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ARTICLES

NOTE

Editor's Note

Chapman Law Review is delighted to release the first issue of Volume 28. This is the first of two general law review issues in this year's volume, to be followed by the Symposium Issue, and it features scholarship covering a diverse range of subjects across numerous legal areas.

Professor Catherine Jean Archibald opens the issue with an article analyzing Florida's "Don't Say Gay" law and the settlement agreement that resulted from a lawsuit challenging the law. In her article, Professor Archibald bases her analysis on case precedent surrounding the First and Fourteenth Amendments, specifically highlighting the unconstitutionality of the law. The article's conclusion calls for courts to strike down this law and similar unconstitutional measures.

Next, in his article, Nir Fishbien examines tax expenditures, defined as revenue losses from tax provisions that deviate from the Haig-Simons income definition, a concept introduced by Stanley S. Surrey in the 1960s. While critics question the validity and relevance of using Haig-Simons as a baseline, the article argues for a return to Surrey's original vision: identifying violations of horizontal equity. By eliminating tax expenditures, Mr. Fishbien suggests systemic biases could be reduced, resulting in a fairer and more equitable tax system for Americans.

Professor Maureen Johnson's article follows and critiques *Garland v. Cargill*, in which the Supreme Court ruled that bump stocks fall outside the National Firearms Act, enabling easier access to machine gun-like weapons. Professor Johnson calls for focusing gun reform on indirect victims and aligning firearm laws with historical Second Amendment interpretations to balance public safety and gun rights.

In the final article, Michelle Norris highlights a congressional hearing where TikTok CEO Shou Zi Chew was questioned by Senator Tom Cotton about potential ties to China. The exchange prompted backlash, with critics accusing Cotton of racism and demonstrating a lack of knowledge of corporate structures. The event brought attention to a broader challenge: varying global data privacy laws, with TikTok storing users' personal information in countries like Malaysia, Singapore, and the United States, leading to security risks. Ms. Norris advocates for the creation of an international data transfer framework, inspired by agreements

like the United States-Mexico-Canada Agreement and the General Data Protection Regulation, to standardize policies, enhance data protection, and resolve legal discrepancies across borders.

The issue ends with a note written by Ms. Lilia Alameida, a J.D. Candidate currently in her third year of study at Chapman University Dale E. Fowler School of Law, Class of 2025. During her second year, Ms. Alameida served as a Staff Editor for *Chapman Law Review*. She has held the critical position of Senior Articles Editor during her third year and, in that capacity, has been instrumental in the production and publication of this volume. Ms. Alameida's note examines the environmental dangers of fracking, especially in California where water shortages and the risk of a severe earthquake are significant issues. Ms. Alameida contends that the oil industry's political sway, achieved through lobbying and campaign contributions, obstructs climate initiatives, as demonstrated by the California Supreme Court's decision in *Chevron U.S.A. Inc. v. County of Monterey*. The ruling diminishes regulatory effectiveness, expands the climate action shortfall, and erodes local and judicial oversight of environmental accountability. Ms. Alameida concludes that without a change in direction by the California Supreme Court, the *Chevron* decision will strengthen Big Oil's dominance, erode political accountability, and suppress local climate initiatives.

Chapman Law Review extends its deepest gratitude to the faculty and administration for their invaluable contributions to the success of this Journal. We are especially thankful to our faculty advisor, Professor Celestine McConville, for her expert guidance and unwavering support throughout the development process. Additionally, we are grateful to Dean Paul D. Paton of the Dale E. Fowler School of Law and our Faculty Advisory Committee—Professors Janine Kim, Carolyn Larmore, Lawrence Rosenthal, and Matthew Tymann—for their assistance and encouragement. We also would like to thank the Research Librarians of the Hugh & Hazel Darling Library, whose expertise has been a vital resource for source collection.

I would like to especially acknowledge the incredible efforts of our Executive Managing Editor, Anna Ross, and our Executive Production Editor, Sara Moradi. Their tireless dedication, adaptability, and hard work were fundamental to the success of this Volume. To our exceptional team of editors, your passion and commitment has made this first general issue a reality, and I am profoundly grateful for your contributions. Collaborating with all

of you has been the most rewarding part of my law school journey, and I could not be prouder of what we have accomplished together. It has been a true honor and privilege to serve and lead the *Chapman Law Review* over the past term.

Taline Nicole Ratanjee
Editor-in-Chief

Still Problematic, Even Post-Settlement: Florida's "Don't Say Gay" Law and the Federal Constitution

Catherine Jean Archibald

CONTENTS

Still Problematic, Even Post-Settlement: Florida's "Don't Say Gay" Law and the Federal Constitution

Catherine Jean Archibald[*]

Florida's "Don't Say Gay" Law, officially part of the Parental Rights in Education Act, came into force in 2022. As amended in 2023, this law prohibits classroom instruction on sexual orientation or gender identity for children in pre-kindergarten through the eighth grade, and forbids any instruction on sexual orientation or gender identity that is not "age-appropriate or developmentally appropriate" for children in any grade.

From the start, this law was controversial and was challenged in court as a violation of the U.S. Constitution. In March 2024, a settlement agreement was reached in a lawsuit challenging the law, providing clarification on various aspects, including what constitutes forbidden conduct under the law.

This Article argues that although the settlement agreement helps resolve many of the problematic aspects of the "Don't Say Gay" Law, the law still violates the Constitution. This Article contends that this law violated and still violates the First Amendment's protection of freedom of speech because of its chilling effect on protected speech and by promoting a particular religious viewpoint in schools. Additionally, it violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment as it is an overbroad and vague law that was enacted with discriminatory animus against the LGBTQ+ community, and it discriminates based on sexual orientation and gender identity. This Article concludes that the courts should strike down this law and others like it as violative of the U.S. Constitution.

* Catherine Jean Archibald is an Associate Professor of Law at University of Detroit Mercy School of Law. She received an A.B. from Princeton University in 2000, a J.D. from Michigan State University College of Law in 2007, and an LL.B. from the University of Ottawa Faculty of Law in 2008. The author is grateful for the support and comments from her colleagues Erin Archerd, Richard Broughton, Cara Cunningham Warren, Courtney Griffin, Camesha Little, Aman McLeod, Patrick Meyer, and Andy Moore. The author extends many thanks to her research assistants, Andrew Belford and Simon Pereira, who helped with the research for this Article.

I. INTRODUCTION

> *"Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards."*
>
> — Florida's "Don't Say Gay" Law[1]

> *"Teachers are hereby banned from giving students any information that is not strictly related to the subjects they are paid to teach."*
>
> — Educational Decree Number Twenty-Six by Order of the High Inquisitor of Hogwarts[2]

In Florida, and increasingly in other states, limits are being placed on what teachers can talk about at school regarding sexual orientation and gender identity. But these limits mean that teacher and student speech is being chilled to the detriment of student learning and inquiry, and, as this Article will show, in violation of the First and Fourteenth Amendments of the U.S. Constitution. As one Supreme Court Justice wrote in 1952:

> Public opinion . . . can be disciplined and responsible only if habits of open-mindedness and of critical inquiry are acquired in the formative years of our citizens. The process of education has naturally enough been the basis of hope for the perdurance of our democracy on the part of all our great leaders, from Thomas Jefferson onwards.
>
> To regard teachers—in our entire educational system, from the primary grades to the university—as the priests of our democracy is therefore not to indulge in hyperbole. It is the special task of teachers to foster those habits of open-mindedness and critical inquiry which alone make for responsible citizens, who, in turn, make possible an enlightened and effective public opinion. Teachers must fulfill their function by precept and practice, by the very atmosphere which they generate; they must be exemplars of open-mindedness and free inquiry. They cannot carry out their noble task if the conditions for the practice of a responsible and critical mind are denied to them. They must have the freedom of responsible inquiry, by thought and

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1 FLA. STAT. § 1001.42(8)(c)(3) (2024).

2 J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 509 (Bloomsbury ed., 2014) (2003).

> action, into the meaning of social and economic ideas, into the checkered history of social and economic dogma.[3]

Florida's "Don't Say Gay" Law[4] prohibits classroom instruction on sexual orientation or gender identity for children in pre-kindergarten through the eighth grade and forbids any instruction on sexual orientation or gender identity that is not "age-appropriate or developmentally appropriate" for children in any grade.[5] Imagine a first-grade teacher who hesitates in answering a student who asks, "Why does Susan have two moms? That's impossible, right?" In the past, that teacher would have been free to answer, "Some women marry other women and have children together." But now, because of Florida's "Don't Say Gay" Law, that teacher knows they must not provide instruction on sexual orientation or gender identity, and may worry that such an answer, though true, might be interpreted as providing instruction on sexual orientation or gender identity. Instead, due to fear of violating the law, the teacher might say, "I can't answer that question." In effect, the teacher is muzzled. All children in the classroom lose. Susan loses by feeling like her family is invalidated. The student who asks the question loses because they miss out on learning about the diversity of family types in the United States. Other children in the classroom lose because they sense fear and uncertainty in their teacher when discussing certain subjects. Instead of existing within and fostering an atmosphere of "open-mindedness and critical inquiry," such a teacher exists within and fosters an atmosphere of fear, uncertainty, and lack of acceptance towards the diversity of family types in the United States.[6]

From the start, Florida's "Don't Say Gay" Law was controversial and was challenged in the courts as a violation of the U.S. Constitution. In March 2024, a settlement agreement (Settlement) was reached in one of these lawsuits, providing

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3 Wieman v. Updegraff, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring).

4 This is not the law's official name, but a nickname given to the law by its critics. This Article uses this name for the law because, as this Article will show, it is an appropriate name for the law, and it is what the law is widely known as. *See* Wynne Davis, *Florida Senate Passes a Controversial Schools Bill Labeled 'Don't Say Gay' by Critics*, NPR (Mar. 8, 2022, 2:35 PM), https://www.npr.org/2022/03/08/1085190476/florida-senate-passes-a-controversial-schools-bill-labeled-dont-say-gay-by-criti [https://perma.cc/4GYK-QT8C].

5 § 1001.42(8)(c)(3).

6 *Wieman*, 344 U.S. at 196 (Frankfurter, J., concurring).

clarification on certain aspects of the law, including what constitutes forbidden conduct under the law.[7]

This Article argues that the Settlement, while immensely helpful and beneficial, does not solve all the problems of Florida's "Don't Say Gay" Law. Further, this Article contends that this law violates the Free Speech Clause and the Establishment Clause of the First Amendment because of its chilling effect on protected speech and by promoting a particular religious viewpoint in schools. Additionally, the "Don't Say Gay" Law violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment because it is overbroad, vague, was enacted with discriminatory animus against the LGBTQ+[8] community, and it discriminates based on sexual orientation and gender identity. This Article concludes that the law and others like it should be struck down by the courts as violative of the U.S. Constitution.

II. THE BACKGROUND AND CURRENT STATUS OF FLORIDA'S "DON'T SAY GAY" LAW

Initially, effective as of July 2022, Florida's "Don't Say Gay" Law prohibited classroom instruction on gender identity and sexual orientation in kindergarten through the third grade, with instruction only allowed in higher grades if it was "age-appropriate or developmentally appropriate."[9] However, in May 2023, the law was expanded to its current form to prohibit classroom instruction on gender identity and sexual orientation in pre-kindergarten through the eighth grade.[10] In March 2024, Florida reached a Settlement that clarified certain aspects of the law.[11] Although the Settlement changed how some of the "Don't Say Gay" Law may be applied,[12] it did not change the fact that the law is still on the books.

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7 Settlement Agreement, Armstrong *ex rel.* M.A. v. Fla. State Bd. of Educ., No. 23-10866 (11th Cir. Mar. 20, 2024), ECF No. 57-2 [hereinafter Settlement], https://aboutblaw.com/bc7W [https://perma.cc/C3TX-38DX].

8 LGBTQ+ stands for "lesbian," "gay," "bisexual," "transgender," "queer," and "questioning." The "+" refers to other "non-straight, non-cisgender identities." *Glossary of Terms: LGBTQ*, GLAAD, https://glaad.org/reference/terms/ [https://perma.cc/M69M-2KDT] (last visited Nov. 10, 2024).

9 Parental Rights in Education Act, ch. 22, 2022 Fla. Laws 248 (codified as amended at FLA. STAT. § 1001.42(8)(c)(3)), https://laws.flrules.org/2022/22 [https://perma.cc/U5M5-H8G3].

10 *See* § 1001.42(8)(c)(3).

11 *See* Settlement, *supra* note 7.

12 *See infra* Section II.E.

A. The Political and Societal Context of the Original Law

LGBTQ+ individuals have existed throughout time, across cultures, and throughout the animal kingdom.[13] Almost ten percent of youth ages thirteen to seventeen in the United States identify as lesbian, gay, bisexual, and/or transgender.[14]

Battles over the rights of LGBTQ+ individuals have long been contentious issues in U.S. politics and law. In the 1986 decision of *Bowers v. Hardwick*, the Supreme Court declared that states could criminalize adults engaged in consensual, same-sex sexual intimacy because there was no constitutional right to engage in that conduct.[15] Almost twenty years later, in the 2003 decision of *Lawrence v. Texas*, the Supreme Court reversed *Bowers* and found that adults do have a constitutional right to engage in consensual, same-sex sexual intimacy.[16] In 1981, gay and lesbian individuals were prohibited from serving in the military.[17] In 1993, the Clinton Administration allowed gay and lesbian individuals to serve in the military, so long as they did not reveal their sexual orientation to others, under the "Don't Ask, Don't Tell" policy.[18] In 2011, the "Don't Ask, Don't Tell" policy was repealed by the Obama Administration.[19] Massachusetts became the first state in the United States to legalize same-sex marriage, after the Massachusetts Supreme Judicial Court held in the 2003 decision of *Goodridge v. Department of Public Health* that the Massachusetts Constitution mandates a right to same-sex marriage.[20] Following that decision, other state supreme courts also found state and/or

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13 *See, e.g.*, BRUCE BAGEMIHL, BIOLOGICAL EXUBERANCE: ANIMAL HOMOSEXUALITY AND NATURAL DIVERSITY 1–2 (Stonewall Inn Editions ed., 2000) (1999) (documenting hundreds of examples of animal same-sex sexual behavior observed by scientists).

14 *See* KERITH J. CONRON, UCLA SCH. OF L., LGBT YOUTH POPULATION IN THE UNITED STATES: FACT SHEET 2 (2020), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Youth-US-Pop-Sep-2020.pdf [https://perma.cc/JB6X-RJVR].

15 Bowers v. Hardwick, 478 U.S. 186, 196 (1986).

16 Lawrence v. Texas, 539 U.S. 558, 574, 578 (2003).

17 *See Don't Ask, Don't Tell Repeal Act of 2010*, NAT'L ARCHIVES FOUND., https://www.archivesfoundation.org/documents/dont-ask-dont-tell-repeal-act-2010/ [https://perma.cc/LCW2-WKU5] (last visited Nov. 10, 2024).

18 *See id.*

19 *See id.*; *see also* Gautam Raghavan, *10 Years Later: Looking Back at the Repeal of "Don't Ask, Don't Tell,"* THE WHITE HOUSE (Sept. 20, 2021), https://www.whitehouse.gov/ppo/briefing-room/2021/09/20/10-years-later-looking-back-at-the-repeal-of-dont-ask-dont-tell/ [https://perma.cc/BD5J-TFD7].

20 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

federal constitutional rights to same-sex marriage.[21] Recently, in the 2015 landmark decision of *Obergefell v. Hodges*, the U.S. Supreme Court found a federal constitutional right to same-sex marriage, legalizing it in all states.[22] Additionally, in 2020, in another landmark decision, *Bostock v. Clayton County*, the Supreme Court held that federal law prohibits employers from discriminating against employees based on their sexual orientation or gender identity.[23] In 2021, the U.S. Department of Education's Office for Civil Rights issued a notice of interpretation stating that students are protected from sexual orientation and gender identity discrimination at school.[24] In 2022, a federal court ordered that this interpretation not be implemented in twenty states.[25]

Other recent political and legal battles affecting the LGBTQ+ community involve questions on what bathrooms transgender individuals can use,[26] what sports teams transgender individuals can participate in,[27] bans on books containing LGBTQ+ content,[28] and bans on gender-affirming healthcare.[29] And of course, there is the subject of this Article,

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21 *See* Catherine Jean Archibald, *Two Wrongs Don't Make a Right: Implications of the Sex Discrimination Present in Same-Sex Marriage Exclusions for the Next Supreme Court Same-Sex Marriage Case*, 34 N. ILL. UNI. L. REV. 1, 11–12, 15–16 (2013).

22 Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

23 Bostock v. Clayton County, 590 U.S. 644, 651–52 (2020).

24 Enforcement of Title IX of the Education Amendments of 1972 in Light of Bostock v. Clayton County, 86 Fed. Reg. 32637, 32638 (June 22, 2021), *vacated*, Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807 (E.D. Tenn. 2022), *aff'd*, 104 F.4th 577 (6th Cir. 2024); *see also* Press Release, U.S. Dep't of Educ., U.S. Department of Education Confirms Title IX Protects Students from Discrimination Based on Sexual Orientation and Gender Identity (June 16, 2021), https://www.ed.gov/news/press-releases/us-department-education-confirms-title-ix-protects-students-discrimination-based-sexual-orientation-and-gender-identity [https://perma.cc/W8M6-FN2X].

25 *See* Tennessee v. U.S. Dep't of Educ., 615 F. Supp. 3d 807, 825, 842 (E.D. Tenn. 2022), *aff'd*, 104 F.4th 577 (6th Cir. 2024).

26 *See, e.g.*, Catherine Jean Archibald, *Transgender Bathroom Rights*, 24 DUKE J. GENDER L. & POL'Y 1, 6–18 (2016) (describing battles over transgender bathroom rights); Catherine Jean Archibald, *Transgender Bathroom Rights in the Time of Trump*, 6 TENN. J. RACE, GENDER, & SOC. JUST. 241, 244–53 (2017) (same).

27 *See, e.g.*, Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL'Y & L. 246, 251–56 (2019) (describing battles over rights of transgender individuals to play on certain sports teams).

28 *See, e.g.*, Alexandra Alter, *Book Bans Continue to Surge in Public Schools*, N.Y. TIMES (Apr. 16, 2024), https://www.nytimes.com/2024/04/16/books/book-bans-public-schools.html [https://perma.cc/TF2T-BASM] (describing bans on books containing LGBTQ+ characters and content in schools).

29 *See, e.g.*, Kimberly Kindy, *Historic Surge in Bills Targeting Transgender Rights Pass at Record Speed*, WASH. POST (Apr. 17, 2023, 6:00 AM), https://www.washingtonpost.com/politics/2023/04/17/gop-state-legislatures-lgbtq-

Florida's "Don't Say Gay" Law, officially part of the Parental Rights in Education Act, which concerns what can be said and taught in schools.[30]

B. The Timeline of the "Don't Say Gay" Law, Including Regulations and Amendment

The Parental Rights in Education Act was signed by Florida Governor Ron DeSantis on March 28, 2022, and came into force on July 1, 2022.[31] It includes sections which allow parents to examine a school's "well-being" questionnaire, decide whether their child can complete the questionnaire, review school records concerning the child's well-being, and be informed of services provided by the school related to their child's well-being.[32]

As originally enacted in 2022, the "Don't Say Gay" section of the Parental Rights in Education Act provided as follows: "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards."[33] In the build-up to the passage of the law, it became clear that key lawmakers who supported it did not want teachers to discuss, answer any student questions about, or even make incidental references to the LGBTQ+ community. For example, Senator Baxley, the Florida Senate sponsor of the "Don't Say Gay" Law, stated that teachers should not answer questions about students with two moms, and that math questions should not include questions involving kids with two moms or two dads.[34]

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rights/ [https://perma.cc/V55X-67HS]; *see also* Nicole Ezeh, *Supreme Court Hears Case on Youth Transgender Care*, NCSL (Dec. 6, 2024), https://www.ncsl.org/state-legislatures-news/details/supreme-court-hears-case-on-youth-transgender-care [https://perma.cc/8NL4-VMJL].

30 FLA. STAT. § 1001.42(8)(c) (2024).

31 Parental Rights in Education Act, ch. 22, 2022 Fla. Laws 248 (codified as amended at FLA. STAT. § 1001.42(8)(c)).

32 *Id.* sec. 1, § 1001.42(8)(c)(2), (5)–(6), at 250 ("A school district may not adopt procedures or student support forms that prohibit school district personnel from notifying a parent about his or her student's mental, emotional, or physical health or well-being, or a change in related services or monitoring, or that encourage or have the effect of encouraging a student to withhold from a parent such information.").

33 *Id.* § 1001.42(8)(c)(3), at 250.

34 *Senate Committee on Education – February 8, 2022*, MY FLA. HOUSE, at 32:10–32:30, 47:05–48:07, 55:24–55:50 (Feb. 8, 2022), https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=7863 [https://perma.cc/UTT8-ADRC]. Additionally, the preamble to the Parental Rights in Education Act states as one

The Parental Rights in Education Act provides procedures for parents to bring concerns to the school, school district, or a court of law if they believe any part of the law is violated.[35] The "Don't Say Gay" Law provides that a parent can bring a concern regarding the implementation of this law to the school district, and if the concern does not get resolved, the parent may request the Commissioner of Education to appoint a special magistrate, paid for by the school district, to investigate the matter and provide a recommendation to the State Board of Education.[36] Additionally, if the school district does not resolve the concern, a parent is also authorized to bring legal action against the school district for declaratory or injunctive relief.[37] If the parent obtains such relief from the court, they will also receive attorney fees and court costs from the school district, as well as a potential award of damages.[38]

Finally, the Parental Rights in Education Act provided that by June 30, 2023, the Florida Department of Education must have reviewed and updated any of its related rules or policies as necessary to comply with the law.[39]

Several months after the "Don't Say Gay" Law came into effect, the Florida Department of Education issued a rule pursuant to the law that forbade Florida teachers from "intentionally provid[ing] classroom instruction to students in prekindergarten through grade 3 on sexual orientation or gender identity" and "intentionally provid[ing] classroom instruction to students in grades 4 through 12 on sexual orientation or gender identity unless such instruction is either expressly required by state academic standards . . . or is part of a reproductive health course or health lesson for which a student's parent has the

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of its purposes: "prohibiting classroom discussion about sexual orientation or gender identity in certain grade levels or in a specified manner." Parental Rights in Education Act, 2022 Fla. Laws at 249 pmbl. Furthermore, when Governor DeSantis signed the "Don't Say Gay" Law, he explained that he did not want children at school to be read a book with a transgender main character. *See* PBS NewsHour, *WATCH: Governor Ron DeSantis Gives Remarks as He Signs into Law Florida's "Don't Say Gay" Bill*, YOUTUBE, at 03:55–04:20 (Mar. 28, 2022), https://www.youtube.com/watch?v=IVuniz7w1bQ [https://perma.cc/NW4E-MKP9].

35 Parental Rights in Education Act, sec. 1, § 1001.42(8)(c)(7), 2022 Fla. Laws at 250–51.

36 *Id.* § 1001.42(8)(c)(7)(b)(I), at 251.

37 *Id.* § 1001.42(8)(c)(7)(b)(II), at 251.

38 *Id.*

39 *Id.* sec. 2, at 251.

option to have his or her student not attend."[40] Any Florida teacher who violates this rule could have their educator's certificate revoked or suspended; in other words, they could lose their job.[41]

In May 2023, the "Don't Say Gay" Law was expanded to its current version, where classroom instruction on sexual orientation and gender identity is now prohibited from kindergarten through the eighth grade. The current version of the law provides, "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8 . . . If such instruction is provided in grades 9 through 12, the instruction must be age-appropriate or developmentally appropriate for students in accordance with state standards."[42]

In August 2023, the Florida Department of Education updated its rules to comport with the updated law, forbidding

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40 FLA. ADMIN. CODE ANN. r. 6A-10.081(2)(a)(6)–(7) (2024). The Florida Department of Education is a state administrative agency empowered by the Parental Rights in Education Act to issue rules pursuant to and consistent with the Act. *See* Parental Rights in Education Act, sec. 1, § 1001.42, 2022 Fla. Laws at 249. By enacting this rule, the agency interpreted the "Don't Say Gay" Law's requirement that instruction on sexual orientation or gender identity be "age-appropriate or developmentally appropriate" for students in grades four through twelve to mean that the only age-appropriate or developmentally appropriate instruction on these subjects is when such instruction is required by state standards or is part of a reproductive or health lesson that parents are able to opt their children out of. *Id.* § 1001.42(8)(c)(3), at 250; *see also* 2 AM. JUR. 2D *Administrative Law* § 67 (2024) (stating that administrative agencies have the power to interpret statutes they are empowered by law to interpret). *See* Andrew Demillo, *Other States Are Copying Florida's "Don't Say Gay" Efforts*, ASSOCIATED PRESS (Mar. 23, 2023, 3:39 PM), https://apnews.com/article/huckabee-sanders-desantis-dont-say-gay-lgbtq-702fd5dc9633a7c93432f582de51a5fb [https://perma.cc/VN77-WCV2] (noting how the Florida Commissioner of Education stated that the Department of Education's rule and its interpretation of the "Don't Say Gay" Law was necessary to "clarify confusion around what is deemed age appropriate in later grades"); *see also* Hunter Foist, *Keep Saying Gay: How Nationwide "Don't Say Gay" Bills Violate the First Amendment, Chill Protected Speech, and Hinder Public Health Outcomes*, 21 IND. HEALTH L. REV. 177, 196 (2024) (explaining that, with this rule, "DeSantis and Florida Republicans are now suggesting that LGBTQ content is never acceptable in Florida classrooms and is never 'age-appropriate'"). To the author's knowledge at the time of publication, no challenges have been made to this administrative interpretation of the law.

41 *See* FLA. ADMIN. CODE ANN. r. 6A-10.81(2); *see also Educator Certification*, FLA. DEP'T OF EDUC., https://www.fldoe.org/teaching/certification/ [https://perma.cc/9MJ7-PLS9] (last visited Oct. 27, 2024) (stating that an educator certification is a requirement to teach in Florida schools).

42 FLA. STAT. § 1001.42(8)(c)(3) (2024). The law has exceptions that only apply to instruction on "awareness of the benefits of sexual abstinence as the expected standard and the consequences of teenage pregnancy." *Id.* § 1003.42(2)(o)(2); *see also id.* § 1003.46(2)(b).

teachers from "intentionally provid[ing] classroom instruction to students in prekindergarten through grade 8 on sexual orientation or gender identity."[43] Additionally, teachers are prohibited from:

> intentionally provid[ing] classroom instruction to students in grades 9 through 12 on sexual orientation or gender identity unless such instruction is either expressly required by state academic standards . . . or is part of a reproductive health course or health lesson for which a student's parent has the option to have his or her student not attend.[44]

Any teacher who violates this rule could have their educator's certificate revoked or suspended; thus, they could lose their job.[45]

C. The Impact of Florida's "Don't Say Gay" Law

Florida's "Don't Say Gay" Law has been devastating for LGBTQ+ children, families, and teachers. As a result of the law, LGBTQ+ books have been removed from schools, pride flags and safe space stickers have been taken down, and school administrators have removed lines from student plays, or cancelled plays altogether.[46] A gay high school valedictorian had to alter what he said in his graduation speech to remove the word "gay."[47] A teacher was investigated under the law for showing a PG-rated Disney movie with an LGBTQ+ character.[48] Teachers have had to scramble to change lesson plans for their students.[49] LGBTQ+ teachers have removed photos of their same-sex spouses, and student and teacher speech about LGBTQ+ family

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43 FLA. ADMIN. CODE ANN. r. 6A-10.081(2)(a)(6)–(7).

44 *Id.*; *see also* sources cited *supra* note 40.

45 *See* sources cited *supra* note 41.

46 Jo Yurcaba, *Florida Teachers Navigate Their First Year Under the 'Don't Say Gay' Law*, NBC NEWS (Aug. 19, 2022, 1:30 AM), https://www.nbcnews.com/nbc-out/florida-teachers-navigate-first-year-dont-say-gay-law-rcna43817 [https://perma.cc/2YT4-HJJD].

47 David Williams, *A Florida Class President Couldn't Discuss Being Gay in High School Graduation Speech – so He Talked About His Curly Hair*, CNN NEWS (May 25, 2022, 10:06 AM), https://edition.cnn.com/2022/05/25/us/florida-curly-hair-graduation-speech/index.html [https://perma.cc/8H9Z-ER92].

48 Jo Yurcaba, *DeSantis Signs 'Don't Say Gay' Expansion and Gender-Affirming Care Ban*, NBC NEWS (May 17, 2023, 9:30 AM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/desantis-signs-dont-say-gay-expansion-gender-affirming-care-ban-rcna84698 [https://perma.cc/R8G9-VF5U].

49 Janelle Griffith, *Florida Teachers Are Worried New Policies Could Get Them Fired — or Even Criminally Charged*, NBC NEWS, https://www.nbcnews.com/news/us-news/florida-teachers-start-school-year-uncertainty-new-policies-take-effec-rcna99243 [https://perma.cc/CS2G-H6RL] (Aug. 16, 2023, 7:10 AM).

members has been chilled.[50] Although some of these harms have been ameliorated due to the Settlement, many of these harms, particularly the chilling of speech at school, remain. Under the "Don't Say Gay" Law and its implementing regulations, even post-Settlement, a teacher cannot provide instruction on the Supreme Court's landmark decision in *Obergefell v. Hodges*, granting same-sex couples the right to marry, in an eleventh-grade history or civics class without worrying that their teaching license will be revoked and they will lose their job.[51] As one LGBTQ+ advocate lamented, "This rule is by design a tool for curating fear, anxiety and the erasure of our LGBTQ community."[52]

LGBTQ+ students face discrimination and harassment at school based on their sexual orientation and/or gender identity.[53] Waning support for LGBTQ+ children in Florida schools harms their mental health, according to the Trevor Project.[54] Teachers in states, including Florida, that have LGBTQ+-related restrictions on speech are hesitant to expose their students to the reality of same-sex marriage and to different types of family structures, removing symbols that are supportive of the LGBTQ+ community, such as pride flags.[55] Teachers are also reporting "soften[ing]" their language in classroom discussions and even

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50 ABBIE E. GOLDBERG, UCLA SCH. OF L., IMPACT OF HB 1557 (FLORIDA'S DON'T SAY GAY BILL) ON LGBTQ+ PARENTS IN FLORIDA 9 (2023), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Dont-Say-Gay-Impact-Jan-2023.pdf [https://perma.cc/PWY6-W2EY] (noting that children in Florida have been afraid to talk about their LGBTQ+ families since the law's passage); *see also* Demillo, *supra* note 40.

51 Hannah Natanson, *Florida Bans Teaching About Gender Identity in All Public Schools*, WASH. POST, https://www.washingtonpost.com/education/2023/04/19/florida-bans-teaching-gender-identity-sexuality/ [https://perma.cc/PQ5D-236C] (Apr. 19, 2023, 6:32 PM); Carlos Suarez et al., *Florida Teachers Can Discuss Sexuality and Gender Identity in Some Classroom Settings, Legal Settlement Clarifies*, CNN, https://www.cnn.com/2024/03/12/us/florida-lgbtq-bill-schools-lawsuit-settlement/index.html [https://perma.cc/9NFD-MRNX] (Mar. 12, 2024, 8:54 AM) (explaining that the Settlement allows "students and teachers . . . to discuss sexual orientation and gender identity in classrooms, as long as it is not part of formal instruction").

52 *Id.*

53 GLSEN, THE 2021 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LGBTQ+ YOUTH IN OUR NATION'S SCHOOLS, at xv–xx (2022), https://www.glsen.org/sites/default/files/2022-10/NSCS-2021-Full-Report.pdf [https://perma.cc/ZM53-GRQL].

54 *See* Devan Cole & Tina Burnside, *DeSantis Signs Controversial Bill Restricting Certain LGBTQ Topics in the Classroom*, CNN, https://www.cnn.com/2022/03/28/politics/dont-say-gay-bill-desantis-signs/index.html [https://perma.cc/9CPJ-7ULT] (Mar. 28, 2022, 4:41 PM).

55 ASHLEY WOO ET AL., RAND CORP., WALKING ON EGGSHELLS—TEACHERS' RESPONSES TO CLASSROOM LIMITATIONS ON RACE- OR GENDER-RELATED TOPICS 12 (2023), https://www.rand.org/content/dam/rand/pubs/research_reports/RRA100/RRA134-16/RAND_RRA134-16.pdf [https://perma.cc/N9DC-EHD9].

avoiding using the word "gender."[56] Additionally, teachers report not being able to engage their students in issues of critical public importance, or to present high interest materials to their students that help them to engage in the content and increase learning.[57] Teachers are forced to "[err] on the side of caution" and "walk[] on eggshells."[58] Approximately one fifth of teachers surveyed about recent limitations on teaching report feeling "more hesitant" to discuss controversial topics, or they avoid such topics altogether.[59]

D. Legal Challenges to the "Don't Say Gay" Law

Shortly after the "Don't Say Gay" Law was passed, a lawsuit challenging it as unconstitutional was filed.[60] The plaintiffs were parents, teachers, students, and organizations in Florida.[61] They originally sued the Florida Governor, Florida Department of Education, and others.[62] The U.S. District Court for the Northern District of Florida (District Court) found that the plaintiffs did not have standing to sue, as they had failed to allege any personalized and redressable injury traceable to the law.[63] The District Court also found that the statute was not vague as to the plaintiffs, despite some LGBTQ+ parents being unsure if they could volunteer in their kids' classrooms anymore.[64] The District Court dismissed the case with leave to amend.[65]

The plaintiffs then filed an amended complaint, and again the District Court dismissed the case, finding once more that the plaintiffs did not have standing.[66] The plaintiffs alleged that "safe space" stickers were removed from a Florida school district as a result of the "Don't Say Gay" Law, but the court found that the stickers were removed because of another section of the

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56 *Id.* (alteration in original).

57 *Id.* at 17–18.

58 *Id.* at 1, 20 (first alteration in original).

59 *Id.* at 21.

60 *See* Complaint & Jury Demand, Equality Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-134 (N.D. Fla. Mar. 31, 2022), ECF No. 1.

61 Equal. Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-134, 2022 WL 19263602, at *1 (N.D. Fla. Sept. 29, 2022), *appeal dismissed sub nom. per stipulation*, Armstrong *ex rel.* M.A. v. Fla. State Bd. of Educ., No. 23-10866, 2024 WL 1348273 (11th Cir. Mar. 22, 2024).

62 *Id.*

63 *Id.* at *2–3, *7.

64 *Id.* at *5.

65 *Id.* at *10.

