reproductive coercion and other kinds of abuse, contrary to the medical consensus about minors' decisionmaking capacity.[226] To take things a step further, litigators can advance a positive vision of the right to safety and argue not only that parental involvement laws should be invalidated but that the state must affirmatively support young survivors of reproductive coercion, whether that be through increased public funding, better sex education that discusses reproductive coercion and abuse, or expanding teens' ability to independently petition for protective orders.

CONCLUSION

As America's abortion landscape continues to evolve, survivors of reproductive coercion face an uncertain future. While many states are enacting new abortion restrictions, others are enshrining new protections for reproductive rights in their state constitutions, though

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managed abortion when unable to access abortion in a medical setting, while young adults do not attempt such methods).

223. Rachel Rebouché, Parental Involvement Laws and New Governance, 34 Harv. J.L. & Gender 175, 176 (2011) ("The stated objectives of parental involvement laws are to protect the health and well-being of minors and to encourage dialogue between parents and adolescents about pregnancy options.").

224. See supra notes 211, 214–215 and accompanying text.

225. See supra section I.B.4.

226. See supra note 221 and accompanying text.

those measures do not always immediately expand access.[227] In these unprecedented times, survivors of reproductive coercion like Evie and Gabriella are depending on advocates to develop bold new approaches to advance their reproductive rights.

This Note demonstrates that, in a post-*Dobbs* America, advocates must confront reproductive abuse head on. Survivors' unique experiences of abortion restrictions not only underscore the life-and-death stakes of these laws but also demonstrate how restrictions enable domestic abuse, increasing both the immediate and long-term threats to survivors' safety. Using the right to safety to challenge abortion restrictions will uplift survivors' stories, giving a human face to the devastation wrought by abortion bans while emphasizing the connection between public and private violence.

227. For example, Missouri voters passed an abortion rights amendment in the November 2024 election, but Planned Parenthood still needed to sue to overturn the state's existing abortion ban. Sarah Fentem, Abortions Still Aren't Available in Missouri, Even Though Voters Legalized It. What Happens Now?, KCUR (Jan. 3, 2025), https://www.kcur.org/health/2025-01-03/abortion-clinics-missouri-access-amendment-3 [https://perma.cc/Z2M7-XGC8]. The ban was lifted, but the judge left several onerous regulations of abortion facilities in place, meaning that clinics are still practically unable to provide abortions. Id. In January 2026, the trial in Planned Parenthood's constitutional challenge to the state's abortion restrictions finally concluded, and Missourians await the judge's decision. Anna Spoerre, Kelcie Moseley-Morris & Kevin Hardy, From Waiting Periods to Insurance Mandates: Missouri Abortion Laws Under Review, Mo. Indep. (Jan. 28, 2026), https://missouriindependent.com/2026/01/28/missouri-abortion-judge-weighs-constitutionality-trap-laws-trial-amendment/ (on file with the *Columbia Law Review*).

THE CHANCELLOR'S REACH: A SUBSTANTIVE EQUITY APPROACH TO EXPANDING PROVISIONAL ASSET FREEZES IN TRANSNATIONAL CASES

*Kenzo E. Okazaki**

The principle that federal courts exist to provide remedies rather than to vindicate abstract interests is firmly rooted in American jurisprudence and continues to animate doctrines of federal court jurisdiction. But remedies are elusive. Even executing on a money judgment, which is simple enough in principle, has been complicated by technologies that allow judgment debtors to conceal their assets quickly and effectively.

This Note argues that federal courts are falling behind developments in capital mobility because they have been constrained by an irrational and unnecessarily narrow view of equity. Since 1999, federal courts have been unable to enjoin litigants from transferring their assets pending the outcome of litigation, subject to narrow exceptions and work-arounds. By examining provisional relief in transnational litigation, this Note exposes the consequences of the Supreme Court's limited view of equity and proposes an avenue for developing effective provisional relief under the Court's precedents. By doing so, it contributes to the growth of academic engagement with substantive equity and its potential to reshape domestic law.

* J.D. 2026, Columbia Law School. University of Oxford, M.Sc.; University of Cambridge, MPhil. Managing Editor, *Columbia Law Review.* Thanks very much to Professor George Bermann for advising this Note and for his invaluable guidance. I am also incredibly grateful to Daniel Listwa, whose insight and suggestions improved this piece immensely. This Note, like all of my other work, is dedicated to my family. I owe everything to their sacrifices. See Gregory A. Prince, "There Is Always a Struggle": An Interview With Chieko N. Okazaki, Dialogue, Spring 2012, at 112, 139 ("My mother taught me another principle: *on.* It meant that you felt gratitude and recognized your obligation to someone who had helped you."); see also Chieko N. Okazaki, Being Enough 29, 32 (2002) ("[A]n old family proverb comes from my mother, who used to tell us . . .'Begin well and do not fear the end.' . . . Think about planting trees and sowing seeds, even though the world, or your personal world, seems to be ending.").

INTRODUCTION

In 1999, the Solicitor General attempted to persuade the Supreme Court that the ability to provisionally freeze assets was essential "in an age of easy global mobility of capital."[1] At that time, capital's ability to permeate national borders had been so revolutionary that it marked a rupture in the concept of territorial sovereignty.[2] Those trends have only accelerated since 1999. Today, capital is more mobile and intangible than ever. In 2024, an estimated $194.6 trillion flowed across national borders—a

1. Brief for the United States as Amicus Curiae Supporting Respondents at *16, Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308 (1999) (No. 98-231), 1999 WL 86498.

2. See Michael Hardt & Antonio Negri, Empire 310 (2000) ("The world market both homogenizes and differentiates territories, rewriting the geography of the globe. Still . . . on a level that is often subordinated to the power of the transnational corporations, reside the general set of sovereign nation-states . . . ."); Steffen Murau & Jens van't Klooster, Rethinking Monetary Sovereignty: The Global Credit Money System and the State, 21 Persps. on Pol. 1319, 1326 (2022) ("The concept of sovereignty that today informs international law is a conception of state sovereignty that focuses on the right of states to exercise power over a territory without interference from other states.").

figure expected to rise to $320 trillion by 2032.[3] Crimes such as money laundering and drug trafficking have profited from this mobility,[4] while the proliferation of cryptocurrency, an explicitly anational means of holding and transferring assets,[5] threatens traditional means of policing.[6] In 2024, "pig butchering" schemes involving cryptocurrency provoked international alarm[7] and produced a great deal of litigation.[8] In the face

3. 2025: Navigating the Cross-Border Payments Evolution, J.P. Morgan (Sep. 9, 2025), https://www.jpmorgan.com/insights/payments/fx-cross-border/2025-trends-for-financial-institutions [https://perma.cc/Y9KL-UHEX].

4. See U.S. Dep't of Treasury, 2024 National Money Laundering Risk Assessment 96 (2024), https://home.treasury.gov/system/files/136/2024-National-Money-Laundering-Risk-Assessment.pdf [https://perma.cc/9TVZ-SYTW] ("A number of recent money laundering threats and vulnerabilities have become more significant and pernicious over the past two years. For example, criminals, scammers, and illicit actors are increasingly using virtual assets and digital peer-to-peer payment systems to engage in fraud and other crimes."). For materials examining the increasingly transnational nature of such crimes, see Yury Fedotov, Remarks at the OSCE Mediterranean Conference Event on "Links Between Drug Trafficking, Organized Crime and Terrorism in the Mediterranean Region", UN Off. on Drugs & Crime (Oct. 24, 2017), https://www.unodc.org/unodc/en/speeches/2017/osce-links-241017.html [https://perma.cc/N7EP-ELY2] ("The cross-border nature of organized crime provides potential avenues for these groups to cooperate where they share interests, and crime presents a number of potential revenue streams for terrorist groups."); see also Yashasvi Chandra, Illicit Drug Trafficking and Financing of Terrorism: The Case of Islamic State, Al Qaeda and Their Affiliate Groups, 14 J. Def. Stud. 69, 69 (2020) ("Over the years, major transnational terrorist groups have emerged as big actors in controlling the network of the illicit drug trade.").

5. See Duncan Smith, Money Laundering, Terrorist Financing and Virtual Assets 57–58 (2024) (defining cryptocurrency and exploring its relationship with national regulation and law enforcement); see also Jason Scharfman, The Cryptocurrency and Digital Asset Fraud Casebook 1–2 (2023) (defining cryptocurrency and citing estimates that, "[a]s of April 2021 . . . the value of the crypto markets is over $2 trillion").

6. Christina Parajon Skinner, Coins, Cross-Border Payments, and Anti-Money Laundering Law, 60 Harv. J. on Legis. 285, 301–11 (2023) (describing the role of banks in preventing terrorist financing and money laundering); see also Chandra, supra note 4, at 72 ("Following the guidelines issued by a majority of countries, banks and other financial institutes adopted comprehensive regulatory measures to curtail money laundering.").

7. See, e.g., Lars Daniel, The Alarming 'Pig Butchering' Cyber Scam Costing Victims Billions—Are You at Risk?, Forbes (Oct. 30, 2024), https://www.forbes.com/sites/larsdaniel/2024/10/30/this-halloween-beware-the-pig-butcher/ [https://perma.cc/4MQM-AH3L] (last updated Dec. 18, 2024) (explaining that "[p]ig butchering is a social engineering scam that combines elements of trust-building and fake investment opportunities" which often involves crypto); 'Pig Butchering' Scam: How China's 'Broken Tooth' Stole Over $75bn From Global Investors Using Crypto Currencies, Econ. Times, https://economictimes.indiatimes.com/news/international/global-trends/pig-butchering-scam-how-chinas-broken-tooth-stole-over-75-bn-from-global-investors-through-crypto-currencies/articleshow/116791522.cms?from=mdr [https://perma.cc/87XM-E3EB] (last updated Dec. 29, 2024) (describing the scam and its relationship to human trafficking); Last Week Tonight, Pig Butchering Scams: Last Week Tonight with John Oliver (HBO), at 3:27–3:34 (YouTube, Feb. 29, 2024), https://www.youtube.com/watch?v=pLPpl2ISKTg (on file with the *Columbia Law Review*) ("[I]f you are thinking, 'this seems like the kind of scam that's been around for decades,' that is partially true, but the way this one works is fairly new . . . .").

of such developments, the law has lagged behind. Unpersuaded by the Solicitor General's argument, a slim majority of the Supreme Court hamstrung federal courts' ability to fashion provisional remedies capable of keeping apace with accelerating asset mobility.[9]

As the mobility and intangibility of capital increases,[10] so too the exigency of reexamining provisional relief. The temptation of frustrating final judgments directly correlates with the ease with which litigants can transfer assets beyond a court's reach,[11] and it is patently impossible to imagine an effective system of litigation that allows a defendant to freely dissipate their assets or otherwise render themselves judgment-proof.[12] Effective provisional relief is accordingly vital. Asset-freeze injunctions are a particularly attractive provisional measure because "claimants can protect their potential judgments . . . when the location of assets against which judgment may be enforced is not a game of hide and seek."[13] In other common law jurisdictions, these injunctions are known as *Mareva* injunctions, interlocutory orders freezing a defendant's assets to prevent their dissipation,[14] and are an "increasingly common feature of modern

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8. See, e.g., Cohn v. Popescu, No. 1:24-CV-00337, 2024 WL 4525500, at *1 (E.D. Tex. Sep. 13, 2024) ("[Plaintiff] alleges that he has been the victim of what is known as a 'pig-butchering scam.'"); Harris v. Upwintrade.com, No. 1:24-CV-00313, 2024 WL 4920599, at *4 (E.D. Tex. Sep. 5, 2024) ("[T]he Harrises have provided evidence that the Defendants intentionally deceived them and misappropriated their assets in what appears to have been an intentional pig-butchering scam."); Song v. Doe, No: 6:24-cv-809-JSS-EJK, 2024 WL 4632242, at *1 n.1 (M.D. Fla. Aug. 19, 2024) ("Plaintiff asserts that she is the victim of what is colloquially known as a 'pig butchering' scam."); Richter v. KRG Trading, Inc., No. CV 24-03622-MWF (SKx), 2024 WL 3050812, at *2 (C.D. Cal. May 28, 2024) ("Plaintiff alleges that Defendants participated in a romance and investment scheme known as 'pig butchering.'").

9. See infra Part II.

10. See S. Nathan Park, Equity Extraterritoriality, 28 Duke J. Comp. & Int'l L. 99, 140 (2017) [hereinafter Park, Equity Extraterritoriality] ("Modern capitalism continuously generates more types of intangible properties of ever-greater dollar amount and ever-greater level of abstraction. The days when intangible properties were mostly debts, shares in a corporation, and simple forms of intellectual property, are firmly behind us . . . .").

11. See Janis Sarra, Stephan Madaus & Irit Mevorach, Chasing Assets Abroad: Ideas for More Effective Asset Tracing and Recovery in Cross-Border Insolvency, 32 Int'l Insolvency Rev. 253, 256 (2023) ("At the touch of computer keys, assets can be shifted through multiple jurisdictions within minutes, creating significant challenges for insolvency professionals and creditors to trace and recover the value for creditors of the insolvent debtor."); cf. Grateful Dead, Friend of the Devil, *on* American Beauty (Warner Records Inc. 1970) ("I ran down to the levee[,] but the devil caught me there[.] [H]e took my 20-dollar bill and vanished in the air.").

12. See David Capper, The Need for *Mareva* Injunctions Reconsidered, 73 Fordham L. Rev. 2161, 2179 (2005) ("[A] lawyer is hired not merely to go to court and win the case. [They] must also collect the debt. Enforcement is everything.").

13. Id. at 2161.

14. See Kern Alexander, The *Mareva* Injunction and *Anton Piller* Order: The Nuclear Weapons of English Commercial Litigation, 11 Fla. J. Int'l L. 487, 488 (1997) ("The purpose of the *Mareva* injunction is to prevent the defendant from dissipating or disposing of assets by removing them from or within the jurisdiction in a manner that would

international-commercial litigation."[15] In the U.S. legal system, provisional asset freezes take the form of preliminary injunctions that operate in personam, which only require jurisdiction over the defendant to command the use of property located beyond the jurisdiction of the court.[16] Asset-freeze injunctions have a distinct advantage over attachment, which requires property to be located within the court's jurisdiction.[17] This advantage is particularly pronounced in transnational

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frustrate a potential judgment."). This instrument draws its name from the case which created it. See Mareva Compania Naviera S.A. v. Int'l Bulkcarriers S.A., [1980] 1 All E.R. 213 (C.A. 1975); George A. Bermann, Provisional Relief in Transnational Litigation, 35 Colum. J. Transnat'l L. 553, 560 (1997) (describing the injunction's history). For a further discussion of *Mareva* injunctions, see Rhonda Wasserman, Equity Renewed: Preliminary Injunctions to Secure Potential Money Judgments, 67 Wash. L. Rev. 257, 336–48 (1992). For a discussion of the injunction's history, see generally James R. Theuer, Pre-Judgment Restraint of Assets for Claims of Damages: Should the United States Follow England's Lead, 25 N.C. J. Int'l L. 419 (2000) (exploring the development of the *Mareva* injunction in England).

15. James E. Pfander & Wade Formo, The Past and Future of Equitable Remedies: An Essay for Frank Johnson, 71 Ala. L. Rev. 723, 726 (2020). Before the *Grupo Mexicano* decision, asset-freezing injunctions also played an important role in ensuring that assets were available to compensate survivors of human rights abuses. Consider, for example, the human rights litigation surrounding the estate of Ferdinand Marcos, the former president of the Philippines. In re Estate of Ferdinand Marcos, Human Rts. Litig., 25 F.3d 1467 (9th Cir. 1994). There, survivors of Marcos and his regime brought suit against his estate for torture, summary execution, and forced disappearance. Id. at 1469. In order to ensure that a final judgment could be satisfied in a related matter, the district court entered a preliminary injunction which was later affirmed by the Ninth Circuit. Republic of the Philippines v. Marcos, 862 F.2d 1355, 1363–64 (9th Cir. 1988) (en banc), cert. denied, 490 U.S. 1035 (1989). The injunction enjoined the estate from transferring assets, and the plaintiffs in the human rights litigation successfully obtained continuation of that injunction. *Marcos*, 25 F.3d at 1480. Eventually, a jury awarded the plaintiffs $1.2 billion in exemplary damages and $766 million in compensatory damages, which the Ninth Circuit affirmed. Hilao v. Estate of Marcos, 103 F.3d 767, 772, 787 (9th Cir. 1996).