66 M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-134, 2023 WL 2631071, at *1 (N.D. Fla. Feb. 15, 2023), *appeal dismissed sub nom. per stipulation*, Armstrong *ex rel.* M.A. v. Fla. State Bd. of Educ., No. 23-10866, 2024 WL 1348273 (11th Cir. Mar. 22, 2024).

Parental Rights in Education Act: the provision that required school administrators to notify parents with any concerns about a child's well-being.[67] The plaintiffs alleged that teachers in one Florida school district had been advised not to talk about their same-sex partners or wear clothing that might lead to discussions on LGBTQ+ topics.[68] But the District Court found that none of the plaintiffs had standing to complain about this policy as they were either not attending that school district, or alternatively they failed to allege that their particular teachers would have talked about their same-sex partners or would have worn different clothing absent the school board policy.[69]

After the District Court dismissed the case for a second time, the plaintiffs appealed. The parties subsequently settled, and the appeal was dismissed.[70]

E. The Settlement of 2024

On March 11, 2024, almost two years after the law was enacted, a settlement was reached between the State of Florida and plaintiffs in the case of *M.A. v. Florida State Board of Education*.[71] Now, students and teachers in Florida can say "gay" or "transgender" in schools in certain delineated circumstances.[72]

The Settlement between the parties is the culmination of a lawsuit brought by plaintiffs Equality Florida, Family Equality, and a number of individuals against the State of Florida, specifically the Florida Department of Education, the Florida State Board of Education, and members of the Florida Board of Education in their official capacities.[73] It provides for the creation of a document that contains recitals about the history of the case and the limits of the law.[74] The Settlement requires the agencies

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67 *Id.* at *5.

68 *Id.* at *6.

69 *Id.*

70 *See Armstrong*, 2024 WL 1348273, at *1. A comparable case to *M.A. v. Florida State Board of Education* had a similar outcome. *See* Cousins v. Sch. Bd. of Orange Cnty., 636 F. Supp. 3d 1360, 1377 (M.D. Fla. 2022) (denying the preliminary injunction sought by individuals and non-profit organizations in their constitutional attack of the Parental Rights in Education Act), *case dismissed for lack of standing*, 687 F. Supp. 3d 1251 (M.D. Fla. 2023).

71 *See* Settlement, *supra* note 7, at 3–6, 8.

72 *See id.* at 4–5 (stating that the "Don't Say Gay" Law does not prohibit "incidental references in literature to a gay or transgender person or to a same-sex couple," and does not restrict "student-to-student speech").

73 *See id.* at 1.

74 *See id.* at 1–6.

to send the Settlement document to every school board in Florida and to encourage the school boards to send copies to every principal within their districts.[75]

In the Settlement, the State of Florida agrees to the following interpretations of the law:

(1) "Instruction" means the "action, practice, or profession of teaching," and only "instruction" on sexual orientation or gender identity is prohibited, not the "mere discussion of them."[76]

(2) Students can choose to address sexual orientation or gender identity in "class participation" and "schoolwork."[77]

(3) Teachers may respond if children talk about "their identities or family life." Teachers may also provide feedback if children choose to write an essay on LGBTQ+ identity. However, for "kindergarten through grade three," teachers may not respond to these situations "by teaching the subjects of sexual orientation or gender identity."[78]

(4) Incidental references to LGBTQ+ individuals and same-sex couples are allowed.[79]

(5) The statute does not prevent "stories where a prince and princess fall in love."[80]

(6) The statute restricts only books intended to instruct on gender identity or sexual orientation but does not prohibit incidental literary references to LGBTQ+ individuals.[81]

(7) The statute does not target or prefer particular sexual orientations or gender identities but instead is neutral. The statute prohibits teaching the "normalcy of opposite-

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75 *Id.* at 7.
76 *Id.* at 3.
77 *Id.*
78 *Id.*
79 *Id.* at 4.
80 *Id.*
81 *Id.*

> sex attraction" because that would be instruction on sexual orientation.[82]

Although the Settlement is a step in the right direction because it clarifies that certain things *are* allowed under the "Don't Say Gay" Law, it does not resolve all of the law's problems.

III. FLORIDA'S "DON'T SAY GAY" LAW VIOLATES THE FIRST AMENDMENT

The First Amendment provides that "Congress shall make no law respecting an establishment of religion . . . or abridging the freedom of speech."[83] The "Don't Say Gay" Law violates both the Freedom of Speech Clause and the Establishment Clause of the First Amendment.

A. Freedom of Speech Exists Within Public Schools

Freedom of speech exists within public schools. It protects the rights of students and teachers to speak, as well as students' rights to receive information. The Supreme Court stated in 1960 that "[t]eachers and students must always remain free to inquire, to study and to evaluate."[84]

Nine years later, the Supreme Court famously stated in *Tinker v. Des Moines School District* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[85] In *Tinker*, five students wore black armbands to school to protest the United States' involvement in the Vietnam War.[86] A school rule forbade wearing black armbands for this purpose, and the five students were suspended from school as a result.[87] The Court held that the school's rule violated the First Amendment, reasoning that "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" was insufficient to shut down speech in the school context.[88] Instead, the Court held that, for a school to limit speech, the

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82 *Id.* This seemingly contradicts section 1003.46 of the Florida Code, which allows teaching on AIDS—including sexuality—but then requires the instruction of the "benefits of monogamous heterosexual marriage." FLA. STAT. § 1003.46(1), (2)(b) (2024).

83 U.S. CONST. amend. I.

84 Shelton v. Tucker, 364 U.S. 479, 487 (1960) (quoting Sweezy v. Wyman *ex rel.* New Hampshire, 354 U.S. 234, 250 (1957)).

85 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

86 *Id.* at 508.

87 *Id.* at 504, 508.

88 *Id.* at 509, 514.

speech would have to "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others," or the school would have to reasonably forecast a substantial disruption to the operation of the school.[89]

In a later case, the Supreme Court ruled that schools could restrict speech that is lewd or obscene.[90] In *Bethel School District No. 403 v. Fraser*, a student at a school-sponsored event gave a speech that the court characterized as being lewd and having sexual innuendo to an assembly of six hundred schoolchildren.[91] The school had a policy prohibiting speech that was disruptive, including "the use of obscene, profane language or gestures."[92] As a result of giving the speech, the student was suspended for two days and prohibited from speaking at his graduation ceremony.[93] The Court ruled that the school's actions were constitutional, reasoning that a school has the right to prohibit "vulgar and lewd speech" because such speech could undermine its basic educational mission.[94] Additionally, the Court reasoned that parents and schools have a valid interest in preventing children from being exposed to "sexually explicit, indecent, or lewd speech."[95]

Additionally, the Court held in *Hazelwood School District v. Kuhlmeier* that a school may censor student speech that appears to be endorsed by the school itself.[96] Students at Hazelwood East High School published a school newspaper as part of their journalism class.[97] The practice of the school was to submit the newspaper to the school principal prior to publication for his approval.[98] On the complained-of occasion, the principal objected to two of the articles, and the student paper was subsequently published without them.[99] One article discussed the experiences of pregnant students at the school; the principal was concerned that the identity of the pregnant students would be discoverable to readers of the paper, even though false names were used.[100] He was also concerned that discussion about birth

89 *Id.* at 513.
90 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986).
91 *Id.* at 676–79.
92 *Id.* at 678.
93 *Id.* at 678–79.
94 *Id.* at 685.
95 *Id.* at 684.
96 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
97 *Id.* at 262.
98 *Id.* at 263.
99 *Id.* at 263–64.
100 *Id.* at 263, 273.

control and sexual activity was inappropriate for younger readers of the paper.[101] The second article comprised a student's experience with the divorce of her parents and included negative statements about her father.[102] The principal was concerned that the father had not been given a chance to respond to the student's complaints.[103] The Court held that the school did not violate the First Amendment by removing the articles.[104] The Court reasoned that "[t]he question whether the First Amendment requires a school to tolerate particular student speech . . . is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech."[105] Schools may limit student speech in "school-sponsored expressive activities" so long as the limits are "reasonably related to legitimate pedagogical concerns."[106] The Court noted that when school censorship of student speech has "no valid educational purpose," then it is the job of the courts to intervene to protect First Amendment rights.[107]

The Supreme Court has held that the First Amendment includes the right to know and receive information.[108] Additionally, the Supreme Court has stated that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[109] Finally, the Supreme Court has held that "the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'"[110] Thus, as established by the Supreme Court, the First Amendment protects teachers' rights to speak and children's rights to receive speech in schools, except in narrow circumstances involving speech that is

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101 *Id.* at 263.

102 *Id.*

103 *Id.*

104 *Id.* at 276.

105 *Id.* at 270–71.

106 *Id.* at 273.

107 *Id.*

108 *See, e.g.*, Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (holding that the First Amendment protects the right to receive literature distributed by others); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."); Thomas v. Collins, 323 U.S. 516, 534 (1945) (striking down a requirement of registering before making a public speech as violative of the speaker's right to speak and the listener's right to hear); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . and freedom of inquiry, freedom of thought, and freedom to teach.").

109 Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (alteration in original) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

110 *Id.* at 105 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

disruptive to classrooms, speech that is lewd or obscene, or speech that is limited for a valid educational purpose.[111] Speech that is limited by the "Don't Say Gay" Law, which is speech about the LGBTQ+ community, fits into none of these narrow categories. Therefore, as the next section shows, Florida's "Don't Say Gay" law violates the First Amendment rights of teachers and students.

B. The Law Violates the Free Speech Clause

Public school teachers have a First Amendment right to speak on matters of public importance in their classrooms, including on the existence of LGBTQ+ people.

In a series of three cases, the Supreme Court laid out a test to determine when a public employee may speak on matters of public concern at work.[112] The three-part test requires that: (1) the speech be on a matter of public importance; (2) the speech is not official speech of the employer; and (3) the speech does not hinder the employer from operating "efficiently and effectively."[113] Furthermore, speech on matters of public importance is protected if made at work as well as when made in the public sphere.[114]

In *Pickering*, the Supreme Court held that school teachers have the right to speak as citizens on matters of public importance, so long as they do not make recklessly false statements.[115] In *Pickering*, a school teacher criticized the school board in a letter that was published in a local newspaper.[116] The letter related to a proposed tax increase and criticized the way the school board had utilized funding,[117] specifically accusing it of

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111 *See* Tinker v. Des Moines Cmty. Sch. Dist., 393 U.S. 503, 506, 508 (1969); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682–83, 685 (1986); *Hazelwood*, 484 U.S. at 273; *see also* Thomas M. Cassaro, *A Student's First Amendment Right to Receive Information in the Age of Anti-CRT and "Don't Say Gay" Laws*, 99 N.Y.U. L. REV. 280, 296–97 (2024) (arguing that "Don't Say Gay" laws violate students' First Amendment rights to receive information).

112 *See* Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 157 (1983); Garcetti v. Ceballos, 547 U.S. 410, 445 (2006).

113 *See Garcetti*, 547 U.S. at 419; *see also* Stephen Elkind & Peter Kauffman, *Gay Talk: Protecting Free Speech for Public School Teachers*, 43 J.L. & EDUC. 147, 162–63 (2014) (discussing the three-part test that comes from *Garcetti*, *Connick*, and *Pickering*).

114 *See* Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 413–15 (1979) (finding that a teacher's speech complaining of racial discrimination to her school principal in the privacy of his office was protected by the First Amendment).

115 *Pickering*, 391 U.S. at 574.

116 *Id.* at 564.

117 *Id.* at 569.

spending excessive funds on athletics.[118] As a result of the letter, the school board held a hearing, where it found that the letter was harmful to the "efficient operation and administration of the schools."[119] The school board then fired the teacher.[120] The teacher sued, and the Supreme Court held that the teacher's First Amendment free speech rights had been violated.[121] The Court reasoned that teachers have a right to speak on matters of public importance and that "the threat of dismissal from public employment is . . . a potent means of inhibiting speech."[122] The Court noted that teachers have informed opinions on matters of public interest that are important to share with the public.[123] Finally, the Court stated that the school district had not shown that the letter caused it any harm, "impeded the teacher's proper performance of his daily duties," or "interfered with the regular operation of the schools."[124] Additionally, the "teacher's public statements [were not] so without foundation as to call into question his fitness to perform his duties in the classroom."[125] Finally, the Court announced that in deciding these types of cases, what must be balanced is the right of the public employee to speak as a citizen on matters of public concern and the need for the government employer to run its office in an efficient manner.[126]

The Supreme Court has also held that employee speech is only protected if it addresses matters of public concern, which must be determined by looking at the full context of the speech.[127] In *Connick*, a public employee, a district attorney, was told by her supervisor that she would be transferred to work on a different caseload.[128] Unhappy with this development, the employee circulated a questionnaire to her coworkers that mainly asked about their satisfaction with the transfer policy, the office grievance process, office morale, and their confidence in their supervisors.[129] The employee was fired the next day due to her

118 *Id.* at 571.
119 *Id.* at 564.
120 *Id.*
121 *Id.* at 574.
122 *Id.*
123 *Id.* at 571–72.
124 *Id.* at 570–73.
125 *Id.* at 573 n.6.
126 *Id.* at 568.
127 Connick v. Myers, 461 U.S. 138, 146–48 (1983).
128 *Id.* at 140.
129 *Id.* at 141.

insubordination and refusal to accept the transfer.[130] The Supreme Court held that the employee's First Amendment rights had not been violated because the speech at issue only concerned "matters . . . of personal interest" and not matters of public concern.[131] The Court reasoned that government employers must be able to dismiss employees who impede the efficient operation of their offices.[132] Furthermore, the Court reasoned that the First Amendment is primarily concerned with speech on matters of public concern, and here, the questionnaire mainly concerned matters of personal interest.[133]

Finally, the Supreme Court held that employee speech is not protected by the First Amendment if it is made pursuant to the employee's official duties.[134] In *Garcetti*, a prosecutor wrote an internal memo analyzing a police warrant and, concluding that the warrant had several mistakes, recommended the case to be dismissed.[135] The prosecutor's office nevertheless decided to proceed.[136] The employee then claimed that he suffered retaliation, including a job transfer and a denial of a promotion.[137] Upon review, the Supreme Court found that the First Amendment did not protect the employee's speech because it represented the official speech of the employer, justifying the employer's disciplinary action against the employee.[138] The Court held that if an employee speaks as a private citizen on a matter of public concern, disciplinary action is only warranted if the speech impacts the employer's ability to work "efficiently and effectively."[139] Additionally, the Court held that the determination of what is in an employee's official job description must be a practical one and must consider what the public employee is actually expected to do as part of the job.[140] The Court noted that additional considerations may apply to "academic scholarship" or "classroom instruction," and it

130 *Id.*
131 *Id.* at 147.
132 *Id.* at 152.
133 *Id.* at 154.
134 Garcetti v. Ceballos, 547 U.S. 410, 426 (2006).
135 *Id.* at 414.
136 *Id.*
137 *Id.* at 415.
138 *Id.* at 424.
139 *Id.* at 419.
140 *Id.* at 424–25.

explicitly stated that it did not decide whether the rule from this case would apply to "speech related to scholarship or teaching."[141]

The "Don't Say Gay" Law violates the First Amendment because it prevents and chills public employees from speaking as citizens on matters of public concern at work. Furthermore, the speech it prevents and chills is speech that is not part of the public employees' official job duties. Finally, the speech it prevents and chills does not hinder the efficient and effective operation of the government service of running schools.

First, the speech at issue—instruction on sexual orientation or gender identity that is not part of the school curriculum—is speech on a matter of public concern, just as the speech in *Pickering* was speech on a matter of public concern.[142] The speech in *Pickering* involved a teacher speaking out about a school board's allocation of public funds, a clear example of a matter that concerns the public. Here, the speech being chilled and prevented by the "Don't Say Gay" Law—a teacher's speech explaining that LGBTQ+ people exist and are part of society—is also a clear example of a matter that concerns the public. At this point in history, many laws in the United States have recently been enacted, or are presently being considered, that harm and restrict the rights of the LGBTQ+ community.[143] People feel less fear and hatred towards the LGBTQ+ community if they know, or know of, an LGBTQ+ person they trust.[144] Lessening fear and

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141 *Id.* at 425.

142 Pickering v. Bd. of Educ., 391 U.S. 563, 571–72, 574 (1968); *see also, e.g.*, Snyder v. Phelps, 562 U.S. 443, 453–54 (2011) (finding that speech is on a matter of public concern when it pertains to the treatment of sexual minorities); Elkind & Kauffman, *supra* note 113, at 171–72 (noting that discussions on homosexuality in schools are necessarily a matter of public concern under *Pickering* and *Connick*).

143 *See, e.g.*, Daniel Trotta, *Human Rights Campaign Declares LGBTQ State of Emergency in US*, REUTERS (June 6, 2023, 2:11 PM), https://www.reuters.com/world/us/human-rights-campaign-declares-lgbtq-state-emergency-us-2023-06-06/ [https://perma.cc/N6PG-U7SM] (noting that hundreds of anti-LGBTQ+ bills were introduced within a year); *Mapping Attacks on LGBTQ Rights in U.S. State Legislatures in 2024*, ACLU, https://www.aclu.org/legislative-attacks-on-lgbtq-rights-2024 [https://perma.cc/M7KB-63CK] (Sept. 5, 2024); Ryan Thoreson, *UN Committee Criticizes US Record on LGBT Rights*, HUM. RTS. WATCH (Nov. 8, 2023, 3:33 PM), https://www.hrw.org/news/2023/11/08/un-committee-criticizes-us-record-lgbt-rights [https://perma.cc/396V-2RBK]; Annette Choi, *Record Number of Anti-LGBTQ Bills Were Introduced in 2023*, CNN, https://edition.cnn.com/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html [https://perma.cc/3D49-6X2T] (Jan. 22, 2024, 5:04 PM).

144 *See, e.g.*, Adrienne Spiegel, *Coming Out Still Matters*, ACLU (Oct. 11, 2013), https://www.aclu.org/news/lgbtq-rights/coming-out-still-matters [https://perma.cc/EY4M-W3YD]; *Why Come Out? Benefits and Risks*, SKIDMORE COLL., https://www.skidmore.edu/osdp/lgbtq/comingout3.php [https://perma.cc/9XSV-HFRC] (last

hatred of the LGBTQ+ community is clearly a public concern, as is increasing acceptance and tolerance of the LGBTQ+ community.[145]

Even if a teacher engaging in speech about gender identity or sexual orientation identifies as a member of the LGBTQ+ community, the speech still mainly involves a matter of public concern rather than a matter of private interest. Conversely, in *Connick*, the Supreme Court characterized a questionnaire written by a public employee unhappy about being transferred to a different caseload as mainly regarding a matter of private interest rather than public concern.[146] By contrast, when a teacher discusses the fact that LGBTQ+ people exist and are members of our society, that is speech about a matter of public concern, regardless of whether that teacher is LGBTQ+ or not. [147]

The language of the statute is: "Classroom instruction by school personnel . . . on sexual orientation or gender identity may not occur in prekindergarten through grade 8."[148] The dictionary definition of "instruction" is: "the act or practice of instructing or teaching; education."[149] Children learn and are taught through discussion and interaction with others, including their teachers.[150] Instruction includes teachers answering student

visited Sept. 29, 2024) (noting that coming out helps to "dispel myths and stereotypes by speaking about one's own experience and educating others").

145 *See, e.g.*, *LGBTI People*, U.N. HUM. RTS., https://www.ohchr.org/en/topic/lgbti-people [https://perma.cc/W44P-D635] (last visited Sept. 28, 2024) (describing widespread discrimination against and violence towards LGBTQ+ people throughout the world); Victor Madrigal-Borloz (Independent Expert on Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity), *Visit to the United States of America*, U.N. Doc. A/HRC/56/49/Add.3 (Apr. 15, 2024).

146 *See supra* text accompanying notes 127–133.

147 *See, e.g.*, Rowland v. Mad River Loc. Sch. Dist., 470 U.S. 1009, 1012 (1985) (Brennan, J., dissenting) (finding that a teacher who was fired after coming out as bisexual spoke on a matter of public concern because there is a "public debate . . . currently ongoing regarding the rights of homosexuals"); Weaver v. Nebo Sch. Dist., 29 F. Supp. 2d 1279, 1284 (D. Utah 1998) (stating that "a voluntary 'coming out' or an involuntary 'outing' of a gay, lesbian, or bisexual teacher would always be a matter of public concern").

148 FLA. STAT. § 1001.42 (2024).

149 *Instruction*, DICTIONARY.COM, https://www.dictionary.com/browse/instruction [https://perma.cc/JWH5-DW7E] (last visited Sept. 28, 2024).

150 *See, e.g.*, *Learning Through Discussion*, COLUM. UNIV. CTR. FOR TEACHING & LEARNING, https://ctl.columbia.edu/resources-and-technology/resources/learning-through-discussion/ [https://perma.cc/3D2V-RWRZ] (last visited Sep. 28, 2024) (noting that class discussion is an active learning technique that "can take many forms . . . [including] casual or informal conversations"); *Discussions*, IND. UNIV. BLOOMINGTON CTR. FOR INNOVATIVE TEACHING & LEARNING, https://citl.indiana.edu/teaching-resources/teaching-strategies/discussions/index.html [https://perma.cc/F6RZ-Y9A7] (last visited Sept. 28, 2024). *See generally* Wendy L. Ostroff, *Empowering Children Through Dialogue and*

questions, even on topics not related to the curriculum. Therefore, under the plain language of the statute, teachers are prevented and chilled from answering student questions on sexual orientation and gender identity.

The Settlement attempts to clarify that "instruction" only includes formal instruction as part of the curriculum. Explaining that "'[i]nstruction' is 'the action, practice, or profession of teaching,'" the Settlement states that only 'instruction' on sexual orientation or gender identity is restricted, "not 'mere discussion of them.'"[151] However, this is problematic and contradictory because, as outlined above, a discussion about sexual orientation or gender identity between a student and a teacher will necessarily involve instruction and teaching on sexual orientation or gender identity, especially when a student is relatively unfamiliar with these topics. The following are examples of discussion questions and answers between a student and teacher, illustrating the aforementioned point.

A student may ask a teacher a question such as, "Why does Susan have two moms?" A teacher responding to that question should be able to say, "Sometimes two women or two men love each other in a romantic way, get married, and have children." A student may ask a male teacher, "Why is there a photo of a man on your desk?" The teacher should be able to explain to the student, "The person in the photo is my husband. Sometimes men marry other men." A child may ask a teacher, "George says he's transgender, but what does that mean?" The teacher should be able to respond, "Sometimes children who are told they are a boy or girl at birth don't agree with that when they get older, and that is being transgender." However, under the "Don't Say Gay" Law as written and interpreted through the Settlement, teachers are prevented or chilled from providing these types of truthful, age-appropriate answers to student questions because they reasonably could be interpreted as providing instruction on sexual orientation or gender identity.

Discussion, 77 EDUC. LEADERSHIP 14 (2020) (noting that children ask valuable questions and learn from the discussions that follow). Indeed, the Socratic Method focuses solely on questions asked and answered to promote learning among the students. *See, e.g.*, Rick Reis, *The Socratic Method: What It Is and How to Use It in the Classroom*, QUADRAT ACADEMY, https://www.quadratacademy.com/single-post/the-socratic-method-what-it-is-and-how-to-use-it-in-the-classroom [https://perma.cc/J9TX-6N5B] (last visited Sept. 28, 2024).

151 Settlement, *supra* note 7, at 3.

Furthermore, the Settlement states that teachers may respond if children talk about "their identities or family life."[152] Teachers may also provide feedback if children choose to write an essay on LGBTQ+ identity.[153] However, for kindergarten classes through the third grade, teachers may not respond to these situations "by teaching the subjects of sexual orientation or gender identity."[154] This language seems contradictory because sometimes a mini-lesson is necessary in responding to a student question, as the above examples demonstrate. These mini-lessons, perhaps on the topics of sexual orientation or gender identity, are speech on a matter of public concern, which is then prevented or chilled by the "Don't Say Gay" Law and the Settlement.

Second, under the rule from *Garcetti*, Florida and other states may have the right to prevent and restrict the teaching of sexual orientation and gender identity topics as a formal part of the state curriculum.[155] Similar to *Garcetti*, where the prosecutor was engaging in his official duties when he wrote an internal memorandum pursuant to those duties, teachers engage in their official duties when teaching the state curriculum.[156] The Supreme Court stated that because the prosecutor was engaged in his official duties when he wrote the memorandum, his speech was not protected by the First Amendment.[157] Similarly, teachers may not be engaged in protected speech if they teach the topics of sexual orientation or gender identity as part of the curriculum when those topics are not part of the state curriculum.

However, when teachers answer student questions off-topic from the curriculum, they are not performing their official duties. After all, a teacher could respond to the student questions such as "Why does Susan have two moms?," "Why is there a photo of a man on your desk?," and "George says he's transgender, but what does that mean?" by stating simply, "I don't have time to answer that, we need to move on to the math lesson." Because they don't need to answer those types of questions, it is clear that

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152 *Id.*

153 *Id.*

154 *Id.*

155 *See, e.g.*, Epperson v. Ark., 393 U.S. 97, 107 (1968) (explaining that a state has an "undoubted right to prescribe the curriculum for its public schools"). For an explanation on why *Garcetti* may not apply in the public school context, see *supra* note 141 and accompanying text; *see also infra* notes 162–166 and accompanying text.

156 *See supra* text accompanying notes 134–141.

157 *See supra* text accompanying note 138.

answering them is not part of a teacher's official duties.[158] But, while a teacher does not need to answer these types of student questions, if the state *compels* them not to answer, then there is a First Amendment violation.[159] Compelling teachers not to answer particular questions is exactly the intention and effect of the "Don't Say Gay" Law, even after the settlement of 2024.[160]

Lastly, answering these types of questions honestly and age-appropriately does not hinder the state's delivery of an effective or efficient education system. After all, many states do not have "Don't Say Gay" laws, and their education systems are not hindered by students and teachers discussing the LGBTQ+ community in a school setting.[161] Therefore, the "Don't Say Gay" Law violates the First Amendment rights of teachers to speak on matters of public concern when they are not performing their official job duties.

Although the Supreme Court in *Garcetti* declined to decide whether its rule would apply to "speech related to scholarship or teaching,"[162] this statement was in response to the dissent of Justice Souter, whose main concern seemed to be academic freedom in the university setting.[163] However, Justice Souter's dissent did include a quotation from a case that concerned First Amendment protections in grade schools, not universities, so perhaps the dissent's concern and the majority's response to that concern would include speech in the grade school context.[164]

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158 *But see* Elkind & Kauffman, *supra* note 113, at 166 (arguing that anytime a teacher speaks to a student in school, they are performing their official job duties).

159 *See Epperson*, 393 U.S. at 107 (explaining that a state cannot restrict a teacher's speech for reasons which would violate the First Amendment).

160 Senator Baxley, the sponsor of the "Don't Say Gay" Law, explicitly stated that teachers should not answer these types of questions at school. *See Senate Committee on Education – February 8, 2022*, *supra* note 34, at 32:00–32:23, 46:58–48:07.

161 *See* Bobbi M. Bittker, *LGBTQ-Inclusive Curriculum as a Path to Better Public Health*, HUM. RTS., July 5, 2022, at 36–38; *see also* Jo Yurcaba, *Over 30 New LGTBQ Education Laws Are in Effect as Students Go Back to School*, NBC NEWS (Aug. 30, 2023, 12:04 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/30-new-lgbtq-education-laws-are-effect-students-go-back-school-rcna101897 [https://perma.cc/N96V-J6XW].

162 Garcetti v. Ceballos, 547 U.S. 410, 425 (2006).

163 *See id.* at 438–39 (Souter, J., dissenting) ("[I] have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities.").

164 *See id.* at 439.

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant

Regardless, even if the Supreme Court announces a different rule for the school setting in the future, it is likely to be more protective of free speech than the protection flowing from the *Pickering*, *Connick*, and *Garcetti* cases.[165] In stating that it was not deciding if its rule applied in the "scholarship or teaching" context, the *Garcetti* majority recognized that "[t]here is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for" by the Court's current decisions.[166] Therefore, teachers have the right to speak on matters of sexual orientation and gender identity at school outside of formal curriculum teaching, and would still have this right under any future, more protective rule that the Supreme Court might decide for the school setting. Thus, the "Don't Say Gay" Law, by preventing and chilling protected speech on sexual orientation and gender identity at schools, violates the First Amendment.[167]

C. The Law Violates the Establishment Clause

The "Don't Say Gay" Law was enacted to promote a particular religious worldview[168] and therefore violates the First Amendment's Establishment Clause. The First Amendment's Establishment Clause provides that "Congress shall make no law

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> protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also* Clifford Rosky, *Don't Say Gay: The Government's Silence and the Equal Protection Clause*, U. ILL. L. REV. 1845, 1847 (2022) (noting that it is uncertain whether a teacher's curricular speech is government speech pursuant to the *Garcetti* rule).

165 *See, e.g.*, Elkind & Kauffman, *supra* note 113, at 170–71 (arguing that if the rule from *Garcetti* does not apply to public school teachers, then the two-part test from the *Connick* and *Pickering* cases will apply).

166 *Garcetti*, 547 U.S. at 425.

167 For other scholarship concluding that Florida's "Don't Say Gay" Law violates the First Amendment, see, for example, Zachary A. Kayal, *He/She/They "Say Gay": A First Amendment Framework for Regulating Classroom Speech on Gender and Sexuality*, 57 COLUM. J. L. & SOC. PROBS. 57, 96 (2023); Cassaro, *supra* note 111, at 318.

168 *See, e.g.*, Jillian Eugenios, *How 1970s Christian Crusader Anita Bryant Helped Spawn Florida's LGBTQ Culture War*, NBC NEWS, https://www.nbcnews.com/nbc-out/out-news/1970s-christian-crusader-anita-bryant-helped-spawn-floridas-lgbtq-cult-rcna24215 [https://perma.cc/6H7Z-UWN6] (Apr. 14, 2022, 9:21 AM) (describing the long history of anti-LGBTQ+ activism and its connection to certain religious groups in Florida); Omar G. Encarnación, *Florida's 'Don't Say Gay' Bill Is Part of the State's Long, Shameful History*, TIME (May 12, 2022, 3:51 PM), https://time.com/6176224/florida-dont-say-gay-history-lgbtq-rights/ [https://perma.cc/2EQ2-3YR7] (describing the connection between the Christian Right and the pursuit of laws that harm and marginalize the LGBTQ+ community).

respecting an establishment of religion."[169] The Establishment Clause does not permit a state to make a law "requir[ing] that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma."[170] Furthermore, if a law coerces public school students to participate in the exercise of religion, it violates the Establishment Clause.[171] By prohibiting discussions on sexual orientation and gender identity, Florida is indirectly coercing students into abiding by a particular set of beliefs: those aligned with certain religious doctrines opposing such discussions.

The Establishment Clause also forbids a state from directing the teaching and learning of students in order to promote or inhibit particular religious views.[172] In *Epperson*, Arkansas had a statute that forbade the teaching of evolution in schools.[173] The Supreme Court held that this law was unconstitutional and in violation of the Establishment Clause because a law "may not aid, foster, or promote one religion or religious theory."[174] The Court found that the law was made with the primary purpose of preventing the teaching of evolution because it conflicted with a particular religious doctrine.[175] The Court explained, "No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens."[176] It reasoned that the law was unconstitutional because "the state has no legitimate interest in protecting any or all religions from views distasteful to them."[177]

Here, the "Don't Say Gay" Law was enacted with the primary purpose and effect of preventing children from learning about people with minority gender identities and sexual

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169 U.S. CONST. amend. I.

170 Epperson v. Arkansas, 393 U.S. 97, 106–07 (1968) (holding invalid as a violation of the Establishment Clause a statute that forbade the teaching of evolution in schools); *see also* Edwards v. Aguillard, 482 U.S. 578, 581, 597 (1987) (citation omitted) (holding invalid as a violation of the Establishment Clause a statute that required the teaching of "creation science" whenever evolution was taught in schools).

171 *See* Lee v. Weisman, 505 U.S. 577, 586–87 (1992) (finding an Establishment Clause violation where school officials "direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools").

172 *Epperson*, 393 U.S. at 103.

173 *Id.* at 98–99.

174 *Id.* at 104.

175 *Id.* at 103.

176 *Id.* at 107.

177 *Id.* (citation omitted).

orientations.[178] This is because many religions traditionally oppose same-sex romantic and sexual relationships, as well as the existence of transgender individuals.[179] No credible suggestion has been made that the law exists for any other purpose. Therefore, the purpose and primary effect of the "Don't Say Gay" Law is to prevent children from learning about the LGBTQ+ community, simultaneously coercing students into compliance with certain religious views that discriminate against this group. The sponsor of the law, Senator Dennis Baxley, expressed in an interview about a different anti-LGBTQ+ bill, "I simply can't affirm homosexuality. My compass won't go there, knowing what I know biblically."[180] This sentiment demonstrates that, in sponsoring the "Don't Say Gay" Law, he was acting to further his religious convictions. In *Epperson*, the prohibition on teaching evolution was found to violate the Establishment Clause because its purpose and primary effect was to prevent certain religious views from being challenged at school.[181] In *Lee v. Weisman*, the Court rejected prayer at a public school graduation ceremony on Establishment Clause grounds due to its coercive nature.[182] Since the "Don't Say Gay" Law has the purpose and primary effect[183] of preventing certain religious

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178 *See Senate Committee on Education – February 8, 2022*, *supra* note 34, at 32:00–33:00, 47:00–48:00, 55:00–56:00.

179 *See, e.g.*, *Religious Groups' Official Positions on Same-Sex Marriage*, PEW RSCH. CTR. (Dec. 7, 2012), https://www.pewresearch.org/religion/2012/12/07/religious-groups-official-positions-on-same-sex-marriage/ [https://perma.cc/T6PN-937K] (showing many religious groups have an official position against same-sex relationships); David Masci & Michael Lipka, *Where Christian Churches, Other Religions Stand on Gay Marriage*, PEW RSCH. CTR. (Dec. 21, 2015), https://www.pewresearch.org/shortreads/2015/12/21/where-christian-churches-stand-on-gay-marriage/ [https://perma.cc/3LEZ-6222] (revealing that many religious groups oppose same-sex marriage); *Personal and Family Issues: Sexual Relationships – CCEA*, BBC, https://www.bbc.co.uk/bitesize/guides/zfwp47h/revision/7 [https://perma.cc/ET83-PYSY] (last visited Oct. 27, 2024) (discussing Christian views on same-sex relationships); Allen H. Vigneron, *The Good News About God's Plan: A Pastoral Letter on the Challenges of Gender Identity*, ARCHDIOCESE OF DET. (Feb. 26, 2024), https://www.aod.org/the-good-news-about-gods-plan [https://perma.cc/7BJA-VMB7] (laying out the Catholic Church's opposition to being transgender).