16. See *Marcos*, 862 F.2d at 1363–64 ("Because the injunction operates *in personam*, not *in rem*, there is no reason to be concerned about its territorial reach."); see also Wasserman, supra note 14, at 304 ("Both state and federal courts have held that they have authority to enjoin a person from taking . . . action outside the state or district so long as they have personal jurisdiction over the person." (footnotes omitted)). Note, however, that freezing assets held by third parties, including banks, requires personal jurisdiction over the third parties, rather than the real target of the freeze. This issue is taken up in section II.C.

17. 6 Am. Jur. 2d Attachments and Garnishments § 23 (2024) ("It is a fundamental rule that in attachment or garnishment proceedings the res must be within the jurisdiction of the court issuing the process."); see also Wasserman, supra note 14, at 301 (1992) ("The preliminary injunction acts *in personam* and bars the defendant from disposing of assets, but it does not bind the defendant's property in any way."). Asset-freeze injunctions and attachment are otherwise functionally similar. See FTC v. H.N. Singer, Inc., 668 F.2d 1107, 1112 (9th Cir. 1982) ("[T]he asset freeze has an effect comparable to that of an attachment . . . ."); see also Bermann, supra note 14, at 562–65 (explaining that an injunction operating in personam and preventing the disposal of assets can have the same practical effect as attachment).

disputes involving assets located abroad. Such cases may become increasingly common as U.S. residents hold more wealth overseas.[18]

Though the importance of provisional remedies in transnational disputes is increasingly acute, the subject has been neglected.[19] With few exceptions, the study of transnational litigation does not address provisional relief at all,[20] and the most recent satisfactory consideration of the subject is now nearly thirty years old.[21] This neglect is alarming. All of the considerations that emphasize provisional relief's role in protecting judgments in general apply a fortiori to transnational litigation because "it is much easier to frustrate the enforcement of the court's final judgment when the case crosses the national border."[22] The

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18. See Greg Falkof, Introduction: The Growth of International Arbitration for Private Wealth Disputes, Glob. Arb. Rev. (Apr. 30, 2025), https://globalarbitrationreview.com/guide/the-guide-high-net-worth-clients-and-arbitration/first-edition/article/introduction-the-growth-of-international-arbitration-private-wealth-disputes [https://perma.cc/ALM6-GRTW] ("The recent growth and internationalisation of private wealth gives rise to a greater demand for legal services tailored to multi-jurisdictional wealth-related disputes . . . ."). Notably, assets may be held abroad through crypto, requiring developments in other areas of the law. Cf. Williams v. Binance, 96 F.4th 129, 139 (2d Cir. 2024) (discussing the possibility that U.S. securities laws may not apply to cryptocurrency transactions that happened to be processed through servers physically located in the United States); Basic v. BProtocol Foundation, No. A-23-CV-533-RP, 2024 WL 4113751, at *9 (W.D. Tex. July 31, 2024) (distinguishing *Binance* and dismissing a claim for forum non conveniens because the electronic exchange was subject to Israeli regulation). As of October 2024, an estimated 17% of U.S. adults hold assets in crypto. Michelle Faverio, Wyatt Dawson & Olivia Sidoti, Majority of Americans Aren't Confident in the Safety and Reliability of Cryptocurrency (Oct. 24, 2024), https://www.pewresearch.org/short-reads/2024/10/24/majority-of-americans-arent-confident-in-the-safety-and-reliability-of-cryptocurrency/ [https://perma.cc/9YJ5-9HD8].

19. Issues that are more or less well addressed in domestic litigation are often undertheorized and must therefore be reevaluated in the "more turbulent waters of transnational litigation." Bermann, supra note 14, at 556.

20. See King Fung Tsang & Pierce Lai, To Catch the Cheshire Cat: Freezing Injunction Jurisdiction at the Click of a Mouse, 33 Wash. Int'l L.J. 115, 146 (2024) ("Pre-judgment provisional measures in U.S. courts have attracted relatively few discussions. That was status quo prior to the seminal case of *Grupo Mexicano*. Even though that seminal case received sharp criticisms, the lack of discussion continued." (footnotes omitted)). Previous articles on the topic have used its conspicuous absence in relevant textbooks to emphasize the paucity of academic attention paid to this issue. See S. Nathan Park, Recognition and Enforcement of Foreign Provisional Orders in the United States: Toward a Practical Solution, 38 U. Pa. J. Int'l L. 999, 1003–04 (2017) [hereinafter Park, Recognition and Enforcement] ("Provisional orders are such a scholarly afterthought that the leading textbook in transnational litigation in the United States does not even have a chapter on provisional orders." (citing Samuel P. Baumgartner, Transnational Litigation in the United States, 55 Am. J. Comp. L. 793, 797–98 (2007) (reviewing Gary Born & Peter B. Rutledge, International Civil Litigation in United States Courts (4th ed. 2007)))).

21. See Bermann, supra note 14, at 557. Professor Bermann concluded that provisional relief in transnational litigation "is far less well defined than the more conventional sorts of judicial interventions." Id. at 556.

22. Park, Recognition and Enforcement, supra note 20, at 1001. See also Jimi Hendrix, All Along the Watchtower, *on* Electric Ladyland (Sony Music Entertainment 1968) ("There's too much confusion[,] I can't get no relief.").

unique costs, uncertainties, and burdens of transnational litigation compel renewed emphasis on measures to deter "actions that will make ultimate victory pyrrhic."[23] Reassessing provisional relief in transnational litigation is especially timely as academic and practical interest in the field intensifies.[24]

The urgency of a renewed focus on developing effective provisional measures in transnational litigation coincides with current pioneering scholarship on equitable remedies.[25] When applied to assets held abroad, asset-freeze injunctions are an exercise of equity extraterritoriality, that is, "the court's authority, originating from the court's equitable powers, to order a person to take certain actions outside of the court's territorial jurisdiction."[26] This use of a court's equitable powers is a potent and flexible means of replying to asset mobility, especially in transnational cases. Though the Supreme Court limited asset freezes by introducing and relying on a static conception of equity,[27] the time is ripe for a reevaluation of that static approach. As Professor Asaf Raz has pointed out, "[A]ll the cards, from originalism and textualism, through the Constitution's text, to relevant case law, are already on the table."[28] This Note argues that the U.S. approach to asset freezes is inadequate to protect the integrity of transnational disputes in a climate characterized

23. David Westin & Peter Chrocziel, Interim Relief Awarded by U.S. and German Courts in Support of Foreign Proceedings, 28 Colum. J. Transnat'l L. 723, 723 (1990); cf. Asahi Metal Industry Co. v. Superior Ct. of Cal., 480 U.S. 102, 114 (1987) ("The unique burdens placed upon one who must defend oneself in a foreign legal system should have significant weight in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders.").

24. See Christopher A. Whytock, Transnational Litigation in U.S. Courts: A Theoretical and Empirical Reassessment, 19 J. Empirical Legal Stud. 4, 5 (2022) ("Transnational litigation is an increasingly active field of scholarship . . . and legal practice." (citations omitted)); see also Pamela K. Bookman, Litigation Isolationism, 67 Stan. L. Rev. 1081, 1083–84 (2015) ("Transnational suits—cases involving foreign parties, foreign conduct, foreign law, or foreign effects—and the law the governs them have growing significance in the United States and around the world."). Transnational cases themselves are also on the rise; "there has been an absolute increase in the number of disputes with discernible connections or relations to more than one country—or no clear connection to any country at all." Paul Herrup, Transnational Litigation: Trends and Challenges, 56 N.Y.U. J. Int'l L. & Pol. 231, 232 (2024); see also Andrew S. Bell, Forum Shopping and Venue in Transnational Litigation 4 (2003) ("[M]ore international trade means more transnational disputes, contractual, quasi-contractual, and arising from the negligent provision of goods and services."). Exact empirical information on this issue is, however, in dispute. See Whytock, supra, at 48 ("[T]ransnational diversity filings constitute a significant but small portion of overall diversity filings . . . they have decreased overall since at least the mid-1980s and then stabilized, with occasional fluctuations . . . .").

25. See infra section III.A.

26. Park, Equity Extraterritoriality, supra note 10, at 102 (internal quotation marks omitted).

27. See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part) ("[T]he Court relies on an unjustifiably static conception of equity jurisdiction."); infra section I.A.

28. Asaf Raz, The Original Meaning of Equity, 102 Wash. U. L. Rev. 541, 593 (2024).

by increasing asset mobility and narrowing approaches to personal jurisdiction. As Professor Nathan Park has suggested, "[T]he developing trends of modern capitalism, in particular its ever-increasing reliance on intangible property, indicate that Equity Extraterritoriality will become even more important in the coming decades."[29] The time has now come to revisit the use of asset-freeze injunctions and put them in productive conversation with current scholarship on equitable remedies.

This Note proceeds in three parts. Part I draws on recent case law to paint a comprehensive portrait of the current state of asset-freeze injunctions in the United States, a project that has not yet been undertaken comprehensively. It shows that asset-freeze injunctions remain available in cases seeking equitable remedies and, more broadly, under the laws of certain states. Part II establishes the urgency of reconsidering asset-freeze injunctions because contemporary asset mobility along with legal developments regarding cryptocurrency and nonparty jurisdiction have rendered the current approach described in Part I inconsistent with the purposes and aims of provisional relief. Part III draws on recent literature on federal equitable remedies to argue that a new federal common law approach to asset-freeze injunctions in transnational cases is now feasible and can equip federal courts to respond to the contextual transformations addressed in Part II. It argues that the transnational context is a particularly attractive one in which to enact changes to federal equity practices because it provides a limiting principle, is less susceptible to *Erie*-based objections, and because "international civil litigation has in the past proved fertile ground for domestic law reform."[30] It then explores some limitations to the proposed approach and concludes that the proposal is nonetheless a worthwhile effort that remedies neglect of provisional relief in transnational litigation, provides a feasible solution that will equip courts to issue effective provisional relief, and advances the study of federal equitable remedies.

I. PROVISIONAL ASSET FREEZES IN U.S. COURTS

Given the paucity of academic attention dedicated to the subject,[31] a reappraisal of the U.S. approach to asset-freeze injunctions that accounts

29. Park, Equity Extraterritoriality, supra note 10, at 183.

30. Stephen B. Burbank, Bitter With the Sweet: Tradition, History, and Limitations on Federal Judicial Power—A Case Study, 75 Notre Dame L. Rev. 1291, 1334 (2000).

31. See supra notes 19–21 and accompanying text. The enforcement of foreign asset freezes has also received little attention, and this process is distinct from that of issuing asset freezes. See Bermann, supra note 14, at 557 ("[I]t may also be necessary . . . to distinguish between situations in which a party to foreign litigation seeks relief from a U.S. court and situations in which a foreign court issues its own order of relief and the U.S. court is merely asked . . . to 'enforce' it."). Though there is not sufficient space in this Note to provide a solution to this issue as well, the following provides the current state of law on the issue. Professor Nathan Park has noted that "U.S. law provides virtually no

for the most recent developments in intangible properties is required. This Part provides a comprehensive view of this landscape. After examining the foundations of the doctrine in *Grupo Mexicano de Desarrollo v. Alliance Bond Fund*, it explains that asset freezes are still available under Federal Rule of Civil Procedure 65 in circumstances in which a plaintiff seeks equitable relief,[32] and under Rule 64, when approved by the law of the forum state.[33] *Grupo Mexicano* does not

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guidance" on the issue and that the process "is fraught with uncertainty and delay." Park, Recognition and Enforcement, supra note 20, at 1001. Unsurprisingly, there is a serious paucity of authority that can reveal a uniform approach to enforcing foreign asset freezes. A few state courts have held that foreign provisional orders are entitled to recognition and enforcement. See id. at 1002. In *Amezcua v. Cortez*, a Florida state court relied on comity to enforce an injunction prohibiting a defendant from transferring assets located in Florida. 314 So. 3d 666, 668–69 (Fla. Dist. Ct. App. 2021). The court relied upon *Cermesoni v. Maneiro*, where the court of appeals had observed: "[W]e have repeatedly approved the enforcement in Florida of temporary injunctions issued by foreign courts as a matter of international comity." 144 So. 3d 627, 629 (Fla. Dist. Ct. App. 2014); see also Gorsoan Ltd. v. Bullock, No. 2020-020803-CA-01, at 3 (Fla. Cir. Ct. Feb. 17, 2021) (holding that foreign interim orders are enforceable under Florida law). Authority is similarly sparse in federal court. A few recent cases suggest hostility. For example, in *LMS Commodities DMCC v. Libyan Foreign Bank*, a Texas district court declined to enforce a foreign asset freeze under the Uniform Foreign-Country Money Judgments Recognition Act and declined to allow amendment of the complaint because "it would be futile for LMS to continue to seek recognition of a prejudgment asset-freeze order." No. 1:18-CV-679-RP, 2019 WL 1925499, at *4 (W.D. Tex. Apr. 30, 2019). The court made no mention of the comity considerations that led state courts to enforce foreign asset freezes. Indirectly enforcing foreign asset freezes also proves challenging. In one recent case, a federal court rejected the argument that comity compels considering a foreign court's issuance of a global asset freeze sufficient to demonstrate a likelihood of success on the merits for attachment in the forum where the court sits. Sakab Saudi Holding Co. v. Aljabri, 578 F. Supp. 3d 140, 144 (D. Mass. 2021), aff'd, 58 F.4th 585 (1st Cir. 2023). Finally, a recent bankruptcy case has raised the issue that enforcing a foreign asset freeze is contrary to public policy based on *Grupo Mexicano*. In re Nexgenesis Holdings Ltda., 662 B.R. 406, 416–21 (Bankr. S.D. Fla. 2024) ("[T]he Ex Parte Order violates basic public policies of the United States, that is . . . that, with very limited exception, the assets of U.S. citizens and companies may not be frozen prior to judgment pending the adjudication of a claim for money damages."); see also id. at n.8 ("[G]ranting the requested injunctive relief would harm . . . the public interest, as creditors should be required to receive a judgment before being allowed to dictate control of the property." (second alteration in original) (internal quotation marks removed) (quoting Residential Fin. Corp. v. Jacobs, No. 2:13-cv-1167, 2014 WL 682486, at *4 (S.D. Ohio Feb. 21, 2014))).

32. In addition to the exceptions addressed at length in this note, *Grupo Mexicano* does not prohibit the issuance of asset-freezing injunctions for *secured* creditors. See, e.g., III Finance Ltd. v. Aegis Consumer Funding Grp., Inc., No. 99 CIV. 2579(DC), 1999 WL 461808, at *4 n.1 (S.D.N.Y. July 2, 1999) ("The *Grupo* case is inapplicable here because III Finance claims a security interest in the assets subject to the preliminary injunction."); Tibor Tajti & Peter Iglikowski, A Cross Border Study of Freezing Orders and Provisional Measures: Does Mareva Rule the Waves? 46 n.14 (2018) ("As secured creditors have rights in the collateral, preliminary injunctions are available to them and the restrictions of *Grupo Mexicano* do not apply to them."); c.f. *Grupo Mexicano*, 527 U.S. at 330 ("[B]efore judgment (or its equivalent) an unsecured creditor has no rights at law or in equity in the property of his debtor.").

33. See infra section I.A.2.

directly bind state courts, so they may follow federal courts in making a distinction between legal and equitable remedies or decline to do so.[34] Though the state law on this issue is sparse, this Note assembles as much relevant authority as can be located.[35] The persistence of asset-freeze injunctions emphasizes their utility, indicating that courts view them as a powerful tool to protect final judgments.

A. *Federal Court*

1. *Rule 65.* — The Supreme Court restrained federal courts' ability to issue and enforce asset-freeze injunctions under federal law in *Grupo Mexicano*.[36] Writing for a 5-4 majority, Justice Antonin Scalia concluded that the district court did not have the power to issue an asset-freeze injunction pursuant to Rule 65 because such power was not "traditionally accorded by courts of equity" and therefore was not conferred upon federal courts by the Judiciary Act of 1789,[37] which granted authority "to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[38] The Court reasoned that, at time of the Founding, it was understood that a creditor had no interest in the debtor's property and thus could not "interfere with the debtor's use of that property," so preliminary relief of this kind was not cognizable absent a prior judgment.[39]

But federal courts have inherent equitable power to issue injunctions freezing assets under Rule 65 when the remedy sought is equitable rather than legal.[40] When seeking an equitable remedy, *Deckert*

34. See infra section I.B.

35. See infra note 53.

36. Tsang & Lai, supra note 20, at 146.

37. *Grupo Mexicano*, 527 U.S. at 318.