180 Erin Sullivan, *Florida House Passes Its Anti-Gay Adoption Bill, but Saner Minds Prevail in the Senate*, ORLANDO WEEKLY (Apr. 9, 2015, 6:04 PM), https://www.orlandoweekly.com/news/florida-house-passes-its-anti-gay-adoption-bill-but-saner-minds-prevail-in-the-senate-2381083 [https://perma.cc/ZFA4-9YV6].

181 *Epperson*, 393 U.S. at 104.

182 Lee v. Weisman, 505 U.S. 577, 586–87 (1992).

183 Note that the purpose and effect test described and discussed above has been criticized by certain Supreme Court justices. *E.g.*, Edwards v. Aguillard, 482 U.S. 578, 636–37 (1987) (Scalia, J., dissenting) ("[D]iscerning the subjective motivation of those enacting the statute is . . . almost always an impossible task. The number of possible motivations, to begin with, is not binary, or indeed even finite."). The *Lemon* test for

views from being challenged at school, and it coerces[184] students into abiding by particular religious beliefs that promote discrimination against the LGBTQ+ community, the law violates the Establishment Clause.

IV. FLORIDA'S "DON'T SAY GAY" LAW VIOLATES THE FOURTEENTH AMENDMENT

The Fourteenth Amendment provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."[185] The "Don't Say Gay" Law violates the Due Process Clause of the Fourteenth Amendment because it is overbroad and vague. Furthermore, it violates the Equal Protection Clause of the Fourteenth Amendment because it causes disproportionate harm to and discriminates against LGBTQ+ individuals, and it was enacted with animus against the LGBTQ+ community.

A. The Law Is Unconstitutionally Overbroad in Violation of the Due Process Clause

Establishment Clause cases (which includes this purpose and effect test) has recently been overruled in a case upholding a teacher's rights to pray at school-sponsored functions. Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 532–34 (2022) (finding that a school football coach had a First Amendment right to pray publicly and lead students in prayer on the football field during school-sponsored games); *see* Lemon v. Kurtzman, 403 U.S. 602, 612 (1971) (holding that in order to conform with the Establishment Clause, a law (1) should have a secular purpose, (2) should not have a primary purpose or effect of advancing or inhibiting religion, and (3) should not lead to excessive government entanglement with religion). It is fair to say that *Kennedy* has introduced uncertainty about the future of Establishment Clause jurisprudence. However, *Epperson* has not been overruled, and a policy that restricts the free speech and free exercise of a teacher's religion—such as the policy at issue in *Kennedy*—is quite different from a law that restricts certain non-disruptive teacher speech, which is the case with the "Don't Say Gay" Law. *Kennedy*, 597 U.S. at 534–35 (stating that "this Court long ago abandoned *Lemon*" and holding that instead courts should look to "historical practices and understandings" to interpret the Establishment Clause in line with the "understanding of the Founding Fathers").

184 The no-coercion test appears to be the preferred method of the Supreme Court as of late in adjudicating Establishment Clause claims. *See Kennedy*, 597 U.S. at 536–37 ("[C]oercion . . . was among the foremost hallmarks of religious establishments the framers sought to prohibit when they adopted the First Amendment."); *see also id.* at 537 ("Members of this Court have sometimes disagreed on what exactly qualifies as impermissible coercion in light of the original meaning of the Establishment Clause."). It remains mired in mystery how exactly the Court will handle Establishment Clause claims going forward, but to be sure, this Article contends that the "Don't Say Gay" Law should be struck down under any test.

185 U.S. CONST. amend. XIV, § 1.

The "Don't Say Gay" Law is unconstitutional because it is overbroad and punishes speech protected by the First Amendment. A statute is overbroad, and therefore an unconstitutional violation of the Due Process Clause, if it could be reasonably construed to prohibit speech protected by the First Amendment.[186] A law that could be construed to prohibit protected speech impinges on the "breathing space" that the First Amendment requires and may chill people from engaging in protected speech for fear of sanctions.[187]

Any person charged with violating a statute because of their speech can allege as a defense that the statute is overbroad, even if the speech at issue could be prohibited under a more narrowly-drawn statute.[188] Overly broad statutes that target speech are a threat to constitutionally protected speech.[189] In *Gooding v. Wilson*, the defendant was convicted of a crime due to stating these words to two police officers: "'White son of a bitch, I'll kill you,' 'You son of a bitch, I'll choke you to death,' and 'You son of a bitch, if you ever put your hands on me again, I'll cut you all to pieces.'"[190] The statute that the defendant was convicted under forbade "opprobrious words or abusive language, tending to cause a breach of the peace."[191] The Supreme Court affirmed the District Court in overturning the conviction, finding that the law was unconstitutionally overbroad.[192] The Court highlighted that although fighting words—words that would incite a reasonable person to immediate violence—can be constitutionally prohibited, "opprobrious" and "abusive" words encompassed more than fighting words.[193] The Court explained that "opprobrious" and "abusive" language includes language that is "conveying or intended to convey disgrace" and "harsh insulting language."[194] Additionally, the Court reasoned that "breach of the peace" includes situations where someone's words are merely offensive, which, again, punishes more than fighting words.[195]

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186 *See, e.g.*, Gooding v. Wilson, 405 U.S. 518, 522 (1972).
187 *Id.* at 521–22.
188 *Id.*
189 *Id.*
190 *Id.* at 520.
191 *Id.* at 519.
192 *Id.* at 520.
193 *Id.* at 525 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
194 *Id.* at 525.
195 *Id.* at 527 (citing Street v. New York, 394 U.S. 576, 592 (1969)).

Here, the "Don't Say Gay" Law is unconstitutionally overbroad because it prohibits, or could reasonably be construed to prohibit, speech protected under the First Amendment. As described in Section II.B, teachers have a constitutional right to speak outside of their official job duties on matters of public concern at their place of work so long as the speech does not disrupt the normal operation of the school.[196] However, the "Don't Say Gay" Law prohibits classroom instruction on sexual orientation and gender identity up to the eighth grade.[197] The Settlement clarifies that teachers can respond to student-initiated discussion of these topics, but teachers of kindergarten through the third grade may not respond to these situations "by teaching the subjects of sexual orientation or gender identity."[198] The law could reasonably be interpreted to prevent teachers from answering student questions about same-sex marriage or acknowledging that a person's gender identity differs from their assigned gender at birth. Pursuant to the law as written and interpreted under the Settlement, teachers are prevented or chilled from providing these types of truthful, age-appropriate, non-disruptive, non-curricular answers to student questions on matters of public importance. Similar to the *Gooding* statute that was declared unconstitutionally overbroad, the "Don't Say Gay" Law prohibits, or could reasonably be construed to prohibit, speech protected by the First Amendment and should be declared unconstitutionally overbroad.[199]

Therefore, the statute, as written and interpreted by the Settlement, violates the Due Process Clause of the Fourteenth Amendment.

B. The Law Is Unconstitutionally Vague in Violation of the Due Process Clause

The Florida Law violates the Due Process Clause of the Fourteenth Amendment because it is vague and does not draw clear lines between what speech is prohibited and what speech is permitted. This chills protected speech in violation of the Constitution. A law is vague in violation of the Due Process Clause of the Fourteenth Amendment when reasonable people

196 *See supra* Section II.B.

197 FLA. STAT. § 1001.42(8)(c)(3) (2024).

198 Settlement, *supra* note 7, at 3. For instance, teachers may provide academic feedback in response to a student's essay about their LGBTQ+ identity. *Id.*

199 *Gooding*, 405 U.S. at 520–21.

are so unsure about its meaning that they "must necessarily guess at its meaning and differ as to its application."[200]

In *Keyishian*, teachers at a state-run university challenged a New York law limiting their speech.[201] The law at issue provided that a teacher could be fired for uttering "any treasonable or seditious word."[202] Additionally, the law forbade the employment of any teacher who "'by word of mouth or writing willfully and deliberately advocates, advises or teaches the doctrine of forceful' overthrow of government."[203] The Supreme Court found that the law was unconstitutionally vague because a teacher "cannot know the extent, if any, to which a 'seditious' utterance must transcend mere statement about abstract doctrine, the extent to which it must be intended to and tend to indoctrinate or incite to action in furtherance of the defined doctrine."[204] It continued, "The crucial consideration is that no teacher can know just where the line is drawn between 'seditious' and nonseditious utterances and acts."[205] Additionally, the Court reasoned that it was unclear under the law whether the "statute prohibit[s] mere 'advising' of the existence of the doctrine, or advising another to support the doctrine."[206] The Court also noted that the law left open the question of whether a teacher who tells their class about "the precepts of Marxism or the Declaration of Independence," or a librarian who recommends that a student read a book about the "French, American, or Russian revolutions," violates the law.[207] The Court found that the law had the effect of intimidating teachers into "stay[ing] as far as possible from utterances or acts which might jeopardize" their jobs.[208] This, in turn, meant that the law stifled the "free play of the spirit which all teachers ought especially to cultivate and practice."[209]

The "Don't Say Gay" Law is unconstitutionally vague, similar to the law at issue in *Keyishian*. The "Don't Say Gay" Law's prohibition of "classroom instruction . . . on sexual

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200 Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926); *see also* Cramp v. Bd. of Pub. Instr. of Orange Cnty., 368 U.S. 278, 283 (1961); Epperson v. Arkansas, 393 U.S. 97, 112 (1968) (Black, J., concurring).

201 Keyishian v. Bd. of Regents, 385 U.S. 589, 591 (1967).

202 *Id.* at 597.

203 *Id.* at 599 (citation omitted).

204 *Id.*

205 *Id.*

206 *Id.* at 599–600.

207 *Id.* at 600–01.

208 *Id.* at 601.

209 *Id.* (quoting Wieman v. Updegraff, 344 U.S. 183, 195 (1952) (Frankfurter, J., concurring)).

orientation or gender identity" is vague because a reasonable teacher cannot decipher from the language of the statute what constitutes "classroom instruction" and what does not. Certainly, a lesson on what sexual orientation or gender identity are would count as "classroom instruction on sexual orientation or gender identity." But what about responding to a student's questions that touch on issues of sexual orientation or gender identity? What about a lesson on major Supreme Court decisions of the past ten years that includes mention of *Obergefell v. Hodges*, which legalized same-sex marriage throughout the United States, or *Bostock v. Clayton County*, where the Court found that discrimination against transgender and gay individuals in employment violates Title VII?[210] Here, the crucial consideration is that no teacher can decipher where the line is drawn between instruction and non-instruction on sexual orientation and gender identity. Therefore, the "Don't Say Gay" Law is unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

Proponents of the "Don't Say Gay" Law may argue that the Settlement has cleared up any vagueness that existed in the law.[211] They may contend, that under the Settlement, it is now clear that incidental references to LGBTQ+ individuals in books, references to families that include LGBTQ+ individuals, and LGBTQ+ teachers displaying photos of their spouses or talking about their families at school do not violate the "Don't Say Gay" Law.[212] Furthermore, they may point out how the Settlement clarifies that "safe space" stickers, Gay-Straight Alliances, and library books containing LGBTQ+ characters are allowed at schools.[213]

While it is true that the Settlement does answer some of the uncertainties, the law remains vague, even post-Settlement. For example, because of the Settlement, LGBTQ+ teachers now know that they can put a photo of their spouse on their desk at school and refer to themselves and their spouse in class.[214] However, it is unclear how much they can say to a child who asks a question such as, "Why are you married to a man if you are a man?" If they respond with the truthful statement, "Sometimes men

210 Obergefell v. Hodges, 576 U.S. 644 (2015); Bostock v. Clayton Cnty., 590 U.S. 644 (2020).
211 *See* Settlement, *supra* note 7.
212 *See id.* at 4–5.
213 *Id.* at 5–6.
214 *See id.* at 5.

marry other men," this could be interpreted as instruction on sexual orientation.[215] If it is interpreted as instruction on sexual orientation, it would violate the Settlement, which states that teachers of kindergarten through the third grade must not answer student questions "by teaching the subjects of sexual orientation or gender identity."[216] Therefore, many teachers are likely to decide not to put a photo of their spouse on their desk, even post-Settlement, due to fear of violating the "Don't Say Gay" Law. Just as in *Keyishian*, the effect of the "Don't Say Gay" Law is that teachers are intimidated into "stay[ing] as far as possible from utterances or acts which might jeopardize" their jobs.[217] Thus, the "Don't Say Gay" Law, post-Settlement, is still unconstitutionally vague in violation of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.

C. The Law Violates the Equal Protection Clause

Scholar Clifford Rosky has noted that "[a]gain and again, states have recognized that anti-gay curriculum laws violate the Equal Protection Clause."[218] He argues that when "government makes a deliberate choice, and takes affirmative steps, to prohibit officials from talking about a specific class of persons," the Equal Protection Clause is likely violated.[219] As discussed above, the "Don't Say Gay" Law chills teachers from speaking about the LGBTQ+ community in schools.[220] The "Don't Say Gay" Law also violates the Equal Protection Clause of the Fourteenth Amendment because it discriminates based on sex, sexual orientation, and gender identity, and because it was enacted to harm LGBTQ+ individuals.

The Fourteenth Amendment's Equal Protection Clause provides: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[221] Under the Fourteenth Amendment, there are three different tiers of scrutiny, the application of which depends on what group the law

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215 *See supra* Section III.B.

216 Settlement, *supra* note 7, at 3.

217 Keyishian v. Bd. of Regents, 385 U.S. 589, 601 (1967).

218 Rosky, *supra* note 164, at 1848–49 (discussing challenges to "No Promo Homo" laws which predate Florida's "Don't Say Gay" Law and forbade teachers from the "advocacy of homosexuality" in schools).

219 *Id.* at 1851–52.

220 *See supra* Section II.C.

221 U.S. CONST. amend. XIV, § 1.

discriminates against.[222] Under the Fourteenth Amendment, a law that discriminates based on sex must pass the "intermediate scrutiny test."[223] According to this test, a law that discriminates based on sex is constitutional only if it serves an important governmental interest and is substantially related to that interest.[224] Additionally, laws that discriminate based on sex can only be upheld if the government shows an "exceedingly persuasive justification" for the law.[225] In addition, the Supreme Court has recently held that a law that discriminates against someone based on their sexual orientation or gender identity necessarily discriminates against that person because of their sex.[226]

Even under the lowest level of scrutiny—the "rational basis" level of scrutiny—a law that discriminates against a particular class of people must have, at the very least, a rational relationship to a legitimate governmental interest.[227] The Supreme Court has held that a law enacted simply to harm a group of people that the majority of the voters view unfavorably is not a law that bears a rational relationship to a legitimate governmental interest.[228]

Furthermore, a law that appears facially neutral violates the Constitution if it disproportionally harms a group and was enacted with invidious discriminatory intent against that group.[229] To determine whether a law was enacted with invidious discriminatory intent, otherwise known as "animus," it must be shown that an "invidious discriminatory purpose" was a motivating factor behind passing the law, which may be shown using any "circumstantial and direct evidence" available.[230]

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222 *See, e.g.*, Catherine Jean Archibald, *Transgender Student in Maine May Use Bathroom that Matches Gender Identity—Are Co-Ed Bathrooms Next?*, 83 UMKC L. REV. 57, 63–64 (2014) (explaining the three tiers of scrutiny under the Fourteenth Amendment).

223 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976); *see also* United States v. Virginia, 518 U.S. 515, 516 (1996).

224 *Craig*, 429 U.S. at 197.

225 *Virginia*, 518 U.S. at 524.

226 Bostock v. Clayton Cnty., 590 U.S. 644, 646 (2020) (finding that Title VII, a civil rights law that prohibits discrimination based on sex, necessarily also prohibits discrimination based on sexual orientation and gender identity).

227 *See* Romer v. Evans, 517 U.S. 620, 631 (1996) (citing Heller v. Doe, 509 U.S. 312, 319–20 (1993)).

228 *Id.* at 631, 634 (finding invalid a Colorado amendment that imposed a "special disability" solely upon lesbian, gay, and bisexual persons).

229 Pers. Adm'r v. Feeney, 442 U.S. 256, 272–73 (1979).

230 Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1976); *see also* William D. Araiza, *Cleansing Animus: The Path Through Arlington Heights*, 74 ALA. L.

Factors that can be considered to determine if animus was a motivating factor for a law include the "historical background" of the law, "particularly if it reveals a series of official actions taken for invidious purposes"; the impact of the law; and the legislative history of the law.[231] Once the plaintiff proves discriminatory intent and impact, the law can only be saved if the defendant can then show by a preponderance of the evidence that the law would have been enacted even without its discriminatory intent as a motivating factor.[232]

A facially neutral law that disproportionately harms a protected group, and which was made with intent to harm that group, violates the Equal Protection Clause of the Fourteenth Amendment.[233] In *Feeney*, the plaintiff alleged that a Massachusetts law giving lifetime favored status to veterans in civil service employment violated the Equal Protection Clause because it disproportionately harmed women.[234] The Court noted that at the time the litigation began, over 98% of veterans in Massachusetts were male and only 1.8% were female.[235] The Supreme Court found that although women were disproportionately harmed by the law as compared to men, there was no evidence that the law had been made intentionally to harm women.[236] Therefore, the Court found that the law did not violate the Equal Protection Clause.[237]

When a significant number of people vote in favor of a discriminatory law, that is an indication of animus as a motivating factor, and the fact that a majority voted in favor of it does not rid the law of its impermissible purpose.[238] Put plainly, a law enacted simply out of animus towards a disfavored group is invalid under the Fourteenth Amendment.[239] In *Romer v. Evans*,

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REV. 541, 554 (2023) (describing the durability and usefulness of the *Arlington Heights* animus test).

231 *Arlington Heights*, 429 U.S. at 266–68.

232 Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977); *see also* Hunter v. Underwood, 471 U.S. 222, 228 (1985).

233 *See Feeney*, 442 U.S. at 272.

234 *Id.* at 259.

235 *Id.* at 270.

236 *Id.* at 279.

237 *Id.* at 279–80.

238 Doe v. Ladapo, No. 4:23-cv-00114-RH-MAF, 2024 WL 2947123, at *15, *25, *39 (N.D. Fla. June 11, 2024) (finding that a transgender healthcare ban in Florida violated the Equal Protection Clause of the Fourteenth Amendment because the law harmed transgender individuals and was made with discriminatory animus).

239 *See* Romer v. Evans, 517 U.S. 620, 631 (1996).

the Supreme Court considered the constitutionality of a state constitutional amendment, voted into law by Coloradans, that invalided any state or municipal ordinance which would prevent discrimination against a person due to their "homosexual, lesbian or bisexual orientation."[240] The effect of this amendment was to repeal various city ordinances within Colorado that prohibited discrimination based on sexual orientation in housing, employment, public accommodations, and so on.[241] The Court found that this state constitutional amendment was invalid under the Equal Protection Clause of the Fourteenth Amendment.[242] Though Colorado stated that the purposes of the amendment were to preserve the liberties of people such as landlords or employers opposed to homosexuality who did not want to associate with lesbian, gay, or bisexual people, and to conserve state resources to fight other forms of discrimination, the Court found these reasons implausible given the far-reaching and broad impact of the amendment.[243] Instead, the Court determined that the underlying purpose of the amendment was to make lesbian, gay, and bisexual people "unequal to everyone else," which is an improper purpose.[244] Thus, because a "bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest," the Court held that there was no legitimate government interest that was rationally related to the law.[245]

Here, though arguably facially neutral, the "Don't Say Gay" Law has the foreseeable and actual effect of harming LGBTQ+ individuals within the state of Florida. The "Don't Say Gay" Law declares: "Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in prekindergarten through grade 8."[246] This law is arguably neutral on its face as, presumably, it would prohibit instruction on heterosexual sexual orientation and cisgender gender identity as well as gay, lesbian, and bisexual sexual orientation and transgender gender identity. Indeed, the Settlement states as

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240 *Id.* at 624.

241 *Id.* at 623–24.

242 *Id.* at 635.

243 *Id.* at 632, 635.

244 *Id.* at 635.

245 *Id.* at 634–35 (alteration in original) (quoting Dep't of Agric. v. Moreno, 413 U.S. 528, 534 (1973)).

246 FLA. STAT. § 1001.42(8)(c)(3) (2024).

much.[247] However, as Scholar Clifford Rosky argues, it is "implausible to think that the law [would] actually be applied in a neutral manner."[248] Indeed, the "Don't Say Gay" Law from the beginning has disproportionately harmed and is still disproportionately harming LGBTQ+ teachers, students, and families.[249] For example, from its inception, teachers have changed lesson plans to omit the fact that some prominent individuals are LGBTQ+.[250] Teachers have removed books with LGBTQ+ characters in them, decided not to form LGBTQ+ clubs with students, and have been caught up in stressful investigation procedures for showing movies that contain LGBTQ+ characters, all due to the "Don't Say Gay" Law.[251] Teachers have not similarly changed lesson plans to omit the fact that some prominent individuals are heterosexual or cisgender. They have not removed books that include heterosexual or cisgender characters. They have not been investigated for showing movies that contain heterosexual or cisgender characters. The "Don't Say Gay" Law disproportionately harms LGBTQ+ teachers and students in schools by not illustrating to everyone in the classroom that LGBTQ+ individuals are valuable and contributing members of society, and by stigmatizing LGBTQ+ identities. Although the Settlement states that the "Don't Say Gay" Law "does not restrict mere 'literary references to a gay or transgender person or to a same-sex couple,'" it also states that the law does "restrict[]. . . the use of books 'to instruct' 'students

247 Settlement, *supra* note 7, at 4.

248 Rosky, *supra* note 164, at 1854–55 (2022) (noting that a children's book discussing two male birds raising a baby bird together is one of the most banned books in the United States, while a similar book discussing a male and a female bird raising baby birds together has never been challenged or banned).

249 *See, e.g.*, Edward Swidriski, *Florida's "Don't Say Gay" Law Raises Serious Legal Questions*, LAB. & EMP. L. NEWSL. (ABA Lab. & Emp. L. Section, Chi., Ill.), Nov. 22, 2022, at 1 (noting that "[t]he legislative motivation behind the law's enactment and the persistence of anti-LGBTQ+ prejudice in parts of society, however, make it doubtful that the law will be applied evenhandedly, regardless of its formal wording"); Eric Berger, *How Florida's 'Don't Say Gay' Law Could Harm Children's Mental Health*, THE GUARDIAN (Apr. 4, 2022, 5:30 AM), https://www.theguardian.com/us-news/2022/apr/04/florida-dont-say-gay-bill-children-mental-health [https://perma.cc/68K6-6Q9H] (explaining how the "Don't Say Gay" Law can harm the mental health of children with LGBTQ+ parents by making it unacceptable for them to talk about their families at school).

250 *See, e.g.*, Lori Rozsa, *Florida Teachers Race to Remake Lessons as DeSantis Laws Take Effect*, WASH. POST (July 30, 2022, 6:00 AM), https://www.washingtonpost.com/education/2022/07/30/florida-schools-desantiswoke-indoctrination/ [https://perma.cc/ZB79-5VGW] (describing one Florida teacher who removed from her lesson plan the fact that the first American woman to fly in space was a lesbian).

251 *See, e.g.*, Yurcaba, *supra* note 48.

on the concepts of sexual orientation or gender identity.'"[252] Therefore, even after the Settlement, many teachers will err on the safe side by not reading books or showing movies to their students that contain LGBTQ+ characters in case a question might be asked by a student, which then leads to a conversation that could be construed as "instruction" on sexual orientation or gender identity.

Next, laws that discriminate against LGBTQ+ individuals necessarily discriminate based on sex.[253] In *Bostock v. Clayton County*, the plaintiffs were two men who were fired from their jobs because they were gay, and one woman who was fired from her job because she was transgender.[254] The Supreme Court found that the individual plaintiffs were fired based on sex in violation of Title VII's prohibition on sex discrimination.[255] The Court reasoned that, in firing an employee because of their sexual orientation or gender identity, the employer "fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."[256] The Court explained that when an employer fires a man for being attracted to men, but would not fire a woman for being attracted to men, then the employer has discriminated based on sex.[257] Similarly, when an employer fires a transgender employee because she now identifies as female, and that employer would not fire a similarly situated female who was assigned female at birth and still identifies as female, that employer has discriminated based on sex.[258]

Similarly, because the "Don't Say Gay" Law disproportionately harms the LGBTQ+ community, it is a law that discriminates based on sex. When a gay teacher is afraid to talk about going on a trip with his husband because of the "Don't Say Gay" Law, but a similar heterosexual teacher is not afraid to talk about going on a trip with her husband, the law treats the two teachers differently because of their sex. Because the law discriminates based on sex, it violates the Equal Protection

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252 Settlement, *supra* note 7, at 4.
253 *See* Bostock v. Clayton Cnty., 590 U.S. 644, 660, 662 (2020).
254 *Id.* at 653–54.
255 *Id.* at 651–52, 680.
256 *Id.* at 652.
257 *Id.* at 660.
258 *Id.*

Clause unless it can pass intermediate scrutiny.[259] This test requires that the law be substantially related to an important government interest.[260] However, restricting teachers from discussing the LGBTQ+ community in classrooms is surely not substantially related to an important government interest as the law harms the LGBTQ+ community—a community that is already marginalized and facing discrimination in society.[261]

Next, the law was enacted due to animus against LGBTQ+ individuals and therefore cannot pass rational basis review, let alone intermediate scrutiny. In *Romer v. Evans*, the Supreme Court found that a law that singled out lesbians, bisexual, and gay individuals for unequal treatment was motivated by animus and could not survive even rational basis scrutiny under the Fourteenth Amendment's Equal Protection Clause.[262] Although the state in *Romer* argued that its law forbidding protections against discrimination for LGB individuals was to preserve the liberty of those not wanting to associate with LGB individuals, the Court found this to be an implausible purpose of the law, given its far-reaching and broad impact.[263] Instead, the Court determined that the purpose of the amendment was to make lesbian, gay, and bisexual people "unequal to everyone else," which is an improper purpose.[264] Similarly, the stated purpose of the "Don't Say Gay" Law, to preserve parental rights, is implausible, given the far-reaching nature of this law, which chills speech on LGBTQ+ issues throughout Florida's schools. Like the law in *Romer* that made LGB people "unequal to everyone else" by making sure they—and only they—remained unprotected by antidiscrimination laws, the "Don't Say Gay" Law makes LGBTQ+ students and teachers "unequal to everyone else" by chilling only their speech about their families and lives and by erasing any mention of LGBTQ+ families in the classroom, while not erasing heterosexual couples and families.[265]

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259 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976).

260 *Id.*

261 *See* Nelson Garcia, *Challenging Florida's Parental Rights in Education Act, AKA the "Don't Say Gay" Law: Finding Equality Through Equal Protection Doctrine*, 14 U. MIA. RACE & SOC. JUST. L. REV. 31, 49–51 (2023) (arguing that the "Don't Say Gay" Law should be judged with intermediate scrutiny and that it fails that test).

262 Romer v. Evans, 517 U.S. 620, 621, 632, 635 (1996).

263 *Id.* at 632, 635.

264 *Id.* at 635.

265 *See Senate Committee on Education – February 8, 2022*, *supra* note 34, at 32:00–33:00, 47:00–48:00, 55:00–56:00.

Therefore, because the "Don't Say Gay" Law (1) disproportionately harms and discriminates against LGBTQ+ individuals and (2) was passed with animus against the LGBTQ+ community, the law cannot pass rational basis review or intermediate scrutiny, and it violates the Equal Protection Clause.

V. THE LAW HAS INSPIRED OTHER STATES TO PASS SIMILAR LAWS

At the time of writing this Article, Florida's "Don't Say Gay" Law has influenced seven other states to pass similar legislation.[266] These restrictive laws are directly impacting almost twenty percent of children in the United States.[267] These other states have not, at the time of writing, reached settlements similar to Florida's Settlement. For the same reasons that this Article has shown that Florida's "Don't Say Gay" Law violates the Constitution and should be struck down, even post-Settlement, these similar laws in other states should also be found unconstitutional by the courts and likewise struck down.

VI. CONCLUSION

Florida's "Don't Say Gay" Law has caused and is causing great harm to the LGBTQ+ community in Florida and beyond. This law and others like it violate the First Amendment's Freedom of Speech and Establishment Clauses, as well as the Fourteenth Amendment's Equal Protection and Due Process Clauses, and should be struck down by the courts. Until that happens, LGBTQ+ individuals, students, and teachers will continue to suffer from the harmful and discriminatory impact of the law.

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266 States that either have similar laws or are considering similar laws include Alabama, Arkansas, Iowa, Indiana, North Carolina, Kentucky, and Louisiana. *See, e.g.*, Samantha LaFrance, *It's Not Just Florida: 4 New 'Don't Say Gay' Laws Passed in 2023*, PEN AM. (Aug. 31, 2023), https://pen.org/4-new-dont-say-gay-laws-passed-in-2023/ [https://perma.cc/V3Q5-GJAK] (noting that North Carolina, Arkansas, Iowa, and Indiana passed similar laws to Florida's "Don't Say Gay" Law in 2023); *see also LGBTQ Curricular Laws*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/curricular_laws [https://perma.cc/79LE-5HAA] (last visited Sept. 18, 2024) (showing eight states with current "Don't Say Gay" Laws: Florida, Alabama, Arkansas, North Carolina, Louisiana, Kentucky, Indiana, and Iowa).

267 *LGBTQ Curricular Laws*, *supra* note 266 (revealing that seventeen percent of LGBTQ+ youth live in states which have a version of the "Don't Say Gay" Law).

Tax Expenditures and Horizontal Equity: A Present-Day Reassessment

Nir Fishbien

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Tax Expenditures and Horizontal Equity: A Present-Day Reassessment

Nir Fishbien[*]

Tax expenditures are "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability." The concept of tax expenditures was coined by the first Assistant Secretary for Tax Policy, Stanley S. Surrey, in the late 1960s, and was codified by the Congressional Budget Act of 1974, which requires that a list of tax expenditures be included in the U.S. budget. The concept relies on the Haig-Simons definition of income (with certain adjustments) as the baseline, a deviation from which is considered a tax expenditure.

There are two basic problems with attempts to define tax expenditures against a Haig-Simons baseline. First, it is not clear why the Haig-Simons, and not other definitions of income, should be used as a baseline. Second, it is not clear why such deviations are normatively problematic. Put bluntly, who cares whether a specific tax provision is a deviation from some theoretical definition of income?

This Article represents an attempt to recapture Surrey's original view of tax expenditures and assess its present-day implications: most importantly, that tax expenditures should be viewed as an attempt to identify departures that violate principles of horizontal equity, i.e., the idea that taxpayers with equal ability to pay should bear an equal burden of tax. As such, eliminating tax expenditures means eliminating many of the biases that are currently an integral part of the tax system. Doing so will make the tax system much more equitable for most Americans than any tax reform currently contemplated by Congress.

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I. INTRODUCTION

Tax expenditures are "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[1] In the late 1960s, the first Assistant Secretary for Tax Policy, Stanley S. Surrey, coined the concept.[2] The Congressional Budget Impoundment Act of 1974, which requires that a list of tax expenditures be included in the U.S. budget, first codified it. This list consists of almost 165 items that amount to roughly $1.6 trillion for fiscal year 2024 alone.[3] Surrey believed many of the tax expenditures could (and should) be provided in the form of spending programs.

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1 Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(3) (1988).

2 Surrey and Paul R. McDaniel developed the concept through the years. *See* STANLEY S. SURREY, PATHWAYS TO TAX REFORM: THE CONCEPT OF TAX EXPENDITURES (1973) [hereinafter SURREY, PATHWAYS]; STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES (1985) [hereinafter SURREY & MCDANIEL, TAX EXPENDITURES]; *see also* Paul R. McDaniel & Stanley S. Surrey, *Tax Expenditures: How to Identify Them; How to Control Them*, 15 TAX NOTES 595 (1982); Stanley S. Surrey, *Federal Income Tax Reform: The Varied Approaches Necessary to Replace Tax Expenditures with Direct Governmental Assistance*, 84 HARV. L. REV. 352 (1970); Stanley S. Surrey, *Government Assistance: The Choice Between Direct Programs and Tax Expenditures*, 8 TAX NOTES 507 (1979); Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705 (1970) [hereinafter Surrey, *Tax Incentives*]; Stanley S. Surrey, *Tax Subsidies as a Device for Implementing Government Policy*, 3 TAX ADVISER 196 (1972); Stanley S. Surrey & William F. Hellmuth, *The Tax Expenditure Budget – Response to Professor Bittker*, 22 NAT'L TAX J. 528, 537 (1969); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Budget Reform Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 679 (1976); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept and the Legislative Process*, *in* THE ECONOMICS OF TAXATION 123 (Henry J. Aaron & Michael J. Boskin eds., 1980); Stanley S. Surrey & Paul R. McDaniel, *The Tax Expenditure Concept: Current Developments and Emerging Issues*, 20 B.C. L. REV. 225 (1979). For the subsequent supporting literature, see Victor Thuronyi, *Tax Expenditures: A Reassessment*, 1988 DUKE L.J. 1155; Edward A. Zelinsky, *James Madison and Public Choice at Gucci Gulch: A Procedural Defense of Tax Expenditures and Tax Institutions*, 102 YALE L.J. 1165 (1993). In particular, see J. Clifton Fleming, Jr. & Robert J. Peroni, *Reinvigorating Tax Expenditure Analysis and Its International Dimension*, 27 VA. TAX REV. 437 (2008) [hereinafter Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*]; J. Clifton Fleming, Jr. & Robert J. Peroni, *Can Tax Expenditure Analysis Be Divorced from a Normative Tax Base?: A Critique of the "New Paradigm" and Its Denouement*, 30 VA. TAX REV. 135 (2010) [hereinafter Fleming & Peroni, *A Critique of the "New Paradigm"*].

3 *See* U.S. DEP'T OF THE TREASURY, OFF. OF TAX ANALYSIS, TAX EXPENDITURES (2024) [hereinafter TAX EXPENDITURES REPORT], https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2025.pdf [https://perma.cc/N2VX-KY5A] (estimating total income tax expenditures for fiscal years 2023 to 2033).