38. Id. (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939)).

39. Id. at 319–20. Though the Government's amicus brief pointed out that the preliminary injunction sought was analogous to "certain applications of a 'creditor's bill,' Justice Scalia essentially required not analogy but identity" with relief traditionally available in courts of equity. Daniel B. Listwa & Charles Seidell, Note, Penalties in Equity: Disgorgement After *Kokesh v. SEC*, 35 Yale J. on Regul. 667, 686 (2018). Recent district court cases have held that *Grupo Mexicano*'s prohibition applies even in bankruptcy cases. See In re Nexgenesis Holdings Ltda., 662 B.R. 406, 416 (Bankr. S.D. Fla. 2024) ("Although this Court has equitable powers, such powers do not provide this Court with the power to do something forbidden to Article III courts.").

40. Tsang & Lai, supra note 20, at 152; see also Purple Innovation v. Foshan Dirani Design Furniture, No. 2:22-cv-620-HCN-DAO, 2024 WL 1347356, at *8 n.4 (D. Utah Mar. 29, 2024) ("Here, Purple sought final equitable relief against the Defendants in its complaint . . . . It follows that *Grupo Mexicano* does not bar an asset freeze in this case."); Fed. Trade Comm'n v. Verity Int'l, Ltd., No. 00 Civ. 7422 (LAK), 2001 WL 504849, at *2 (S.D.N.Y. May 14, 2001) ("*Grupo Mexicano* was limited to cases seeking strictly legal relief . . . ."). Courts have also interpreted certain statutes as providing for asset-freeze injunctions. See Tiffany (NJ) LLC v. Dong, No. 11 Civ. 2183 (GBD) (FM), 2013 WL 4046380, at *22–23 (S.D.N.Y. Aug. 9, 2013) ("[T]he Lanham Act expressly provides that

v. Independence Shares Corp. controls, standing for the proposition that "a court has sufficient equitable powers to preliminarily freeze a defendant's assets in suits sounding in equity."[41]

2. *Rule 64.* — Federal courts may issue asset-freeze injunctions "under the law of the forum state pursuant to Rule 64."[42] Rule 64 equips federal courts with "every remedy . . . available . . . under the law of the state where the court is located" that "provides for seizing a person or property to secure satisfaction of the potential judgment."[43] In *Pineda v. Skinner Services*, the First Circuit held that Rule 64 authorizes "injunctive relief under state law,"[44] meaning that "*Grupo Mexicano* does not constrain the district court's authority to grant analogous relief under

federal courts have the power to 'grant injunctions, according to the principles of equity' in trademark infringement cases." (quoting 15 U.S.C. § 1116(a) (2024))); see also Mun. Credit Union v. Queens Auto Mall, Inc., 126 F. Supp. 3d 290, 298–99 (E.D.N.Y. 2015) ("A district court has authority under the Lanham Act to grant injunctive relief to protect a plaintiff's trademark rights.").

41. Turnkey Offshore Project Servs., LLC v. JAB Energy Sols., LLC, No. 21-672, 2021 WL 3509677, at *6 (E.D. La. Aug. 10, 2021) (citing Deckert v. Independence Shares Corp., 311 U.S. 282, 289–91 (1940)); Theuer, supra note 14, at 484 ("If equitable relief is sought, injunctions may issue . . . ."); see also Fed. Sav. & Loan Ins. Corp. v. Dixon, 835 F.2d 554, 562 (5th Cir. 1987) ("[O]nce a plaintiff establishes an equitable cause of action, the district court may use its full equitable powers to grant appropriate preliminary relief as well.").

42. Pineda v. Skinner Servs., Inc., 22 F.4th 47, 53 (1st Cir. 2021); see also Fed. R. Civ. P. 64 ("[E]very remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."); Fed. Trade Comm'n v. Zurixx, LLC, No. 2:19-cv-713-DAK-DAO, 2021 WL 5179139, at *7 (D. Utah Nov. 8, 2021) ("Rule 64 allows the court to follow Utah rules allowing receiverships and asset freeze injunctions."); cf. *Grupo Mexicano*, 527 U.S. at 330 ("The remedy sought here could render Federal Rule of Civil Procedure 64, which authorizes use of state prejudgment remedies, a virtual irrelevance."); Gilead Scis., Inc. v. Safe Chain Sols., LLC, 684 F. Supp. 3d 51, 69–71 (E.D.N.Y. 2023) (declining to issue an asset freeze under state law because the Lanham Act was applicable to the assets in question). Though asset-freeze injunctions do not deprive a party of possession of their assets like other measures described in Rule 64, their functional equivalence counsels against drawing too sharp a distinction between these remedies, especially when the rule specifies "other corresponding or equivalent remedies, however designated." Burbank, supra note 30, at 1313 (citing Fed. R. Civ. P. 64). For further arguments against distinguishing between Rules 64 and 65 for asset-freeze injunctions, see id. at 1312–16.

43. Fed. R. Civ. P. 64.

44. *Pineda*, 22 F.4th at 53 (citing United States ex rel. Rahman v. Oncology Assocs., 198 F.3d 489, 501 (4th Cir. 1999) (holding that FRCP 64 "incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets" and that this form of provisional relief was available under Maryland law)); see also Hendricks v. Bank of Am., N.A., 408 F.3d 1127, 1139 (9th Cir. 2005) ("[W]e look to California law to determine whether the district court could grant a preliminary injunction even though final resolution of the underlying fraud claim would not occur in that court."); Charlesbank Equity Fund II v. Blinds To Go, Inc., 370 F.3d 151, 161 (1st Cir. 2004) ("The [Supreme] Court's reasoning [in *Grupo Mexicano*] supports the continued vitality of Rule 64 . . . .").

Rule 64 when authorized by the law of the forum state."[45] District courts in the First Circuit have relied upon this principle,[46] and the Fourth Circuit has as well.[47]

The *Pineda* court went on to reject the defendant's argument that a federal court's power to issue an asset-freeze injunction under Rule 64 extends only to cases in which the court sits in diversity because "nothing in Rule 64 indicates that the power . . . turns on the basis for the district court's subject-matter jurisdiction."[48] Accordingly, the court held that the district court had "correctly asserted its authority"[49] in enjoining the defendant "from selling, transferring, or otherwise conveying any assets . . . except in the ordinary course of business, unless the net value of the assets of Skinner Services, Inc. will be at least $1,425,000 regardless of any such sale, transfer, or conveyance."[50] Though a domestic case, the court's rationale for granting the injunction—that "defendants may dissipate or conceal their assets in order to avoid judgment"[51]—is no less applicable to transnational litigation. So long as a federal district court has personal jurisdiction over a party, and state law authorizes provisional asset-freezing measures, there is no reason why the court could not enjoin them from transferring foreign assets.[52]

B. *State Court*

State courts may issue provisional asset freezes if permitted to do so by state law.[53] *Grupo Mexicano* does not directly bind state courts which

45. *Pineda*, 22 F.4th at 49.

46. See BRT Mgmt., LLC v. Malden Storage, LLC, No. 17-10005-FDS, 2022 WL 95926, at *2 (D. Mass. Jan. 10, 2022) (citing *Pineda* and holding that the district court may grant asset-freeze injunctions under Massachusetts law); Revolutions Med. Corp. v. Med. Inv. Grp. LLC, No. 12-10753-GAO, 2012 U.S. Dist. LEXIS 186815, at *14 n.10 (D. Mass. Nov. 7, 2012) ("Rule 64 'allows a federal court to borrow provisional remedies created by state law.'" (quoting Goya Foods, Inc. v. Wallack Mgmt. Co., 290 F.3d 63, 70 (1st Cir. 2002))).

47. See *Rahman*, 198 F.3d at 501 (holding that FRCP 64 "incorporates state procedures authorizing any meaningful interference with property to secure satisfaction of a judgment, including any state-authorized injunctive relief for freezing assets" and that this form of provisional relief was available under Maryland law).

48. *Pineda*, 22 F.4th at 54.

49. Id. at 55.

50. Pineda v. Skinner Servs., Inc., No. 16-12217-FDS, 2019 WL 8262655, at *3 (D. Mass. Dec. 23, 2019), aff'd *Pineda*, 22 F.4th. 47.

51. Id. at *1.

52. See Bermann, supra note 14, at 566 (arguing that courts should not hesitate to issue orders restraining property abroad and should issue contempt orders in the event of noncompliance regardless of whether foreign judicial assistance is forthcoming); cf. Abi Jaoudi & Azar Trading Corp. v. Cigna Worldwide Ins. Co., Civ. No. 91-6785, 2016 WL 3959078, at *1 (E.D. Pa. July 22, 2016) (concluding that the foreign nationality of nonparties did not insulate them from being held in contempt).

53. Though state case law is sparse, the following attempts to account for as many state law positions on the issue as possible. For Alabama, see Norman v. Occupational

Safety Ass'n of Ala. Workmen's Comp. Fund, 811 So. 2d 492, 501 (Ala. 2001) ("Although the Supreme Court's holding on the jurisdiction of the federal district courts does not control Alabama courts' authority to issue injunctions, the analysis is persuasive and consistent with Alabama law."). For California, see Morris v. Lee, No. 30-2021-01234127-CU-EN-CJC, 2022 Cal. Super. Lexis 51, at *1 (Cal. Super. Ct. Jan. 3, 2022) (issuing an asset freeze because of a risk of "immediate and irreparable damage to the Court's ability to grant effective final relief in the form of permanent injunctive relief, restitution, disgorgement, or other equitable monetary relief"); see also Pavone & Fonner, LLP v. Willis, No. D072986, 2018 WL 1476694, at *6–7 (Cal. Ct. App. Mar. 27, 2018) (declining to issue an asset freeze to preserve effectiveness of potential monetary judgment). For Connecticut, the only available analysis is federal. See Sec. Ins. Co. of Hartford v. Trustmark Ins. Co., 221 F.R.D. 300, 302 (D. Conn. 2003) (appearing to distinguish sharply between provisional remedies available under FRCP 65 and those available under FRCP 64). For Delaware, see Am. Healthcare Admin. Servs. v. Aizen, 285 A.3d 461, 482 (Del. Ch. 2022) ("Equitable relief that has the sole function and effect of freezing [a litigant's] assets in place to make them available to satisfy any possible future money judgment . . . is not within the proper exercise of the Court's power." (alterations in original) (internal quotation marks omitted) (quoting Uragami v. Century Int'l Credit Corp., No. Civ.A. 15659, 1997 WL 33175027, at *2 (Del. Ch. Dec. 2, 1997))); Seiden v. Kaneko, No. 9861-VCN, 2015 WL 7289338, at *14 (Del. Ch. Nov. 3, 2015) (citing *Grupo Mexicano* approvingly and drawing a distinction between fraudulent transfer and a future monetary judgment). For Florida, see Stand Up for Animals, Inc. v. Monroe Cnty., 69 So. 3d 1011, 1013 (Fla. Dist. Ct. App. 2011) (declining to freeze assets because the claims, "while sounding in equity, are no more than a claim for damages stemming from a breach of contract" and thus are reparable by money damages). For Georgia, see Western Sky Fin., LLC v. State ex rel. Olens, 793 S.E.2d 357, 369 (Ga. 2016) (citing *Grupo Mexicano* approvingly and noting that "this Court, applying Georgia law, has held that injunctive relief may be available in cases in which equitable relief is sought"); see also SRB Inv. Servs., LLLP v. Branch Banking & Trust Co., 709 S.E.2d 267, 273–74 (Ga. 2011) (affirming an asset-freeze injunction involving fraudulent transfers). For Illinois, see Franz v. Calaco Dev. Corp., 751 N.E.2d 1250, 1256 (Ill. App. Ct. 2001) ("The law does not provide for a process of equitable attachment."); see also Oak Leaf Outdoors, Inc. v. Double Dragon Int'l, Inc., 812 F. Supp. 2d 944, 946–49 (C.D. Ill. 2011) (citing *Franz* and declining to issue an asset freeze under FRCP 64). For Indiana, see Paul v. I.S.I. Servs., Inc., 726 N.E.2d 318, 321–22 (Ind. Ct. App. 2000) (affirming an asset freeze because it was more "practicable, efficient, and adequate" than a legal remedy, despite plaintiff's pursuit of money damages). For Massachusetts, see SW Invs., Inc. v. 75 Sydney St., LLC, No. 2184CV00338BLS2, 2021 WL 5626284, at *1 (Mass. Super. Ct. Apr. 6, 2021) (following *Grupo Mexicano* and concluding that the injunction sought amounted to an illegal "creditor's bill"); Interisle Consulting Grp., LLC v. Galaxy Internet Servs., Inc., 32 Mass. L. Rptr. 177, 177 (Super. Ct. 2014) ("The Court is not obligated to follow the Supreme Court's decision in *Grupo Mexicano,* . . . [b]ut the Supreme Judicial Court has made clear that the same limitations on equity jurisdiction discussed in *Grupo Mexicano* also apply under Massachusetts law."). Emphasizing the complexity of state/federal divides on this issue, the Court of Appeals for the First Circuit declined to follow both of these cases, instead authorizing an asset freeze for a money judgment on the basis that "[t]he weight of Massachusetts authority indicates that the Supreme Judicial Court of Massachusetts would permit the preliminary injunction at issue here." *Pineda*, 22 F.4th at 54. For Minnesota, see U.S. Bank Nat'l Ass'n v. Angeion Corp., 615 N.W.2d 425, 434 (Minn. Ct. App. 2000) ("Although the Supreme Court's holding on the jurisdiction of the federal district courts does not control Minnesota courts' authority to issue injunctions, the analysis is persuasive and consistent with Minnesota law."). For Nebraska, the only available analysis is federal. See Pioneer Hi-Bred Int'l, Inc. v. AltEn, LLC, Nos. 8:22CV70; 8:22CV71; 8:22CV82, 2023 WL 1822724, at *10–15 (D. Neb. Feb. 8, 2023) (sharply distinguishing between asset freezes available under FRCP remain free to offer broader provisional relief than that available in federal court.[54] Of course, state courts may continue to draw distinctions between legal and equitable relief and will often follow the Supreme Court's reasoning.[55] Some state courts have reached the same position as the Supreme Court based on state law alone.[56] In cases in which the moving party seeks equitable relief, state courts, like their federal counterparts, are willing to issue asset-freeze injunctions.[57]

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65 and attachment under Nebraska law under FRCP 64). For Nevada, see Triangulum Partners, LLC v. Galaxy Gaming, Inc., No. 79555, 2021 WL 1346095, at *2 (Nev. Apr. 9, 2021) (citing *Grupo Mexicano* approvingly for the proposition that a right to recover must be established before equitable interference with property). For North Carolina, see State ex rel. Cooper v. Western Sky Fin., LLC, No. 13 CVS 16487, 2015 WL 5091229, at *19 (N.C. Super. Ct. Aug. 27, 2015) (citing *Grupo Mexicano* approvingly for its law/equity distinction but in dicta). For New York, see Credit Agricole Indosuez v. Rossiyskiy Kredit Bank, 729 N.E.2d 683, 686 (N.Y. 2000) ("[T]he evidence is that section 6301 was intended to embody the very same traditional principles of equity jurisdiction *Grupo Mexicano* found reflected in Federal Rules of Civil Procedure, rule 65 in an action on a debt."). For Oklahoma, see H.A. Sand Springs, LLC v. Lakeside Care Center, LLC, 273 P.3d 73, 77 (Okla. Civ. App. 2011) ("The *Grupo* decision, which recognizes the limits of a federal court's equity jurisdiction, is not dispositive of this state court proceeding . . . ."). For South Carolina, see Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 603 S.E.2d 905, 907 (S.C. 2004) ("There is no federal question here that would cause the *Grupo* decision to be binding in this state court proceeding."). For Texas, the position is complex. Courts have endorsed *Grupo Mexicano.* See, e.g., Michael v. NE CS First Nat'l, LP, No. 02-23-00307-CV, 2024 WL 1579009, at *48 (Tex. Ct. App. Apr. 11, 2024) (following principles established in *Grupo Mexicano*); RWI Construction, Inc. v. Comerica Bank, 583 S.W.3d 269, 276 (Tex. Ct. App. 2019) (endorsing *Grupo Mexicano's* reasoning that courts may not enjoin assets unrelated to the suit because it reasoned from English common law, and Texas state law had adopted English common law as the "rule of decision in Texas courts"). However, Texas courts will allow asset freezes so long as they are not "completely unrelated to the subject matter of the suit," that is, if they may be used to "satisfy claims in the parties' dispute." Tex. Black Iron, Inc. v. Arawak Energy Int'l Ltd., 527 S.W.3d 579, 586–87 (Tex. Ct. App. 2017) ("Here, Arawak presented evidence that the particular 20" and 26" drilling equipment it sought to enjoin related to and would be used to mitigate Arawak's claims related to its purchase of these items."); see also Renovation Gurus, LLC v. Lake Point Assisted Living, LLC, No. 05-19-00499-CV, 2020 WL 477135, at *3 (Tex. Ct. App. Jan. 29, 2020) (summarizing the "general rule and its exception").

54. See, e.g., *U.S. Bank Nat'l Ass'n*, 615 N.W.2d at 434 (Minn. Ct. App. 2000) ("[T]he Supreme Court's holding on the jurisdiction of the federal district courts does not control Minnesota courts' authority to issue injunctions . . . ."); *H.A. Sand Springs*, 273 P.3d at 77 (Okla. Civ. App. 2011) ("The *Grupo* decision, which recognizes the limits of a federal court's equity jurisdiction, is not dispositive of this state court proceeding . . . ."); see also Emigrant Bus. Credit Corp. v. Hanratty, No. 158207/2022, 2022 N.Y. Misc. LEXIS 7416, at *12 n.3 (N.Y. Sup. Ct. Nov. 29, 2022) ("Defendants also cite the United States Supreme Court case *Grupo Mexicano* . . . . Defendants fail to explain the applicability of this federal court case, which, even if it were, for argument's sake, applicable, would also be unavailing.").

55. See supra note 53.

56. See supra note 53.

57. See supra note 53 (no courts disputing their authority to issue these injunctions where equitable relief is sought). For example, a state court in Florida issued an asset-freeze injunction against Heathrow Financial Corporation for violations of state law which

Other state courts reject this position more or less explicitly. Appellate courts in Oklahoma[58] and South Carolina[59] have noted that they do not consider *Grupo Mexicano* dispositive. California state courts appear to have reached this same conclusion implicitly.[60] Given that *Grupo Mexicano* does not bind state courts, commentators on state law, like critics of *Grupo Mexicano* generally, favor the issuance of asset-freeze injunctions that are not burdened by the Justice Scalia's "static conception of equity jurisdiction,"[61] preferring Justice Ruth Bader Ginsburg's approach.[62]

II. CONTEXTUAL TRANSFORMATIONS AND THE INADEQUACY OF CURRENT LAW

If the case for robust provisional measures to protect a final judgment against dissipation was persuasive in 1999, matters are now well beyond the Rubicon.[63] The ease of transferring and concealing assets has increased exponentially since the Supreme Court considered the issue.[64] In response to these developments, commentators in foreign jurisdictions have urged more vigorous pursuit of *Mareva* injunctions because "the possibility to now wire transfer millions of dollars from one country to another in the blink of an eye, combined with the speed and complex-

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applied to assets worldwide because plaintiffs sought "equitable relief in the form of restitution." State v. Heathrow Fin. Corp., No. 2016-CA-00136, 2016 Fla. Cir. LEXIS 4924, at *2 (Fla. Cir. Ct. Jan. 14, 2016).

58. *H.A. Sand Springs*, 273 P.3d at 77.

59. Scratch Golf Co. v. Dunes West Residential Golf Props., Inc., 603 S.E.2d 905, 907 (S.C. 2004).

60. In *ODG Sweegen LLC v. Chen*, for example, a California state court relied on state law to note that "there are circumstances allowing for the issuance of an injunction when monetary damages are sought." No. 30-2020-01140383-CU-BT-CXC, 2020 Cal. Super. LEXIS 7481, at *12 (July 8, 2020). The court's analysis did not address the plaintiff's equitable interest in the frozen assets, id., and the order was affirmed by the appellate court. ODG Sweegen v. Chen, No. G059226, 2021 WL 2657016, at *14 (Cal. Ct. App. June 29, 2021).

61. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part).

62. See 1 Enforcement of Judgments and Liens in Virginia § 2.4 ("Justice Ginsburg's dissenting opinion . . . argues persuasively for Equity's generative capacity to grow and accommodate to changing economic and legal developments. . . . Other states' courts, including Virginia's, might consider it carefully in evaluating whether their jurisprudence supports an asset-freezing injunction, when the court has in personam jurisdiction over the defendant . . . .").

63. See supra notes 2–8 and accompanying text; see also Tom Holland, Rubicon: The Last Years of the Roman Republic, at xv (2003) ("Narrow and obscure the stream may have been, so insignificant that its very location was ultimately forgotten, yet its name is remembered still. No wonder. So fateful was Caesar's crossing of the Rubicon that it has come to stand for every fateful step taken since.").

64. See Park, Recognition and Enforcement, supra note 20, at 1013–14 ("Thanks to ever-increasing international commerce and advancements in technology, it takes mere seconds to move money across the border, and mere hours to move a person."); Sarra et al., supra note 11, at 256.

ity of international trade, makes it easier than ever to dissipate assets."[65] Currently, courts in the United States are unable to follow suit, and this Part argues that the current American approach to asset freezes in a climate of extreme asset mobility undermines the very rationale of provisional measures, which is to protect the integrity of the litigation.[66] This Part then examines two particular developments that compel reexamination of asset-freeze injunctions under U.S. law, each of which has further inhibited courts' ability to protect final judgments in transnational cases.[67] First, the development of case law over the last two years in response to the proliferation of crypto fraud cases threatens to further restrict the availability of asset-freeze injunctions in the very cases in which they are most crucial. Second, the Supreme Court's narrowing approach to personal jurisdiction has severely curtailed courts' ability to enforce orders against foreign nonparties who serve as custodians of defendants' assets. This Part begins by arguing that the law/equity distinction in federal court is increasingly incompatible with the purposes of provisional relief because it does not deter opportunistic behavior. It then explores why developments in cryptocurrency and jurisdiction have made the artificiality of the law/equity distinction especially untenable.

A. *Current Asset Mobility Makes the Law/Equity Distinction Untenable*

The contemporary degree of asset mobility exposes current law's inconsistency with the purpose of provisional measures, which is to "protect[] the judicial process from fraud and other deceptive behavior."[68] Asset-freeze injunctions protect litigation by preventing a defendant from dissipating their assets pending a final judgment.[69] The current approach to asset-freeze injunctions is increasingly ineffectual in

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65. Mareva Injunctions in Cross-Border Litigation: A Canadian Perspective, NYSBA, https://nysba.org/NYSBA/Sections/International/Seasonal%20Meetings/Tokyo%202019/Coursebook/Semerjian%20Materials%201%20%20Mareva%20injunctions%20in%20crossborder%20litigation_%20a%20Canadian%20Perspective.pdf?srsltid=AfmBOoqi8xyZm5ZdbMIxAxZSUxzJ5JKqrKEQjK6mVW73-xZlWl-_0eB [https://perma.cc/DRE4-785K].

66. See Wasserman, supra note 14, at 299 ("If a plaintiff obtains a preliminary injunction to freeze the defendant's assets, the public interest is served in at least six ways. First and most obvious, the preliminary injunction protects the integrity of the judicial process."); see also Chieko N. Okazaki, Peacemaking: Our Essential Work in the Last Days, 2 Serv. & Integrity 101, 108 (2009) (expressing attorneys' hope that "the rule of law will be stronger than individual selfishness").

67. Transnational cases, of course, are uniquely vulnerable to judgment frustration. See Park, Recognition and Enforcement, supra note 20, at 1001 ("[I]t is much easier to frustrate the enforcement of [a] court's final judgment when the case crosses the national border.").

68. Wasserman, supra note 14, at 299.

69. Park, Recognition and Enforcement, supra note 20, at 1013 ("[A]ll provisional orders share a common goal: enhancing the efficacy of litigation. Securing the satisfaction of the forthcoming judgment . . . [is] necessary to ensure that the lawsuit can practically deliver the desired end result . . . .").

serving this purpose because it draws irrational distinctions that are irrelevant to the integrity of litigation.

Consider two illustrations. First, Defendant B defrauded Plaintiff A and made off with Plaintiff A's crypto assets. Plaintiff A alleges conversion and seeks, among other remedies, a constructive trust. Defendant B is preparing to conceal their ill-gotten crypto assets. Second, Defendant D breached a contract with Plaintiff C. Plaintiff C sues for damages. Defendant D is preparing to dissipate their assets held abroad to render themselves judgment-proof. Under current law, Plaintiff A would have a cognizable claim to an asset-freeze injunction while Plaintiff C would not. Put another way, Defendant D may opportunistically abuse the law/equity limitation to frustrate litigation simply because Plaintiff C does not seek an equitable remedy. There is no practical or normative basis for these results. The nature of a remedy is irrelevant to whether a defendant should have more or less latitude to frustrate litigation, for "although a plaintiff's claim to money that was originally [the plaintiff's] is theoretically different from a claim to money as damages only, the harm . . . in the two actions . . . is identical if the defendant dissipates the fund."[70]

The ease of dissipating assets today makes such arbitrary results especially intolerable. Even if Justice Scalia's historically fixed understanding of equity's limits could outweigh the reality of international commerce twenty-seven years ago, the same cannot be said today. In *Grupo Mexicano*, Justice Ginsburg worried that "increasingly sophisticated foreign-haven judgment proofing strategies, coupled with technology that permits the nearly instantaneous transfer of assets abroad, suggests that defendants may succeed in avoiding meritorious claims in ways unimaginable before the merger of law and equity."[71] Even then, she may not have appreciated that such technology would soon be in the pocket of every potential defendant.[72] The intense proliferation of cryptocurrencies over the last few years represents the latest and most extreme revolution in capital mobility, which is regularly used to evade asset seizure.[73] Courts have consistently recognized capital mobility's potential to frustrate judgments in civil litigation, singling out crypto

70. See Wasserman, supra note 14, at 334.

71. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 338–39 (1999) (Ginsburg, J., concurring in part and dissenting in part) (citing Lynn M. LoPucki, The Death of Liability, 106 Yale L.J. 1, 32–38 (1996)).

72. See, e.g., Vodafone Is Bringing Crypto Payments to SIM Card-Based Mobile Wallets, PYMNTS (May 6, 2024), https://www.pymnts.com/cryptocurrency/2024/vodafone-is-bringing-crypto-payments-to-sim-card-based-mobile-wallets/ [https://perma.cc/6QX6-NVPD] ("[I]ntegrating crypto wallets with smartphone SIM cards could offer a more secure and convenient way to manage cryptocurrency assets . . . .").

73. See, e.g., Christos Alexakis, Giulio Anselmi & Giovanni Petrella, Flight to Cryptos: Evidence on the Use of Cryptocurrencies in Times of Geopolitical Tensions, 89 Int'l Rev. Econ. & Fin. 498, 499–500 (2024) (exploring the increased use of cryptocurrency and its use to avoid asset seizure in cases of financial sanctions).

cases for special treatment because of the ease of concealment and dissipation.[74] The law/equity distinction that has resulted from the current approach is therefore especially irrational today.

B. *Emerging Approaches to Crypto Cases Further Strain Current Law*

Courts' attempts to cope with the emergence of mobile and intangible currencies have revealed that the current approach is becoming conceptually inadequate. Without reform, asset freezes may become unavailable in the very cases in which they are the most necessary. In 2024, for example, "pig-butchering" schemes involving cryptocurrency have provoked intense alarm.[75] In the ultimate phase of these schemes, fraudsters abscond with the assets that they have persuaded their targets to convert into cryptocurrency.[76] Recognizing the unique concerns of judgment frustration entailed by crypto, courts have paid particular attention to the mobility and anonymity of crypto assets in issuing provisional asset freezes as these cases increasingly appear on their dockets.[77] Because schemes such as "pig butchering" entail theft,

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74. See, e.g., Cohn v. Popescu, No. 1:24-CV-00337, 2024 U.S. Dist. LEXIS 190419, at *9–10 (E.D. Tex. Aug. 16, 2024) ("In light of the speed with which cryptocurrency transactions are made, as well as the potential that the Defendants may further move the assets they are alleged to have stolen, . . . Mr. Cohn's request to freeze the exchange accounts to which those assets were transferred is justified . . . ."); Fitzgerald v. Defendant, No. 24-21925-CV-WILLIAMS, 2024 WL 3537916, at *2 (S.D. Fla. June 12, 2024) ("Considering the speed with which cryptocurrency transactions are made as well as the anonymous nature of those transactions, it is necessary to freeze the Destination Addresses to maintain the status quo to avoid dissipation of the money taken from Plaintiff."); Jacobo v. Doe, No. 1:22-cv-00672-DAD-BAK (BAM), 2022 WL 2052637, at *5 (E.D. Cal. June 7, 2022) (finding that the plaintiff would likely suffer irreparable harm absent an asset-freeze injunction due to the speed and anonymity of cryptocurrency transactions); Astrove v. Doe, No. 22-CV-80614-RAR, 2022 WL 2805315, at *3 (S.D. Fla. Apr. 22, 2022) ("[C]onsidering the speed with which cryptocurrency transactions are made as well as the anonymous nature of those transactions, it is imperative to freeze the Destination Addresses to maintain the *status quo* to avoid dissipation of the money illegally taken from Plaintiff."); Heissenberg v. Doe, No. 21-CIV-80716-ALTMAN/Brannon, 2021 WL 8154531, at *2 (S.D. Fla. Apr. 23, 2021) ("Because of the speed and potential anonymity of cryptocurrency transactions, . . . Plaintiff is likely to suffer immediate and irreparable injury if a temporary restraining order is not granted . . . . Plaintiff has good reason to believe the Defendant will . . . transfer his ill-gotten gains beyond the jurisdiction of this Court unless those assets are restrained."); cf. Gaponyuk v. Alferov, No. 2:23-cv-01317-KJM-JDP, 2023 WL 4670043, at *2 (E.D. Cal. July 20, 2023) (citing the risk that cryptocurrencies can "rapidly become lost and untraceable").

75. See supra notes 7–8 and accompanying text.

76. Daniel, supra note 7.

77. See, e.g., *Cohn*, 2024 U.S. Dist. LEXIS 190422, at *6, 10 ("[T]he assets allegedly stolen from Mr. Cohn could be further transferred to unretrievable locations at any time, with the click of a button . . . . Several federal courts have found that this exigency justified issuance of freezing orders in similar crypto-fraud cases, and this Court finds their reasoning persuasive here."); *Gaponyuk*, 2023 WL 4670043, at *2 (granting an asset freeze for a plaintiff seeking an equitable remedy because of the risk that cryptocurrencies can "rapidly become lost and untraceable"); *Jacobo*, 2022 WL 2052637, at *15–16 (finding that

plaintiffs often seek equitable remedies, meaning that an asset freeze injunction would be available.[78] But at least one district court has declined to issue an asset freeze for a crypto case involving equitable remedies because it characterized crypto assets as fungible.[79] The court reasoned that though conversion "generally constitutes an irreparable injury that will justify an injunction,"[80] cryptocurrency is unique because its "purpose is to provide an analogue for traditional currency."[81] The court held that to obtain an injunction, the plaintiff would have to show that the defendant would "not have the money to pay for the loss after trial."[82] Other courts have taken note of this issue,[83] and commentators too generally consider cryptocurrency to be fungible.[84]

This emerging approach is unsound. Practically, it fails to consider that cryptocurrencies are not traceable in the same way as money, which usually passes through financial institutions.[85] More importantly, it places

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plaintiff seeking restitution would likely suffer irreparable harm absent an asset-freeze injunction due to the speed and anonymity of cryptocurrency transactions); *Heissenberg*, 2021 WL 8154531, at *2 (granting an asset freeze seeking an equitable remedy citing the "speed and potential anonymity of cryptocurrency transactions" to constitute irreparable harm).

78. See, e.g., *Gaponyuk*, 2023 WL 4670043, at *6 (seeking a constructive trust); *Jacobo*, 2022 WL 2052637, at *14 (seeking restitution among other remedies); *Heissenberg*, 2021 WL 8154531, at *7–8 (seeking a constructive trust and disgorgement). Other courts have been more stringent in requiring a showing that dissipation is likely. See Huntley v. Vbit Techs. Corp., No. 22-1164-CFC-SRF, 2023 WL 5938665, at *6–7, *14–17 (D. Del. Aug. 10, 2023) (affirming that asset freezes are available when seeking equitable relief and that crypto poses heightened dissipation risk but denying the asset freeze because of an insufficient showing that irreparable harm is likely).

79. Schiermeyer v. Thurston, 697 F. Supp. 3d 1265, 1272–73 ("[C]ryptocurrency tokens are fungible and easy to value. To show that he is likely to suffer irreparable injury, Mr. Schiermeyer must therefore demonstrate that Mr. Thurston would *likely* be unable to pay an award of money damages after a trial."); see also First Amended Verified Shareholder Derivative Complaint at 31–32, *Schiermeyer,* 697 F. Supp. 3d 1265 (D. Utah 2023) (No. 2:23-cv-00589-HCN), 2023 U.S. Dist. LEXIS 181478 (seeking restitution and a constructive trust).