The enormous amount of tax expenditures in the Internal Revenue Code (Code) by itself might indicate that Surrey failed in his primary aim, which was to persuade Congress to repeal or at least restrict tax expenditures. However, it is also clear that the concept has withstood the test of time despite constant criticism that started almost immediately after Surrey introduced it.[4]

Surrey developed the concept of tax expenditures in speeches between 1967 and 1968 and in many articles and books after returning to academia.[5] In 1967, Surrey coined the phrase "tax expenditure" to describe a provision in the Code that is a deliberate departure from accepted concepts of net income, which affects the economy in ways that are usually accomplished by explicit expenditures.[6] Surrey viewed tax expenditures as provisions in the Code not designed for the principal purpose of raising revenue. In his early career, he found that income tax is in fact composed of two distinct elements: (1) structural provisions necessary to implement a normal income tax, and (2) special preferences that mainly benefit a certain group of taxpayers and that were deviations from the normal structure of the system (recall Surrey's work was dominated by the idea that the tax system is compiled by an internally consistent framework).[7] Surrey called for a "full accounting"[8] for tax expenditures and their costs to encourage expenditure control and to facilitate tax reform. He argued that such accounting

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4 *See, e.g.*, STAFF OF JOINT COMM. ON TAX'N, 110TH CONG., A RECONSIDERATION OF TAX EXPENDITURE ANALYSIS 29–38 (Comm. Print 2008); Bruce Bartlett, *The End of Tax Expenditures as We Know Them?*, 92 TAX NOTES 413, 414 (2001); Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L TAX J. 244, 258–59 (1969); Douglas A. Kahn & Jeffrey S. Lehman, *Tax Expenditure Budgets: A Critical View*, 54 TAX NOTES 1661, 1662–63 (1992); Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 201–02 (2004); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs*, 113 YALE L.J. 955, 976 (2004). Nonetheless, many other countries have adopted the concept. *See* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 2, 156; *see also* ORG. FOR ECON. COOP. & DEV., TAX EXPENDITURES: RECENT EXPERIENCES 107 (1996).

5 *See, e.g.*, SURREY, PATHWAYS, *supra* note 2, at 31–34.

6 *See* Stanley S. Surrey, Assistant Sec'y, U.S. Dep't of the Treasury, The U.S. Income Tax System – the Need for a Full Accounting, Remarks Before the Money Marketeers (Nov. 15, 1967), *in* U.S. Dep't of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1968, at 322–23 (1969); SURREY, PATHWAYS, *supra* note 2, at 1, 3.

7 *See* STANLEY S. SURREY, A Half-Century with the Internal Revenue Code: The Memoirs of Stanley S. Surrey, at xviii (Lawrence Zelenak & Ajay Mehrota eds., 2022); *id.* at xvii.

8 SURREY, PATHWAYS, *supra* note 2, at 3.

would lead to a better tax system in terms of fairness and simplicity because tagging certain provisions as tax expenditures would result in the elimination of some (or most) of them.[9]

A couple of years later, the Treasury Department released its first tax expenditures budget, identifying "the major respects in which the current income tax bases deviate from widely accepted definitions of income and standards of business accounting and from the generally accepted structure of an income tax" and providing "estimates of the amount by which each of these deviations reduces revenues."[10] Such estimations were calculated based on the revenue forgone due to specific tax expenditures (without regard to how taxpayers would have reacted to the removal of the tax expenditure in question, or how their behavior would have changed due to such removal).[11]

Following that report, the Senate requested that its version of the Revenue Act of 1971 include estimates of losses in revenue from provisions of the Code and estimates of indirect expenditures through the operation of the Code. In response to that request, the Treasury Department indicated that it was willing to supply such information as requested and, consequently, in 1972, issued a joint report on tax expenditures with the Joint Committee on Taxation (JCT).[12] Two years later, the Congressional Budget and Impoundment Control Act of 1974 (Act) established the House and Senate Budget Committees to oversee the new congressional budget process.[13] Congress did not transfer any power to the Budget Committees from existing tax-writing committees.[14] Under the Act, tax expenditures, defined as "those revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability," were to be enumerated into the "tax expenditures

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9 *Id.* at 4. Similar considerations led him to support the Subpart-F legislation earlier in 1962. *See* Nir Fishbien, *From Switzerland with Love: Surrey's Papers and the Original Intent(s) of Subpart-F*, 38 VA. TAX REV. 1 (2018).

10 U.S. Dep't of the Treasury, Annual Report of the Secretary of the Treasury on the State of the Finances for the Fiscal Year Ended June 30, 1968, at 326–40 (1969) [hereinafter U.S. Dep't of the Treasury, 1968 Fiscal Report].

11 *See* Edward D. Kleinbard, *Tax Expenditure Framework Legislation*, 63 NAT'L TAX J. 353 (2010).

12 *Id.* at 358.

13 Congressional Budget and Impoundment Control Act of 1974, 2 U.S.C. § 622(3) (1988).

14 ALLEN SCHICK, CONGRESS AND MONEY: BUDGETING, SPENDING AND TAXING 17, 78 (1980).

budget."[15] The Act provided that whenever a committee of either House proposes a bill or resolution that provides a new budget, alters spending authority, or increases or decreases revenues or tax expenditures, the report accompanying that bill or resolution should contain a tax expenditure analysis.[16]

The Budget Committees, with the help of the Congressional Budget Office (CBO), were officially in charge of producing an annual tax expenditure budget, and the executive branch was required to include a tax expenditure budget in the annual President's Budget transmittal to Congress. Nonetheless, the Senate Budget Committee eventually stopped using the analyses as part of the budgetary process, and the analysis became an informative rather than operational tool mainly used to highlight tax expenditures and provide bipartisan, objective information to Congress regarding their costs.[17]

Since 1975, the CBO traditionally relied on the JCT in preparing tax analysis mainly because the JCT had the requisite expertise with respect to revenue matters, and a statutory requirement obliging Congress to rely on estimates of the JCT when considering the revenue effects of proposed legislation.[18] The JCT reports included the tax expenditures analysis, with a description of the features of the "baseline" that is used to identify and measure tax expenditures.[19] The JCT defines this baseline as "a normal income tax structure," and the determination of whether a provision is a tax expenditure "is made on the basis of a broad concept of income that is larger in scope than 'income' as defined under general U.S. income tax principles," adding that it "uses its judgment in distinguishing between those income tax provisions (and regulations) that can be viewed as a part of normal income tax law and those special provisions that result in tax expenditures."[20]

In addition to the list published by the CBO (based on the JCT report), the Treasury also publishes its own list of tax expenditures, aimed at identifying provisions that are

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15 *See* 2 U.S.C. § 622(3).

16 2 U.S.C. § 602(a).

17 Kleinbard, *supra* note 11, at 359.

18 *Id.* at 358.

19 STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAX'N, 94TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES (Comm. Print 1976).

20 STAFF OF THE JOINT COMM. ON TAX'N, 116TH CONG., ESTIMATE OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2018-2022, at 2 (Comm. Print 2018).

considered basic structural features of income tax that deviate from the existing structural rules.[21] It implements two baseline concepts: the normal tax baseline and the reference tax law baseline, both of which are used to identify and estimate tax expenditures.[22] For the most part, the two concepts coincide, but those items that are treated as tax expenditures under the "normal tax baseline," but not the "reference tax law baseline," are indicated in the report as "normal tax."[23] The normal tax baseline is based on a practical form of a comprehensive income tax, which is itself based on the Haig-Simons definition of income as the sum of consumption and the change in net wealth in a given period of time with certain adjustments: "The normal tax baseline allows personal exemptions, a standard deduction, and deduction of expenses incurred in earning income. It is not limited to a particular structure of tax rates, or by a specific definition of the taxpaying unit."[24] The reference tax law baseline is also based on a comprehensive income tax, but it is much closer to existing law, such that it is limited to special exceptions from a generally provided tax rule.[25]

Despite its informative function, the tax expenditures analysis has been an imperative part of tax policy considerations in the United States. Surrey's main argument was that tax expenditures suffered from inherent defects that made them inferior to analogous governmental spending programs. As such, he believed the analysis would show policymakers the real cost of tax expenditures and force their ongoing scrutiny.[26]

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21 *See Tax Expenditures*, U.S. DEP'T OF THE TREASURY, https://home.treasury.gov/policy-issues/tax-policy/tax-expenditures [https://perma.cc/HJQ9-LLW5] (last visited Oct. 31, 2024).

22 TAX EXPENDITURES REPORT, *supra* note 3, at 1.

23 *Id.*

24 *Id.* at 3.

25 *Id.* "Provisions under the reference tax law baseline are generally tax expenditures under the normal tax law baseline, but the reverse is not always true." *Id.* For example, "[u]nder the reference tax law, gross income does not include gifts defined as receipts of money or property that are not consideration in an exchange" or other transfer payments from the government. *Id.* Therefore, these provisions are not considered tax expenditures. On the other hand, while "the normal tax baseline also excludes gifts between individuals from gross income . . . all cash transfer payments from the Government to private individuals are counted [as] gross income, and exemptions of such transfers from tax are [therefore] identified as tax expenditures," unlike under the reference tax law baseline. *Id.*

26 SURREY, PATHWAYS, *supra* note 2, at 4.

Surrey was concerned with the "upside-down" subsidy that tax expenditures created.[27] Tax expenditures that came in the form of deductions most benefited those taxpayers subject to higher brackets. Nowadays, many of the tax expenditures are in the form of tax credits, rather than deductions—a testament to the effect of Surrey's criticism and the Tax Expenditure Analysis.[28] Yet tax expenditures in the form of credits could also be inequitable, as they benefit only those who file tax returns and, to the extent that the credits are not refundable, only those who, after all the exemptions and deductions allowed, still have taxable income.[29] Surrey was also concerned with the revenue cost of tax expenditures. He wanted to facilitate disclosure of the full cost of the federal government, including the extent to which direct spending programs or tax expenditures contributed to that cost. He believed such disclosure of tax expenditures and their costs would provide clear estimates of the revenue losses that could be added to the totals of direct congressional appropriations.[30] This could demonstrate that the income tax is already relatively broad, and that Congress can eliminate many

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27 *See* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 79. As an example to the absurd, the following was provided:

> Another example of upside-down assistance is the medical expense deduction. Despite much debate about a national health insurance program, few people recognize that such a program already exists, run through the Internal Revenue Code. It has many of the features of a normal health insurance program. There is a *deductible*: only medical expenses in excess of 5 percent of adjusted gross income qualify for the tax deduction. There is a *coinsurance* element requiring the insured to pay a portion of the medical expenses above the deductible level; the coinsurance element is a function of the individual's marginal income tax rate. If an individual in the 11 percent bracket incurs $100 of medical expenses above the deductible level (5 percent of adjusted gross income), under the coinsurance element he or she must pay $89 of those medical expenses and the government will pay $11. In contrast, an individual who makes $50,000 a year and incurs the same $100 of medical expenses above the deductible level will pay $62, and the government will bear the remaining $38. Finally, for the wealthiest taxpayers, those with more than $200,000 per year adjusted gross income, the government will pick up $50 of each $100 of medical expenses above the deductible level. Again, poverty-level taxpayers and those claiming the standard deduction are automatically excluded. Indeed, since home ownership with its accompanying deductions for interest and property taxes is almost essential to the itemization of personal deductions, it is fair to say that the medical expense deduction constitutes a national health insurance program for well-to-do homeowners.

Id. (footnotes omitted).

28 *See, e.g.*, *The Distribution of Major Tax Expenditures in 2019*, CONG. BUDGET OFF. (Oct. 2021), https://www.cbo.gov/publication/57585 [https://perma.cc/QX55-6CKY].

29 *See* Donald C. Lubick, *A View from Washington*, 98 HARV. L. REV. 338, 340 (1984).

30 *See* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 25, 226.

of the exceptions that impair its broad ability to collect taxes, rather than layer on fundamentally flawed new tax rules. The tax expenditures analysis was also aimed at exposing the real size of the government.[31] Altogether, the tax expenditures analysis provided a useful framework from which to evaluate the equity, efficiency, and administrability of certain tax provisions.[32]

Despite his desire to eliminate most preferential tax provisions, Surrey was aware of the tremendous power lobbyists held on Capitol Hill. He hoped that highlighting the shortcomings of tax expenditures would serve as a countermeasure to such influence.[33] Nonetheless, the current list of tax expenditures for the 2024 fiscal year alone totals approximately $1.6 trillion. This fact by itself might suggest that Surrey had failed in his primary goal. In any case, the efficacy of the analysis has been undercut substantially—a result of the constant criticism that started almost immediately after Surrey introduced the concept.[34] However, the concept has withstood the

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31 *See* Kleinbard, *supra* note 11, at 21. Shaviro criticizes this point:

> Tax expenditure analysis rests on an equivalence. *Tax Rule A*, it suggests, is really a spending rule, and thus should be restated as hypothetical *Tax Rule B* plus *Spending Rule C*, which in combination are equivalent. If the rule at issue is something . . . which one has determined ought not to be in the tax system to begin with, the process of re-description is relatively simple. *Tax Rule B* is simply the absence of any such tax rule, and the entire revenue consequences are attributed to *Spending Rule C*. If, however, the tax rule is "wrong," yet there ought to be some tax rule, as in the case of accelerated depreciation, (assuming it exceeds "correct" tax depreciation, such as economic depreciation), then the process is more cumbersome. One must do more work in specifying hypothetical *Tax Rule B* in order to attribute its net revenue loss, relative to actual *Tax Rule A*, to hypothetical *Spending Rule C*.
>
> So long as hypothetical *Rules B* and *C* are indeed equivalent to actual *Tax Rule A*, the exercise is tautologically correct. To have any significance, however, the restatement needs to be motivated. After all, one could just as easily decompose *Tax Rule A* into the even more favorable *Tax Rule D* . . . plus *Negative-Spending Rule E* . . . *Tax Rule A* then could be described as a tax penalty relative to *D*, as measured by *E*. One thus needs to explain why a particular counter-factual should be chosen from among the infinite possibilities as capturing the "true" character of the actual observed *Tax Rule A*.

Daniel N. Shaviro, *Rethinking Tax Expenditures and Fiscal Language*, 57 TAX L. REV. 187, 206 (2004).

32 Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*, *supra* note 2, at 485.

33 *See* Stanley S. Surrey, *The Congress and the Tax Lobbyist – How Special Tax Provisions Get Enacted*, 70 HARV. L. REV. 1145, 1154 (1957); *see also* Thuronyi, *supra* note 2, at 1158.

34 STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 19, at 7–8 ("Driven off track by seemingly endless debates about what should and should not be included in the 'normal' tax base, tax expenditure analysis today does not advance either of the two goals that

test of time, despite such constant criticism. Part II accordingly reviews the two main lines of attack against the concept of tax expenditures and offers appropriate responses. Most of this criticism was, and still is, based on the idea that tax expenditures are measured against the Haig-Simons definition of income. Part III provides present-day examples of how tax expenditures should be analyzed and explores tax expenditures through the lens of horizontal equity. Finally, Part IV concludes that the modern tax system would greatly benefit from Surrey's insight.

II. TWO LINES OF ATTACK ON TAX EXPENDITURES

A. Incoherence of the Base

In its 1967 debut, the tax expenditures analysis scrutinized certain tax provisions and federal expenditures with equal rigor. Surrey called for a "full accounting" of the effects of these provisions with respect to the budget and the tax system. Since then, the concept has been highly controversial in U.S. tax policy. For practical reasons, Surrey believed a Haig-Simons definition of income should be used as a baseline for the tax expenditures analysis, reflecting the normative elements of the tax system.[35] He also thought that the Haig-Simons definition of income should be modified to incorporate certain other accepted business accounting standards and other modifications that reflect the "generally accepted structure of an income tax."[36]

The Haig-Simons definition of income is essentially based on "gain" or "accretion" and should generally include the sum of the market value of rights exercised in consumption and the change in the value of property rights (wealth) between the beginning and the end of the period in question.[37] Naturally, this definition created a relatively wide base—one that reaches further than the coverage of the existing U.S. income tax system (e.g., appreciation of capital assets that are currently not taxed due to

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inspired its original proponents: clarifying the aggregate size and application of government expenditures, and improving the Internal Revenue Code.").

35 *See* Kleinbard, *supra* note 11; Stanley S. Surrey, *The United States Income Tax System — The Need for Full Accounting*, *in* TAX POLICY AND TAX REFORM: 1961-1969, at 575, 578 (William F. Hellmuth & Oliver Oldman eds., 1973); *see also* SURREY, PATHWAYS, *supra* note 2, at 33; SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 88, 186.

36 SURREY, PATHWAYS, *supra* note 2, at 12; SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 3–4.

37 SURREY, PATHWAYS, *supra* note 2, at 12.

the realization principle).[38] Additionally, other issues that arose since the adoption of the Haig-Simons definition of income required special attention (as to whether they have become part of the normative tax system).[39] As a result, Surrey suggested that the generally accepted structure of the income tax would be accounted for as well.[40] For Surrey, this generally accepted structure included, among others, the exclusion of imputed rental income on owner-occupied homes, personal exemptions, rate schedules, certain Section 162 deductions, and income-splitting for married couples as part of the base and not considered tax expenditures.[41]

Arguably, the main difficulty in the analysis is the determination of those normative elements that will comprise the base. Surrey admitted that such work "requires an intellectually consistent, thorough analysis of the normative structure of an income tax in today's world."[42] For Surrey, the Haig-Simons definition of income was just a convenient starting point, but in no way was it the end result.[43] Critics have strongly attacked the choice of the Haig-Simons baseline, characterizing it as "unprincipled, imprecise, and insufficiently related to our hybrid income/consumption tax system as it actually exists."[44] In the words of Douglas Kahn and Jeffrey Lehman, the process of identifying the baseline was like asking whether the National Zoo should house pandas, and answering by saying that other self-proclaimed experts have determined that "normative zoos" should only house bears and that pandas are not really bears.[45]

Daniel Shaviro argued that a more acceptable baseline would be one that draws a distinction between distributive tax rules based on equitable principles, such as ability-to-pay and tax rules that have no distributive purpose but instead serve mainly to provide benefits to certain taxpayers.[46] Even Shaviro agrees

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38 Interestingly, in a recent Supreme Court case, a majority of the Court soundly rejected an attempt to characterize realization as a constitutional norm embedded in the tax system. *See* Moore v. United States, 144 S. Ct. 1680, 1688–89 (2024).

39 *See* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 5.

40 *See* SURREY, PATHWAYS, *supra* note 2, at 13.

41 *See* Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*, *supra* note 2, at 457.

42 SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 5; s*ee also* SURREY, PATHWAYS, *supra* note 2, at 15–19.

43 *See* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 187–88.

44 Fleming & Peroni, *A Critique of the "New Paradigm," supra* note 2, at 145.

45 *See, e.g.*, Kahn & Lehman, *supra* note 4, at 1665.

46 *See* Shaviro, *supra* note 4, at 207–13.

that a baseline is needed to identify tax provisions that confer preferential treatment on particular income items or for particular taxpayer groups.[47]

Bittker was among the first to criticize the baseline problem and Surrey's call for "full accounting."[48] His primary concern was that evaluating the cost of tax expenditures may require "an agreed starting point" which might be hard to identify:

> What is needed is not an ad hoc list of tax provisions, but a generally acceptable model, or set of principles, enabling us to decide with reasonable assurance which income tax provisions are departures from the model, whose costs are to be reported as "tax expenditures." In this connection, it is important to note that the proposed "full accounting" is evidently intended to embrace every provision that serves as the substitute for an appropriation . . . .
>
> In listing the exclusion of social security benefits as a "tax expenditure" that ought to be reflected in the Federal Budget as aid to the elderly, the Treasury analysts very likely had in mind the fact that these receipts constitute income under the Haig-Simons definition. Conversely, their study accepts the deduction of business expenses under section 162 as necessary to the accurate determination of net income, with the result that the revenue "lost" by virtue of this provision is not reported as a "tax expenditure" to aid private enterprise. . . .
>
> To effect a "full accounting," then, we must first construct an ideal or correct income tax structure, departures from which will be reflected as "tax expenditures" in the National Budget.[49]

Bittker's main argument was that the full accounting for tax expenditures, as suggested by Surrey and implemented by the first Treasury report, was far from full and that the decisions regarding what to include and exclude in the list of tax

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47 *Id.* at 208–13. Shaviro would like to see a baseline in accordance with what Richard Musgrave described as the distributional function of the public sector, which, under Shaviro, "should be thought of as limited to acting on the basis of broad equitable considerations, such as those involving inequality or ability to pay." *Id.* at 209. Shaviro continued:

> There need be no implication that Surrey was right in thinking that the income tax system should not be used to pursue "spending-like" (that is, allocative) goals that are distinct from its main distributional purpose, such as by containing special preferences for investment in particular industries. There is no ex ante reason to think that income tax, in some set of cases, might not be the optimal instrument for pursuing some set of goals that lie[s] outside its core distributional function. The point is simply one of clarifying that any such rules do something different than what one otherwise might primarily have in mind when thinking about [] "the income tax."

Id.

48 Bittker, *supra* note 4, at 246.

49 *Id.* at 247–48.

expenditures were arbitrary. For example, the list of tax expenditures did not include structural pillars of our tax system, such as the progressive tax rate, the separate taxation of corporate income, and certain provisions that determine the timing of income and deductions. All of the preceding could potentially be recast as tax expenditures. The Treasury's 1969 report indeed admitted that "[t]he design of the list seems best served by constructing what seemed a minimum list rather than including highly complicated or controversial items that would becloud the utility of this special analysis,"[50] and Bittker viewed that approach as causing the analysis to be arbitrary and far from the "full accounting" Surrey was calling for.

Further, even if the Haig-Simons definition of income could be applied consistently and serve as a baseline, Bittker was concerned with how the baseline would be used with respect to elements of other areas in the tax world, such as the exclusion from taxable income of gifts, bequests, life insurance proceeds, and recoveries for personal injuries and wrongful death, accelerated depreciation deductions, special accounting privileges (such as installment sale reporting), the foreign tax credit, and many other similar items.[51] Other scholars criticized the choice of the Haig-Simons baseline because they believed the baseline should stem from elements of consumption tax. They argued that, although the federal income tax is not based on consumption tax, it has important consumption tax features, making it a hybrid system.[52] The practical implication of this argument is either that there is no feasible baseline or that the proper baseline should be based on consumption tax.[53]

As a response to the "baseline" problem, Seymour Fiekowsky, who was the Assistant Director of the U.S. Treasury Department's Office of Tax Analysis, proposed to redefine the tax expenditure analysis by abandoning the Haig-Simons baseline and instead limiting tax expenditures to those tax provisions that

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50 U.S. Dep't of the Treasury, 1968 Fiscal Report, at 330 (1969).

51 Boris I. Bittker, *Accounting for Federal "Tax Subsidies" in the National Budget*, 22 NAT'L. TAX J. 244, 252 (1969).

52 Chris Edwards, *Tax Expenditures and Tax Reform*, CATO INST. (July 25, 2023), https://www.cato.org/policy-analysis/tax-expenditures-tax-reform [https://perma.cc/Q5DL-EUH9] ("A consumption base is a better starting point to identify unjustified tax preferences, and a better model to guide tax reforms. The current federal 'income' tax is actually a hybrid, part Haig-Simons and part consumption, and this study argues that Congress should move toward the latter.").

53 Bartlett, *supra* note 4, at 420–21.

meet two questions: (1) whether the provision is inconsistent with the current structure of the tax law, and (2) whether any other government agency could administer an equivalent spending program at any comparable cost.[54] Following Fiekowsky's steps,[55] the JCT conducted a thorough study on the tax expenditure analysis in general, and the baseline problem in particular, and released a major report in 2008, in which it argued that the "baseline" approach has significantly demolished the effectiveness of the tax expenditures analysis as a whole.[56]

The JCT report called for abandoning the Haig-Simons baseline and adopting an alternative one.[57] In its new approach, and following Fiekowsky's suggestion, the JCT suggested dividing the tax expenditure analysis into two main distinct categories: tax expenditures in the narrow sense, or "Tax Subsidies," and a new category that would include a list of structural elements of the Code (that do not necessarily deviate from an identifiable baseline), materially affecting economic decisions and imposing substantial economic efficiency costs, or "Tax-Induced Structural Distortions."[58]

The Tax Subsidies category sought to catch specific tax provisions that are deliberately inconsistent with *identifiable* general rules of the *existing* tax code, such that there is no need to define (and compare) to a hypothetical normative tax baseline.[59] An additional condition was that the specified provision "collects less revenue than does the general rule."[60] On the other hand, the Tax-Induced Structural Distortions category was residual, created with the main purpose of listing important provisions that were previously flagged as tax expenditures but would escape such characterization under the new Tax Subsidies category.[61] This could occur when the provision in question could not easily be described as an exception to a current tax law because the general rule was not clear on its face.[62] An additional condition was that the specified provision has a significant effect

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54 Seymour Fiekowsky, *The Relation of Tax Expenditures to the Distribution of the 'Fiscal Burden,'* 2 CAN. TAX'N 211, 215–16 (1980).

55 *See* STAFF OF THE JOINT COMM. ON TAX'N, *supra* note 4, at 39.

56 *Id.* at 7–9.

57 *See generally id.*

58 *Id.* at 9–10.

59 *Id.* at 9, 39.

60 *Id.*

61 *See id.* at 9–10.

62 *Id.* at 40–41.

on the economy.[63] The two categories together were aimed to cover much of the same ground as did the "classical" tax expenditures analysis, and "in some cases extend the application of the concept further."[64]

For tax subsidies to overcome the baseline issue—primarily how to define the normative baseline, a deviation from which will result in a tax expenditure classification—the report suggested using an "identifiable general rule of the present tax law" as the base.[65] This modification would ensure that any provision which deviates from present tax law and collects less revenue than does the general rule would be labeled as a tax expenditure. The report suggested that such an "identifiable general rule of the present tax law" should closely correspond to the current reference tax baseline used by the Treasury report. The JCT anticipated that the Tax Subsidies category would comprise the most significant tax expenditures.[66]

Nonetheless, by removing the hypothetical normative base (originating from the Haig-Simons definition of income) and using the reference law baseline—such as the current tax rules—the JCT's suggested approach would not flag some of the most significant tax provisions (that under the "older" approach were tax expenditures) because they cannot easily be described as exceptions to a general rule of present law, since such a general rule is not clear from the face of the Code. The JCT provides deferral as an example.[67] In the years prior to the Global Intangible Low-Taxed Income mechanism, "deferral" allowed active foreign earnings of U.S. Multinational Enterprises (MNEs) to escape any U.S. tax until such earnings were repatriated to the United States (for example, in the form of a dividend). Under the "classic" tax expenditure analysis, deferral was flagged as a tax expenditure because the normative tax base originally was defined to treat all foreign earnings of U.S. MNEs as subject to current tax, while the deferral of active earnings was considered the exception.[68] Under the proposed JCT approach, such deferral would not have been classified as a tax expenditure (under the tax subsidy category), since present law (at the time of writing)

63 *Id.* at 10.
64 *Id.* at 39.
65 *Id.*
66 *Id.*
67 *Id.* at 10.
68 *Id.* at 41–42.

seemed ambiguous as to what exactly was the general rule for taxing foreign earnings.[69]

The JCT's answer to that ambiguity was the new category of Tax-Induced Structural Distortions. As noted, this category would include the structural elements of tax law (and not just mere deviations from an identifiable general tax rule, and thus not tax subsidies) that "materially affect economic decisions in a manner that imposes substantial economic efficiency costs."[70] The JCT suggested that this new category would be analyzed solely under economic efficiency principles and not from any normative perspective, such that no normative base would be necessary.[71]

The report explains that tax "deferral" of active foreign earnings should be classified as a tax expenditure (under the Tax-Induced Structural Distortion category) because it materially affects economic decisions mainly with respect to foreign versus domestic investment.[72] In this way, the JCT ensured that deferral and the like would stay under constant examination. Another example discussed was the different taxation of debt and equity, which generally encourages businesses to leverage their capital structures and, as such, materially affects economic decisions.[73]

Surprisingly, while abandoning the Haig-Simons baseline to avoid criticism and controversy, the JCT's new Tax-Induced Structural Distortions adopt, even if implicitly, a normative baseline that is grounded in income tax principles, rather than, for example, a consumption tax. Notwithstanding its stated goal of a value-neutral analysis, the JCT's new approach must face normative questions to determine whether a certain provision qualifies as a Tax-Induced Structural Distortion, such that it must be isolated and analyzed as a tax expenditure. Proponents of tax expenditures have normally argued that their preferences are facially justified and should not be subject to a cost-benefit analysis.[74] They would surely use the same arguments to claim that their preferences do not deviate from the existing rules nor materially affect the economy, dodging both the first and the

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69 *Id.* at 41.

70 *Id.*

71 *Id.*

72 *Id.* at 41–42.

73 *Id.* at 10.

74 *See, e.g.*, Fleming & Peroni, *A Critique of the "New Paradigm," supra* note 2, at 165–67.

second categories, respectively. This would merely replace one line of attack (the normative baseline) with another (what is the existing law or what materially affects the economy).[75] Due to the problems discussed above and other related issues, the JCT reversed its position in 2010 and abandoned its new approach, re-embracing the Haig-Simons baseline once again.[76]

Another attack on the use of the normative base is that it presumably suggests that "provisions that fall *outside* the implicit baseline of the tax expenditure budget (tax expenditures) are somehow corrupt, dangerous, and evil," and that "[t]hey should be changed as soon as possible to conform with the 'neutral' position."[77] This is not, however, what the tax expenditures analysis advocates for. The classification of an item as a tax expenditure does not in itself make that item either a desirable or an undesirable provision.[78] The classification is aimed to help Congress and the public identify items that are not part of the normative tax structure.[79]

B. Recasting Tax Expenditures as Direct Expenditures

Another major line of attack against the tax expenditures analysis is mainly associated with David Weisbach and Jacob Nussim. In a 2004 article,[80] Weisbach and Nussim argued whether a tax expenditure deviates from a certain baseline is in

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75 *See* Paul A. McDaniel & James R. Repetti, *Horizontal and Vertical Equity: The Musgrave/Kaplow Exchange*, 1 FLA. TAX REV. 607, 616 (1993).

76 *See* U.S. DEP'T OF THE TREASURY, OFF. OF TAX ANALYSIS, TAX EXPENDITURES 297 (2010), https://home.treasury.gov/system/files/131/Tax-Expenditures-FY2010.pdf [https://perma.cc/5YZL-TEMA] ("Identification and measurement of tax expenditures depends importantly on the baseline tax system against which the actual tax system is compared. The tax expenditure estimates presented in this chapter are patterned on a comprehensive income tax, which defines income as the sum of consumption and the change in net wealth in a given period of time.").

77 *See, e.g.*, Kahn & Lehman, *supra* note 4, at 1663.

78 *See* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 5.

79 *See id.*

80 *See generally* Weisbach & Nussim, *supra* note 4. In contrast, Zelinsky raised a similar but different argument:

> The core of my argument is that the institutions formulating and administering tax policy are more competitive and visible than their direct outlay counterparts because tax institutions are subject to more numerous and diverse constituencies than the specialized, limited-clientele organizations that design and implement direct government spending. Tax institutions, because of their greater visibility and more competitive nature, are less susceptible to interest group capture and possess greater legitimacy under pluralist criteria than their direct expenditure equivalents.

Zelinsky, *supra* note 2, at 1166.

fact an unnecessary inquiry and whether the particular tax expenditure is best operated through the tax system rather than through an alternative governmental spending program:

> [T]he decision to implement a "nontax" program through the "tax system" has little or nothing to do with tax policy. Instead, the tax expenditure decision, which we will also call the integration decision or the decision to combine tax and spending programs, is solely a matter of institutional design. It is about assigning projects such as tax collection, education, defense, or housing to specific units of government. Different groupings of activities will perform differently, and we should use those groupings that yield the best possible performance.
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> . . . .
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> . . . [O]ur theory focuses on institutional design–the question of how the government chooses to compartmentalize its functions. It is entirely irrelevant whether some piece of government policy complies with independent tax norms. If the underlying policy is held constant, there are no effects of putting a program into or taking a program out of the tax system even if doing so hurts or enhances traditional notions of tax policy. Welfare is the same regardless of whether the program is formally part of the tax system or is located somewhere else in the government. If we mistakenly look only at the tax system instead of overall government policy, we will draw the wrong conclusions. Putting a program into the tax system makes the tax system look more complicated, but there is unseen simplification elsewhere. The tax system will seem less efficient, but the efficiency of government policy is unchanged.[81]

Weisbach and Nussim's theory focuses on "institutional design" considerations, namely how the government chooses to divide its functions into units and which way will provide the best possible set of public policies and government services.[82] As such, it is irrelevant, as the argument goes, to examine whether a specific government policy complies with independent tax norms. Rather, one should consider whether the total welfare would have changed had the program been implemented somewhere else in the government and not in the Code. Weisbach and Nussim believed that the contention that the tax collection function should necessarily be separated from other functions of the government is not true in and of itself, and that there are good reasons for not separating it from other functions of the government.[83] Weisbach and Nussim's concern was that focusing

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81 Weisbach & Nussim, *supra* note 4, at 957–58.

82 *Id.* at 958.