80. *Schiermeyer,* 697 F. Supp. 3d, at 1272 (quoting AAAG-California, LLC v. Kisana, 439 F. Supp. 3d 1265, 1279 (D. Utah 2020)).

81. Id.

82. Id.

83. See, e.g., United States v. Approximately 69,370 Bitcoin BTC, No. 20-cv-07811-RS, 2022 WL 2755353, at *3 (N.D. Cal. July 14, 2022) ("There may, of course, be reasons to treat the fungibility of cryptocurrency differently from that of paper currency. At least at this point, however, neither Buckley nor any or the other claimants has shown that the law would permit them to trace individual bitcoins without consideration of fungibility issues.").

84. Christa J. Laser, Legal Issues in Blockchain, Cryptocurrency, and Non-Fungible Tokens (NFTs), 102 Neb. L. Rev. 761, 766 (2024) ("Cryptocurrencies are perceived stores of value or money that are generally considered fungible, meaning one Bitcoin is equivalent in value to any other Bitcoin just as one dollar bill would be equivalent to, and tradable for, another.").

85. See Skinner, supra note 6, at 301–11 (describing the role of banks in preventing terrorist financing and money-laundering); see also Newton AC/DC Fund L.P. v. Hector

pressure on the law/equity distinction because it creates the possibility that asset freezes may remain out of reach even when an equitable remedy is claimed in cases in which they are the most necessary, that is, when judgment frustration is uniquely likely.[86] The exception for insolvency also leads to an absurd result because an asset freeze would not be available in a functionally equivalent circumstance, that is, when a plaintiff seeking money damages could show that a defendant would be judgment-proof if they were not enjoined from transferring their assets.[87]

C. *Nonparty Jurisdiction Developments Counsel Against the Current Approach*

The Supreme Court's narrowing approach to general jurisdiction has also provided opportunities for judgment-frustration. If a defendant cannot be enjoined from moving their assets, they may transfer them to a nonparty foreign bank or crypto platform.[88] Those transfers can frustrate post-judgment discovery, which aims to uncover assets to satisfy a final judgment.[89] Post-judgment discovery is governed by Rule 69.[90] Though broad in scope,[91] a district court "must have personal jurisdiction" over nonparties to compel their compliance with discovery orders.[92]

DAO, No. 24-722 (RK) (JBD), 2024 WL 580182, at *3 (D. N.J. Feb. 13, 2024) ("[C]ryptocurrencies cannot be traced with the same clarity, and potentially recovered via the same methods, as funds transferred via the traditional financial system."); Anshu Siripurapu & Noah Berman, The Crypto Question: Bitcoin, Digital Dollars, and the Future of Money, Council on Foreign Rels. (Sep. 23, 2021), https://www.cfr.org/backgrounder/crypto-question-bitcoin-digital-dollars-and-future-money [https://perma.cc/JMA8-67YF] (last updated Jan. 17, 2024) ("[C]ryptocurrencies . . . can be transferred relatively quickly and anonymously, even across borders, without the need for a bank that could block the transaction or charge a fee.").

86. See supra note 74 and accompanying text.

87. See supra note 70 and accompanying text.

88. See Aaron D. Simowitz, Transnational Enforcement Discovery, 83 Fordham L. Rev. 3239, 3306 (2015) ("[S]cofflaw debtors frequently attempt to transfer their assets to nominal third parties, to trusts that will shield the assets from enforcements, or to creditors that they would rather pay ahead of their current antagonist." (citing Douglas G. Baird & Thomas H. Jackson, Fraudulent Conveyance Law and Its Proper Domain, 38 Vand. L. Rev. 829 (1985)); id. at 3306–07 ("Some assets—buildings, equipment, oil tankers, private planes—are easier to locate than others . . . . It is certainly true, however, that . . . intangible property that in practice cannot be located without discovery ha[s] become dominant.").

89. See id. at 3305–06.

90. Fed. R. Civ. P. 69.

91. See EM Ltd. v. Republic of Argentina, 695 F.3d 201, 207 (2d Cir. 2012) ("The scope of discovery under Rule 69(a)(2) is constrained principally in that it must be calculated to assist in collecting on a judgment.").

92. See Motorola Credit Corp. v. Uzan, 132 F. Supp. 3d 518, 520 (S.D.N.Y. 2015) (internal quotation marks omitted) (quoting Gucci v. Bank of China, 768 F.3d 122, 141 (2d Cir. 2014)). Personal jurisdiction is also required to enforce an asset-freeze injunction against nonparties. See Tiffany (NJ) LLC v. China Merchs. Bank, 589 F. App'x 550, 553 (2d Cir. 2014) (citing Canterbury Belts Ltd. v. Lane Walker Rudkin, Ltd., 869 F.2d 34, 40 (2d Cir. 1989)) (noting that courts "can enforce an injunction against a nonparty only if it has personal jurisdiction over that nonparty").

Daimer's restrictive approach to general jurisdiction[93] significantly diminished federal courts' ability to compel compliance by foreign nonparties.[94] The extent to which international comity[95] influenced the Court's reasoning marked a "significant break" from past practices, which depended upon a less-deferential view of personal jurisdiction.[96] And even if a court can assert specific jurisdiction over a nonparty, the Second Circuit has required district courts to conduct a comity analysis to decide whether compelling compliance with an order is appropriate.[97] Courts in other circuits have cited this requirement approvingly.[98] But comity analyses can be challenging and unpredictable because "courts and commentators repeatedly confess that they do not really understand what international comity means."[99] With courts' ability to issue orders

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93. See Daimler AG v. Bauman, 571 U.S. 117, 137, 139 (2014) (holding that a company is subject to general jurisdiction in a forum when it is incorporated there or when its contacts with that forum are so "continuous and systematic" as to render it at home in the forum); Tsang & Lai, supra note 20, at 152–53 (explaining that Daimler has made it much harder to establish personal jurisdiction over nonparties).

94. See Diego Zambrano, A Comity of Errors: The Rise, Fall, and Return of International Comity in Transnational Discovery, 34 Berkeley J. Int'l L. 157, 193 (2016) ("*Daimler* and *Gucci* have severely limited the existence of general personal jurisdiction over foreign companies with affiliates in the United States.").

95. Courts often base their understanding of comity on *Hilton v. Guyot*, in which the Supreme Court defined comity as "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation." 159 U.S. 113, 164 (1895).

96. Zambrano, supra note 94, at 192; see also Société Nationale Industrielle Aérospatiale v. U.S. Dist. Ct. for S. Dist. of Iowa, 482 U.S. 522, 539–40 (1987) (holding that "the Hague Convention did not deprive the District Court of the jurisdiction it otherwise possessed to order a foreign national party before it to produce evidence physically located within a signatory nation"); Zambrano, supra note 94, at 176 (Aérospatiale damaged the [Hague] Convention to such an extent that even in circumstances where the Federal Rules seemed inappropriate, such as ordering discovery from foreign non-parties, courts nonetheless rejected the Convention.").

97. *Gucci*, 768 F.3d at 138–40; Zambrano, supra note 94, at 188 ("Regardless of the reasons for the renewed importance of comity, the Second Circuit wanted to make clear to lower courts that comity should be seriously considered in every decision affecting foreign countries.").

98. See Hawkins v. i-TV Digitális Távközlési zrt., 935 F.3d 211, 229 (4th Cir. 2019) (citing *Gucci* and concluding "foreign nonparty contemnors must . . . have minimum contacts with the forum"); see also Receiver for Rex Venture Grp., LLC v. Banca Comerciala Victoriabank SA, 843 F. App'x 485, 491 (4th Cir. 2021) (citing *Hawkins* approvingly for the minimum contacts proposition); Aviva Sports, Inc. v. Fingerhut Direct Mktg., No. 09-cv-1091 (JNE/HB), 2021 WL 5276668, at *8 (D. Minn. Nov. 12, 2021) ("In the absence of Eighth Circuit case law on point, the Court finds the Second Circuit's reasoning instructive, and therefore will apply its translated specific personal jurisdiction test to the present motion to compel discovery."); Am. Fid. Assurance Co. v. Bank of N.Y. Mellon, No. CIV-11-1284-D, 2014 U.S. Dist. LEXIS 183099, at *3–5 (W.D. Okla. Dec. 12, 2014) (endorsing the Second Circuit's approach in *Gucci* but distinguishing the question of waiver of jurisdiction).

99. William S. Dodge, International Comity in American Law, 115 Colum. L. Rev. 2071, 2073 (2015); see also Park, Equity Extraterritoriality, supra note 10, at 168 ("For

aimed at enforcing a final judgment diminished and uncertain, an injunction that deters an individual from transferring their assets abroad immediately is an especially important provisional tool.[100]

Cryptocurrency exchanges present further challenges. Establishing personal jurisdiction can be especially challenging in cases involving cryptocurrency exchanges which often "do not have a territorial affiliation"[101] and are therefore beyond the general jurisdiction of U.S. courts.[102] Specific jurisdiction is also uniquely difficult to establish because of the difficulty of finding "sufficient jurisdictional contacts with the forum."[103] Therefore, as cryptocurrencies become easier to purchase and transfer,[104] the ability to enjoin a person from converting their assets

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those trained in the U.S. legal tradition, the comity doctrine may be an uninspiring, weak tea of a doctrine.").

100. See Simowitz, supra note 88, at 3322 (describing the *Mareva* injunction as a "robust approach to enforcement" in the context of post-judgment discovery).

101. Tsang & Lai, supra note 20, at 152–53, 157; see also Mallory Mecklenburg, Note, A Plaintiff's Cryptonite: Charting a Path Forward for Minimum Contacts in the Cryptocurrency Era, 91 Geo. Wash. L. Rev. 785, 788–89 (2023) (explaining that many crypto platforms are located overseas and that users can easily circumvent restrictions on trading on overseas exchanges).

102. See Mecklenburg, supra note 101, at 791 (explaining the challenges in analyzing personal jurisdiction for cryptocurrency exchanges); Tsang & Lai, supra note 20, at 157 (discussing cryptocurrency exchanges' lack of territorial affiliation and collecting cases). The challenge of exercising jurisdiction over cryptocurrency platforms has also emerged in the related field of legislative jurisdiction. See Williams v. Binance, 96 F.4th 129, 138 (2d Cir. 2024) (rejecting Binance's argument that matching between buyers and sellers on the platform does not occur anywhere "even if the Binance exchange lacks a physical location"); see also Morrison v. Nat'l Australia Bank Ltd., 561 U.S. 247, 267 (2010) (applying the presumption against extraterritoriality to limit the Exchange Act's jurisdictional reach).

103. Tsang & Lai, supra note 20, at 157. Applying current minimum contacts standards to cryptocurrency platforms is especially challenging. Mecklenburg, supra note 101, at 803–06. Though the Second Circuit recently ruled on the application of U.S. securities laws to crypto platforms which initially were held to have insufficient contacts with the forum, the court noted that its decision may be different if faced with "plaintiffs seeking to apply United States securities laws based on the happenstance that a transaction was initially processed through servers located in the United States despite all parties to the transaction understanding that they were conducting business on a foreign-registered exchange." *Williams*, 96 F.4th at 139. If the standards for specific personal jurisdiction and prescriptive jurisdiction are analyzed in a similar way, a defendant wishing to transfer their assets abroad to evade enforcement of a judgment is certainly aware that their actions are meant to be conducted on a foreign exchange.

104. See Nathan Reiff, Cryptocurrency Exchanges: What They Are and How to Choose, Investopedia, https://www.investopedia.com/tech/190-cryptocurrencyexchanges-so-how-choose/ [https://perma.cc/U5RN-8XDC] (last updated Nov. 22, 2024) ("Cryptocurrency exchanges make it easy to buy and sell the currencies you want with low fees and strong security features."); Use Cases for Blockchain Gain Momentum as User Experience Simplifies, PYMNTS (June 3, 2024), https://www.pymnts.com/cryptocurrency/2024/use-cases-for-blockchain-gainmomentum-as-user-experience-simplifies/ [https://perma.cc/LR7L-V7KX] ("[N]ew marketplace moves from traditional financial services players . . . show the emergence of a new focus on simplifying crypto's

into a form that makes it more difficult for a court to enforce orders aiding the plaintiff is especially important.[105]

It is essential that U.S. courts reform their approach to asset-freeze injunctions in response to these developments. Asset freezes are a straightforward deterrent when a defendant is considering transferring their assets to a foreign bank account or crypto platform at any point in the litigation. Without this tool, a court may lack the ability to prevent defendants from increasing the costs and undermining the efficacy of litigation by shielding their assets from the court's jurisdictional reach and potentially frustrating the enforcement of an eventual judgment.[106]

III. TOWARD RENEWED EQUITABLE PROVISIONAL REMEDIES IN TRANSNATIONAL CASES

This Part argues that federal courts have the equitable authority to develop standards for provisional asset-freeze injunctions in transnational cases that abandon the law/equity distinction. For the purposes of this Note, a case is transnational when a defendant's assets, which would be necessary to satisfy a final judgment, are located outside of the territorial jurisdiction of any U.S. court.[107] Section III.A examines the Supreme Court's implicit acceptance of equitable remedies that prevent opportunism arising from situations that cannot be squared with a truly static view of equity. It demonstrates that judicial innovation in equitable remedies remains feasible. Section III.B proposes model standards for issuing a provisional asset-freeze injunction in transnational cases by synthesizing considerations unique to transnational litigation and the *Winter* factors. Section III.C fits the proposed model into the Supreme Court's equity jurisprudence, demonstrating that it is a reasonable and plausible development in the Court's case law.

A. *The Supreme Court and Substantive Equity*

The Supreme Court's equity jurisprudence has not foreclosed innovation in provisional equitable relief for three reasons. First, the Court has implicitly departed from its approach in *Grupo Mexicano* when necessary to correct results that would otherwise reward opportunism. Provisional asset freezes are narrowly tailored to serve precisely this

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more complex aspects by creating the more intuitive, user-friendly experiences that are essential for broader adoption.").

105. See Tsang & Lai, supra note 20, at 157 (discussing how *Daimler* made it "more difficult for the U.S. court to establish personal jurisdiction over third-party banks and therefore seriously reduces the occasions where a court can compel a foreign bank to comply with a preliminary injunction to freeze the defendant's assets").

106. See, e.g., Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 134 (2d Cir. 2014) ("[A] district court can enforce an injunction against a nonparty such as [Bank of China] only if it has personal jurisdiction over that nonparty.").

107. In other words, if a defendant possesses sufficient assets to satisfy an eventual judgment in the United States, the dispute is not transnational in character.

purpose.[108] Second, and relatedly, even though Court's historical method is here to stay, the Court has softened its historical inquiry to accommodate cases for which Founding-era courts did not contemplate. Third, even if *Grupo Mexicano* has been subsequently affirmed, a preliminary injunction of the kind proposed here would be permissible because it is not a "substantial expansion of past practice"[109] and is uniquely situated to avoid the *Erie* concerns that motivated the Court in *Grupo Mexicano*.[110] By way of background, this section introduces "equitable originalism," an approach inaugurated by *Grupo Mexicano*, and contrasts it with substantive equity, a view that scholars have urged is more faithful to the original meaning of "equity" in the Constitution and the Judiciary Act of 1789 and provides for more flexible approaches to equitable remedies.

Grupo Mexicano represented the Court's first articulation of equitable originalism,[111] the view that federal courts may only grant equitable remedies "'traditionally accorded by courts of equity' at our country's inception."[112] Equitable originalism is a "static conception of equity jurisdiction"[113] because its historical approach "freez[es] in amber the precise remedies available at the time of the Judiciary Act."[114] The Court's

108. See infra note 186 and accompanying text.

109. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999).

110. See Samuel L. Bray, The Supreme Court and the New Equity, 68 Vand. L. Rev. 997, 1010 (2015) (explaining Justice Scalia's approach).

111. Anna Conley, A Challenge to "Equitable Originalism"—The History of Injunctions as a Principle-Based Adaptable Judicial Power, 17 N.Y.U. J.L. & Liberty 112, 116 (2023) ("The first and so far only big win for the equitable originalism approach to injunctive power was Justice Scalia's 1999 majority opinion in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*").

112. Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) (quoting Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999)); see also Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1950 (2020) (Thomas, J., dissenting) ("According to our usual interpretive convention, 'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding."); Riley T. Keenan, Functional Federal Equity, 74 Ala. L. Rev. 879, 895 (2023) ("*Grupo Mexicano* was the first case in which the Supreme Court rejected a federal equitable remedy because of its supposed inconsistency with founding-era English equity practice.").

113. *Grupo Mexicano*, 527 U.S. at 336 (1999) (Ginsburg, J., concurring in part and dissenting in part); see also Bray, supra note 110, at 1010 (noting that Justice Scalia "was seeking an equity that seemed almost frozen in time: the remedies that could have been given, or that were analogous to the remedies that could have been given, by the chancellor in 1789").