83 *See id.* at 957–59.

on the tax system would blind policymakers from *overall* government considerations.[84]

While it might not make sense to charge the IRS with the responsibility of military defense, for example, it might be wise, as Weisbach and Nussim argued, to implement all federal welfare-type programs through the IRS.[85] The reason is that there are benefits to putting welfare and tax into the same organizational unit. Both programs rely on income, both require large-scale information and financial processing, and both are based on redistribution grounds.[86] As a result, implementing welfare programs with tax collection might actually result in an overall benefit in the form of efficacy and coordination. To Weisbach and Nussim, this emphasizes the main point that tax expenditures should not be judged through a tax policy lens but rather through a larger governmental perspective, taking into account the potential benefits of coordination between various types of government activities. To the extent that the administration of welfare programs does not require highly specialized operatives, such as those associated with military defense, for example, integrating them into the tax system might result in lower costs and other benefits of coordination.[87] Put differently, the only important question is which approach—administrating the program through the tax system or through a separate governmental unit—provides the best delivery mechanism.[88]

One significant problem with Weisbach and Nussim's argument is that their cost-benefit analysis requires an evaluation of the tax system and its functions, so that we can measure the effectiveness and cost of the tax expenditure in question when it is implemented in the tax system, and compare it against the effectiveness and cost of the same tax expenditure in the form of governmental spending. This, in turn, raises another question, as to who exactly would be responsible for evaluating the costs in both alternatives and how such evaluation would be conducted. In this context, a key question is whether the evaluation should consider other tax expenditures

84 *Id.* at 958.
85 *Id.*
86 *Id.* at 959.
87 *Id.*
88 *Id.* at 963–64.

that are currently implemented in the tax system. Clifton Fleming and Robert Peroni explain:

> [T]o determine whether a particular government subsidy, such as a deduction for medical expenses, is best delivered as a direct expenditure or as a subsidy through the tax system, we need to know the tax system's content and structure so that we can evaluate the effectiveness of the tax expenditure alternative and the costs it imposes on the tax system. The results of this evaluation must then be taken into account along with the costs and benefits of the direct expenditure alternative. One way to do this analysis is to assume that the contemplated tax expenditure would occur in an income tax regime identical to the present system with its irrational and inefficient load of tax expenditures. This would distort the analysis, however, because the systemic costs (in terms of complexity, enforceability, and possible unfairness) of a proposed tax expenditure would likely appear much smaller if the tax expenditure were evaluated as just one item among many others that were also dubious but that were assumed to be constant.[89]

As noted, if we want to evaluate the real costs of tax expenditures and their effects on the tax system, we should not just add the marginal costs of an additional tax expenditure. Rather, we should measure the cost of tax expenditures as a whole. This could only be done by comparing the current tax system with all the tax expenditures that are already an integral part of it, to a tax system with *none* of those provisions. By doing so, we would find the real cost of tax expenditures, rather than the marginal additional cost of one expenditure, added to a tax system already full of existing tax expenditures. This also means that in order to evaluate the cost of a single tax expenditure, we must compare the cost that it would impose on the tax system as if it were the first and only one in the system. This contradicts what Weisbach and Nussim had in mind. They wanted us to examine the cost of adding an additional tax expenditure into a system already full of them. The reason for using a tax expenditures-free system as the subject of comparison, rather than one that already has other tax expenditures implemented in it, is that such system would be the most efficient form of a tax system. Unfortunately, the problem in this exercise—structuring a theoretical tax system free of tax expenditures for comparison—is that it would take us back to the discussion of what a normative baseline should be or, more specifically, what

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89 Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*, *supra* note 2, at 469–70.

constitutes the normative and most efficient tax system. This is exactly the discussion Weisbach and Nussim wanted to avoid.[90]

One important conclusion from the above is that tax expenditures have an *overhead* cost, which the tax system *accrues* just by having them in it. That cost is in the form of a reduction in the system's efficacy and is the result of the several unique characteristics of tax expenditures. First, tax expenditures are by nature inequitable, especially if in the form of deductions, where tax expenditures are more valuable to high-income earners than to low-income earners. In many cases, these inequitable provisions escaped real scrutiny when first enacted and remain part of the Code only because repealing them might be too complicated (although they would not have been enacted were they properly considered in the first place).[91] In that sense, tax expenditures are characterized as "being there to stay there," hiding in plain sight with other structural tax features of the Code. To that extent, it is also difficult to keep tax expenditures within their "proper" bounds, and they are often being used by taxpayers to shelter income. Take as an example the recently enacted twenty percent pass-through deduction under Section 199A. Although the deduction's declared goal was mainly to benefit small and medium-sized businesses (by limiting it to taxpayers with taxable income lower than the threshold and explicitly excluding certain lines of business, such as the performance of services in the fields of health, law, athletics, and art), nevertheless some excluded taxpayers planned to claim the deduction by "cracking apart" otherwise ineligible excluded activities' or services' revenue streams from eligible revenue streams, such that as much income as possible would qualify for the deduction.[92] As a result, the Treasury had to issue proposed regulations directly aimed at restricting that "cracking" strategy (as well as other tax-planning strategies). Obviously, such an effort has a significant cost beyond the general costs of running

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90 *Id.*

91 *See* SURREY, PATHWAYS, *supra* note 2, at 133–34.

92 *See* David Kamin et al., *The Games They Will Play: Tax Games, Roadblocks, and Glitches Under the 2017 Tax Legislation*, 103 MINN. L. REV. 1439, 1465–66 (2019). Law firms could presumably use the "cracking" strategy to claim the deduction. Partners in a law firm would set up a separate real estate investment trust (REIT). *Id.* at 1466. The REIT, which is eligible for the deduction, "would hold all of the law firm's real estate assets. Then the REIT could charge the law firm the maximum rent that could plausibly be justified for use of [real estate] assets . . . in order to transform some of the law firm's legal service income into rental income earned by the REIT [and a deduction to the law firm]. This rental income would then qualify for the pass-through deduction." *Id.*

the IRS, such as promulgating a dedicated set of regulations and ensuring taxpayers' compliance (i.e., through audits). As a result of greater incentives for taxpayers to "cheat" the system (which could be the result of certain tax expenditures), such cost is increased. Notably, even the regulation seems to leave the door open for a number of tax-planning maneuvers that will provide the benefits of the pass-through deduction to unintended taxpayers.[93]

Second, due to their upside-down nature (when in the form of deductions) and their application to a limited group of taxpayers, tax expenditures are, in fact, incentives that are provided in a form that directly contradicts Congress' initial intention when it established a *progressive* tax system. As such, tax expenditures are harmful to the equity and structure of the tax system, as explicitly set by Congress (since no tax expenditures are enacted with the principal purpose of further benefiting the rich).[94]

Third, tax expenditures, by dividing the consideration and the administration of government spending programs, confuse and complicate the tax legislative process. Generally, the House Ways and Means Committee and the Senate Finance Committee govern tax legislation.[95] These committees would normally not consider the substantive areas involved in most tax expenditures; such provisions charge them with handling matters that are outside of their scope of responsibilities, impeding the decentralization of the legislative process.[96] Similarly, additional costs are imposed on the already underfunded IRS,[97] the expertise of which does not extend to these other areas.[98]

Fourth, tax expenditures have a negative influence on the notion of fiscal citizenship to the extent the latter is linked to taxpaying rather than tax return filing. Larry Zelenak suggests that perception matters in this case and that simply not labeling transfer programs as part of the tax system (and thus increasing the number of *taxpaying* citizens, although they receive net transfers from the federal government), could have a great

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93 *Id.* at 1463.

94 *See* SURREY, PATHWAYS, *supra* note 2, at 137.

95 *See* Tax Analysts, *Reforming Tax Expenditures*, YOUTUBE, at 09:35–10:14 (Apr. 14, 2021), https://www.youtube.com/watch?v=-pRW-sxCa2I [https://perma.cc/TT4G-UQ42].

96 *See* SURREY, PATHWAYS, *supra* note 2, at 142.

97 Emily Horton, *Underfunded IRS Continues to Audit Less*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 18, 2018, 10:30 AM), https://www.cbpp.org/blog/underfunded-irs-continues-to-audit-less [https://perma.cc/R24Q-HH7F].

98 SURREY, PATHWAYS, *supra* note 2, at 143. As discussed, this in turn also creates the problem of a lack coordination between tax expenditures and other substantive programs.

positive influence on the social contract between the people, the state, and the tax system as a whole.[99]

Fifth, tax expenditures do not improve the tax system. To the contrary, they are likely to damage it significantly by making the tax system, which is already complicated as is, even more complex. Tax expenditures, mixed with the tax code's structural provisions, lead to confusion and the "blurring of concepts and objectives."[100]

In economic terms, one might try to describe this as the rule of "*diminishing* costs," where the marginal cost of each tax expenditure is *reducing*, rather than *increasing*.[101] This is, in essence, the most dangerous element of tax expenditures: the more we have in our tax code, the cheaper (and more tempting) it would be to implement an additional one (rather than trying to remove them entirely). As Surrey put it:

> It is no answer to say, as do some cynics, that since the tax system today has so many special provisions there should be no objection, when worthwhile programs are involved, to adding still more to the heap. Rather, the effort should persist to contract those existing special provisions that are improper and wasteful. We know from long experience that provisions can be enshrined in tax laws far past their usefulness and long after their defects become clear. We should not, when alternatives are present, freeze in more special provisions, especially since programs in the complex areas of social policy to which many tax incentive proposals relate are essentially experimental in nature.[102]

To better understand the "overhead" cost on the tax system that is associated with tax expenditures, it might be wise to look at the earned income tax credit (EITC) as an example (in addition to the aforementioned 199A deduction). In essence, the EITC is a welfare system that is integrated into the tax system. Weisbach and Nussim would like us to simply "compare the benefits of having two programs and two administrative agencies . . . to the benefits of having a single agency administering both programs," but they failed to consider the

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99 Lawrence Zelenak, *The American Families Plan and the Future of the Mass Income Tax*, 172 TAX NOTES 1277, 1279–80, 1283–85 (2021).

100 SURREY, PATHWAYS, *supra* note 2, at 146.

101 *See* Chuck Marr & Brian Highsmith, *Reforming Tax Expenditures Can Reduce Deficits While Making the Tax Code More Efficient and Equitable*, CTR. ON BUDGET & POL'Y PRIORITIES (Apr. 15, 2011), https://www.cbpp.org/research/reforming-tax-expenditures-can-reduce-deficits-while-making-the-tax-code-more-efficient [https://perma.cc/2746-X955].

102 *Id.*

overall effect on the tax system resulting from the use of the system for purposes other than distribution.[103] Arguably, the more the tax system is used to administer other programs, the more lucrative it is to deceive it. In the EITC context, taxpayers are now incentivized to cheat the system so that they are eligible for the credit. This could be done by differing deductions so that a taxpayer's taxable income would be just above the threshold to make them eligible for the refundable credit.[104] Weisbach and Nussim would argue that the same incentives to cheat exist even if a separate governmental agency administers the program, and that similar audit and enforcement costs would be imposed. I do not believe this to be true or that the costs are comparable. Deceiving the tax system might have unpredictable costs, especially if and when the system is used to implement more spending programs. Deceiving a certain welfare program would have a more limited effect. Furthermore, the integrity of the tax system is a key element of a functioning government and is relevant to a much larger part of the population—all taxpayers, rather than only those who use the welfare program—and, as such, any impairment of the system's integrity might have an unpredictable and unmeasurable result.

Weisbach and Nussim's approach seems to be based entirely on weighing the benefits of governmental simplification and coordination from administering a certain program through the tax system, against the benefits of specialization that are the result of administering the same program through a dedicated, separated unit.[105] By doing so, Weisbach and Nussim ignore the "overhead" cost with respect to the other tax expenditures in the tax system, which would otherwise be ultimately focused on revenue collection.[106]

Separately, Weisbach and Nussim argue that their approach would save time since, under their cost-benefit approach, one can simply skip over the question of whether a certain tax provision is or is not an element of a normative tax system and move directly to deciding whether the tax system is the best delivery

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103 *See* Weisbach & Nussim, *supra* note 4, at 957.

104 *See* James Edward Maule, *No Thanks, Uncle Sam, You Can Keep Your Tax Break*, 31 SETON HALL LEGIS. J. 81, 88–89 (2006).

105 *See* Weisbach & Nussim, *supra* note 4, at 983–88.

106 *See generally* Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*, *supra* note 2, at 471.

mechanism.[107] Nonetheless, the determination of whether the tax system is indeed the best delivery system in and of itself requires a distinct, time-consuming examination, as noted above. It might be difficult to determine whether a delivery through the tax system is more cost-efficient than delivery through a separate government unit. Advocates of tax incentives and subsidies would likely still engage in a heated debate regarding whether the provision at issue is most fitted to be administered through the tax system, rather than through any other government unit.[108] Currently, those advocates focus on the first question of the tax expenditures analysis, specifically whether the provision in question is part of the normative baseline. They would now shift their attention to argue that it is more efficient to administer the program through the tax system, but there is no reason to believe that such a debate would be any shorter or conserve time.[109]

In addition, one of the key elements of the current tax expenditures analysis is that in considering whether to administer a certain spending program through the tax system or through a separate government agency, one must first determine (1) whether it is even possible to recast the tax expenditure as an analogous direct spending program and (2) whether such a direct spending program is *desirable*.[110]

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107 *Id.* at 468–69, 475–76.

108 *See id.* at 480.

109 *See id.* at 475–76.

110 *Id.* at 473–74. Fleming and Peroni provide the Section 103 exemption from interest on state and local government bonds as an example:

> [T]he direct expenditure analogue of the section 103 exemption for interest . . . would be a program of cash payments divided between governmental borrowers and wealthy individual investors with the portion received by the investors being windfalls that cause no reduction in the interest costs of the governmental borrowers. Not only would this be wasteful, it would also be objectionable from a distributional standpoint because the windfall payments would go overwhelmingly to high-income taxpayers. A direct expenditure program displaying these characteristics of waste and inequity would have little (hopefully no) chance of being enacted. With these flaws exposed by TEA's mandatory recasting of the section 103 exemption into a direct expenditure program, the next question would be whether the simplification and coordination gains that might result from putting the program into the tax system—and this is the focus of Weisbach's and Nussim's analysis—would be large enough to transform an appalling direct expenditure program into an acceptable tax provision. The answer is likely no but Weisbach and Nussim seem to regard the inquiry as unimportant. Instead, they apparently view the issue of simplification and coordination gains as determinative when we believe that it should be only one factor in a broader analysis.

Id. at 474 (footnotes omitted).

Surrey explained that, given a congressional decision to provide assistance, the relevant question would be "when should it be furnished through a direct expenditure program and when through a special tax program?"[111] Presumably, such an analysis would also have to be conducted under Weisbach and Nussim's suggestion, just at different stages of the legislative process.

Finally, the tax expenditures analysis is important in identifying taxpayers' real "economic" income. Stated otherwise, when the analysis characterizes a tax expenditure as such, it treats the expenditure as an additional tax liability paid by the taxpayers and then returned to them in the form of a check from the government. One can think of this as a two-step process. First, taxpayers are deemed to have computed their tax liability by applying the statutory rates to their *economic income*. Each taxpayer's "economic tax check" then forwards the resulting tax liability to the government. Then the government remits to the taxpayer a check for the relevant subsidies for which the taxpayer qualifies. This "tax subsidy check" is the result of provisions in the Code that are tax expenditures.[112] The "economic" income is solely the result of the taxpayer's wealth, and in order to isolate it from the taxable income, we need to be able to identify the various applicable tax expenditures.[113]

Determining the taxpayer's economic income is important so that economists can examine the inequalities that are grounded in the structure of the tax system rather than in its expenditure features.[114] McDaniel further explained that a failure to differentiate the tax component from the spending component of the tax system has led to practical difficulties, such as classifying *economic* inequities that are the result of tax spending as economic inequities that are in the structural elements of the tax system.[115] That is not true. Only if, after restoring tax expenditures to the tax base, taxpayers with the same amounts of economic income do not pay the same amounts of economic tax, then this signals possible defects in the structural elements of the tax system. Surrey himself had a similar notion in mind:

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111 SURREY, PATHWAYS, *supra* note 2, at 129, 180–81; s*ee also* SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 26.

112 Paul R. McDaniel, *Identification of the "Tax" in "Effective Tax Rates," "Tax Reform" and "Tax Equity,"* 38 NAT'L TAX J. 273, 273 (1985).

113 *See id.* at 273–74.

114 *See id.* at 277–78.

115 *See id.* at 277. Of course, the spending program by itself (in the form of credit, deduction, etc.) "may be an unwise, ineffective, or inefficient subsidy." *Id.*

> The tax expenditure concept in essence considers these special provisions as composed of two elements: the imputed tax payment that would have been made in the absence of the special provision (all else remaining the same) and the simultaneous expenditure of that payment as a direct grant to the person benefited by the special provision. The exemption, deduction, or other type of tax benefit is thus seen as a combined process of assumed payment of the proper tax by the taxpayer involved and an appropriation by the Government of an expenditure made to that taxpayer in the amount of the reduction in his actual tax payment from the assumed payment — that is, the tax reduction provided by the special provision.[116]

Obviously, in real life, the process of sending a check (the "economic tax check") and receiving a check (the "tax subsidy check") to and from the government is collapsed into a single step by which the taxpayer nets the two checks in the process of completing an income tax return and paying her remaining tax liability or claiming a refund. The tax expenditures analysis is crucial for determining economic income in order to discover real defects in the normative tax structure.[117] As such, the current tax expenditures analysis is an important tool to identify economic income and a tool that could be lost if Weisbach and Nussim's approach were to be adopted.

III. TAX EXPENDITURES ANALYSIS AND HORIZONTAL EQUITY

Tax expenditures are not geographically limited to the United States. The concept of the tax expenditure analysis attracted international attention shortly after its presentation in the United States. In 1976 and 1977, the International Fiscal Association and the International Institute of Public Finance raised the importance of the concept in their annual meetings, and shortly thereafter, a number of countries, including Canada and the United Kingdom, adopted it.[118] Some regard the recent "state aid" cases as an attempt by the European Commission to apply normative tax rules on member states, which, in a sense, is similar to the tax expenditures analysis.[119]

A survey in Germany, Italy, and Israel showed that in those countries, tax expenditures are evaluated against a constitutional

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116 SURREY, PATHWAYS, *supra* note 2, at 6–7.

117 *See* McDaniel, *supra* note 112, at 276.

118 SURREY & MCDANIEL, TAX EXPENDITURES, *supra* note 2, at 2.

119 For a thorough discussion on such an attempt and the related problems associated with it, see Ruth Mason, *Identifying Illegal Subsidies*, 69 AM. U. L. REV. 479 (2019).

norm of equality.[120] There, tax expenditures are conceptualized as unequal tax treatments of equal taxpayers that are disproportionate to their aims and have no rational basis.[121] This experience of evaluating tax expenditures against a norm of equality is helpful because it is unnecessary to measure tax expenditures against a theoretical baseline. Instead, each tax expenditure is a line drawn to distinguish between taxpayers and can be assessed on its own terms by comparing the treatment of different groups of taxpayers against a background norm of equal protection. In fact, and as will be discussed below, I believe this was Surrey's original intention with respect to the tax expenditure analysis. With respect to any new and existing tax expenditure that deviates from the principle of horizontal equity, Congress should consider whether its purpose justifies such deviation. More importantly, Congress should determine whether such deviation is proportional, namely whether it causes the least damage to horizontal equity. This type of analysis could be a new process for JCT staff, in addition to the determination of the costs of tax expenditures in foregone revenue.[122]

Similarly, tax expenditures in the United States should be analyzed as to whether they achieve *fairness* in the tax system. The analysis should identify departures from horizontal equity, such as the idea that taxpayers with equal abilities to pay should bear equal tax burdens.[123] Since the United States does not have "constitutionalized" horizontal tax equity principles as some other countries do, a theoretical comprehensive income based on the Haig-Simons definition of income serves as a second-best solution to guarantee fairness.[124] Such a tax expenditure analysis

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120 *See generally* Reuven Avi-Yonah, *Should U.S. Tax Law Be Constitutionalized? Centennial Reflections on Eisner v. Macomber (1920)*, 16 DUKE J. CONST. L. & PUB. POL'Y 65, 70–81 (2021) (discussing the history and the evolution of how tax expenditures are viewed in these countries).

121 *See generally id.* at 69.

122 *Id.* at 88 ("A report along these lines may persuade members of Congress to stop listening to lobbyists and cut back on some of the more egregious tax expenditures.").

123 *See* Fleming & Peroni, *Reinvigorating Tax Expenditure Analysis*, *supra* note 2, at 456–58. The ability-to-pay concept in and by itself is regarded as a longstanding concept in the U.S. federal tax system. *See id.* at 456.

124 SURREY, PATHWAYS, *supra* note 2, at 31 ("The prime objective of income tax reform is to achieve greater fairness in the federal tax system and thereby restore the confidence of the public in that system. This confidence has been seriously diminished. What we know and read about public attitudes indicates a lack of trust in the tax system, a belief that there are privileged groups escaping taxes while the average person must pay his tax bills. This view of the tax system, and in particular the income tax, is — unfortunately — justified by the actual facts.").

could resemble the Treasury's general explanations of the administration's fiscal year revenue proposals report, which is published yearly to discuss the administration's newly proposed revenue provisions.[125]

Surrey was specifically concerned with tax expenditures because he believed that they took advantage of the tax system's vulnerability:

> The tax expenditures tumble into the law without supporting studies, being propelled instead by cliches, debating points, and scraps of data and tables that are passed off as serious evidence. A tax system that is so vulnerable to this injection of extraneous, costly, and ill-considered expenditure programs is in a precarious state from the standpoint of the basic tax goals of providing adequate revenues and maintaining tax equity. It is therefore imperative that the process and substance of these tax expenditures be reexamined.[126]

Surrey's end goal was grounded in principles of fairness and horizontal equity. As the economist Alvin Rabushka (of the flat tax) said, the federal tax system had become "the most discriminatory body of law in a country that has tried to exterminate discrimination everywhere else in society."[127] For Surrey, the fairness of a tax system hinges on how well it achieves horizontal and vertical equity.[128]

Horizontal equity means that the tax burden on similarly situated taxpayers should be equal, while vertical equity means that taxpayers with different incomes should pay different amounts of tax proportional to the differences in their incomes.[129] Accordingly, the dominant goal of a tax reform should be that the tax system adhere to principles of fairness and horizontal equity.[130] Surrey noted that the principle of horizontal equity is the backbone of the income tax and is an "aspect inherent" in the Haig-Simons definition:

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125 *Revenue Proposals*, TREASURY.GOV, https://home.treasury.gov/policy-issues/tax-policy/revenue-proposals [https://perma.cc/YZ7K-A9GT] (last visited Sep. 28, 2024).

126 SURREY, PATHWAYS, *supra* note 2, at 6.

127 Ryan J. Donmoyer, *Flat Tax Strategy: The IRS as Poster Boy for Tax Reform*, 77 TAX NOTES 1305, 1305 (1997); *see, e.g.*, Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Sep. 27, 2020), https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html [https://perma.cc/3336-JL4T].

128 Martin J. McMahon Jr., *2018 Erwin N. Griswold Lecture Before the American College of Tax Counsel: Tax Policy Elegy*, 71 TAX LAW. 421, 424 (2018).

129 Fleming & Peroni, *A Critique of the "New Paradigm," supra* note 2, at 158.

130 *See* SURREY, PATHWAYS, *supra* note 2, at 31.

> To a very large degree the analysis under the income tax flowed from the concept of horizontal equity under the tenets of that tax, an aspect inherent in the Haig-Simons definition of income. Such a concept is clearly relevant to taxes that are applied in terms of an individual's total position, as is the normative model of an individual income tax.[131]

The difficulty is the determination of who is "similarly situated." Ideally, "two taxpayers with equal incomes, *however derived*, should pay equal income taxes."[132] However, tax expenditures make things much more complicated. For example, is a working taxpayer who earns $100 of wage compensation "similarly situated" to a taxpayer who receives $100 of welfare benefits? Would a taxpayer who consumes $100 of food be considered "similarly situated" to a taxpayer who consumes $100 of iPhone games? Answering these questions requires a discussion of social policies, and the tax expenditure analysis should not avoid such a discussion but rather provide the basis for discussing it. Take, for example, the biggest item in the current tax expenditure analysis: the exclusion of employer contributions for medical insurance premiums. Under current law, employer-paid health insurance premiums and other medical expenses (including long-term care) are not included in an employee's gross income even though the employer can deduct these as a business expense.[133] This exclusion is the largest tax expenditure in the federal budget, costing over $3.44 trillion from 2024 to 2033.[134]

This exclusion also means that employees who work for an employer that provides such benefits receive a tax subsidy by not having to include the employer's contribution in their income. On the other hand, self-employed individuals and employees who do not receive health benefits from their employer generally must pay for health insurance and medical care—with limited tax benefits offered to them.[135] Since this tax expenditure is in the form of an exclusion, it is, in effect, regressive since tax rates rise with income. Thus, high-income taxpayers benefit most from the

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131 *Id.* at 26–27.

132 McMahon, *supra* note 128, at 424 (emphasis added).

133 *See* I.R.C. § 106(a).

134 TAX EXPENDITURES REPORT, *supra* note 3, at 33 tbl.3.

135 *See* GARY GUENTHER, CONG. RSCH. SERV., RL33311, FEDERAL TAX TREATMENT OF HEALTH INSURANCE EXPENDITURES BY SELF-EMPLOYED: CURRENT LAW AND ISSUES FOR CONGRESS 1–2, 5–7 (2009).

exclusion.[136] These are the types of inequalities that a horizontal equity-focused tax expenditure analysis would address.

Another example is the deductibility of home mortgage interest and local property.[137] Notwithstanding the general rule that expenses incurred in relation to untaxed investment, such as the investment of purchasing an owner-occupied home, are not deductible, current law generally allows an owner or occupant to deduct mortgage interest paid on their primary residence.[138] Additionally, an owner or occupant may take a deduction for local property taxes paid on real property (the 2017 tax reform capped the deductibility of any taxes paid in any taxable year, including for local property taxes, to $10,000).[139] The combined cost of these tax expenditures is roughly $1.28 trillion from 2024 to 2033.[140]

These deductions create an unjustified distinction between homeowners who can claim them and renters who cannot. Homeowners also benefit from the exclusion of the imputed income from home ownership (worth $1.95 trillion from 2024 to 2033).[141] The alleged purpose of these deductions is to promote home ownership; however, empirical research shows that these deductions may have a larger effect on the *size* of homes purchased rather than on the decision to become a homeowner.[142] In other words, these deductions are inefficient and ineffective at achieving their stated purpose, as they disproportionately benefit wealthier individuals in purchasing more expensive property. Renters do not enjoy similar tax benefits. Permitting deductions only for mortgaged homeowners is unfair to renters and is not predicated on a rational distinction between the two consumer groups. Whether one is paying a mortgage or paying rent, they are paying for housing all the same. Congress should allow similar deductions for renters or repeal such deductions to comply with horizontal equity.[143]

Some argue that this tax expenditure is justified based on some non-tax bases, such as supporting the existing system of employer-provided insurance. Empirical literature, however,

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136 *See id.* at 5.

137 *See* I.R.C. § 163(h)(3).

138 *Id.*

139 *See* I.R.C. § 164(a).

140 *See* TAX EXPENDITURES REPORT, *supra* note 3, at 24 tbl.1.

141 *Id.*

142 *See* MARK P. KEIGHTLEY, CONG. RSCH. SERV., R41596, THE MORTGAGE INTEREST AND PROPERTY TAX DEDUCTIONS: ANALYSIS AND OPTIONS 14–15 (2014).

143 Avi-Yonah, *supra* note 121, at 121–22.

questions whether this tax expenditure is necessary to maintain a functional health system in the United States.[144] Congress should "repeal the expenditure and include premiums as income or let people who do not receive such employer-sponsored benefits create equivalent tax-free health savings accounts" to achieve horizontal equity.[145] A tax expenditure analysis could raise the relevant competing social policies and values related to this tax expenditure that will allow Congress, and the public, to make that decision.[146]

Basing the tax expenditures analysis on fairness and horizontal equity considerations would shift the discussion from secondary questions of what the normative base is or what existing law says on a certain issue, to the primary question of what is fair and right. Such discussion should be much more accessible to the general public and would not necessarily require prior tax knowledge. This, in turn, will make the analysis more

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144 *See id.* at 118 ("[I]t is unlikely that medium and large firms will wholesale exit the employer-provided insurance [even if this tax expenditure were to be eliminated] because of other non-tax benefits, such as the negotiating power obtained with group size, benefits of group purchase, and ease of plan choice and administration. Second, when the scale of the non-group market is dramatically increased by individuals leaving employer-provided insurance, the non-group market might function better and provide lower prices. Besides, the promotion of the employer-sponsored insurance system is not necessarily a benefit to society because it distorts the labor market by limiting job-to-job mobility and warping retirement decisions."); *see also* Jonathan Gruber & Brigitte C. Madrian, *Health Insurance, Labor Supply, and Job Mobility: A Critical Review of the Literature* 7 (Nat'l Bureau of Econ. Rsch., Working Paper No. 8817, 2002) (arguing that the economic effects of this tax expenditure are detrimental to the job market because many employees do not leave their jobs due to the availability of health insurance, even though they would prefer otherwise).

145 Avi-Yonah, *supra* note 121, at 119.

146 Scholars have suggested that any proposed change in the tax system in general, whether or not such change pertains to a tax expenditure provision, should be viewed in the prism of fairness and equity considerations. In their paper, Alice Abreu and Richard Greenstein claim that the tax system in its entirety, not just tax expenditures, should be examined based on social values and policies:

> It should be replaced with a view that acknowledges that social values are necessarily intrinsic to the tax system. The reason is not that tax expenditures *qua* tax expenditures are a proper part of the tax system and may offer the best or most efficient delivery of the intended benefit, as Dr. Joseph Pechman and some noted scholars have argued. We take no position on the ongoing debate between scholars who embrace the concept of tax expenditures and those who urge its abandonment on pragmatic or efficiency grounds. We argue instead that the bifurcated view of the tax system should be replaced with a unified view that acknowledges the influence of social values and the promotion of social policies throughout the tax system, and not only through tax expenditures.

Alice G. Abreu & Richard K. Greenstein, *Rebranding Tax / Increasing Diversity*, 96 DENV. L. REV. 1, 18 (2018).

effective as Congress would be concerned with enacting tax benefits that are equitable since the public is informed—and efficient—as the time spent on deliberation would be dedicated to on-point, important questions of fairness.

IV. CONCLUSION

Tax expenditures are "revenue losses attributable to provisions of the Federal tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability."[147] The first Assistant Secretary for Tax Policy, Stanley S. Surrey, coined the concept in the late 1960s, and it was codified by the Congressional Budget and Impoundment Control Act of 1974, which requires that a list of tax expenditures be included in the U.S. budget.[148] For practical reasons, the concept relies on the Haig-Simons definition of income as the baseline (while acknowledging that not all deviations from Haig-Simons are treated as tax expenditures), but that does not seem to be Surrey's original intent.

This paper is an attempt to bring the debate on tax expenditures back to where it started. Surrey was not mainly focused on which definition of the income tax should be used as the baseline against which tax expenditures are measured. Rather, he cared about the way tax expenditures distinguish between taxpayers based on criteria other than ability-to-pay, resulting in unfairness and the impairment of horizontal equity. We should share those same concerns.

147 I.R.C. § 106(a).

148 William McBride, *A Brief History of Tax Expenditures*, TAX FOUND. (Aug. 22, 2013), https://taxfoundation.org/research/all/federal/brief-history-tax-expenditures/ [https://perma.cc/8PTK-98AZ].

Garland v. Cargill: It's a Duck! Except at the Supreme Court . . .

Maureen Johnson

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Garland v. Cargill: It's a Duck! Except at the Supreme Court . . .

Maureen Johnson[*]

Garland v. Cargill *may go down as one of the most notorious cases ever handed down by the Supreme Court. By a 6-3 tally, "bump stocks"—which essentially turn semi-automatic weapons into machine guns—were deemed outside the purview of the National Firearms Act of 1934 (NFA). Initially, the Bureau of Alcohol, Tobacco, Firearms, and Explosives (ATF) determined that bump stock-converted weapons did not fall within the statutory definition of a machine gun. Amidst a bipartisan outcry following the 2017 Las Vegas Massacre, the ATF changed course, determining that bump stock conversions were indeed "machine guns" and therefore prohibited by the NFA. In her dissent, Justice Sotomayor called it like it was: "When I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck."*

Whether intended or not, Cargill *greenlights the path by which would-be assassins and insurrectionists can easily and legally arm themselves with the functional equivalent of machine guns.* Cargill *also enables both madmen and common criminals to up their firepower to match or even best that of law enforcement. While Congress presumably could reinstate the ban, that window could be closing under the "dangerous and unusual" Second Amendment carveout. Gun lobbyists are already floating arguments that, so long as an item is readily commercially available, it is not "unusual," and therefore protected against categorical prohibition.*

This Article argues for a change in the social and legal rhetoric surrounding gun reform to center indirect victims. Surprisingly, that corresponds to historical limitations on the scope of the Second Amendment. Of course, the individual and societal right to be free from undue terror needs to be balanced against the right to bear arms. That balance existed at the Founding. The open issue regarding the continued legality of bump stocks arguably offers the perfect baby step to return to the ideals of the Founders, set aside tribalism, and come together for the common good.

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* Maureen Johnson is an assistant visiting clinical professor at both the University of California, Irvine (UCI) School of Law and Seattle University School of Law. She thanks her peers, specifically including Professors Sha-Shana Crichton, Gabrielle Marks Stafford, and Todd Stafford. She also thanks her students. The impetus for this Article arose from her UCI upper-division writing seminar, exploring the intersection of social and legal rhetoric in pivotal Supreme Court decisions pertaining to civil rights.

I. INTRODUCTION

Garland v. Cargill may go down as one of the most perplexing and inherently dangerous cases ever handed down by the Supreme Court. In a 6-3 tally, "bump stocks"—which essentially turn semiautomatic weapons into machine guns—were deemed outside the purview of the National Firearms Act of 1934 (NFA).[1] The dispute arose from shifting interpretations of the NFA by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF).[2] Initially, and despite a 1968 amendment specifically targeting conversions, the ATF determined bump stock-converted weapons did not fall within the statutory definition of a machine gun.[3] That changed on a dime following the 2017 Las Vegas Massacre. A killer, holed up on an upper floor of the Mandalay Bay Resort, used bump stocks to shoot over a thousand rounds, targeting attendees at a country music festival.[4] Fifty-eight were left dead, with over eight hundred others injured.[5]

Amidst bipartisan outcry, the ATF did what it should have done from the outset. The ATF determined bump stock conversions, which drastically raise the rapid-fire potential of semiautomatic weapons, were indeed "machineguns" and therefore prohibited by the NFA.[6] "Drastically" is not an overstatement. Matching the firepower of machine guns, bump stock conversions can fire at a rate of up to eight hundred rounds per minute with a single pull of the trigger.[7] In her dissent, Justice Sotomayor called it like it was, in what would become an instant classic in terms of Supreme Court rhetoric: "When I see a bird that walks like a duck, swims like a duck, and quacks like a duck, I call that bird a duck."[8]

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1 Garland v. Cargill, 602 U.S. 406, 412–14 (2024).

2 *Id.*

3 *See infra* Section II.B.

4 Miles Kohrman, *The Las Vegas Mass Shooter Had 13 Rifles Outfitted with Bump Stocks. He Used Them to Fire 1,049 Rounds.*, THE TRACE (Aug. 3, 2018), https://www.thetrace.org/newsletter/las-vegas-mass-shooting-bump-stocks-route-91/ [https://perma.cc/K47K-R6KL].

5 Khaled A. Beydoun, *Lone Wolf Terrorism: Types, Stripes, and Double Standards*, 112 NW. U. L. REV. 1213, 1214–15 (2018) (discussing the Las Vegas Massacre and "lone wolf" killings); *see also* discussion *infra* Section II.A.

6 There are apparently three ways to properly spell "machine guns." The NFA uses "machineguns" while the more common spelling is "machine guns." It is also proper to hyphenate. This Article uses the more common two-word spelling, except when quoting a source. *See Cargill*, 602 U.S. at 413.

7 *Cargill*, 602 U.S. at 434 (Sotomayor, J., dissenting).

8 *Id.* at 430. The author wishes to give a shout-out to Ryan Ghassemi, a student in her UCI class whose final project was drafting an amicus brief in *Cargill*. The first words

Notably, Justice Alito's concurrence even acknowledged "[t]here can be little doubt that the Congress that enacted [the NFA] would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock."[9] Justice Alito punted the ball to Congress, suggesting it remedy the situation by amending the NFA to specifically include bump stocks.[10] Given the log jam in Congress, that suggestion had little more than a hope and a prayer. Nor is it clear amending the NFA resolves the issue.[11] As noted in *District of Columbia v. Heller*, and discussed in passing at oral argument in *Cargill*, the constitutionality of the NFA has yet to be challenged at the Supreme Court.[12] But such challenges are already percolating in the lower courts. At issue is the "dangerous and unusual" Second Amendment carveout that long has been presumed to cover the NFA's prohibition on machine guns. Yet, as Justice Breyer warned in his dissent in *Heller*, this exception is cast in the conjunctive, meaning that a weapon must be both dangerous *and* unusual.[13] In other words, once a dangerous weapon becomes readily available, it is no longer "unusual" and can no longer be categorically prohibited. That argument gains traction every day and every dollar that bump stocks flood the

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of his brief, turned in well before *Cargill* was handed down, foreshadowed Justice Sotomayor's dissent: "If it walks like a duck, if it talks like a duck, it's a duck."

9 *Id.* at 429 (Alito, J., concurring) (citing 26 U.S.C. § 5845(b)). Justice Alito explained, "There is a simple remedy for the disparate treatment of bump stocks and machineguns. Congress can amend the law—and perhaps would have done so already if ATF had stuck with its earlier interpretation. Now that the situation is clear, Congress can act." *Id.* Arguably, Congress *did* act. Congress had at least implicitly delegated the power to interpret the statute to the ATF, and the ATF had done so for decades. *See* Mia Romano & Dru Stevenson, *Litigating the Bump-Stock Ban*, 70 U. KAN. L. REV. 243, 250–58 (2021) (discussing the implication of the *Chevron* doctrine on the delegation of authority giving rise to the ATF's determination that bump stocks fell within the purview of the NFA).

10 *Cargill*, 602 U.S. at 429 (Alito, J., concurring).

11 *Cargill* could be an example of what scholar Barry Friedman calls "judicial decision—popular response—judicial re-decision." BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 382 (2009). The Supreme Court might be floating *Cargill* to gage public support for broadening the list of weapons that cannot be categorically banned. In other words, if there is no real response to lifting a ban on devices that deliver machine gun firepower, that would seem to give the Supreme Court license to rule more expansively: for instance, ruling that it is constitutionally impermissible to ban semiautomatic weapons, or even automatic weapons like machine guns. *See* discussion *infra* Section III.B.

12 *See* District of Columbia v. Heller, 554 U.S. 570, 624 (2008); Transcript of Oral Argument, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976) [hereinafter Cargill Oral Argument].

13 *See id.* at 721 (Breyer, J., dissenting).

gun market. Once bump stock conversions are deemed to fall within the Second Amendment arsenal of constitutionally protected weapons because they can be purchased at commonplace local retailers, it is not a far leap to bring their functional equivalent—fully automatic machine guns—back into the fold.

Cargill must be analyzed in tandem with a second gun reform case handed down just one week later: *United States v. Rahimi*.[14] In that case, the Supreme Court rejected a facial challenge to a federal statute temporarily prohibiting individuals subject to a domestic violence restraining order from possessing firearms.[15] *Cargill* should also be viewed in the broader context of the cascade of polarizing Supreme Court cases that followed. Waiting in the wings was *Trump v. United States,*[16] which appears to convey broad presidential immunity for even indisputable criminal acts peripherally related to the exercise of presidential powers, and *Loper Bright Enterprises v. Raimondo*,[17] involving the soon-to-be-overruled *Chevron* doctrine that had been criticized for providing deference to agency determinations. While the *Chevron* doctrine was not addressed in *Cargill*, it hovered over the decision.[18] Did the ATF not know what it was talking about when it corrected course and deemed bump stock conversions the statutory equivalent of machine guns? The Supreme Court could and should have given at least some level of deference to the ATF's determination, especially given Justice Alito's recognition that the ATF ultimately interpreted the statute in the *exact* manner intended by the 1934 Congress.

A cynic might contend that the Supreme Court simply was not going to hand gun lobbyists a two-for-two defeat in the same term. *Rahimi* was near unanimous, with but a single dissent by Justice Thomas, who drafted the *Cargill* majority opinion.[19] A more generous take would be that the Justices were grappling with how to clarify Second Amendment jurisprudence, and the chips fell where they may. But future historians will not ignore the societal backdrop—in particular, the highly-charged and

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14 United States v. Rahimi, 144 S. Ct. 1889 (2024).

15 *Id.* at 1898 (concluding that 18 U.S.C. section 922(g)(8) is constitutional on its face).

16 Trump v. United States, 603 U.S. 593 (2024).

17 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244 (2024).

18 Technically, as recognized by the Solicitor General, the *Chevron* doctrine was not at play. Reply Brief for the Petitioners at 20, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976).

19 Garland v. Cargill, 602 U.S. 406, 406 (2024).

ongoing political rhetoric permeating the 2024 presidential campaign, a spillover from the violent discourse and civil unrest surrounding the 2020 election. There were calls for violence against numerous public and private figures.[20] Seeds were planted that any loss at the ballot box could only be explained by corruption and fraud.[21] There was a growing and palpable concern over a "violent revolution."[22] In fact, just one day after *Cargill* was handed down, Steve Bannon, a public figure who long had alluded to violent civil unrest, riled attendees at a political rally with the following: "Are we at war? Is this a political war to the knife? Are you prepared to leave it all on the battlefield in 2024?"[23] Bannon ended by shouting, "Ladies and gentlemen, it's very simple: Victory or death!"[24] Two weeks later, directly following the *Trump* decision, the president of the Heritage Foundation, author of the "Project 2025" policy agenda, sparked fury by announcing the country was in the process of a "second American Revolution, which will remain bloodless if the left allows it to be."[25]

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20 Maggie Astor, *Heritage Foundation Head Refers to 'Second American Revolution,'* N.Y. TIMES (July 3, 2024), https://www.nytimes.com/2024/07/03/us/politics/heritage-foundation-2025-policy-america.html [https://perma.cc/KMH4-2ASS] (referencing actual violence, such as the January 6 attack on the Capitol and the white supremacist rally in Charlottesville, as well as threats of violence to public figures, including the former chairman of the Joint Chiefs of Staff and the New York Attorney General).

21 *See* Daniel Arkin, *Trump Says He'll Accept 2024 Results if They're 'Fair and Legal' While Airing False 2020 Fraud Claims*, NBC NEWS (June 27, 2024, 8:12 PM), https://www.nbcnews.com/politics/donald-trump/trump-says-accept-2024-results-fair-legal-airing-false-2020-fraud-clai-rcna159372 [https://perma.cc/HFY8-2MDT].

22 Astor, *supra* note 20. "Project 2025" refers a blueprint that spans over nine hundred pages, outlining a drastic "overhaul [of] the federal government under a Republican president." *Id.*; *see also* HERITAGE FOUNDATION, A MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE (Paul Dans & Steven Groves eds., 2023).

23 Tim Hains, *Bannon: "November 5th Is Judgment Day, January 20th, 2025 Is Accountability Day*," REAL CLEAR POLS. (June 16, 2024), https://www.realclearpolitics.com/video/2024/06/16/bannon_november_5th_is_judgment_day_january_20th_2025_is_accountability_day.html [https://perma.cc/UZ86-2WGT] (providing the full text of and commentary on Steve Bannon's address in Detroit, Michigan); *see also* discussion *infra* Section III.B.

24 *Id.*

25 Astor, *supra* note 20. Trump denied knowledge of the divisive agenda of Project 2025, despite the preamble identifying a large number of his former and existing advisors listed as contributors. Steve Contorno, *Trump Claims Not to Know Who Is Behind Project 2025. A CNN Review Found at Least 140 People Who Worked for Him Are Involved*, CNN POL., https://www.cnn.com/2024/07/11/politics/trump-allies-project-2025/index.html [https://perma.cc/MRV7-DTKC] (July 11, 2024, 2:45 PM). On July 24, 2024, it was reported that Senator J.D. Vance, Trump's vice-presidential pick, would author a foreword to a soon-to-be released book by the head of Project 2025. *See* Rachel Dobkin, *JD Vance Foreword in Project 2025 Leader's Book Raises Eyebrows*, NEWSWEEK,

Violent rhetoric paused for a nanosecond when former president and then-candidate Donald Trump was grazed by a bullet during an assassination attempt at a rally in Butler, Pennsylvania, two days prior to the Republican National Convention.[26] Both Trump and President Joe Biden called for unity, but others sowed even more discord, like Congresswoman Marjorie Taylor Green, who posted on X: "The Democratic party is flat out evil, and yesterday they tried to murder President Trump."[27] Social media reflected a stark partisan split; some vowed revenge as others claimed the assassination was a "false flag."[28] On "far-fringe platforms," the call for violence was "intense and immediate."[29] Then, on July 21, 2024, President Biden dropped out of the presidential race, stirring angst and ire amongst many Republicans and prompting threats of lawsuits to challenge a replacement candidate.[30] All of this happened barely over a month after the Supreme Court's decision in *Cargill*.[31]

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https://www.newsweek.com/jd-vance-kevin-roberts-project-2025-book-foreword-1929753 [https://perma.cc/Z2F6-J3VR] (July 24, 2024, 2:00 PM).

26 The assassination attempt occurred on July 13, 2024. Michael Levenson, *What We Know About the Assassination Attempt Against Trump*, N.Y. TIMES (July 30, 2024), https://www.nytimes.com/article/shooting-trump-rally.html [https://perma.cc/3YM5-V37R]. One attendee was killed and two others were injured. *Id.* The gunman, who shot from atop a nearby warehouse, was also killed. *Id.* As Secret Service agents led Trump off the stage, he raised and pumped his fist to the crowd. *Id.*

27 Chris Brennan, *Republican Reaction to Trump Shooting Only Sows More Division. Our Leaders Must Stop It.*, USA TODAY (July 15, 2024, 5:11 AM), https://www.usatoday.com/story/opinion/columnist/2024/07/15/trump-assassination-attempt-maga-republican-statements/74397739007/ [https://perma.cc/HE28-CTHH]. Mike Collins, a House Representative from Georgia, called for a Pennsylvania district attorney "to charge Biden 'for inciting an assassination.'" *Id.*

28 *Id.*

29 Jessica Guynn, *Trump Shooting Inflamed an Already Divided Nation. Can America Turn Down the Heat?*, USA TODAY, https://www.usatoday.com/story/news/politics/elections/2024/07/14/trump-rally-shooting-social-media/74402514007/ [https://perma.cc/4R5Y-ULAR] (July 15, 2024, 6:48 PM) (identifying the militia group, The Proud Boys, as calling for "civil war and violence"). Experts expressed fear that images and verbiage—such as Trump's fist-pumping and use of the term "fight" as he was led offstage—could have an "incredibly dangerous" effect. Tatyana Tandanpolie, *Experts Fear GOP's Post-Shooting Trump Idolization Could Have "Incredibly Dangerous" Effect*, SALON (July 19, 2024, 3:00 PM), https://www.salon.com/2024/07/19/experts-fear-gops-post-idolization-could-have-incredibly-dangerous-effect/ [https://perma.cc/TG83-BW3E]. That fear need not be interpreted as faulting Trump for what might be a spontaneous reaction. Rather, it should be viewed as a potential contributing factor to the escalating danger of political violence.

30 Other contributing factors to the escalated threat of violence include the immediate and continued efforts to block the run of a replacement candidate. Just a handful of days after President Biden's faltering debate performance on June 27, 2024, the Heritage Foundation announced its intent to file lawsuits in three key swing states: Wisconsin, Nevada, and Georgia. *See* Stephen Collinson, *Biden's*

In short, America was a powder keg. Whether intended or not, *Cargill* greenlit the path by which future mass-murderers, including would-be assassins and insurrectionists, easily and legally could arm themselves with the functional equivalent of

Disastrous Debate Pitches His Reelection Bid into Crisis, CNN POL., https://www.cnn.com/2024/06/28/politics/biden-trump-presidential-debate-analysis/index.html [https://perma.cc/J4UM-DW2P] (June 28, 2024, 4:00 PM); Caroline Vakil and Yash Roy, *Here's How the Process to Replace Biden Would Work if He Withdraws*, POLITICO (July 6, 2024, 6:00 AM), https://thehill.com/homenews/campaign/4757220-joe-biden-kamala-harris-donald-trump-withdraw/ [https://perma.cc/EHM7-94BR]. On July 21, 2024, just hours before President Biden bowed out of the presidential race, Republican Speaker of the House Mike Johnson echoed this sentiment. *See* David Cohen, *Republicans Could File Challenges if Biden Replaced, Speaker Johnson Says*, POLITICO (July 21, 2024, 10:31 AM), https://www.politico.com/news/2024/07/21/biden-johnson-2024-elections-laws-00169973 [https://perma.cc/L3R4-637C] ("House Speaker Mike Johnson reiterated Sunday that any attempt by Democrats to sub in a new candidate in place of President Joe Biden is likely to be met by legal challenges."). These efforts could have been laying the groundwork for future political maneuvers, had Trump not been re-elected, potentially including Speaker Johnson's refusal to play his role in certifying the election results. That possibility came into sharper focus when Vice President Kamala Harris became the official Democrat nominee for president, choosing Minnesota Governor Tim Walz as her running mate. *See* Steven Shepard, *Dems Officially Nominate Harris, Walz*, POLITICO (Aug. 6, 2024, 7:34 PM), https://www.politico.com/news/2024/08/06/democrats-officially-nominate-harris-walz-00172966 [https://perma.cc/DW47-K6XG]. Even before then, state officials made clear that any legal efforts to block a new ticket would fail. *See* Vakil and Roy, *supra* note 30 (noting "officials from [Wisconsin, Nevada, and Georgia] cast doubt on Heritage's claims, saying that the state deadlines have not yet passed, allowing for a change to be made"). But that did not dispel the then-existing threat of extended political chaos and violence well beyond election day, especially given Trump's contention that the Harris/Walz ticket was an unconstitutional "coup," disenfranchising Democrat voters who cast their ballot for Biden in the pre-convention primaries. Brett Samuels, *Trump Stokes Fears with 'Unconstitutional'" Harris Talk*, THE HILL (Aug. 10, 2024, 12:00 PM), https://thehill.com/homenews/campaign/4821089-donald-trump-kamala-harris-unconstitutional/ [https://perma.cc/6GMW-EAXJ]. Ultimately, Trump became the President-elect, beating Harris by 312 to 226 electoral votes, lulling some fears about the transfer of power but raising a new array of concerns. James M. Lindsay, *The 2024 Election by the Numbers*, COUNCIL ON FOREIGN RELS. (Dec. 18, 2024, 3:14 PM), https://www.cfr.org/article/2024-election-numbers [https://perma.cc/S25M-95E4]; *see* Kathryn Watson et al., *What Could Trump's Second Term Bring? Deportations, Tariffs, Jan. 6 Pardons and More*, CBS NEWS, https://www.cbsnews.com/news/second-trump-presidency-implication/ [https://perma.cc/RCM7-F24Y] (Nov. 9, 2024, 7:33 AM).

31 On July 16, 2024, at a Las Vegas conference hosted by the National Association for the Advancement of Colored People, President Biden called for bringing back the ban on assault weapons, including AR-15s—the weapon used by the shooter in the Trump assassination attempt. Francis Vinall, *Biden, Citing Attack on Trump, Renews Call for Assault Weapons Ban*, WASH. POST (July 17, 2014, 3:16 AM), https://www.washingtonpost.com/politics/2024/07/17/biden-assault-weapons-ban-ar15-trump/ [https://perma.cc/ST8A-B3JR]. Ultimately, the conference turned out to be President Biden's last campaign appearance before dropping out of the race just five days later on July 21, 2024. *See* Zolan Kanno-Youngs, *From Buoyant to Frail: Two Days in Las Vegas as Biden Tests Positive*, N.Y. TIMES (July 18, 2024), https://www.nytimes.com/2024/07/18/us/politics/biden-covid-democrats.html [https://perma.cc/CF5K-MCPU].

machine guns. It also enabled madmen and common criminals to up their firepower to match or best that of law enforcement. Of course, as affirmed in *Rahimi*, once an individual actually harms or terrorizes others, they can be prevented from owning a gun *in the future*.[32] And Congress presumably *could* pass a law banning bump stocks. But as of June 14, 2024, machine guns were there for the taking, dangling like a carnival prize for any militia group or lone-wolf type.

What possibly could go wrong?

The legal and social rhetoric regarding gun reform needs to change. Too often, the battle focuses on the rights of gun owners. But what about the victims, both direct and indirect? They, too, have rights.[33] And the price they pay pales in comparison to the impact of limited restrictions on others, such as banning machine guns and their functional equivalent. Sure, Kid Rock might enjoy shooting up a case of Bud Light at eight hundred rounds per minute.[34] But is that transient enjoyment worth giving militia groups access to machine guns? Is it worth the life and limbs of innocent people—including children and law enforcement officers—destined to fall victim to bump stock conversions as a direct result of the Supreme Court's decision in *Cargill*?

In the aftermath of a mass murder, advocates for gun reform typically focus on the danger of putting weapons in the hands of the deranged, such as the killer responsible for the Las Vegas Massacre. Despite the uptick, gruesomeness, and prevalence of

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32 United States v. Rahimi, 144 S. Ct. 1889, 1896, 1902 (2024).

33 Leila Nadya Sadat & Madaline M. George, *Gun Violence and Human Rights*, 60 WASH. U. J. L. & POL'Y 1, 3–4 (2019) (pointing out that "gun violence often focuses on *gun* rights . . . [b]ut what about *human* rights?"). These authors list several competing rights including "[t]he right to learn, worship, attend a concert or movie, or simply go the bank without the fear and uncertainty of becoming the next victim of a mass shooting." *Id.* at 4.

34 Famously, Kid Rock joined in the backlash and boycott against Bud Light after the company demonstrated support for Dylan Mulvaney, a transgender rights activist who had shared her gender-transition journey in a TikTok series called "Days of Girlhood." Jonah Valdez, *Kid Rock Joins Transphobic Backlash to Bud Light's Partnership with Dylan Mulvaney*, L.A. TIMES (Apr. 4, 2023, 2:17 PM), https://www.latimes.com/entertainment-arts/story/2023-04-04/kid-rock-bud-light-dylan-mulvaney-transgender [https://perma.cc/8G7A-TB7F]. In response, Kid Rock posted a video of himself shooting up three cases of Bud Light with a rifle. *Id.* Michael Che, a comedian known for his "Weekend Update" segment on *Saturday Night Live*, had a humorous retort relating to gun reform: "[W]hat if we got trans people.. hear me out.. to do ads for guns..?" Matt Wilstein, *Michael Che Just Solved Gun Violence with One Instagram Post*, THE DAILY BEAST, https://www.thedailybeast.com/snls-michael-che-just-solved-gun-violence-with-one-instagram-post [https://perma.cc/ZTU3-ASJ3] (Jan. 12, 2024, 12:35 PM).

mass murders, that argument is not moving the needle.[35] An emerging argument, which actually has its roots in the past, focuses on *indirect* victims: a society pummeled not just by bullets, but by the collective toll of fear and exposure to gun violence. That was a driving—and presumably constitutional—force behind the passage of the NFA in 1934 during the days of Al Capone. Implicit in the passage and general acceptance of the NFA is the recognition that there are competing individual and societal rights of equal or paramount importance to Second Amendment rights. Even at the Founding, competing rights were *of course* balanced to arrive at solutions that were in the best interest of society. Somewhere along the way from the Founding to 1934 to today, individual and societal rights to live free from undue terror have been shelved in favor of an ever-broadening interpretation of the Second Amendment that all but ignores the rights of indirect victims.

"Blind, but now I see." This famous line from "Amazing Grace" has its place in civil rights litigation.[36] Professor Charles Calleros describes how advancements in civil rights often follow a "recognizable historical pattern."[37] As eloquently explained, "a pattern first of denying a civil right, then recognizing the right, and later wondering—with some embarrassment—how we could ever have voiced uncertainty about the right" is a common progression of civil rights movements.[38] Put simply, once society recognizes a truism, that truism is difficult to unsee, and it is hard to understand why it was not seen before.

This Article posits that looking through the lens of a future observer can be a powerful tool to expose the flaws of existing social and legal arguments, specifically including the Supreme Court's decision in *Cargill* and the subsequent congressional failure to immediately reinstate the ban. If we can see today how a future observer easily would view our actions and inaction as bordering on crazy, we can learn from that clarity and adjust accordingly. As such, the broader social and legal context is presented here in time capsule form, including commentary from

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35 *See* discussion *infra* Section III.C.

36 *See* Julia Franz & Trey Kay, *The Complicated Story Behind the Famous Hymn 'Amazing Grace,'* THEWORLD (April 21, 2017), https://theworld.org/stories/2017/04/21/long-story-amazing-grace [https://perma.cc/H65V-JXRW].

37 Charles R. Calleros, *Advocacy for Marriage Equality: The Power of a Broad Historical Narrative During a Transitional Period in Civil Rights*, 2015 MICH. ST. L. REV. 1249, 1253.

38 *Id.*

two befuddled future observers considering the flawed logic of *Cargill* and the inexplicable failure of Congress to act.

Part II explores the backdrop of the *Cargill* decision, including the Second Amendment and the historical grounds underlying the right to bear arms. Part III addresses the showdown over bump stocks. Each of these Parts relies heavily on the briefing, oral arguments, and court opinions in *Cargill* and *Rahimi*, as that best captures the rhetoric before the Supreme Court when these decisions were handed down. Part IV looks at the broader social context, including the chaotic end to the 2023 Term and the prescient danger of politically charged violence. This Part also explores how gun reform can be reframed to forge a new bipartisan approach, reconciling the interests of gun owners and the public at large. This includes centering indirect victims and doing more to remedy the root causes of gun violence. It also includes a discussion of the counter-perspective and the need to listen to one another. Unity. The open issue regarding the continued legality of bump stocks arguably presents the perfect baby step to return to the ideals of the Founders, set aside tribalism, and come together for the common good.

II. THE BACKDROP: THE HISTORICAL AND LEGAL BASIS FOR RESTRICTION OF SECOND AMENDMENT "GUN RIGHTS"

The year is 2075. Our two future observers, Artemis and Diana, settle in for their afternoon review of key U.S. Supreme Court cases, including consideration of the pre-existing social and legal context.[39] Artemis wanders over to a small electronic metal box perched atop a table, an "Instant Memory imPlanter" (IMP). Scrolling through options generated from their browser history, Artemis selects: Supreme Court Decisions, 2024.

IMP can best be described as the 2075 version of ChatGPT, but with a twist. Instead of cranking out a response to a prompt by hobbling together word snippets, IMP imPlants a wide variety of data directly into a human user's memory bank and does so in a highly sensory manner. In a moment's time, a user absorbs a

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[39] Artemis and Diana are the respective Greek and Roman goddesses of the hunt. Ruthann Robson, *Before and After Sappho: Eudaemonia*, 21 L. & LITERATURE 354, 355 (2009) (referring to Artemis as the "[g]oddess of the hunt"); David C. Krajicek, *Nobody Loves a Crime Reporter*, 2003 J. INST. JUST. & INT'L STUD. 33, 36 (noting that Diana was the Roman equivalent of Artemis); *see generally* Marie Adornetto Monahan, *The Role of Women in the Development of the First Court of Justice*, 25 CUMB. L. REV. 577 (1995) (discussing legal themes resonating with Greek mythology).

vast amount of relevant media content, such as that contained in books, websites, and other entertainment and information platforms. IMP easily imPlants sights and sounds, such as Oscar-nominated films and Billboard Hot 100 songs, and even tastes and smells. IMP impishly starts things off with a sensory suggestion.

> IMP: Would you like to begin with an imPlanted memory of a "Frappuccino," a refreshing coffee-based iced beverage served at Starbucks, a popular coffee shop and meeting place in the 2020s?
>
> ARTEMIS: That would be very nice, IMP. Is there a particular Supreme Court case you might suggest we imPlant? Maybe something that could change the course of history?
>
> IMP: How about *Garland v. Cargill*? The Supreme Court ruled that "bump stocks," devices that essentially converted semiautomatic weapons into machine guns, capable of shooting eight hundred rounds per minute, were not "machineguns" within the meaning of the National Firearms Act of 1934.
>
> DIANA: Oh right, that case caused quite a stir. Though IMP, I believe we've caught you in an error. You must mean *eighty* rounds per minute, not eight hundred. Even that would be more than a bullet a second.
>
> IMP: Rechecking data. . . . I am correct. The firepower of the bump stocks at issue in *Cargill* made it possible for an attached weapon to fire four hundred to eight hundred shots per minute, which was on par with machine guns in the 2020s.[40]

Artemis and Diana exchange a quizzical look as they take their seats, leaning back against two cushioned lounges on either side of IMP.

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[40] Cargill Oral Argument at 40 (petitioners' attorney referencing four hundred to eight hundred rounds per minute); *see also id.* at 55 (Cargill's attorney, Jonathan F. Mitchell, conceding the same); Larry Buchanan et al., *What Is a Bump Stock and How Does It Work?*, N.Y. TIMES, https://www.nytimes.com/interactive/2017/10/04/us/bump-stock-las-vegas-gun.html [https://perma.cc/GT2Z-4C28] (June 14, 2024) (discussing bump stocks and embedding audio recordings demonstrating the rate of fire in both the Las Vegas Massacre and the Orlando Pulse Nightclub Massacre, the latter of which took forty-nine lives on June 12, 2016).

DIANA: That seems a little crazy. How could that not be a machine gun?

ARTEMIS: (*dryly*) "Gun rights."

IMP: Guns don't have rights; people do.

DIANA: Good point, IMP.

To begin the first of three sessions, Artemis and Diana insert their index fingers into two devices resembling modern-day oximeters. Through joint thought-command, IMP knows the answer to its initial inquiry without Artemis or Diana ever saying a word. They close their eyes to begin their first session, enjoying an imPlanted memory of a 2020s Frappuccino.[41]

A. The Founding Fathers and the Second Amendment Right to Bear Arms

"The British are coming – The British are coming."[42] Paul Revere races through the countryside of Massachusetts, heading for Lexington on his famous midnight ride, sounding the alarm for ordinary citizens—the minutemen—to take up arms in the colonists' battle for independence.[43] Far from a polished, well-tooled militia, like the "British Redcoats," they were instead often a hapless band of "poor, untrained, half-armed farmers."[44] There was no National Rifle Association (NRA), nor any indication that gun manufacturers were leveraging power to sell muskets for sport. Rather, guns were needed to survive, both individually and collectively as a state.[45] Government-issued weaponry largely did not exist, making it necessary for

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41 The author's use of this conversational technique was inspired by the scholarly works of Derrick Bell. *See, e.g.*, DERRICK A. BELL JR., FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992).

42 Randall Niles, *The Midnight Ride of Paul Revere*, DRIVE THRU HIST. (June 28, 2022), https://drivethruhistory.com/the-midnight-ride-of-paul-revere/ [https://perma.cc/YU9K-7L9R].

43 *See id.*

44 Todd B. Adams, *Should Justices Be Historians? Justice Scalia's Opinion in* District of Columbia v. Heller, 55 U.S.F. L. REV. 301, 318 (2021) (citing ESTHER FORBES, JOHNNY TREMAIN 281 (Kindle ed. 2010)). Adams discusses Justice Scalia's theory of originalism at length, including a review of the weaponry available at the Founding. *See id.* at 318–20.

45 For an interesting discussion of the olde English rationales for allowing, but limiting, the right of citizens to bear arms, see Robert Hardaway et al., *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms*, 16 ST. JOHN'S J. LEGAL COMMENT 41, 74–75 (2002) (noting that "the arms provision was in actuality a militia provision, permitting individual access to arms for the limited reason of common defense").

individual citizens to secure their own arms. Indeed, "[a] person's role in the militia depended on their weapon."[46] Colonists who could only bring "hunting rifles" to the match were constrained to fight as "skirmishers."[47]

Against this backdrop, the plain text of the Second Amendment was drafted: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."[48] Interpretation looks to the "normal and ordinary" meaning of the chosen language at the time of enactment.[49] Although "militia laws of the founding period . . . required militia members to 'keep' arms in connection with militia service," the Supreme Court rejected the notion that the Founders intended to limit the right to bear arms to only those serving in a militia.[50] Rather, the right belonged to the people at large. This was consistent with how things were handled across the pond.[51] As noted by Blackstone, "[b]y the time of the founding, the right to have arms had become fundamental for English subjects."[52] It extended not only to the defense of the state, but for self-defense and self-preservation, specifically including the right to protect oneself "against both public and private violence."[53] Writing for the majority in *Heller*, Justice Scalia noted that of the nine state constitutions protecting the right to bear arms, "at least seven unequivocally protected an individual citizen's right to self-defense."[54]

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46 Adams, *supra* note 44, at 319. Adams notes, "If a person did not have a musket . . . they might not fight at all." *Id.* As put by George Washington: "I have not a Musket to spare to the Militia who are without Arms . . . . [I]t will be needless for those to come down who have no Arms, except they will consent to work upon the Fortifications . . . ." *Id.* (citing George Washington, *To the Pennsylvania Council of Safety*, *in* THE PAPERS OF GEORGE WASHINGTON (Univ. of Va. Press, digital ed. 2008)), https://rotunda.upress.virginia.edu/founders/default.xqy?keys=GEWN-print-03-07-02-0323 [https://perma.cc/QU7M-YECF].

47 *Id.* (adding that "skirmishers . . . did not have a role in the line").

48 U.S. CONST. amend. II; *see generally* Dru Stevenson, *Revisiting the Original Congressional Debates About the Second Amendment*, 88 MO. L. REV 455, 470–514 (2023) (considering contemporaneous debates about the scope and language of the Second Amendment).

49 District of Columbia v. Heller, 554 U.S. 570, 576–77 (2008).

50 *Id.* at 582–85, 627 (discussing how members of the militia "would bring the sorts of lawful weapons that they possessed at home to militia duty").

51 *Id.* at 582–83.

52 *Id.* at 593–94.

53 *Id.* at 594. *But see id.* at 655–62 (Stevens, J., dissenting) (arguing that the Second Amendment only proscribed infringements on the right to maintain a well-regulated military).

54 *Id.* at 600–03 (majority opinion). Justice Stevens' dissent framed this legal point more broadly:

> Until today, it has been understood that legislatures may regulate the civilian

Still, there were limits, both at the Founding and today. Just as the First Amendment right of free speech was not unlimited, neither were the rights granted under the Second Amendment.[55] As Justice Scalia plainly explained in *Heller*, "[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*."[56] Central to this finding was the fact that common-sense restrictions on the possession of firearms were commonplace.[57] Put in perspective by Justice Scalia, "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose."[58]

The havoc that ensues when bad actors have access to extraordinary weaponry was seen well before *Heller*, namely when machine guns became the weapon of choice for gangsters, prompting the passage of the NFA in 1934.[59] Albeit in dicta, the *Heller* court recognized the presumed constitutionality of the NFA.[60] In particular, Justice Scalia addressed a dissenting argument, presented by Justice Stevens, relying on precedent that held the right to bear arms was limited in two ways at the Founding: to those *serving* in the military and to weapons *used*

> use and misuse of firearms so long as they do not interfere with the preservation of a well-regulated militia. The Court's announcement of a new constitutional right to own and use firearms for private purposes upsets that settled understanding, but leaves for future cases the formidable task of defining the scope of permissible regulations.

Id. at 679–80 (Stevens, J., dissenting). Justice Stevens feared that striking the District's gun regulation "may well be just the first of an unknown number of dominoes to be knocked off the table." *Id.*; *cf. id.* at 722 (Breyer, J., dissenting) (noting "the unfortunate consequences" of the *Heller* decision, including that the decision "threatens to throw into doubt the constitutionality of gun laws throughout the United States").

55 *Id.* at 595 (majority opinion).

56 *Id.*

57 *Id.* at 626–27, 632 (referencing both common-sense restrictions in the modern era, such as prohibitions on firearm possession by "felons and the mentally ill," and Founding-era laws that "restricted the firing of guns within . . . city limits to . . . some degree"); *see also id.* at 683–87 (Breyer, J., dissenting) (commenting on the regulation of gunpowder storage).

58 *Id.* at 626 (majority opinion).

59 It is generally agreed that the influx of mob use of machine guns prompted the passage of the NFA. *See, e.g.*, Mathew S. Nosanchuk, *The Embarrassing Interpretation of the Second Amendment*, 29 N. KY. L. REV. 705, 746–47 (2002) (discussing congressional testimony regarding a prohibition on "fully automatic machine guns—the then-freely available weapon of choice for gangsters such as Al Capone and John Dillinger"); *see also* discussion *infra* Sections II.B–C.

60 *See Heller*, 554 U.S. at 621–25.

by the militia.[61] Scoffing at this argument, Justice Scalia countered, "That would be a startling reading of the opinion, since it would mean that the National Firearms Act's restrictions on machineguns (not challenged in *Miller*) might be unconstitutional, machineguns being useful in warfare."[62]

Notably, and resonating with sensibilities of both yesteryear and today, Justice Scalia found that the language in the Second Amendment pertaining to the maintenance of a militia as necessary for the "security of a free state" was meant to refer to the "polity," as opposed to the security, of individual states: for example, one state defending itself against another.[63] An additional rationale was that a well-regulated militia was "useful in repelling invasions and *suppressing* insurrections."[64] It therefore would turn the Second Amendment on its head to ensure access to particularly lethal weaponry that could be used to overturn the government or to wreak havoc on society.

B. Mobsters, Machine Guns, and the Motives Behind the 1934 NFA and the 1968 Amendment Targeting Conversions

February 14, 1929. Four mobsters, two disguised as police officers, enter a warehouse on Chicago's South Side to ambush a rival bootlegger.[65] But this is no ordinary ambush. Two of the mobsters are armed with Thompson sub-machine guns, which would be widely known as "Tommy Guns" before the day was done.[66] Seven men are lined up, faces against the garage wall.[67] Shots ring out as the gunmen use automatic fire to spray bullets left and right from a 20-round box magazine and a 50-round

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61 *Id.* at 636–39 (Stevens, J., dissenting) (citing United States v. Miller, 307 U.S. 174, 178 (1939)).

62 *Id.* at 624 (majority opinion).

63 *Id.* at 597; *see also* THOM HARTMANN, THE HIDDEN HISTORY OF GUNS AND THE SECOND AMENDMENT 106 (Elissa Rabellino ed., 2019) (dismissing the notion that the Second Amendment was enacted "so that the early colonists could wage war against their own government just like they had the British"). Hartmann also discusses the historical and present-day relation between racism and gun rights. *See, e.g.*, *id.* at 6–17.