114. *Trump*, 145 S. Ct. at 2588 (Sotomayor, J., dissenting); see also Ruth Bader Ginsburg, Looking Beyond Our Borders: The Value of a Comparative Perspective in Constitutional Adjudication, 22 Yale L. & Pol'y Rev. 329, 333–34 (2004) (discussing *Grupo Mexicano* and the pitfalls of "frozen-in-time interpretation").

"rejection of the more dynamic approach to equity"[115] has prompted intense academic criticism which has reached a fever pitch over the last two years.[116] The use of the term "equity" in the Constitution and the Judiciary Act of 1789,[117] these scholars contend, is broader than the precise set of remedies employed by courts of equity at the founding.[118] This broader view of equity has been called "substantive" or "functional" equity and is defined as "a system of meta-law, designed to respond to unpredictable situations" in which a legal rule would otherwise produce, inter alia, "pro-opportunistic results."[119] Put another way, equity is a form of "second-order law" that prevents ex ante–focused legal rules from producing "unforeseen and undesired results."[120] Substantive equity's focus on responding to unforeseen applications of an ordinarily appropriate rule of law is therefore in tension with equitable originalism's inflexibility.[121]

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115. Listwa & Seidell, supra note 39, at 687; see also *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part) ("In my view, the Court relies on an unjustifiably static conception of equity jurisdiction.").

116. See infra section III.C.3.

117. See U.S. Const. art. III, § 2, cl. 1 ("The judicial Power shall extend to all Cases, in Law and Equity . . . ."); see also *Grupo Mexicano*, 527 U.S. at 318–19 (interpreting the use of "equity" in the Judiciary Act of 1789 to confine federal jurisdiction to the "system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries" (internal quotation marks omitted) (quoting Atlas Life Ins. Co. v. W.I. Southern, Inc., 306 U.S. 563, 568 (1939))).

118. Raz, supra note 28, at 543; see also Keenan, supra note 110, at 897 ("[T]he historical evidence suggests that an informed reader in 1789 would have understood the term 'equity'—whether in Article III of the Constitution or the Judiciary Act of 1789—as referring to the traditional, precedent-based equity practice inherited from England's Chancery Court." (citing Owen W. Gallogly, Equity's Constitutional Source, 132 Yale L.J. 1213, 1281–90, 1310–14 (2023)).

119. Id. at 543–44; Henry E. Smith, Equity as Meta-Law, 130 Yale L.J. 1050, 1076, 1080–81 (2021) [hereinafter Smith, Equity as Meta-Law] (arguing that equity has always had "a special role in combatting opportunism" because it prevents parties from taking advantages of gaps in the law that could not be "cost-effectively defined, detected, and deterred by explicit ex ante rulemaking").

120. Smith, Equity as Meta-Law, supra note 119, at 1054–56. See also Keenan, supra note 112, at 908 (discussing and endorsing literature arguing that equity is meant to prevent parties from taking "unforeseen advantage of existing legal rules"); Raz, supra note 28, at 550–56 (offering a historical account of equity's role in "preserv[ing] the correct operation of law in unforeseeable situations"); James Fullmer, Note, The Outer Limits of Equity: A Proposal for Cautious Expansion, 39 Harv. J.L. & Pub. Pol'y 557, 569 (2016). For the origin of this premise, see Aristotle, Nicomachean Ethics, *in* The Basic Works of Aristotle 1020 (W.D. Ross trans., Richard McKeon ed., 2001) ("[T]his is the nature of the equitable, a correction of law where it is defective owing to its universality.").

121. See Keenan, supra note 112, at 909 ("If federal equity's function is to address complexity, then federal courts should be freer to modify equity's doctrines and remedies to address complex problems."); see also *Grupo Mexicano*, 527 U.S. at 336 (Ginsburg, J., concurring in part and dissenting in part) ("Since our earliest cases, we have valued the adaptable character of federal equitable power."); Fullmer, supra note 120, at 572

Despite the Court's nominal adherence to equitable originalism,[122] its jurisprudence has been far from settled. The Court's approach to equity in *Liu v. SEC*,[123] for example, illustrates a deviation from equitable originalism and a limited embrace of a substantive view of equity.[124] In *Liu*, the Court interpreted the SEC's authority to seek "equitable relief" in civil actions under the Securities Exchange Act[125] to include disgorgement.[126] Instead of referencing Founding-era practice, the majority instead considered whether the category of relief was "typically available in equity."[127] Notably, the Court emphasized the "principles" of equity jurisprudence,[128] echoing Justice Ginsburg's insistence on focusing on the general "*principles* of equity" existing at the Founding rather than on the "specific practices and remedies of the pre-Revolutionary Chancellor" in her *Grupo Mexicano* opinion.[129] The majority's limited departure from *Grupo Mexicano* was not meaningful as a matter of the Court's equity jurisprudence. In his dissenting opinion, Justice Clarence Thomas reiterated the view that "'equitable relief' refers to forms of equitable relief available in the English Court of Chancery at the time of the founding" and discussed the application of this principle to the Judiciary Act in *Grupo Mexicano*.[130] In his view, the remedy approved in *Liu* would not have passed muster under a strict application of equitable originalism.[131] Commentators agree, noting that the approval of

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(proposing a "peripheral equity rule" which would approve novel equitable remedies when traditional equitable remedies would not do justice).

122. See Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) ("We must therefore ask whether universal injunctions are sufficiently 'analogous' to the relief issued '"by the High Court of Chancery in England at the time of the adoption of the Constitution and the enactment of the original Judiciary Act."'" (quoting *Grupo Mexicano*, 527 U.S. at 318–19)).

123. 140 S. Ct. 1936 (2020).

124. See Raz, supra note 28, at 548, 558 (explaining that the court "relied more broadly on substantive equity to shape both the reasoning and the outcome" of the case (emphasis omitted)).

125. 15 U.S.C. § 78u(d)(5) (2024) ("In any action or proceeding brought or instituted by the [SEC] under any provision of the securities laws, . . . any Federal court may grant . . . any equitable relief that may be appropriate or necessary . . . .").

126. *Liu*, 140 S. Ct. at 1942.

127. Id. at 1942 (emphasis omitted) (internal quotation marks omitted) (quoting Mertens v. Hewitt Assocs., 508 U.S. 248, 256 (1993)).

128. Id.

129. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 336 (1999) (Ginsburg, J., concurring in part and dissenting in part).

130. *Liu*, 140 S. Ct. at 1950 (Thomas, J., dissenting).

131. Id. Notably, the Court had previously deviated from strict equitable originalism in *Kansas v. Nebraska*. 574 U.S. 445 (2015). There, the Court had also approved disgorgement in a water dispute between Kansas and Nebraska. Id. at 463. Though the case represented a "rare and unique invocation of original jurisdiction" and may have therefore led the justices to believe that *Grupo Mexicano* did not apply, it still "represent[ed] a change in the Court's equitable mood" because disgorgement would have been foreclosed by Founding-era practice. Fullmer, supra note 120, at 560–61, 566 (2016).

disgorgement in *Liu* over Justice Thomas's dissent represented a significant shift "in that the Court (without announcing it in so many words) relied more broadly on *substantive* equity to shape both the reasoning and the outcome."[132] Professor Riley Keenan has argued that *Liu* marked a turn to "equitable traditionalism,"[133] an approach focusing on "English and American equity practice more generally before 1938."[134] In his view, *Dobbs v. Jackson Women's Health Organization*[135] imported this traditionalist approach to federal courts' "general equity power under the Judiciary Act of 1789," by "citing cases from after 1789 but before 1938 to determine what 'traditional' equity allowed."[136]

The fluctuations in the Court's equity jurisprudence suggested that equitable originalism's constraint on "judges using equity flexibly as intended in Article III" explain the "long gap between *Grupo Mexicano* and a second United States Supreme Court decision re-affirming equitable originalism."[137] Though that reaffirmance finally came in *Trump v. CASA, Inc.*,[138] the Court's opinion did not foreclose the flexible approach to equity toward which the Court had long been moving. In fact, the majority opinion had a distinctly functionalist flavor, speaking of equity as a mechanism "to secure justice where it would not be secured by the ordinary and existing processes of law,"[139] a view consistent with scholars who criticize equitable originalism. Like *Liu*, the Court's discussion of traditional equitable remedies was more flexible, citing cases after 1798 in its analysis.[140]

These fluctuations demonstrate that though the Court has repeatedly reaffirmed its historical approach to originalism,[141] its jurisprudence is not immune from the exigencies of addressing opportunism or other abuses of the legal system. Professor Raz has noted that *Liu* "illustrates how even static equity-oriented federal judges have

132. Raz, supra note 28, at 548, 558; see also Bray, supra note 110, at 1010 n.61 (noting that *Grupo Mexicano* "advanced a more fixed conception of equity than in later cases").

133. See Keenan, supra note 112, at 899.

134. Id. at 881.

135. 142 S. Ct. 2228 (2022).

136. Keenan, supra note 112, at 899, 901.

137. Anna C. Conley, The Inevitability of Adaptability - Comparative Contributions to Understanding Originalism, 39 Emory Int'l L. Rev. 467, 512 (2025).

138. 145 S. Ct. 2540, 2551 (2025) (citing Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 319 (1999)).

139. Id. (internal quotation marks omitted) (quoting George Burton Adams, The Origin of English Equity, 16 Colum. L. Rev. 87, 91 (1916)).

140. See id. at 2552 (first citing Scott v. Donald, 165 U.S. 107, 109 (1897), then citing Frothingham v. Mellon, 262 U.S. 447, 447–89 (1923), then citing Cutting v. Gilbert, 6 F. Cas. 1079, 1080 (C.C.S.D.N.Y. 1865) (No. 3519), then citing Gregory v. Stetson, 133 U.S. 579, 586 (1890)).

141. See Gallogly, supra note 118, at 1218 ("[L]ike the Court's revival of equity in general, its reliance on history shows no sign of abating.").

gradually had to take . . . into account" the reality that equitable relief must be flexible.[142] The Court's post-*Grupo Mexicano* progression toward a broader approach to history has developed Justice Scalia's gestures that "the historical inquiry is broader than 1789 and that incremental change is not ruled out."[143] Though a very different area of law, the Court's recent Second Amendment jurisprudence provides an illuminating example of how the Court can step away from static historical analysis when undesirable results would otherwise follow. Though *New York State Rifle & Pistol Ass'n Inc. v. Bruen* introduced a strict historical test to restrictions on the right to bear arms,[144] the Court's refinement of that test in *United States v. Rahimi*[145] was considerably more relaxed.[146] In fact, many opinions, even by Justices who consider themselves originalists, recognized "that a strict form of a frozen-in-time Founding-era focus absolved of any obligation to translate historical examples to the modern-day world simply cannot work."[147]

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142. Raz, supra note 28, at 564.

143. Bray, supra note 110, at 1010 n.61 (citing *Grupo Mexicano*, 527 U.S. at 322, 327, 329, 332–33); Christopher D. Moore, So-Called "Administrative Stays" in Trump 2.0, 104 Tex. L. Rev. Online 1, 24 (2025), https://texaslawreview.org/so-called-administrative-stays-in-trump-2-0/ [https://perma.cc/YC5Z-B65D] (noting that "*Grupo* may leave open the possibility that courts may issue remedies that the High Court of Chancery itself could not issue so long as that issuing remedy does not amount to a 'substantial expansion of past practice'" (quoting *Grupo Mexicano*, 527 U.S. at 329)).

144. 142 S. Ct. 2111, 2126 (2022) ("Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'" (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50 n.10 (1961))).

145. 144 S. Ct. 1889, 1903 (2024).

146. See Daniel S. Harawa, Between a Rock and a Gun, 134 Yale L.J. Forum 100, 112 (2024), https://yalelawjournal.org/pdf/HarawaYLJForumEssay_m7qtyweb.pdf [https://perma.cc/2SPD-MT7V] ("As Justice Thomas explained, *Rahimi* should have been 'an easy case' if the Supreme Court had hewed faithfully to what it said in *Bruen*." (quoting Nelson Lund, The Fidelity of 'Originalist' Justices Is About to Be Tested, N.Y. Times (Apr. 9, 2024), https://www.nytimes.com/2024/04/09/opinion/guns-supreme-court.html (on file with the *Columbia Law Review*))); see also Ian Ayres & Fredrick E. Vars, The Coming Assault on Categorical Gun Prohibitions, 77 Stan. L. Rev. Online 31, 42 (2025), https://review.law.stanford.edu/wp-content/uploads/sites/3/2025/02/Ayres-Vars-77-Stan.-L.-Rev.-Online-31.pdf [https://perma.cc/X47F-33K6] (considering the possibility that *Rahimi* loosened "the necessary resemblance between the challenged burden and the historic burden). But see Mark W. Smith, Much Ado About Nothing: *Rahimi* Reinforces *Bruen* and *Heller*, Harv. J.L. & Pub. Pol'y: Per Curiam (July 22, 2024), https://journals.law.harvard.edu/jlpp/much-ado-about-nothing-rahimi-reinforces-bruen-and-heller-mark-w-smith/ [https://perma.cc/Y5SY-Q4EY] (arguing the *Rahimi* did not depart from *Bruen*). Cf. Trump v. CASA, Inc., 145 S. Ct. 2540, 2588 (2025) (Sotomayor, J., dissenting) ("[G]eneral principles of equity that themselves existed at the founding militate against requiring a near exact match as the majority does." (citing *Rahimi*, 144 S. Ct. at 1898)); *Rahimi*, 144 S. Ct. at 1898 ("The law must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" (citing *Bruen*, 142 S. Ct. at 2133)).

147. Amanda L. Tyler, Levels of Generality, the Limits of Originalism, and the Supreme Court's Second Amendment Jurisprudence, 78 SMU L. Rev. 265, 277 (2025).

B. *Model Standards for Transnational Cases*

A party seeking an asset freeze must meet the requirements for an injunction to issue under Rule 65.[148] When determining whether to issue a preliminary injunction, courts consider five factors: irreparable injury, inadequacy of a remedy at law, balance of hardships, public interest, and likelihood of success on the merits.[149] The following sections address each element and explore considerations unique to the transnational context that courts should evaluate when considering issuing an asset-freeze injunction. This section then briefly discusses the interaction between this standard and *Erie*.

1. *Irreparable Injury.* — The fact that a case is transnational should place a thumb on the scale in favor of finding a likelihood of irreparable injury to account for the relative ease of frustrating a judgment when the dispute crosses borders.[150] Courts must still undertake a fact-intensive inquiry to determine if frustration is likely, considering factors such as refusal to disclose location of assets,[151] prior fraudulent activity,[152] or announced plans to frustrate a judgment.[153] Judgment-frustration is irreparable harm,[154] but a court in a transnational case may consider whether the frustration of a judgment by a court in the United States

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148. The Rule itself contains no standard for injunctions, which instead "depend[s] on traditional principles of equity jurisdiction." *Grupo Mexicano*, 527 U.S. at 318–19 (quoting 11A Wright & Miller's Federal Practice and Procedure § 2941 (2d ed. 1995) (internal quotation marks omitted)); see also Michael T. Morley, The Federal Equity Power, 59 B.C. L. Rev. 217, 254–56 (2018) (exploring the source of the injunction standard under Rule 65).

149. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008); see also Bethany M. Bates, Note, Reconciliation After *Winter*: The Standard for Preliminary Injunctions in Federal Courts, 111 Colum. L. Rev. 1522, 1535–37 (2011).

150. See Park, Recognition and Enforcement, supra note 20, at 1001 ("[I]t is much easier to frustrate the enforcement of [a] court's final judgment when the case crosses the national border."); supra note 71–74 and accompanying text.

151. See, e.g., EBSCO Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir. 1988) (affirming a preliminary injunction because "the defendant had taken specific steps to conceal assets and had refused to disclose what assets he has or where they are located").

152. See, e.g., USACO Coal Co. v. Carbomin Energy, Inc., 689 F.2d 94, 98 (6th Cir. 1982) (concluding that there was a risk of asset dissipation because of "previous questionable dealings in matters connected to the present lawsuit").

153. See, e.g., In re Uranium Antitrust Litig., 617 F. 2d 1248, 1259 (7th Cir. 1980) (affirming a preliminary injunction because a defendant had "instructed its American subsidiaries to transfer their assets to Canada").