64 *Heller*, 554 U.S. at 597 (emphasis added).

65 *See* Christian Bush, *Modern Scofflaws: An Examination of Alcohol Resale Law and the Bourbon Black Market*, 18 J.L. ECON. & POL'Y 1, 6 (2023) (describing the St. Valentine's Day Massacre and noting that "the public reacted with disgust for the criminal underworld and the Prohibition laws that incentivized it").

66 *See* Romano & Stevenson, *supra* note 9, at 245 n.12 (identifying the St. Valentine's Day Massacre as "one of two events in the 1920s to early 1930s that attracted the attention of lawmakers"); *see also* Brief for the Petitioners at 2, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976).

67 *See* Bush, *supra* note 69.

drum.[68] The victims are riddled with gunshots, even after they lay on the ground, two of their faces obliterated.[69] The battle was over Chicago's bustling liquor business and the gunmen were settling a score for the notorious Al Capone.[70] The event, dubbed the "St. Valentine's Massacre," was met with disgust by the public.[71]

No doubt, the 1920s and 1930s brought terror to the streets of Chicago, New York, and any other city or town with mafia activities.[72] Gangsters embracing the use of machine guns would later be glorified in movies such as *The Godfather* and *Bonnie and Clyde.*[73] Yet for the vulnerable citizens exposed to such bloodshed in real time, the threat was mind-numbing.

As documented by historian Patrick J. Charles in a brief relied upon by Justice Sotomayor in her dissent,[74] machine guns came onto the scene no later than 1861 with the invention of the "Gatling gun." This new line of weaponry did not catch the attention of lawmakers until the 1920s.[75] There were two reasons for the delay. Early iterations of machine guns "were almost exclusively owned and operated by the military and law enforcement agencies."[76] And, even had machine guns been readily available to the public, the "large size and heavy weight" rendered them unsuitable.[77]

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68 *Id.*

69 *See id.*; *see also* DIERDRE BAIR, AL CAPONE, HIS LIFE, LEGACY, AND LEGEND 138 (2016) (describing "horrific photographs" and the "bathetic stories about the only survivor, a dog belonging to one of the victims").

70 *See* Bush, *supra* note 69. Other than references to generally known gangsters, such as Al Capone, the author purposefully has chosen not to mention the names of the killers.

71 *See id.*

72 *See id.* (noting one of the consequences of the Prohibition was "the rise of organized crime in major cities"); *see also* JOHN J. BINDER, AL CAPONE'S BEER WARS: A COMPLETE HISTORY OF ORGANIZED CRIME IN CHICAGO DURING PROHIBITION 282–85 (2017).

73 *See* Naomi Mezey & Mark C. Niles, *Screening the Law: Ideology and Law in American Popular Culture*, 28 COLUM. J.L. & ARTS 91, 161 (2005) (discussing movies "portray[ing] criminals not as heroes, but in an undeniably attractive light, like *The Godfather* trilogy, *Bonnie and Clyde*, *The Silence of the Lambs*, *Reservoir Dogs*, and even *Young Guns*, to name just a few"). For a compelling discourse on how glorifying "lawless" conduct can "suggest violence is society's necessary recourse," see John Denvir, *The Slotting Function: How Movies Influence Political Decisions*, 28 VT. L. REV. 799, 799–800 (2004) (focusing on *The Godfather* franchise).

74 *See, e.g.*, Garland v. Cargill, 602 U.S. 406, 430 (2024) (Sotomayor, J., dissenting).

75 Brief for Patrick J. Charles as Amicus Curiae Supporting Petitioners at 4–5, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976) [hereinafter Charles Brief].

76 *Id.* at 5.

77 *Id.*

Then came the Tommy Gun.[78] A toggle flipped the mode from semiautomatic to fully automatic. In the former, it discharged at a rate of a "100-round drum magazine in a minute." When fully automatic, that same 100-round magazine was dispelled in just over four seconds, translating to approximately 25 bullets per second.[79] The shooter had the option of switching back to single-fire mode by simply releasing the trigger. This arguably could be even more terrifying as it reduced the need to reload, which essentially was the only time potential victims were safe and the shooter was vulnerable. In either mode, the Tommy Gun packed a monumental punch in terms of lethality.[80]

While initially marketed as an "anti-bandit" gun, bandits, like Al Capone and John Dillinger, quickly recognized the sizable advantage Tommy Guns gave them over both their street rivals and their common enemy, the police.[81] Public and private settings literally became battlefields. It wasn't just the rat-a-tat-tat of a pistol. It was the continuous fire of what had to have been the deadliest weaponry ever placed in the hands of civilians. Newspaper headlines captured the mania and provided the gory details, all of which shocked and frightened everyday people trying to live their everyday lives.[82] It wasn't just "gangsters" getting killed; it also was the boys in blue and innocent, law-abiding citizens.[83]

Not surprisingly, the public demanded change. Even the NRA agreed that machine guns needed to be prohibited.[84] In its November 1926 magazine, *American Rifleman*, the NRA urged that "laws should be amended to prohibit the use of machine-guns, howitzers, and field artillery by civilians—honest or otherwise."[85] While there were quibbles over wording to ensure

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78 *Id.*

79 *Id.* at 6.

80 *See id.*

81 *See id.* at 9.

82 *See id.* at 9 & n.18.

83 *See* Stephanie Cooper Blum, *Drying Up the Slippery Slope: A New Approach to the Second Amendment*, 67 BUFF. L. REV. 961, 983–84 (2019) ("[G]angsters during Prohibition were more violent than prior criminals, rendering local law enforcement largely ineffective."); *Eliot Ness*, ATF, atf.gov/our-history/eliot-ness [https://perma.cc/495D-D4AC] (last visited Nov. 15, 2024) ("The massacres often resulted in the injury or death of innocent bystanders.").

84 Charles Brief, *supra* note 75, at 10–11, 11 n.23.

85 *Id.* at 11 n.23; *see also id.* at 12 n.28 (citing *Firearms Sales May Be Limited by Florida Law*, TAMPA DAILY TIMES, Mar. 17, 1933, at 7A) (noting "NRA Secretary-Treasurer

semiautomatic weaponry—such as hunting rifles—were not swept into the fold, the goal was to ensure the dreaded Tommy Gun and all similar weaponry were off-limits to the general public.[86]

Ultimately, Congress passed the NFA in 1934.[87]

Congress revisited the NFA in 1968, following an alarming "increas[ed] rate of crime and lawlessness," coupled with the growing use of firearms.[88] Notably, the definition was amended to specifically capture any creative attempts to convert semiautomatic (or other) weapons into machine guns. The new definition covered any "combination of parts designed and intended[] for use in converting a weapon into a machinegun."[89] Thus, while it would still be decades until commercial bump stocks make their debut in 2002,[90] Congressional intent was to ensure—as much as possible—that the terrifying times of Al Capone and the Tommy Gun were over.

C. Other Legislation Limiting the Right to Bear Arms: The Brady Bill and the 1994 Ban on Assault Weapons

Gangsters and Tommy Guns provided the impetus for legislative change in the 1930s.[91] Shock and fear made way for the perfect argument that could be presented at just the right time and in just the right manner.[92] Simply put, it did not take a

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C.B. Lister express[ed] support for any law that 'absolutely prohibited to all except the military and police' the use and possession of machine-guns").

86 Charles Brief, *supra* note 75, at 9–10, 12 (explaining that, later in the debate, "pushback came from several sporting, hunting, and shooting organizations"). Charles further notes that no group "opposed outlawing the possession or use of machine guns by private individuals" and such groups were "emphatically supportive of such legislation." *Id.* at 12. The concern was that semiautomatic weapons fell within the scope of the proposed language. *See id.*

87 The Gun Control Act of 1968, 18 U.S.C. § 921; *see also* James B. Jacobs, *Why Ban "Assault Weapons?,"* 37 CARDOZO L. REV. 681, 683–84 (2015) (discussing the passage and scope of the Act, which rendered "'gangster weapons'—e.g., machineguns, sawed-off shotguns, and silencers—illegal").

88 Brief for the Petitioners, *supra* note 66, at 2–3.

89 26 U.S.C. § 5845(b); *see* Cargill Oral Argument, *supra* note 40, at 41–42.

90 *See* Tess Saperstein, *High Caliber, Yet Under Fire: The Case for Deference to ATF Rulemaking*, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 483, 495–97 (2024) (discussing the ATF's consideration of the Akins "Accelerator" in 2002, an earlier version of the bump stock devices at issue in *Cargill*).

91 Charles Brief, *supra* note 75, at 9, 12.

92 This phrasing refers to the rhetorical construct of *kairos*. *See* Linda L. Berger, *Creating Kairos at the Supreme Court:* Shelby County, Citizens United, Hobby Lobby, *and the Judicial Construction of Right Moments*, 16 J. APP. PRAC. & PROCESS 147, 153 (2015) (noting "kairos often plays the ah-ha-moment role in narrative"); *see also* Rachel Croskery-Roberts, *It's About Time: Kairos as a Dynamic Frame for Crafting Legal Arguments and Analyzing Rhetorical Performances in the Law*, 33 S. CAL. INTERDISC. L.J.

constitutional scholar to convince the public that the Second Amendment could not possibly mean machine guns should be placed in the hands of common criminals, let alone sophisticated mafioso. The most persuasive arguments often are simple: common sense coupled with an innate sense of what is just or fair. Such arguments resonate in both the heart and mind, opening the door for transformative change.[93]

While America loves its guns,[94] there have been at least two relatively recent instances when shock and empathy have budged open the door for significant national reform: the 1993 Brady Bill and the 1994 assault weapons ban.[95] The circumstances surrounding these exceptions include the attempted assassination of President Ronald Reagan,[96] as well as early instances of the gunning down of innocent children.[97] Gun restrictions were put in place as a direct result of shock and public outcry.[98] The same held true for the Las Vegas Massacre, the largest mass murder in U.S. history. Until now.

57, 59–60, 67–68, 74 (2023) (discussing ancient Greek origins of *kairos*). In Greek mythology, "Kairos is the youngest son of Zeus" and the "god of the 'fleeting moment,' the god of 'opportunity'" who is "usually pictured with wings and winged feet to demonstrate the concept of the fleeting or passing moment." *Id.* at 74.

93 *See* Scott Fraley, *A Primer on Essential Classical Rhetoric for Practicing Attorneys*, 14 LEGAL COMMC'N & RHETORIC: JALWD 99, 107–08 (2017) (recognizing *kairos* is the "proper time to advance a legal argument, both in the sense of societal time (when society is ready for it) and in the context of a specific argument (when the argument will make the most impact)"); *see also* Ruth Anne Robbins, *Fiction 102: Create a Portal for Story Immersion*, 18 LEGAL COMMC'N & RHETORIC: JALWD 27, 55 (2021) (noting that persuasion "always depends on the audience's receptivity" and that a "story must be told at a moment in time when the audience is ready to receive it").

94 *See* Michael G. Lenett, *Taking a Bite Out of Violent Crime*, 20 U. DAYTON L. REV. 573, 573–74 (1995) (acknowledging the "special relationship" between Americans and guns, referencing, inter alia, "John Wayne, Rambo, and Bonnie and Clyde," and noting that "America has developed a high tolerance for gun crime, enduring more of it than any other industrialized nation").

95 *See* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 227 (2008). Professor Siegel also considers the "Culture Wars" surrounding gun legislation and the Supreme Court. *See id.* at 201–02.

96 *See id.* at 227 (correlating these events with the election of President Bill Clinton, which put a "supporter of gun control [in] the White House").

97 *See, e.g.*, Jeffrey A. Roth & Christopher S. Koper, *Impacts of the 1994 Assault Weapons Ban: 1994–96*, NAT'L INST. JUST.: RSCH. BRIEF, Mar. 1999, at 1 (describing the Stockton schoolyard shooting of 1989); *see also* Lenett, *supra* note 94, at 609 (discussing motivations for the 1994 ban on assault weapons).

98 *See* Siegel, *supra* note 95, at 226–27; *see also id.* at 202–03 (noting that "[c]ontemporary debate over gun control began in the 1960s, when President Lyndon B. Johnson called for restrictions on firearms sales in the wake of President [John F.] Kennedy's assassination," further escalating with the assassinations of civil rights leaders Dr. Martin Luther King, Jr., and Senator Robert F. Kennedy).

The impetus for the 1994 assault weapons ban, which would sunset a decade later in 2004,[99] included a mass school shooting in Stockton, California in 1989.[100] A gunman, armed with a semiautomatic rifle, entered a crowded schoolyard on a sunny and otherwise normal day and opened fire on nearly four hundred children.[101] It took only two minutes, during which the killer discharged over one hundred rounds, to kill five children and wound twenty-nine others and a teacher.[102] In short order, California became the first state to pass a law banning semiautomatic weapons.[103] Other state bans on assault weapons also have been driven by local gun massacres, including the Sandy Hook mass shooting at an elementary school in Newton, Connecticut.[104]

True shock can push the needle.[105] Neuroscientists might consider this an example of System 1 versus System 2 responses. The former refers to immediate reactions, usually driven by emotions and preexisting perceptions; the latter is reasoned aftermath.[106] The greater the shock, the longer it takes for emotionally driven reactions to dissipate.[107] When trauma is severe, simply rethinking the events can both refresh and deepen the emotionally driven response.[108] That might be why there are

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99 Lenett, *supra* note 94, at 609.

100 *Id.* at 573. Lenett specifically identified the Stockton schoolyard shooting as a motivation behind the 1994 ban, noting it "hit a sore nerve in the general public." *Id.* at 573–75.

101 *Id.* at 573.

102 *Id.*

103 *Id.* at 580–83 (noting that California banned sale of assault weapons, followed shortly thereafter by New Jersey, Hawaii, Connecticut, and Maryland).

104 *Id.* at 574–75; Jacobs, *supra* note 87, at 683 ("The December 2012 Sandy Hook Elementary School massacre in Newton, Connecticut triggered a new round of proposals for banning assault weapons as a strategy for preventing school shootings—or at least minimizing casualties.").

105 *See* Lenett, *supra* note 94, at 574 ("[E]very so often, an event or series of events—mob violence, assassination—jars the national consciousness and incites public demand for reasonable and measured gun *control*."); *see also id.* at 577 (listing mass murders in the late 1980s and early 1990s).

106 *See* Nicole E. Negowetti, *Judicial Decisionmaking, Empathy, and the Limits of Perception*, 47 AKRON L. REV. 693, 705 (2014) (explaining that a person's immediate reactions "operate without conscious awareness or conscious control").

107 *See* TAYLOR S. SCHUMANN, WHEN THOUGHTS AND PRAYERS AREN'T ENOUGH: A SHOOTING SURVIVOR'S JOURNEY INTO THE REALITIES OF GUN VIOLENCE 1–5, 51–63 (2021).

108 *See* Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLINICAL L. REV. 201, 207–10 (2018) (considering the enduring impact and effects of trauma); *see also* Negowetti, *supra* note 106, at 706–07 (discussing "schemas," meaning deeply ingrained thought patterns in the context of implicit racial and other biases).

state bans on assault weapons but no current federal ban.[109] It is much more personal when the trauma is in your backyard. For example, while the Sandy Hook Massacre occurred in 2012, it hardly seems like a distant memory to Connecticut residents, in particular, those living in Newton.[110]

Sadly, another cohort is that the degree of shock needed for an emotional response increases exponentially over time. Consider James Bond movies. Film students have long been taught that the flashy traditional opening needs to get bigger and better with every new iteration; screenwriters rise to the occasion, creating an even higher bar to beat in each subsequent chapter of the franchise.[111] A similar phenomenon exists due to the constant pace of recent mass murders. Unless the death toll is unusually high or the circumstances particularly gruesome or distinctly memorable, a mass murder can grab headlines for a few days and then be tossed atop the heap of all the mass murders that came before.[112]

There was sufficient public outcry to nationally ban bump stocks in 2017. The open questions are whether there will be sufficient outcry after the Supreme Court's ruling in *Cargill* to reinstate the ban and whether it will take an additional tragedy (or tragedies) to evoke that response.

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109 Jacobs, *supra* note 87, at 683.

110 The author of this Article lived in Connecticut a decade after the Sandy Hook Massacre and can personally attest to the lingering effects on both local communities and the state as a whole. *See also* CHRIS MURPHY, THE VIOLENCE INSIDE US: A BRIEF HISTORY OF AN ONGOING AMERICAN TRAGEDY 64–67 (2020) (discussing the tragedy and how America is "lagging" behind other countries on gun reform, from the perspective of a U.S. senator from Connecticut); Jacobs, *supra* note 87, at 683 (noting the national response to the 2012 Sandy Hook Massacre).

111 The author of this Article recalls learning this tactic in a 2007 class taught by the legendary Professor Howard Suber at the UCLA School of Theater, Film, and Television. Professor Suber extensively explores cinematic storytelling in numerous publications. *See* HOWARD SUBER, THE POWER OF FILM, at xxiii (2006); *see, e.g.*, Brian D. Johnson, *James Bond: The Evolution of an Iconic Franchise—and the Coolest Secret Agent of All Time*, MACLEAN'S (Oct 6, 2021), https://macleans.ca/culture/james-bond-the-evolution-of-an-iconic-franchise-and-the-coolest-secret-agent-of-all-time/ [https://perma.cc/G27E-2UNE] (discussing how budgets increased and digital effects overtook stunts in the opening scenes of the James Bond franchise).

112 The cycle of public outrage at a mass murder yielding no legislative results has been ongoing. *See* Katherine L. Record & Lawrence O. Gostin, *What Will It Take? Terrorism, Mass Murder, Gang Violence, and Suicides: The American Way, or Do We Strive for a Better Way?*, 47 U. MICH. J.L. REFORM 555, 557 (2014); *see also* Vinall, *supra* note 31 ("Revulsion at high-profile shootings have largely not resulted in increased controls.").

III. THE SHOWDOWN: A TOMMY GUN? OR NOT?

"Two plus two is four," says one lawyer. "But is it?" quizzically asks another. After a sufficient amount of caffeine, a handful of lawyers could probably come up with a myriad of arguments as to why this simple premise could be viewed from a different perspective, yielding a different answer. A recent cartoon captures similar nonsensicalness in the specific context of *Cargill*.[113] Two schoolchildren crouch under desks amidst a torrent of gunfire.[114] One says to the other, "We're okay . . . SCOTUS says a bump stock is not a machine gun."[115] The nonsensicalness arises from the fact that arguing over whether a weapon is deemed a "machine gun" misses the point; the danger arises from firepower, not nomenclature.

The battle over bump stocks turned on the phrase "by a single function of the trigger."[116] As explained more below, there was no dispute that a shooter need only pull and hold the trigger *once* to achieve automatic firepower comparable to that of a machine gun.[117] The counterargument posited that what mattered was the *inner trigger mechanism*.[118] Put differently, a "single function of the trigger" should be viewed from the perspective of the gun—not the shooter—even though Congress intended just the opposite.

In our futuristic world, Artemis and Diana settle in for the second session of their memory imPlant of *Cargill*. This session focuses on the decision itself and the then-existing context, both legal and societal.

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113 Richard Galant, *Opinion: The Simple Thing Supreme Court Can't Agree On*, CNN (June 16, 2024, 8:39 AM), https://www.cnn.com/2024/06/16/opinions/machine-gun-by-any-other-name-supreme-court-column-galant/index.html [https://perma.cc/9K7A-6NRS].

114 *Id.*

115 *Id.* (referencing Justice Sotomayor's dissent and making an allegory to Shakespeare: "That which we call a rose by any other word would still smell as sweet").

116 Garland v. Cargill, 602 U.S. 406, 415 (2024).

117 *See infra* Section III.B.

118 Cargill's attorney argued that the phrase "single function of the trigger" must be construed to mean "the trigger's function and not [] what the shooter *does* to the trigger." Cargill Oral Argument at 50, 85, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976) (emphasis added).

A. The 2017 Las Vegas Massacre and the Public Outcry to Ban Bump Stocks

> Some days it's tough just gettin' up
> Throwin' on these boots and makin' that climb
> Some days I'd rather be a no show, lie low
> 'Fore I go outta my mind
> But when she says baby (baby)
> Oh, no matter what comes ain't goin' nowhere
> She runs her fingers through my hair
> And saves me
> Yeah, that look in her eyes got me comin' alive
> And drivin' me a good kinda crazy
> When she says baby
> Oh, when she says baby.
>
> — Jason Aldean[119]

October 1, 2017. The annual Route 91 Harvest Country Music Festival takes place at an outdoor venue in Paradise, Nevada, steps away from the Mandalay Bay Resort and the iconic Las Vegas Strip.[120] The sound of electric guitars and country twang fills the air. Country music star Jason Aldean begins the final set with a love song, "When She Says Baby."[121] Couples cradle, swaying together as the crowd sings along, the laid-back ballad capturing their truth. Then the unthinkable. Some presume it's fireworks, but it becomes clear torrents of bullets are raining down, felling those on stage and throughout the venue.[122] The music stops but the terror continues. On frantic radio calls, emergency personnel characterize it as "automatic fire."[123] In a little over eleven minutes, over a thousand rounds take their toll.[124] Sixty victims would pass, with another eight hundred and fifty suffering injuries, most from bullets or shrapnel.[125]

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119 Jason Aldean, *When She Says Baby*, *on* NIGHT TRAIN (Broken Bow Recs. 2012).

120 Mallory Simon, *10 Las Vegas Survivors and Their Six Hours of Hell*, CNN, https://www.cnn.com/2017/10/05/us/inside-the-las-vegas-massacre/index.html [https://perma.cc/BWG3-SN5D] (Oct. 5, 2017, 6:08 PM).

121 *Id.*

122 *See id.*

123 CBS News, *11 Minutes | Official Trailer*, YOUTUBE (Sept. 14, 2022), https://www.youtube.com/watch?v=HV-epVYBRzs [https://perma.cc/AH3K-9BX2] (responding police officers describing "automatic fire").

124 Kohrman, *supra* note 4.

125 Initial reports indicated that fifty-eight victims passed in the immediate aftermath. Rio Lacanlale, *Las Vegas Woman Becomes 60th Victim of October 2017 Mass Shooting*, LAS VEGAS REV.–J., https://www.reviewjournal.com/crime/shootings/las-vegas-woman-becomes-60th-victim-of-october-2017-mass-shooting-2123456/

The extraordinary firepower was made possible by bump stocks. The massacre, which tallied up as the deadliest mass murder in American history, shocked the nation and the world. How could one person impose such carnage? Many, if not most, likely had never even heard of bump stocks prior to this event. Both the guns and the bump stocks were legally purchased, which seemed to make no sense.[126] Following the attack, there were calls for renewing the ban on assault weapons altogether, or at least banning bump stocks.[127] Initially, even the NRA was open to some reform.[128]

Pushback. In the face of this extreme loss of life and limb, Congress could not reach a consensus.[129] The ban on bump stocks

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[https://perma.cc/LBB8-X7UN] (Sept. 17, 2020, 6:53 PM). There was also some dispute, especially early on, as to exactly how many were injured. *Id.* Many reports suggested the number ranged from 800 to 850. *See, e.g.*, Mary Clare Jalonick, *Republicans Block Bill to Outlaw Bump Stocks for Rifles After Supreme Court Lifts Trump-Era Ban*, AP NEWS, https://apnews.com/article/bump-stocks-senate-vote-schumer-las-vegas-shooting-6684089f5080bfa97f99b967fd234f60 [https://perma.cc/4SGE-ZKM7] (June 18, 2024, 2:41 PM) (referencing 850 victims); Russ Bynum, *How Bump Stocks Ended up Before the U.S. Supreme Court*, PBS NEWS (Feb. 28, 2024, 3:15 PM), https://www.pbs.org/newshour/politics/how-bump-stocks-ended-up-before-the-u-s-supreme-court [https://perma.cc/CJ2M-CD4U] (detailing the history of bump stocks, the Las Vegas Massacre, and the journey of the *Cargill* case to the Supreme Court).

126 Julie Turkewitz & Jennifer Medina, *Las Vegas Police Release Final Report on Massacre, with Still No Idea of Motive*, N.Y. TIMES (Aug. 3, 2018), https://www.nytimes.com/2018/08/03/us/las-vegas-shooting-final-report.html [https://perma.cc/3UFP-TZ86] (noting that the killer "purchased all weapons and ammunition legally" and "did not commit a crime until he fired the first round into the crowd"). The police report indicated that "887 people sustained documented injuries." *Id.*

127 In 2017, following the Las Vegas Massacre, there was broad public support to ban bump stocks. David T.S. Jonas, *Take the Politics out of Political Significance: The Case for Using Objective Metrics in Major Questions Analysis*, 31 GEO. MASON L. REV. 339, 382–83 (2023) (referencing a poll by NPR and Ipsos, finding that "83% of respondents either strongly favored or somewhat favored banning firearm attachments such as bump stocks 'that allow rifles to rapidly fire similar to an automatic weapon'").

128 Nicholas Bogel-Burroughs & Jack Healy, *The Bump Stock Ban Stemmed from a Horrific Mass Shooting*, N.Y. TIMES (June 14, 2024), https://www.nytimes.com/2024/06/14/us/bump-stock-vegas-shooting-supreme-court.html [https://perma.cc/8X9B-KBNA] (noting "wide political agreement" and that "[w]ithin days of the shooting, the National Rifle Association endorsed stronger restrictions").

129 *See* Sadat & George, *supra* note 33, at 20–21 (discussing Congress' failure to act and the ATF's subsequent ban on bump stocks). Some argue that resistance derives from untrue "myths" advanced by special interest groups like the NRA. *See generally* THOMAS GABOR & FRED GUTTENBERG, AMERICAN CARNAGE: SHATTERING THE MYTHS THAT FUEL GUN VIOLENCE (2023) (debunking thirty-seven myths to combat misinformation about gun violence). Guttenberg's daughter, Jaime, was a victim of the 2018 Parkland Massacre. *Id.* His book includes a passionate foreword by the head coach of the Golden State Warriors basketball team, Steve Kerr, who also experienced gun violence in his family. Steve Kerr, *Foreword* to THOMAS GABOR & FRED GUTTENBERG, AMERICAN CARNAGE: SHATTERING THE MYTHS THAT FUEL GUN VIOLENCE 12, 12–17 (2023).

ultimately came down during President Trump's first term. Per an ATF press release, Trump directed Attorney General Jeff Sessions "to dedicate all available resources to . . . propose for notice and comment a rule banning all devices that turn legal weapons into machineguns."[130] On December 18, 2018, the ATF, crediting Trump, announced an immediate ban.[131] The press release also made clear that bump stocks did indeed transform otherwise legal weapons into "machineguns." As set forth in the press release:

> President Donald Trump is a law and order president, who has signed into law millions of dollars in funding for law enforcement officers in our schools, and under his strong leadership, the Department of Justice has prosecuted more gun criminals than ever before as we target violent criminals. We are faithfully following President Trump's leadership by making clear that bump stocks, *which turn semiautomatics into machine guns*, are illegal, and we will continue to take illegal guns off of our streets.[132]

The final rule implemented by the ATF specifically determined that "'single function of the trigger' mean[t] single pull of the trigger and analogous motions."[133] The ATF further directed that anyone in possession of a bump stock needed to either surrender the weapon to law enforcement or destroy the device in a manner that "render[ed] the device incapable of being readily restored to its intended function."[134]

Cargill, a gun shop owner, bought two bump stocks during the ATF's rulemaking process.[135] He dutifully surrendered the bump stocks to the ATF following the adoption of the final rule. That same day, he filed suit, thereby forging the trail that would eventually drop bump stocks at the door of the Supreme Court.[136]

B. The Briefing in *Cargill*: Two Competing Frames for the Phrase "Single Function of a Trigger"

When the facts are not on your side, argue the law. When the law is not on your side, argue the facts. When neither is on your

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130 Press Release, Off. of Pub. Affs., Department of Justice Announces Bump-Stock-Type Devices Final Rule (Dec. 18, 2018), https://www.justice.gov/opa/pr/department-justice-announces-bump-stock-type-devices-final-rule [https://perma.cc/GH3G-955F] (referencing the prior February 20, 2018, press release).

131 *Id.*

132 *Id.* (emphasis added).

133 *Id.*

134 *Id.*

135 Brief for the Petitioners, *supra* note 66, at 11.

136 *Id.*

side, pound your fist on the table. The origin of this tongue-in-cheek legal adage may not be clear, but it certainly describes the dilemma facing Cargill's attorneys when everyone and anyone viewed bump stocks as turning semiautomatic weapons into illegal machine guns. But there is one more trick in every lawyer's toolbox. In any given case, the essence of a dispute can be distilled down to "what's really going on" (WRGO).[137] If the legal issue spells doom for your client, reframe.

In terms of a traditional Second Amendment challenge, Cargill faced insurmountable hurdles from prior precedent and the longstanding presumed constitutionality of the NFA. However, recent law *had* favored gun lobbyists. Just two years prior, in *Heller*, the Supreme Court substantially shored up the Second Amendment by requiring that any statute restricting the right to bear arms must be "consistent with this Nation's historical tradition of firearm regulation."[138] In terms of weaponry not in existence at the time of enactment, the government must prove there was an analogue demonstrating the relevant similarity between the modern-day law and acceptable regulations at the Founding.[139]

Still, there was no requirement that there be an exact fit. As previously established in *Bruen*, "analogical reasoning requires only that the government identify a well-established and representative historical *analogue,* not a historical *twin*."[140] Both *Bruen* and *Heller* acknowledged the constitutionality of colonial prohibitions on "dangerous and unusual" weapons.[141] That served as the precise justification for the NFA's ban of machine guns, which was passed nearly a century prior, albeit never constitutionally challenged.[142] Moreover, there was no dispute that the 1934 Congress intended to prohibit machine guns of any

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137 Maureen Johnson, *You Had Me at Hello: Examining the Impact of Powerful Introductory Emotional Hooks Set Forth in Appellate Briefs Filed in Recent Hotly Contested U.S. Supreme Court Decisions*, 49 IND. L. REV. 397, 460–61 (2016) (discussing competing WRGOs and other practitioner tips); Maureen Johnson, *"That Little Girl Was Me": Kamala Harris and the Civil Whites of 1964 and Beyond*, 33 CARDOZO L. REV. 577, 626–27 (2022) (explaining the correlation between *kairos* and WRGOs); *see also* ROSS GUBERMAN, POINT MADE: HOW TO WRITE LIKE THE NATION'S TOP ADVOCATES 1 (2d ed. 2014) (expressing the need to immediately grab the reader's attention with a concise, powerful theme).

138 N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 17 (2022).

139 *Id.* at 28–30.

140 *Id.* at 30.

141 *Id.* at 47 (citing District of Columbia v. Heller, 554 U.S. 570, 627 (2008)).

142 *Heller*, U.S. at 624.

kind and that bump stocks converted semiautomatic weapons into the functional equivalent of machine guns. Just like the Tommy Gun and modern-day, military-grade machine guns, bump stock conversions achieve automatic fire with but a single pull of the trigger.[143]

Slam dunk for the Solicitor General?

The *Cargill* briefing and oral arguments presented two very different views of WRGO. Cargill was effectively boxed out from arguing that bump stocks did not convert a semiautomatic weapon into the functional equivalent of a machine gun. As explained in the Solicitor General's brief, once the trigger is pulled, the "cycle continues until the shooter moves his trigger finger, stops maintaining forward pressure with his non-trigger hand, or exhausts the ammunition."[144] This mechanism is used in Tommy Guns, which first prompted the passage of the NFA in 1934. A shooter could discharge one shot, multiple shots, or maintain continuous shooting until the ammunition was spent.[145] All that is necessary is for the shooter to maintain pressure by holding down the trigger and keeping the weapon steady. As explained in the Solicitor General's brief:

> A semiautomatic rifle equipped with a bump stock fires multiple shots "by a single function of the trigger." It allows a shooter to initiate a bump-firing sequence with a single motion—either pulling the trigger, or sliding the rifle forward in order to press the trigger against the trigger finger. That single motion sets off a cycle—*fire, recoil, bump, fire*—that enables the rifle to fire hundreds of rounds a minute.[146]

Facing these apparent roadblocks, Cargill reframed the issue.[147] Instead of trying to challenge the constitutionality of

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143 Cargill Oral Argument, *supra* note 40, at 54–55 (explaining that guns with bump stocks carry the same amount of firepower as machine guns). Cargill's attorney refused to concede that there had been more than one shot fired per the "function of the trigger," but did not contest that the shooter only had to pull the external metal portion of the trigger once; instead, Cargill's attorney claimed the true "trigger" was the internal mechanism. *Id.* at 51–55. In his words, "the phrase 'single function of the trigger' can only be construed grammatically to focus on the trigger's function, and not on what the shooter does to the trigger." *Id.* at 50.

144 Brief for the Petitioners, *supra* note 66, at 5–7.

145 Charles Brief, *supra* note 75, at 4–7.

146 Brief for the Petitioners, *supra* note 66, at 22–23 (emphasis added) (citations omitted) (quoting 26 U.S.C. § 5845(b)).

147 Of course, Cargill was not the only litigant to advance this argument, which was consistent with prior reasoning advanced by gun lobbyists and accepted by the ATF prior to its changed position. *See* Brief for the Respondent at 8–12, Garland v. Cargill, 602 U.S. 406 (2024) (No. 22-976).

the NFA under the Second Amendment[148] or counter the argument that bump stocks converted weapons into the functional equivalent of a machine gun, Cargill honed in on the *manner* by which bump stocks achieved this end.[149] Therein came the laser-sharp focus on the phrase "single function of the trigger."[150] The Solicitor General, the 1934 Congress, and likely anyone without a pony in the race interpreted this as including one pull of the trigger by the shooter, albeit held down to maintain continuous fire.[151] Cargill took a different tack—the trigger is engaged separately for each shot because the internal hammer mechanism causes the trigger to be "bumped" into the shooter's stationary finger by each recoil prior to the release of the next shot in the firing sequence.[152]

Say that again?

As Cargill explained, the firing sequence for a semiautomatic rifle includes three steps: (1) "The shooter activates the trigger"; (2) "The trigger releases the hammer, which springs forward and causes a single bullet to be fired"; and (3) "The shooter releases or disengages the trigger, causing the trigger to reset and allowing the hammer and trigger to return to a cocked position."[153] Per Cargill, "[a] bump stock does not change any of this,"[154] adding "[t]he only difference with a bump stock is that this shooting cycle repeats itself more quickly, as the bump stock facilitates rapid firing through repeated 'bumps' of the trigger into the shooter's finger."[155] However, rifles with bump stocks can fire four hundred to eight hundred shots within a minute: in effect, making the rate at which a shooter's "stationary" finger is bumped equal to four hundred to eight hundred bumps per

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148 Notably, while Cargill did not make a Second Amendment challenge, this argument *was* made in amici briefs. *See* Reply Brief for the Petitioners, *supra* note 18, at 19 ("Some of respondent's amici, though not respondent himself, argue that a ban on bump stock devices would violate the Second Amendment."); *see also* Cargill Oral Argument, *supra* note 40, at 104–05 (revealing that Cargill's attorney had no position as to whether bump stocks are protected by the Second Amendment because he did not brief the issue).