154. If a judgment cannot be collected, "no remedy, at law or equity, will ever compensate [a defendant] for the permanent loss of [the] right to recover." Wasserman, supra note 14, at 291; see also Douglas Laycock, The Death of the Irreparable Injury Rule, 103 Harv. L. Rev. 688, 716, 728–32 (1990) ("[D]amages are no remedy at all if they cannot be collected, and most courts sensibly conclude that a damage judgment against an insolvent defendant is an inadequate remedy."). Therefore, "in cases in which the plaintiff sues to collect money damages and can demonstrate that the defendant is about to . . . frustrate the potential [] judgment, the plaintiff's . . . harm should be considered irreparable." Wasserman, supra note 14, at 293.

could be repaired by, for example, ongoing litigation in a court of the country where the assets are located.[155]

2. *Inadequacy of Legal Remedy.* — In the context of a provisional asset-freeze injunction, the remedy available at law is attachment.[156] Under Rule 64, federal courts draw upon state attachment statutes that are territorially limited, meaning that a federal court would be unable to attach assets located outside of the state's territory.[157] The provisional remedy of attachment is therefore inherently incapable of being an adequate remedy when the assets in question are already beyond the court's territorial jurisdiction. Of course, attachment would be an adequate provisional remedy if there were sufficient assets within the forum state to satisfy an eventual judgment[158] or within the United States as a whole.[159]

3. *Balance of Hardships.* — A court may consider mitigating the harshness of an asset-freeze injunction by only enjoining the defendant from making transfers "outside the ordinary course of business" or "freez[ing] all assets except those needed for ordinary living expenses or attorneys' fees."[160] In transnational cases, a court could enjoin assets located extraterritorially only to the extent necessary to satisfy an eventual judgment to mitigate the harshness of the injunction. It is also plausible that the injunction would cause the defendant to violate foreign law. In that case, the court should consider whether the foreign sovereign compulsion doctrine would prohibit issuing the injunction.[161]

155. A court may also consider forum non conveniens dismissal in such circumstances, which may provide a better opportunity for recovery. In a case in which litigation to freeze or attach assets abroad is ongoing, the court may grant a lis pendens motion to stay proceedings in the United States. See Continental Time Corp. v. Swiss Credit Bank, 543 F. Supp. 408, 410 (S.D.N.Y. 1982) (noting that a court has inherent power to stay or dismiss an action in favor of a proceeding in a foreign forum which presents "the same claims and issues").

156. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 337–38 (1999) (Ginsburg, J., concurring in part and dissenting in part).

157. See supra note 16 and accompanying text.

158. This is a requirement for a worldwide *Mareva* injunction under English law. Alexander, supra note 14, at 501.

159. If there are not sufficient assets within the state in which the federal court sits, however, attachment may still pose challenges because attaching those assets would require duplicative litigation in several states. Wasserman, supra note 14, at 280.

160. Id. at 297.

161. See Interamerican Refining Corp. v. Texaco Maracaibo, Inc., 307 F. Supp. 1291, 1296 (D. Del. 1970) ("[D]efendants were compelled by regulatory authorities in Venezuela to boycott plaintiff . . . . [S]uch compulsion is a complete defense to an action under the antitrust laws based on that boycott."); see also Restatement (Fourth) of the Foreign Relations Law of the United States § 442 (A.L.I. 2024) (indicating that "courts in the United States have discretion to excuse violations of law, or moderate the sanctions imposed for such violations, on the ground that the violations are compelled by another state's law" under certain conditions).

4. *Public Interest.* — Based on the findings of the court under the likelihood of irreparable injury analysis, a court should conclude that an asset freeze to prevent judgment frustration is in the public interest because the injunction protects "the integrity of the judicial process," the very reason the courts have the power to issue preliminary injunctions.[162] This factor will be especially compelling in cases when U.S. plaintiffs have suffered wrongs at the hands of defendants concealing assets abroad, for the inability to freeze assets could de facto deprive them of the adequacy of their home forum.[163]

Courts may consider the potential offense to foreign nations as part of its public interest analysis. Injunctions that have extraterritorial effects potentially create "diplomatic strife."[164] Foreign governments' resentment of U.S. discovery orders demonstrates the potential extent of this tension.[165] Before a court issues an asset-freeze injunction, it should consider whether the particular injunction is likely to generate a response that may be contrary to a public interest in the nation's diplomatic relations.[166]

5. *Likelihood of Success on the Merits.* — Though a plaintiff's likelihood of success on the merits is completely fact-specific, courts evaluating asset-freeze injunctions in transnational cases should be particularly attuned to choice of law issues.[167] Federal courts must consult the choice of law rules of the forum state to determine what substantive law will govern the merits of the claim[168] before determining whether the

162. Wasserman, supra note 14, at 299.

163. Cf. Piper Aircraft Co. v. Reyno, 454 U.S. 235, 254 (1981) (noting that "if the remedy provided by the alternative forum is so clearly inadequate or unsatisfactory that it is no remedy at all, the unfavorable change in law may be given substantial weight" in a forum non conveniens analysis). It may be especially compelling in human rights litigation.

164. See Park, Equity Extraterritoriality, supra note 10, at 148.

165. See Restatement (Third) of the Foreign Relations Law of the United States § 442 n.1 (A.L.I. 1987) ("No aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States."); see also Stephen N. Subrin, How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective, 135 U. Pa. L. Rev. 909, 919 (1987) (discussing the equitable roots of discovery under the federal rules).

166. See supra note 97 and accompanying text.

167. See Gary Born & Peter B. Rutledge, International Civil Litigation in United States Courts 733 (4th ed. 2007) ("International litigation inevitably presents choice-of-law issues . . . .").

168. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that federal courts must apply forum state choice-of-law rules); Christopher A. Whytock, Myth of Mess? International Choice of Law in Action, 84 N.Y.U. L. Rev. 719, 724 (2009) ("There is no uniform choice-of-law doctrine in the United States. To the contrary, different U.S. states have adopted different doctrines, which use a variety of methods for making choice-of-law decisions."); see also Roger P. Alford, Human Rights After *Kiobel*: Choice of Law and the Rise of Transnational Tort Litigation, 63 Emory L.J. 1089, 1102–11 (2014) (providing a brief summary of a variety of choice-of-law rules).

plaintiff is likely to succeed under the applicable law.[169] Though courts routinely apply choice of law doctrine,[170] they may be less familiar with foreign law and be especially cautious in determining a plaintiff's likelihood of success under the foreign law at issue.[171]

6. Erie *and Equity in Federal Court.* — The solution presented presupposes that federal courts are free to apply a federal standard for preliminary injunctions under Rule 65. That is the law,[172] but this section nevertheless raises *Erie* objections to fortify its approach against potential criticism based on emerging literature.[173] After presenting the tension between *Erie* and the federal standard governing injunctions under Rule

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169. See, e.g., Reiff v. CyberRisk All., LLC, No. 25-CV-6351(VM), 2025 WL 3019938, at *2, 5 (S.D.N.Y. Oct. 29, 2025) (determining that Delaware law applied to a contractual dispute before evaluating the plaintiff's likelihood of success on the merits).

170. See Symeon C. Symeonides, Choice of Law in the American Courts in 2020: Thirty-Fourth Annual Survey, 69 Am. J. Compar. L. 177, 179 (collecting data on conflicts cases available on Westlaw).

171. See Bodum USA, Inc. v. La Cafetiere, Inc., 621 F.3d 624, 631 (7th Cir. 2010) (Posner, J., concurring) (condemning as "unsound" the "practice of trying to establish the meaning of a law of a foreign country by testimony or affidavits of expert witnesses"); see also Fed. R. Civ. P. 44.1 ("In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence.").

172. Beber v. NavSav Holdings, LLC, 118 F.4th 921, 930 (8th Cir. 2024) ("[A] federal district court applies a federal standard, not a state standard, when it decides to grant or refuse a preliminary injunction."); Schuler v. Adams, 27 F.4th 1203, 1209 (6th Cir. 2022) (noting that federal injunction standards apply in federal court); Flood v. ClearOne Commc'ns, Inc., 618 F.3d 1110, 1117 (10th Cir. 2010) ("[F]ederal law governs the procedural questions when a preliminary injunction may issue and what standards of review we apply . . . ."); Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989) ("Rule 65(a) of the Federal Rules of Civil Procedure contemplates a federal standard as governing requests addressed to federal courts for preliminary injunctions." (internal quotation marks omitted) (quoting Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977))); see also Guar. Tr. Co. of N.Y. v. York, 326 U.S. 99, 105 (1945) ("[A] federal court may not afford an equitable remedy not available in a State court."); Caprice L. Roberts, Remedies, Equity & *Erie*, 52 Akron L. Rev. 493, 504 (2019) ("Federal courts sitting in diversity generally do and should apply federal equitable remedies standards."); David E. Shipley, The Preliminary Injunction Standard in Diversity: A Typical Unguided *Erie* Choice, 50 Ga. L. Rev. 1169, 1172–73 (2016). In *Grupo Mexicano* itself, the Supreme Court assumed that federal law governed the issuance of injunctions. Keenan, supra note 38, at 892 n.108; see also Burbank, supra note 30, at 1312 ("[T]he Court . . . refused to consider the implications of *Erie*."). But, for much older cases suggesting the opposite conclusion, see Kaiser Trading Co. v. Associated Metals & Mins. Corp., 321 F. Supp. 923, 931 n.14 (N.D. Cal. 1970) ("[T]he best approach would be to look to state law to determine if a preliminary injunction is permissible."); Port of N.Y. Auth. v. E. Air Lines, Inc., 259 F. Supp. 745, 753 (E.D.N.Y. 1966) (applying state law to the preliminary injunction standard).

173. Equity's *Erie* problem has become an increasingly dynamic field of debate. See, e.g., Andrea Olson, Resolving Equity's *Erie* Problem, 56 Ariz. St. L.J. 289, 299 (2024) ("[The] field is itself recognized as neither substantive nor procedural, defying the classic dividing line of the *Erie* test."); see also Keenan, supra note 112, at 892 n.107 (citing Roberts, supra note 172, at 498) (taking whether *Erie* applies to equity to be an open question).

65, this section argues that even if the federal standard failed the twin aims test,[174] its application to transnational cases could still prevail.[175]

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174. See Hanna v. Plumer, 380 U.S. 460, 468 (1965) ("The 'outcome-determination' test therefore cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws.").

175. It should also be noted "that transnational litigation...can impact foreign affairs." Bookman, supra note 24, at 1100 (citing Gary B. Born, Reflections on Judicial Jurisdiction in International Cases, 17 Ga. J. Int'l & Comp. L. 1, 11 (1987)). That impact is no less pronounced in purely private disputes. See Andrew W. Davis, Note, Federalizing Foreign Relations: The Case for Expansive Federal Jurisdiction in Private International Litigation, 89 Minn. L. Rev. 1464, 1496 (2005) ("[M]ost private international litigation in the United States has some impact on foreign states, [and] the impact will at times be substantial enough to warrant federal uniformity."); see also Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 Va. L. Rev. 1617, 1634–36 (1997) (noting that a variety of private international law issues potentially implicate the federal common law of foreign relations). For that reason, federal courts may make substantive federal common law in cases that impact foreign affairs. See Sosa v. Alvarez-Machain, 542 U.S. 692, 729 (2004) ("[P]ost-Erie understanding has identified limited enclaves in which federal courts may derive some substantive law in a common law way."); Tex. Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 641 (1981) ("[F]ederal common law exists only in such narrow areas as those concerned with the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." (footnotes omitted)); see also Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 427–28 (1964) (holding that the act of state doctrine is governed by federal common law because of its bearing on foreign affairs), superseded by statute on other grounds, Foreign Assistance Act of 1964, Pub. L. No. 88-633, § 301(d)(4), 78 Stat. 1009, 1013 (amended 1965) (codified as amended at 22 U.S.C. § 2370(e)(2) (2024)), as recognized in, Republic of Hung. v. Simon, 145 S. Ct. 480 (2025); id. at 425 (deeming it "fair to assume that the Court did not have rules like the act of state doctrine in mind when it decided Erie"); id. at 425 & n.24 (noting "a judge of the International Court of Justice[] recognized the potential dangers were Erie extended to legal problems affecting international relations." (citing Philip C. Jessup, The Doctrine of Erie Railroad v. Tompkins Applied to International Law, 33 Am. J. Int'l L. 740 (1939))); In re Whittaker Clark & Daniels Inc., 152 F.4th 432, 474 (3d Cir. 2025) (Krause, J., concurring) (noting that "federal courts sitting in diversity jurisdiction may theoretically formulate special federal common law to protect important federal interests); Ungaro-Benages v. Dresdner Bank AG, 379 F.3d 1227, 1232–33 (11th Cir. 2004) ("Because our foreign relations could be impaired by the application of state laws, which do not necessarily reflect national interests, federal law applies to these cases even where the court has diversity jurisdiction."). And conflicts with foreign affairs justifying federal preemption need not arise from an "actual conflict with federal law" or be "based on evidence of a real disruption in international relations." Judith Resnik, Foreign as Domestic Affairs: Rethinking Horizontal Federalism and Foreign Affairs Preemption in Light of Translocal Internationalism, 57 Emory L.J. 31, 76 (2007). The conflict may be "dormant." Id. Asset freeze injunctions may "contravene the interests of foreign sovereigns." See Park, Equity Extraterritoriality, supra note 10, at 104 ("By reaching beyond their territorial jurisdiction via Equity Extraterritoriality, U.S. courts often contravene the interests of foreign sovereigns and cause diplomatic rows."); cf. Gucci Am., Inc. v. Weixing Li, 768 F.3d 122, 139 (2d Cir. 2014) ("[W]here the Bank objected to application of the Asset Freeze Injunction to it, . . . citing an apparent conflict with the requirements of Chinese banking law, comity . . . required the district court to consider the Bank's legal obligations pursuant to foreign law before compelling it to comply with the . . . [i]njunction."). Potentially, then, there is a greater place for federal law in transnational asset freezes.

Despite persistent critique, there is no complete academic consensus that the federal injunction standard should yield to contrary state standards. In 2000, Professor Stephan Burbank argued that Rule 65 does not support a "broad charter for federal common law," so a common law rule on the issue should yield to "the requirements of contrary state law."[176] In contrast, more recent scholarship has argued that federal preliminary injunction standards should apply when a federal court considers state law claims under their diversity jurisdiction.[177] Professor David Shipley, for example, has argued that applying a federal standard is consistent with the twin aims of *Erie*, and that the case is especially strong for preliminary injunctions because "the grant or denial of this interim equitable relief is provisional and not a final adjudication of the merits of the claim."[178] Circuit courts of appeal have consistently concluded that a federal standard applies to preliminary injunctions, holding that Rule 65 "incorporates traditional federal equity practice."[179]

Even if it were subjected to the twin-aims test, this federal practice would likely survive. The twin aims as articulated in *Hanna* are (1) discouraging forum shopping and (2) avoiding the inequitable administration of law.[180] On the first aim, there is an apparent consensus that forum shopping is problematic "only if it leads to unfairness" and is not "itself a *per se* evil."[181] Therefore, though the proposed rule would make a federal forum more appealing when assets are located abroad, the injunction would only be granted if the court found that the defendant intended to frustrate the judgment. Allowing forum shopping to help a plaintiff prevent judgment frustration is hardly objectionable. On the second aim, inequitable administration of the law would result if the "character or result of a litigation" would have been materially different in federal court.[182] This concern would arise in a case in which a party cannot invoke diversity jurisdiction to reach federal court. But the role of equity is to ensure the integrity of litigation, so it would be strange

176. Burbank, supra note 30, at 1320, 1335. Professor Morley agrees, arguing that the modified outcome-determination test from *Hanna* "dictates that state law should govern equitable remedies because applying state law furthers the *Erie* Doctrine's objectives." Morley, supra note 148, at 259.

177. Roberts, supra note 172, at 504.

178. Shipley, supra note 172, at 1231.

179. Ferrero v. Associated Materials Inc., 923 F.2d 1441, 1448 (11th Cir. 1991); see also Instant Air Freight Co. v. C.F. Air Freight, Inc., 882 F.2d 797, 799 (3d Cir. 1989) ("Rule 65(a) of the Federal Rules of Civil Procedure contemplates a federal standard as governing requests addressed to federal courts for preliminary injunctions." (internal quotation marks omitted) (quoting Sys. Operations, Inc. v. Sci. Games Dev. Corp., 555 F.2d 1131, 1141 (3d Cir. 1977))).

180. Hanna v. Plumer, 380 U.S. 460, 468 (1965).

181. Richard W. Bourne, Federal Common Law and the *Erie-Byrd* Rule, 12 U. Balt. L. Rev. 426, 473 (1983).

182. *Hanna*, 380 U.S. at 467.

to conclude that some state courts' inability to effectively meet that goal means that federal courts should be similarly ineffectual.

C. *The Legality of the Proposed Expansion*

Expanding the availability of preliminary asset-freeze injunctions in transnational cases is consistent with the trend in the Supreme Court's equity cases because these injunctions are analogous to substantive-equity remedies that the Court already endorsed. As discussed above, substantive equity prevents injustice when an otherwise applicable legal rule would produce an unforeseen result.[183] Preliminary injunctions serve that very purpose.[184] Asset-freeze injunctions deter opportunistic behavior by preventing defendants from "misus[ing] . . . first-order legal rights (in this case, property rights) to obstruct the correct operation of law,"[185] thus resolving "a gap in complex procedural devices and their vulnerability to opportunism" and "preserv[ing] the integrity of the litigation, especially against judgment-proofness—traditional targets of equity—in a focused way."[186] The current approach to asset-freeze injunctions eviscerates their utility in preventing opportunism.[187] Because transnational cases present unique opportunities for judgment-frustration,[188] they are an ideal case for courts to recognize that flexible equitable remedies are necessary and contribute to the reevaluation of federal courts' equitable powers that is now underway.[189] The Supreme Court has already taken the first steps. Its previous departures from strict originalism have responded to a recognition that a static conception of equity is inadequate to confront contemporary legal issues.[190] Part II demonstrated that the current approach to asset-freeze injunctions is one such case, while emphasizing that transnational cases are especially vulnerable to abuse.[191] Justice Ginsburg raised this very issue in *Grupo Mexicano*, arguing that "a dynamic equity jurisprudence is of special importance in the commercial law context," and that a restrictive

183. See supra section III.A.

184. Smith, supra note 119, at 1137.

185. Raz, supra note 28, at 560.

186. Smith, supra note 119, at 1137. The *Mareva* injunction is similarly grounded in "equity's traditional power to remedy the 'abuse' of legal process by defendants and the 'injustice' that would result from defendants 'making themselves judgment-proof' by disposing of their assets during the pendency of litigation." Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 339 (1999) (Ginsburg, J., concurring in part and dissenting in part) (citing Iraqi Ministry of Defence v. Arcepey Shipping Co. [1979] 1 All E.R. 480 at 484–87 (Eng.)).

187. See supra Part II.

188. Park, Recognition and Enforcement, supra note 20, at 1001 ("[I]t is much easier to frustrate the enforcement of a court's final judgment when the case crosses [a] national border.").

189. See supra section III.A.

190. See supra notes 122–140 and accompanying text.

191. See supra Part II.

approach to asset-freeze injunctions was ill-advised because "Chancery may have refused to issue injunctions of this sort simply because they were not needed to secure a just result in an age of slow-moving capital and comparatively immobile wealth."[192]

In response to this reality, liberalizing asset-freeze injunctions in transnational cases is a modest and plausible expansion of the Court's equity jurisprudence for three reasons. First, there are requisite historical antecedents for asset-freeze injunctions. Second, limiting such injunctions to transnational cases is consistent with a gradual expansion of equity arguably approved by *Grupo Mexicano*.[193] Specifically, it provides a limiting principle which resolves Justice Scalia's concern that animated that majority opinion. Third, there is a growing academic consensus that a historically informed originalism requires a substantive, rather than static, approach to equity. Asset-freeze injunctions are a modest expansion of equitable practice which are consistent with that originalist interpretation.

1. *Limiting Principles.* — There are plausible historical antecedents to asset-freeze injunctions that are compelling under the Court's softening approach to equitable originalism. Justice Scalia's opinion in *Grupo Mexicano* seemed to require "not analogy but identity"[194] by rejecting the Government's argument that a "creditor's bill" was sufficiently analogous to the injunction requested.[195] This historical analogue is more persuasive under the Court's recent jurisprudence. The Court's gestures to more general principles of equity, rather than specific remedies,[196] is consistent with Justice Ginsburg's observation that a remedy's rarity does not entail that "the remedy was beyond equity's capacity."[197] In *Liu*, the Court implicitly contradicted Justice Scalia's rejection of the creditor's

192. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 337–38 (1999) (Ginsburg, J., concurring in part and dissenting in part). Early equity cases foresaw such circumstances; the Court wrote in 1896: "It must not be forgotten that, in the increasing complexities of modern business relations, equitable remedies have necessarily and steadily been expanded, and no inflexible rule has been permitted to circumscribe them." Union Pac. Ry. Co. v. Chicago, R.I. & P. Ry. Co., 163 U.S. 564, 600–01 (1896).

193. Bray, supra note 110, at 1010 n.61 (citing *Grupo Mexicano*, 527 U.S. at 322, 327, 329, 332–33).

194. Listwa & Seidell, supra note 39, at 686.

195. See *Grupo Mexicano*, 527 U.S. at 319–20; Listwa & Seidell, supra note 39, at 686 (noting that Justice Scalia rejected the historical analogy because doing so would require speculating on whether the present case would have qualified for an exception in which the creditor's bill did not require a previous judgment).

196. See, e.g., Liu v. Sec. & Exch. Comm'n, 140 S. Ct. 1936, 1942–43 (2020) ("Equity courts have routinely deprived wrongdoers of their net profits from unlawful activity, even though that remedy may have gone by different names."); see also Trump v. CASA, 145 S. Ct. 2540, 2563 (2025) (noting that injunctions must "comply with principles of equity"); Raz, supra note 28, at 565–66 (discussing the tension between static equity and the broader principles of equity).

197. *Grupo Mexicano*, 527 U.S. at 338 (Ginsburg, J., concurring in part and dissenting in part).

bill as a plausible historical analogue by authorizing disgorgement over Justice Thomas's dissent which, like Justice Scalia's majority opinion in *Grupo Mexicano,* "focused on specific diverging details" and treated those distinctions as if "they entirely negate[d] a much broader legal concept."[198] The Court's retreat from static interpretations of equitable remedies suggests that a limited departure from *Grupo Mexicano* is plausible, especially considering that approving asset-freeze injunctions in transnational cases would not entail reversing *Grupo Mexicano* as a whole.[199]

Furthermore, an approval of asset-freeze injunctions in transnational cases is arguably consistent with *Grupo Mexicano.* The majority opinion arguably "le[ft] open the possibility that courts may issue remedies that the High Court of Chancery itself could not issue so long as issuing that remedy does not amount to a 'substantial expansion of past practice.'"[200] An asset-freeze injunction of the type proposed in this Note would not constitute a substantial expansion of equity practices for three reasons.

First, the expansion would only apply to transnational disputes that are subject to unique concerns regarding judgment frustration. These limits give effect to Justice Scalia's concern that the injunction would be

198. Raz, supra note 28, at 566. In fact, "the possible exceptions to the general rule that a creditor's bill required a judgment . . . . [are] exactly the sort of issue[s] that should have concerned [the] Court, given its attention to the particular nature of the relief 'traditionally accorded by courts of equity.'" The Supreme Court, 1999 Term—Leading Cases, 113 Harv. L. Rev. 316, 323 n. 63 (1999) [hereinafter Leading Cases] (quoting *Grupo Mexicano,* 527 U.S. at 319); see also Brief for the United States as Amicus Curiae, supra note 1, at *11 (discussing exceptions to the general rule that a creditor's bill required a previous judgment).

199. The remedy could be limited because, relying on principles of equity where a remedy is available at law, those legal remedies like attachment will be more likely effective in domestic litigation. Anyway, it cannot be said that the Supreme Court has been particularly hesitant to overturn precedent. See, e.g., Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2273 (2024) (overturning *Chevron*'s "interpretive methodology" but holding that prior cases relying upon *Chevron* are still subject to stare decisis); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2278–79 (2022) (overturning *Roe v. Wade* and noting that stare decisis "is the norm but not an inexorable command"); see also id. at 2301 (Thomas, J., concurring) ("[I]n future cases, we should reconsider all of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell.*"). Nor can it be said that the Court has always considered stare decisis in developing its precedent. See, e.g., Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 143 S. Ct. 2141, 2239 (2023) (Sotomayor, J., dissenting) ("It is a disturbing feature of today's decision that the Court does not even attempt to make the extraordinary showing required by *stare decisis.*").

200. Moore, supra note 143, at 24 (quoting Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 329 (1999)); see also Bray, supra note 110, at 1010 n.61 (analyzing Justice Scalia's discussion of "remedies that were 'traditionally accorded by courts of equity,'" and identifying numerous phrases "suggesting that . . . incremental change is not ruled out" (quoting *Grupo Mexicano,* 527 U.S. at 319)).

too powerful a remedy, lacking any limiting principle.[201] Academics have expressed similar concerns. Professor Henry Smith wrote that Justice Ginsburg's opinion "at most gestured to the test of injunctive relief without giving much sense of any limits," concluding that "[e]mploying equity only when it can be justified is not much of a restraint."[202] In sum, "Justice Scalia's nearly static approach has no persuasive principle; Justice Ginsburg's alternative, no limiting one."[203]

But the transnational limitation proposed here makes the provisional remedy strong enough to deal with the contextual transformations in asset mobility across borders, but not so broadly applicable as to become an all-purpose remedy.[204] Far from representing an all-encompassing federal remedy, the proposed approach strikes a desirable balance with state law. In general, the federal injunction standard strikes a balance with state law because state law determines a plaintiff's likelihood of success on the merits.[205] The approach described in section III.B effectively imposes additional deference to state law in the consideration of whether a legal remedy is inadequate. To satisfy that element, attachment under state law must be inadequate for an asset freeze to issue.[206] Determining the adequacy of the legal remedy therefore requires consulting the forum state's attachment statute.[207] This requirement ensures that an asset freeze would not "render . . . use of state prejudgment remedies[] a virtual irrelevance."[208] Furthermore, the proposed standard would pursue the stated goals of *Grupo Mexicano* by emphasizing state law because state attachment statues are currently irrelevant in cases seeking equitable relief.[209] In fact, the proposed approach is broadly preferable to attachment under Rule 64, as invoked by Justice Scalia, because asset freezes are less intrusive than attachment orders and produce fewer effects on third parties.[210]

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201. See *Grupo Mexicano*, 527 U.S. at 330–31 ("Why go through the trouble of complying with local attachment and garnishment statutes when this all-purpose prejudgment injunction is available?").

202. Smith, supra note 119, at 1137.

203. Bray, supra note 110, at 1019.

204. See supra note 201 and accompanying text.

205. Roberts, supra note 170, at 503. The analysis of likelihood of success on the merits implicates the forum state's choice of law rules for which substantive law governs the dispute. See Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941) (holding that state choice of law rules apply in federal courts sitting in diversity).

206. See supra section III.B.2.

207. See supra notes 154–157; see also supra section I.A. (explaining that, in the wake of Grupo Mexicano, Rule 65 cannot support a prejudgment asset freeze in suits seeking legal relief, and that Rule 64 instead ties the availability of comparable relief to the forum state's attachment statute and related prejudgment remedies).

208. Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 330 (1999).

209. See supra section I.A.

210. See Wasserman, supra note 14, at 281–85 ("[V]irtually all of the state attachment statutes authorize the sheriff to physically seize the defendant's tangible

Second, even in a transnational case, the plaintiff would still have to satisfy the procedural requirements of *Winter*,[211] which would be especially restrictive under the proposed solution.[212] Third, Part I demonstrated that asset-freeze injunctions are already available in cases in which plaintiffs seek equitable relief in federal court.[213] The proposed approach would merely expand their availability in a manner consistent with the aim of preventing judgment frustration.

2. *The Future of Equity in the Supreme Court.* — Finally, approving asset-freeze injunctions is consistent with a growing body of literature[214] suggesting that substantive equity is consistent with the Judiciary Act of 1789,[215] or even mandated by the Constitution.[216] Though *Grupo Mexicano*'s method was statutory in nature, analyzing federal courts' equitable authority with reference to the Judiciary Act,[217] scholars have argued that "Article III vests the federal courts with an equity power considerably different from what the Court has interpreted most federal statutes to confer."[218] On this view, Article III provides "greater leeway to adapt the federal system of equitable remedies than the Supreme Court's statute-based doctrine" would permit.[219] Though the Court continues to

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property, whether found in the possession of the defendant or in the possession of a third party.").

211. See Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008) (setting out the standard for preliminary injunctions in federal court).

212. See supra section III.B.2.

213. See supra Part I.

214. See Raz, supra note 28, at 548 (describing the current "wave of scholarship" in the field).

215. See Keenan, supra note 110, at 909 ("What if, in giving federal courts equity powers, Congress authorized them to address complex problems in the areas of law where equity governs—today, that is to say, primarily in the field of remedies?").

216. See Gallogly, supra note 118, at 1222 (arguing that Article III is a primary source of "federal equity power," which gives federal courts "greater leeway to adapt the federal system of equitable remedies than the Supreme Court's statute-based doctrine seems to permit"); id. *passim* (offering an originalist interpretation of Article III to determine the scope of federal courts' equitable powers); Raz, supra note 28, at 543 ("[S]ubstantive equity[] is the equity mentioned in the Constitution, which judges are required to apply, especially within the framework of originalism and textualism." (emphasis omitted) (footnotes omitted)); id. at 593 (arguing that the static conception of equity is "an unjustified departure from the functional, historical, and textually binding idea of equity as corrective meta-law or second-order law"). But see Keenan, supra note 110, at 905 ("Gallogly's account contradicts the Supreme Court's repeated statements identifying the Judiciary Act as federal equity's source. Such a contradiction might be warranted if historical evidence supported Gallogly's reading overwhelmingly—but, as Gallogly acknowledges, the historical record is largely inconclusive on this issue." (footnotes omitted)).

217. See Grupo Mexicano de Desarrollo, S.A. v. All. Bond Fund, Inc., 527 U.S. 308, 318 (1999). The Court has been restrictive in determining "the extent the general jurisdictional statutes are read to authorize courts to administer equitable remedies . . . in part because of the obvious tension with Erie." Moore, supra note 143, at 23–24.

218. Gallogly, supra note 118, at 1222.

219. Id.

insist that the Judiciary Act of 1789 is the source of the federal equity power, its approach has not been without conceptual difficulty.[220] Notably, non-statutory sources of the federal equity power can provide a theoretical basis for *Ex parte Young* relief,[221] which has been difficult to square with the Court's current approach to equity.[222] In sum, a revival of substantive equity is possible today because, in addition to the Court's retreat from static equity,[223] "all the cards, from originalism and textualism, through the Constitution's text, to relevant case law, are already on the table."[224] Because static equity is "only a recent innovation in the federal courts, it should not take too much effort to end this misadventure."[225] Asset freezes in transnational cases are a good place to start.

3. *The Future of Equity in State Courts.* — Despite the Supreme Court's reticence to squarely confront the need for flexible equitable remedies in federal court, state courts are free to liberalize their own approaches to asset-freeze injunctions. Part II has emphasized the desirability of rejecting *Grupo Mexicano,* at least for transnational cases,[226] and Part III has provided a plausible roadmap and rationale for developing effective provisional relief jurisprudence.

CONCLUSION

The law of provisional remedies must continue to develop alongside the accelerating mobility of assets. To undermine the process and integrity of litigation is to undermine the values it serves and the rights it vindicates. From commercial litigation to human rights litigation, which each have increasingly transnational dimensions, provisional relief is essential and deserves renewed attention. Asset freezes are a simple but powerful means of fortifying the efficacy of litigation, and this Note has attempted to revive interest in their utility in the transnational context. The convergence of the undertheorization of transnational provisional relief, its importance in a climate characterized by extreme asset mobility,

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220. See Trump v. CASA, Inc., 145 S. Ct. 2540, 2551 (2025) (treating §11 of the Judiciary Act of 1789 as the source of the federal equity power). But "the problem is that neither Section 11 of the 1789 Judiciary Act, nor any other provision of that act, [was] the basis for federal subject matter jurisdiction for the suits in CASA." Jack Goldsmith, A Legal Mistake at the Heart of Trump v. CASA?, Executive Functions (July 11, 2025), https://www.execfunctions.org/p/a-legal-mistake-at-the-heart-of-trump [https://perma.cc/78PX-24AH].

221. Id.

222. See *CASA*, 145 S. Ct at 2589 (Sotomayor, J., dissenting) ("Under the majority's rigid historical test, however, even plaintiff-protective injunctions against patently unlawful Government action should be impermissible. Such a result demonstrates the folly of treating equity as a closed system, rather than one designed to adapt to new circumstances." (footnote omitted)).

223. See supra section III.A.

224. Raz, supra note 28, at 593.

225. Id. at 596.

226. See supra Part II.

and an emerging literature on federal equitable remedies makes this a unique time for intervention. This Note's proposal brings attention to provisional relief in a rapidly developing field of scholarship, arms courts with a reply to contemporary asset mobility, and offers an opportune context in which to continue challenging the untenable stasis in equitable remedies.

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