149 Reply Brief for the Petitioners, *supra* note 18, at 15.

150 Brief for the Petitioners, *supra* note 66, at 18.

151 *See id.* at 20.

152 Brief for the Respondent, *supra* note 147, at 38–39. At oral argument, Cargill's attorney plainly stated: "[R]apid fire is not the test under the statute. It's not whether it fires rapidly. It's whether it fires more than one shot automatically . . . by a single function of the trigger." Cargill Oral Argument, *supra* note 40, at 71.

153 Brief for the Respondent, *supra* note 147, at 19–20.

154 *Id.* at 20.

155 *Id.* at 20–21.

minute. A bump stock device also has a ledge to ensure the shooter's trigger finger remains stationary, meaning the shooter's finger certainly does *not* pull the trigger more than once, let alone at a rate of four hundred to eight hundred times per minute.[156] The bump stock also "comes with a rectangular 'receiver module' that guides and regulates the weapon's recoil."[157] Still, per Cargill, four hundred to eight hundred bumps of the trigger against the shooter's stationary finger—a finger held stationary by the bump stock itself—would nevertheless constitute four hundred to eight hundred separate functions of the trigger.[158]

Oral arguments were held on February 28, 2024. Principal Deputy Solicitor General Brian H. Fletcher led off with a reference to the Las Vegas Massacre and an explanation that once a single pull of the trigger engages continuous shooting, it remains continuous so long as the shooter "maintains steady forward pressure."[159] The main concern from the conservative Justices seemed to be whether anyone could be prosecuted for failing to timely destroy or turn in their bump stocks pursuant to the ATF's order. For example, Justice Gorsuch was concerned for the scores of individuals who may have purchased bump stocks prior to the 2018 prohibition in reliance on the ATF's prior interpretation. Specifically, Justice Gorsuch questioned whether the shift in the ATF's position "would render between a quarter of a million and a half million people federal felons."[160] Fletcher assured the Justices that no one had or would be prosecuted for failing to comply with the rule. He further noted the five-year statute of limitations was set to run in a month.[161] As a practical matter, that meant there would be no such prosecutions as the statute presumably would (and ultimately did) run before the issuance of the Supreme Court's opinion.

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156 Brief for the Petitioners, *supra* note 66, at 5–6 ("A bump stock also includes a stationary finger rest (also known as the 'extension ledge') on which the shooter places his finger while shooting.").

157 *Id.*

158 Brief for the Respondent, *supra* note 147, at 20–21 (arguing that multiple shots in a single sequence still constitute "distinct 'functions' of the trigger").

159 Cargill Oral Argument, *supra* note 40, at 3.

160 *Id.* at 19–23 (Justice Gorsuch's line of questioning); *see also id.* at 27–30 (Justice Kavanagh's discussion of mens rea as it pertains to potential prosecutions); *id.* at 34–35 (Justice Alito's remarks on potential prosecutions). Interestingly, in terms of Supreme Court banter, the line of questioning by Justice Gorsuch was marked by what may well become a signature stylistic hallmark, when he pointedly asked, "Thoughts?" *Id.* at 19–20; *see also id.* at 67–68 (same).

161 *Id.* at 24.

Generally speaking, and despite nearly two hundred references to "function" or "single function of the trigger," it appeared that the Justices understood there was only one volitional act by the shooter necessary for a weapon equipped with a bump stock to engage in automatic fire.[162] Justice Barrett commented, "[I]ntuitively, I am entirely sympathetic to your argument . . . it seems like, yes, that this is functioning like a machine gun."[163] Even Justice Thomas, who would be tapped to write the majority opinion, appeared to recognize Congress intended to rid the streets of weapons capable of machine gun rapid-fire.[164] There was almost no discussion at all about whether the ATF overstepped its bounds.[165]

By contrast, *Rahimi*, the other Supreme Court case from the 2023 Term that captured the attention of gun lobbyists, involved a straightforward traditional Second Amendment challenge.[166] The alleged facts were especially egregious, which appeared to weigh upon the Justices' minds at oral argument.[167] As ultimately incorporated into the Supreme Court opinion, Rahimi allegedly engaged in extreme physical abuse of his girlfriend (C.M.), which included several instances when Rahimi brandished his weapon and fired shots at C.M. and others.[168] In seeking a restraining order, C.M. reported numerous other assaults and detailed how Rahimi's conduct endangered their

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162 *See id.* at 127–28.

163 *Id.* at 13. Yet Justice Barrett also noted the Fifth Circuit "looked at it from the perspective of the gun and the machinery of the gun." *Id.* at 15.

164 Justice Thomas added, "And there was significant damage from machineguns, carnage, people dying, et cetera. And behind this is a notion that the bump stock does the exact same thing. So, with that background, why shouldn't we look at a broader definition of 'function,' one suggested by the . . . government, as opposed to just the narrow one you suggest?" *Id.* at 49–50.

165 However, Justice Gorsuch did express his concerns about the ability of a private citizen, realistically, to challenge the ATF's determination absent prosecution. *See id.* at 19–22.

166 *See* Dahlia Lithwick, *Zackey Rahimi Is the Perfect Poster Boy for the Gun Lobby at the Supreme Court*, SLATE (Nov. 7, 2023, 5:45 AM), https://slate.com/news-and-politics/2023/11/zackey-rahimi-gun-lobby-poster-boy-supreme-court.html [https://perma.cc/AR4C-LKKR]; United States v. Rahimi, 144 S. Ct. 1889 (2024).

167 *See* Transcript of Oral Argument, *Rahimi*, 144 S. Ct. 1889 (2024) (No. 22-915) [hereinafter Rahimi Oral Argument].

168 *Rahimi*, 144 S. Ct. at 1894–95. Additional details include that when C.M. tried to flee during an argument, Rahimi "grabbed her by the wrist, dragged her back to his car, and shoved her in, causing her to strike her head against the dashboard." *Id.* at 1895. When he noticed a bystander was watching, he retrieved a gun from under the passenger seat. *Id.* As C.M. took this opportunity to escape, he fired at her, later threatening that "he would shoot her if she reported the incident." *Id.*

young child.[169] Not surprisingly, the trial court judge granted the restraining order, finding Rahimi constituted a "credible threat," a prerequisite to restricting him from possessing a firearm.[170] Following the trial court's order, Rahimi allegedly "threatened a different woman with a gun" and ultimately was identified by state police as the "suspect in a spate of at least five additional shootings."[171] After that, Rahimi was allegedly involved in a road rage incident, where he fired at a truck driver "several times."[172] On a separate occasion, he pulled a gun and shot into the air at a roadside diner when a friend's credit card was declined.[173] At oral argument, these facts prompted Chief Justice Roberts to candidly ask Rahimi's attorney, "[Y]ou don't have any doubt that your client's a dangerous person, do you?"[174]

Given how both *Heller* and *Bruen* came out in favor of gun lobbyists, the conventional wisdom was that a conservative-leaning Supreme Court might do the same with both *Cargill* and *Rahimi*. While *Cargill* might have been the better bet as to which case would hand gun lobbyists their first real loss in decades, the opposite turned out to be true.[175]

C. The Decisions: *Cargill* and *Rahimi*

Holmes, Brandeis, Harlan, Black, Douglas, and Scalia. These well-known Supreme Court Justices have been dubbed the "Great Dissenters."[176] Justice Sotomayor may well be added to

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169 *Id.*

170 *Id.*

171 *Id.*

172 *Id.*

173 *Id.* When the police obtained a warrant to search Rahimi's home, "they discovered a pistol, a rifle, ammunition—and a copy of the restraining order." *Id.*

174 Rahimi Oral Argument, *supra* note 167, at 79.

175 Gun activists have exerted substantial pressure against any limitation of the Second Amendment. For example, the NRA has pressured legislators by utilizing a "scoring" or rating system, which monitors politicians' votes and factors them into approval ratings. *See* Allen Rostran, *The Past and Future Role of the Second Amendment and Gun Control in Fights over Confirmation of Supreme Court Nominees*, 3 NE. U.L.J. 123, 161 (2011); Vinall, *supra* note 31 (discussing the difficulty of enacting gun reform); Esther Ness, *Moving Beyond Thoughts and Prayers: A New and Improved Federal Assault Weapons Ban*, 44 FORDHAM INT'L L.J. 1087, 1108–09 (2021) (discussing leverage on politicians).

176 William D. Blake & Hans J. Hacker, *"The Brooding Spirit of the Law": Supreme Court Justices Reading Dissents from the Bench*, 31 JUST. SYS. J. 1, 1 (2010). Blake and Hacker quote Chief Justice Hughes as noting, back in 1936, that a dissent is "an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believes the court to have been betrayed." *Id.* (quoting CHARLES EVANS HUGHES, THE SUPREME COURT OF THE UNITED STATES 68 (1936)); *see also* Christopher W. Schmidt & Carolyn Shapiro, *Oral Dissenting on the Supreme Court*, 19 WM. & MARY BILL RTS. J. 75, 94 (2010).

the list. In what was at least once a relatively rare move, she read her dissent in *Cargill* from her seat in the staid public chambers of the Supreme Court.[177] It was not just a protest against a technical or dry interpretation of a rule of law. It was frank recognition that lives were going to be lost, blood would be spilt, and it was the Supreme Court that was going to allow that to happen. In fact, it was the Supreme Court that was opening the door.[178]

Lock, stock, and barrel, Justice Thomas' majority opinion followed the WRGO served up by Cargill and the gun lobbyists. It does not matter how fast or furious bullets fly out of the chamber.[179] So long as they come out one at a time, it's just "a single function of the trigger."[180] With diagrams, Justice Thomas focused on the internal mechanism and laid out how semiautomatic guns fired a single shot at a time.[181] Then, echoing Cargill's brief, Justice Thomas declared, "Nothing changes when a semiautomatic rifle is equipped with a bump stock," meaning the internal firing mechanism continues to be reset prior to the discharge of the next bullet.[182]

Yet the majority's prior explanation of bump stocks acknowledged that a shooter's trigger finger remained "stationary" during continuous shooting; specifically, the trigger

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177 Mark Walsh, *Two Oral Dissents and More Opinion Days to Come*, SCOTUSBLOG (June 27, 2024, 5:17 PM), https://www.scotusblog.com/2024/06/two-oral-dissents-and-more-opinion-days-to-come/ [https://perma.cc/DC5P-MLMK]; *see also* Abbie VanSickle, *Behind the Curtain at the Supreme Court*, N.Y. TIMES (June 24, 2024), https://www.nytimes.com/interactive/2024/06/27/us/supreme-court-chamber-photos.html [https://perma.cc/DV9Y-TJ7F] (noting that, "[a]s with much of the building, the chamber appears older than it is"). VanSickle further elucidated, "As Judith Resnik and Dennis Curtis, professors at Yale Law School, explained in their book, 'Representing Justice,' it 'was designed to look old—as if it had been in place since the country's founding.'" *Id.*; *see also* discussion *supra* Section III.B (discussing oral dissents in the 2023 Term).

178 In a May 25, 2024, interview at Harvard University's Radcliffe Institute for Advanced Study, Justice Sotomayor shared how deeply she was affected by impactful Supreme Court decisions that did not turn out the way she believed they should. Marina Pitofsky, *'You Have to Shed the Tears': Justice Shares that She Cries After Some Supreme Court Cases*, USA TODAY (May 27, 2024). https://www.usatoday.com/story/news/politics/2024/05/27/sonia-sotomayor-cries-supreme-court/73868167007/ [https://perma.cc/68L7-T9HJ]. Justice Sotomayor confessed, "There are days that I've come to my office after an announcement of a case and closed my door and cried." *Id.* She added, "There have been those days. And there are likely to be more." *Id.*

179 Garland v. Cargill, 602 U.S. 406, 421 (2024).

180 *Id.*

181 *Id.*

182 *Id.*; *see also* Brief for the Respondent, *supra* note 147, at 20 ("A bump stock does not change any of this, and the shooting cycle of a bump stock–equipped semi-automatic rifle is exactly the same as a semi-automatic weapon without the bump stock.").

finger is kept "stationary" by a "ledge" at the exterior locus.[183] The majority also conceded that the exact purpose of bump stocks was to achieve the same level of firepower as outlawed machine guns.[184] As explained by Justice Thomas:

> Shooters have devised techniques for firing semiautomatic firearms at rates approaching those of some machineguns. One technique is called bump firing. A shooter who bump fires a rifle uses the firearm's recoil to help rapidly manipulate the trigger. The shooter allows the recoil from one shot to push the whole firearm backward. As the rifle slides back and away from the shooter's stationary trigger finger, the trigger is released and reset for the next shot. Simultaneously, the shooter uses his nontrigger hand to maintain forward pressure on the rifle's front grip. The forward pressure counteracts the recoil and causes the firearm (and thus the trigger) to move forward and "bump" into the shooter's trigger finger. This bump reengages the trigger and causes another shot to fire, and so on.[185]

Justice Thomas further stated that "[a] bump stock does not alter the basic mechanics of bump firing" because "the trigger still must be released and reengaged to fire each additional shot."[186]

Early on in the opinion, and again at the end, the majority criticized the ATF for reversing its prior categorization of bump stocks as not falling within the purview of the NFA.[187] Specifically, the majority pointed out that "[o]n more than 10 separate occasions over several administrations, ATF consistently concluded that rifles equipped with bump stocks cannot 'automatically' fire more than one shot 'by a single function of the trigger.'"[188] The majority then tied the ATF's shift in position to the public outcry following the Las Vegas Massacre.[189] Of course, the issue of the ATF's shift in position had been addressed at oral argument and there was an obvious answer that the majority opinion ignored. As pointed out by Principal Deputy Solicitor General Fletcher, "courts do not hesitate to correct government errors in interpreting statutes; an agency certainly should be afforded the same opportunity."[190]

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183 *See Cargill*, 602 U.S. at 411–12.

184 *See id.*

185 *Id.* at 411. The notion that the firepower supplied by bump stocks is comparable to that of some machine guns comes from Cargill's brief. *See* Brief for the Respondent, *supra* note 147, at 3 ("Experts have devised ways for semi-automatic rifles to fire at rates approaching those of machineguns.").

186 *See Cargill*, 602 U.S. at 412.

187 *Id.* at 411–12, 428.

188 *Id.* at 412.

189 *Id.* at 412–13.

190 Cargill Oral Argument, *supra* note 40, at 20.

Additionally, as noted above, Justice Alito's concurrence confirmed that the ATF's *corrected* interpretation indeed tracked congressional intent. It bears repeating that Justice Alito expressly wrote: "There can be little doubt that the Congress that enacted 26 U.S.C. § 5845(b) would not have seen any material difference between a machinegun and a semiautomatic rifle equipped with a bump stock."[191]

The better-reasoned opinion is the passionate dissent penned by Justice Sotomayor, joined by Justices Kagan and Jackson. What mattered to these dissenters—and what would have mattered to the 1934 Congress—was whether bump stock conversions were the type of high-powered weaponry intended to be taken out of the hands of the general public.[192] Unlike the majority, Justice Sotomayor led with the devasting loss of life that had occurred in the Las Vegas Massacre, directly attributing the extraordinary lethality and mass injuries to the use of bump stocks.[193] She provided a solid legal basis as to why such weaponry fell within the NFA's ban on machine guns. As reflected in Justice Sotomayor's colloquial and very fitting "duck" analogy, the ordinary meaning of "single function of the trigger," both in 1934 and today, certainly covered one pull of the trigger by the shooter resulting in continuous rapid-fire akin to that of a machine gun.[194] She also alluded to life-and-death consequences. As powerfully stated:

> On October 1, 2017, a shooter opened fire from a hotel room overlooking an outdoor concert in Las Vegas, Nevada, in what would become the deadliest mass shooting in U.S. history. Within a matter of minutes, using several hundred rounds of ammunition, the shooter killed 58 people and wounded over 500. He did so by affixing bump stocks to commonly available semiautomatic rifles. These simple devices harness a rifle's recoil energy to slide the rifle back and forth and repeatedly "bump" the shooter's stationary trigger finger, creating rapid-fire. *All the shooter had to do was pull the trigger and press the gun forward. The bump stock did the rest*.
>
> . . . .
>
> Today, the Court puts bump stocks back in civilian hands. To do so, it casts aside Congress's definition of machinegun and seizes upon one that is inconsistent with the ordinary meaning of the statutory text

191 *Cargill*, 602 U.S. at 429 (Alito, J., concurring) (referencing the "horrible shooting spree in Las Vegas in 2017").

192 *See id.* at 445–46 (Sotomayor, J., dissenting).

193 *See id.* at 429–30.

194 *See id.* at 430 (quoting 26 U.S.C. § 5845(b)).

> and unsupported by context or purpose. *When I see a bird that walks like a duck, swims like a duck , and quacks like a duck, I call that bird a duck.* A bump-stock-equipped semiautomatic rifle fires "automatically more than one shot, without manual reloading, by a single function of the trigger." Because I, like Congress, call that a machine gun, I respectfully dissent.[195]

Justice Sotomayor then painted the picture of the terror that prompted Congress to prohibit machine guns in the first place, including how "[g]angsters like Al Capone used machineguns to rob banks, ambush the police, and murder rivals."[196] She had an answer to the question regarding the arguably peculiar wording of the phrase "single function of the trigger," which she backed up with legislative history.[197] Machine guns sometimes did (and certainly could) rely upon different mechanisms to initiate fire, including pushing a button instead of pulling a trigger.[198] Congress wanted to make sure that the statute covered any and all existing or future methods that could be used to deliver the devastation of a traditional machine gun.[199] Notably, even Cargill's attorney admitted at oral argument that the language was chosen because of these distinct possibilities.[200] Justice Sotomayor also persuasively argued that the important analysis under the statute is not the internal mechanism, but "how a person can fire" the weapon, such as the "human act of the shooter's initial pull."[201] If but a single pull—albeit continuous—results in rapid-fire, then a bump stock-equipped semiautomatic rifle is no different than a 1934 Tommy Gun. Ruling otherwise "eviscerates Congress's regulation of machineguns and enables gun users and manufacturers to circumvent federal law."[202]

Justice Sotomayor's final point focused on the majority's "evasion" of congressional intent, relying on Justice Scalia's

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195 *Id.* at 429–30 (emphasis added) (quoting 26 U.S.C. § 5845(b)).

196 *Id.* at 430–31 (citing Charles Brief, *supra* note 75, at 5).

197 *Id.* at 436–37.

198 *Id.* at 435, 438.

199 *Id.* at 431–33.

200 *Id.* at 437–38. Cargill's attorney "even agreed that Congress used the word 'function' to ensure that the statute covered a wide variety of trigger mechanisms, including both push and pull triggers." *Id.* at 438.

201 *Id.* at 434–35.

202 *Id.* Justice Sotomayor further noted, "This is not a hard case." *Id.* at 435. She highlighted Senate hearings, including testimony by the then-president of the NRA that the "distinguishing feature of a machine gun [was] that by a single pull of the trigger the gun continues to fire." *Id.* at 436–37 (citation omitted).

"presumption against ineffectiveness."[203] Interestingly, in *Abramski v. United States*, Justice Scalia "declin[ed] to read a gun statute in a way that would permit ready 'evasion,' 'defeat the point' of the law, or 'easily bypass the scheme.'"[204] Yet that was exactly what the *Cargill* majority did, given that the NFA's clear intent was to capture "weapons that shoot rapidly via a single action of the shooter."[205] *Of course* that would include a "bump-stock-equipped AR-15" that even a relative novice could fire "at a rate of 400 and 800 rounds per minute with a single pull of the trigger."[206]

Justice Sotomayor bookended her dissent with a final reference to the tragedy of the Las Vegas Massacre and the inevitable and lethal consequences of the majority decision, all of which clearly were worthy of both a written and oral dissent. As she passionately concluded:

> Congress's definition of "machinegun" encompasses bump stocks just as naturally as M16s. Just like a person can shoot "automatically more than one shot" with an M16 through a "single function of the trigger" if he maintains continuous backward pressure on the trigger, he can do the same with a bump-stock-equipped semiautomatic rifle if he maintains forward pressure on the gun. *Today's decision to reject that ordinary understanding will have deadly consequences.* The majority's artificially narrow definition hamstrings the Government's efforts to keep machineguns from gunmen like the Las Vegas shooter. I respectfully dissent.[207]

As noted above, Justice Alito's concurrence essentially punted the ball back to Congress to reinstate the ban by amending the NFA to expressly ban bump stocks. *Rahimi* bolsters the argument that *if* Congress takes Justice Alito's cue, such a ban would withstand constitutional challenge.[208] *Rahimi*,

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203 *Id.* at 442 (citing Abramski v. United States, 573 U.S. 169, 181–82 (2014)).

204 *Id.* Justice Sotomayor added that this was discussed in a text written by Justice Scalia and constitutional practitioner and scholar Bryan Garner. *See* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 63 (2012).

205 *Cargill*, 602 U.S. at 442 (Sotomayor, J., dissenting).

206 *Id.* at 443.

207 *Id.* at 446 (emphasis added) (citation omitted).

208 *See* United States v. Rahimi, 144 S. Ct. 1889, 1897, 1902 (2024) ("[America's] tradition of firearm regulation allows the Government to disarm individuals who present a credible threat to the physical safety of others."). In theory, Justice Alito's invitation suggests that he would find an amendment banning bump stocks constitutional, though, even had this reasoning been included in the majority opinion, it would have been classic dicta as the constitutionality of the NFA was not even challenged. *See Cargill*, 602 U.S. at 429 (Alito, J., concurring). If Justice Alito resigns, his replacement on the bench certainly might point that out. Nor can it be ignored that none of the other Justices joined Justice Alito's concurrence.

like *Heller* and *Bruen*, engaged in a historical overview of the Second Amendment, going back to the Founding and affirming that the constitutionality of a gun regulation turns on "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition."[209] The *Rahimi* court found that the Fifth Circuit misread *Bruen* to require a "'historical twin' rather than a 'historical analogue.'"[210] A modern-day law, including restrictions on modern-day weapons, is constitutional so long as it is "relevantly similar" to the type of common-sense restrictions instituted in the past.[211] As explained in *Rahimi*:

> [S]ome courts have misunderstood the methodology of our recent Second Amendment cases. These precedents were not meant to suggest a law trapped in amber. As we explained in *Heller*, for example, the reach of the Second Amendment is not limited only to those arms that were in existence at the founding. Rather, it "extends, prima facie, to all instruments that constitute bearable arms, even those that were not [yet] in existence." By that same logic, the Second Amendment permits more than just those regulations identical to ones that could be found in 1791. *Holding otherwise would be as mistaken as applying the protections of the right only to muskets and sabers*.
>
> As we explained in *Bruen*, the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition. A court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck by the founding generation to modern circumstances."[212]

Notably, the *Rahimi* court rejected Rahimi's suggestion that *Heller* stood for the proposition that it was unconstitutional to prohibit possession of a firearm in one's own home.[213] Rahimi had argued that he should at least be permitted to keep a firearm inside his home for protection.[214] Implicit in the rejection of Rahimi's argument is that weapons kept *inside* the home make it *outside* of the home, and therefore prohibitions can be put in

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209 United States v. Rahimi, 144 S. Ct. 1889, 1897–98 (2024) (first citing District of Columbia v. Heller, 554 U.S. 570, 582 (2008); and then citing N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 26–31 (2022)); *see generally id.* at 1899–1902.

210 *Id.* at 1903 (quoting *Bruen*, 597 U.S. at 30).

211 *See id.* at 1898, 1901 (quoting *Bruen*, 597 U.S. at 29).

212 *Id.* at 1897–98 (emphasis added) (citations omitted).

213 *Id.* at 1902.

214 *Id.* ("Rahimi argues *Heller* requires us to affirm, because [the statute] bars individuals subject to restraining orders from possessing guns in the home, and in *Heller* we invalidated an 'absolute prohibition of handguns . . . in the home.'") (citation omitted).

place if there exists sufficient danger to others.[215] Although far from a done deal, the presumed constitutionally of a ban on machine guns, as well as the functional equivalent, such as bump stock-converted semiautomatic weapons, would likely apply to both existing and newly enacted federal and state laws.[216] In the interim, bump stocks are up for grabs, at least in those states that do not have an independent ban.

IV. THE AFTERMATH: BUMP STOCKS TAKE THEIR PLACE IN THE READILY AVAILABLE GUN MARKET

June 14, 2024. Seemingly minutes after the Supreme Court posted its ruling, a banner was added to the homepage of an online store selling bump stocks. It declared: "WE ARE USA LEGAL!!! Supreme Court lifts the ban! We are experiencing high volume. Please be patient for the next few days."[217]

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215 As discussed in Section II.A, *Heller*, examining *Miller*, recognized that it would be "startling" to find the NFA unconstitutional. *See* District of Columbia v. Heller, 554 U.S. 570, 624–25 (2008).

216 *See* Andrew Chung, *With One Major Gun Case Looming, US Supreme Court Sidesteps Others*, REUTERS (July 2, 2024, 8:52 AM), https://www.reuters.com/legal/us-supreme-court-rebuffs-challenge-illinois-assault-weapon-bans-2024-07-02/ [https://perma.cc/6SFQ-D8SB]. On July 2, 2024, dodging the issue for the 2024–2025 term, the Supreme Court denied certiorari in a case challenging an Illinois state ban on assault-style rifles. *Id.* The ban was put in place following a "massacre at a 2022 Independence Day parade in the Chicago suburb of Highland Park." *Id.* The Supreme Court, however, heard oral arguments on an appeal regarding "ghost guns" on October 8, 2024, "challenging the government's authority to regulate 'ghost guns' under the Gun Control Act of 1968." Taonga Leslie, *Garland v. VanDerStok*, AM. CONST. SOC'Y: SCOTUS UPDATE (Oct. 8, 2024), https://www.acslaw.org/scotus_update/garland-v-vanderstok/ [https://perma.cc/5KVJ-H63P]; *see also Ghost Guns*, BRADY, https://www.bradyunited.org/resources/issues/what-are-ghost-guns [https://perma.cc/S3GT-QXWP] (explaining that ghost guns are "unserialized (and therefore untraceable) firearms that are put together by components purchased either as a kit or as separate pieces"). ATF rules currently prohibit "parts and kits for ghost guns, which can be assembled at home in minutes." Chung, *supra* note 216; *see also* Amy Howe, *Supreme Court Temporarily Reinstates Rule Regulating "Ghost Guns,"* SCOTUSBLOG (Aug. 8, 2023, 1:27 PM), https://www.scotusblog.com/2023/08/supreme-court-temporarily-reinstates-ban-on-ghost-guns/ [https://perma.cc/WU3P-WLRN]. Notably, the lower court blocked the ATF's prohibition on "ghost guns," meaning such weapons would again be legal, and four of the nine Justices (Justices Thomas, Alito, Gorsuch, and Kavanaugh) wanted to leave the lower court's ruling in place pending final Supreme Court resolution. *Id.* As of December 18, 2024, the Supreme Court has not issued a ruling in *VanDerStok*. *See generally* VanDerStok v. Garland, 86 F.4th 179 (5th Cir. 2023).

217 The backdrop read: "LOOKING FOR BUMPSTOCKS? WE GOT 'EM," followed by a clickable arrow. *Veteran Created. Veteran Owned.*, AM. BUMPSTOCK, https://bumpstock.com/ [https://perma.cc/Y7EN-TFJY] (last visited June 14, 2024); *see also* Clayton Vickers, *Bump Stock Ruling Could Trigger Booming Rapid-Fire Marketplace*, YAHOO NEWS (May 21, 2024, 3:00 AM), https://www.yahoo.com/news/bump-

When the Supreme Court talks, people listen. When a Supreme Court decision changes the law, it has real-life consequences. There were up to an estimated half a million bump stocks purchased prior to the ATF ban. That number could go much higher in the aftermath of *Cargill*.[218] Congress could intervene, albeit within constitutional limits, but they would have to actually *act* to do so. That seemed almost impossible amidst a political climate fraught with chaos and division, worsened by other polarizing Supreme Court decisions, and despite a narrowly avoided assassination attempt on a presidential candidate. The futility is not lost on Artemis and Diana.

> ARTEMIS: It makes no sense to ban machine guns and not ban the functional equivalent.
>
> DIANA: And there was a straightforward fix—Justice Alito's concurrence. Congress could have just reinstated the ban.
>
> ARTEMIS: All they had to do was utilize the "unanimous consent" parliamentary feature. They could have done that the next day.
>
> IMP: You are both correct. That was an option.[219]
>
> DIANA: *United States v. Trump*. When was that handed down?
>
> IMP: *United States v. Trump* was handed down on July 1, 2024, two weeks and three days after *Cargill*. Twelve days later, on July 13, 2024, a gunman attempted to assassinate Donald J. Trump, the former

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stock-ruling-could-trigger-100000879.html?fr=sycsrp_catchall [https://perma.cc/E5DU-KW4V] (discussing the potential public safety danger if bump stocks were legalized).

218 Three days after the decision in *Cargill*, the inventor of the bump stocks at issue announced the sale of his business, previously characterized as somewhat smalltime. *See* Brian New, *After Supreme Court Strikes Down Ban, Bump Stock Inventor Puts Business Up for Sale*, CBS NEWS (June 18, 2024, 6:25 AM), https://www.cbsnews.com/texas/news/after-supreme-court-strikes-down-ban-bump-stock-inventor-puts-business-up-for-sale/ [https://perma.cc/AYW4-XHZS]; *see also* Tiffany Hsu, *Bump Stock Innovator Inspired by People Who 'Love Full Auto,'* N.Y. TIMES (Oct. 5, 2017), https://www.nytimes.com/2017/10/05/business/bump-stock-innovator.html [https://perma.cc/ARK8-Y9QM]. Presumably, the timing of the cash-out signaled that the value of the company was enhanced by the Supreme Court decision, thereby indicating a potential ramp-up in production.

219 *See* Igor Bobic, *Republicans Oppose Banning Bump Stocks Used in Las Vegas Shooting*, YAHOO NEWS (June 18, 2024, 3:20 PM), https://www.yahoo.com/news/republicans-oppose-banning-bump-stocks-192026005.html [https://perma.cc/4UMF-B2EN] (discussing New Mexico Senator Martin Heinrich's attempt to pass a bill banning bump stocks within days of the *Cargill* decision).

> president, then-nominee for the Republican party, who would become the President-elect within a few months. Trump was grazed by a bullet. A spectator was killed, and two others were critically wounded.
>
> ARTEMIS: Did the shooter use a bump stock?
>
> IMP: No. The shooter, who was 20 years old, used an AR-15, a semiautomatic rifle, which his father had purchased six months prior. The shooter was killed by Secret Service agents almost immediately after he fired seven to eight bullets in under ten seconds.[220]
>
> DIANA: What if the AR-15 had been equipped with a bump stock?
>
> IMP: Accuracy might have been compromised, but more shots could have been fired. Using six hundred shots per minute for the calculation, then the shooter could have fired one hundred shots in ten seconds.

Artemis and Diana shake their heads, dismayed and exasperated.

> ARTEMIS: How could they not see what could be coming?
>
> DIANA: Say it ain't so, Artemis.[221]

Artemis and Diana sink back in their lounges to begin the final session of their imPlant. This session includes the immediate reaction to *Cargill*, as well as the broader social and legal context. This session ends with a look at emerging legal and

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220 *See* Rachel Sharp, *Explosive Devices Reported in Trump Gunman's Car After Failed Rally Assassination Attempt 'Using Father's Gun*,*'* YAHOO NEWS (July 14, 2024, 10:59 AM), https://www.yahoo.com/news/explosive-devices-reported-trump-gunman-161210534.html?fr=sycsrp_catchal [https://perma.cc/6M2P-K57W]. There could have been several practical reasons why the killer chose not to use a bump stock, including that he may have been limited to his father's artillery. Alternately, there may simply have not been sufficient time between the *Cargill* ruling on June 14, 2024, and the shooting on July 13, 2024, for the shooter to obtain the additional accessories and ammunition necessary for the conversion.

221 The final discourse is a popular cultural reference to the idiom, "Say it ain't so, Joe," which traces its roots to a 1919 gambling scandal where members of the White Sox betrayed public trust by allegedly throwing a World Series game. *See* Scott Chiusano, *'Say It Ain't So, Joe': Remembering the 1919 Black Sox and Baseball's Biggest Scandal*, N.Y. DAILY NEWS, https://www.nydailynews.com/2015/10/09/say-it-aint-so-joe-remembering-the-1919-black-sox-and-baseballs-biggest-scandal/ [https://perma.cc/X83X-JZK5] (Apr. 9, 2018, 7:57 AM). A dismayed and disillusioned young fan posed the question to "Shoeless Joe" Jackson, hoping to make sense out of the senseless. *See id.*

factual arguments that could reframe the national conversation on gun reform.

A. Immediate Reaction: Amidst a Chaotic End of the 2023–2024 Term, and Despite the Extreme Lethality and Enduring Trauma of the Las Vegas Massacre, Congress Fails to Reinstate the Ban

Shock rippled through the nation when the Supreme Court announced *Cargill*. No one felt it more than survivors of the Las Vegas Massacre. At least two were quoted as saying it felt like "a slap in the face."[222] As further shared by survivor Megan O'Donnell Clements:

> It feels very dismissive of what people went through that day when 58 people died, because I can tell you right now that 58 people wouldn't be dead if the shooter hadn't had the aid of that bump stock . . . So that feels . . . like a slap in the face.[223]

The *Las Vegas Sun* ran a scathing editorial, emphasizing the impact not just on the direct victims but the entire Las Vegas community:

> We know better than most about the chaos and carnage a bump stock can inflict. The Oct. 1, 2017, Route 91 Harvest Festival shooting put the deadly power of bump stocks on display for all to see, as the deadliest mass shooting in modern American history unfolded on what is arguably the most famous stretch of road in the world.
>
> The ease with which a lone gunman used weapons equipped with bump stocks to kill 60 people and injure more than 500 others in the span of 11 minutes would have been unbelievable had we not seen it

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222 Sarah Mueller, *'Frustrating': A Delaware Survivor of the Las Vegas Mass Shooting Reacts to Supreme Court Overturning Bump Stocks Ban*, WHYY (June 16, 2024), https://whyy.org/articles/delaware-survivor-las-vegas-mass-shooting-react-supreme-court-bump-stocks-decision/ [https://perma.cc/4CRJ-NDPH]. Survivor Brittany Quintero shared, "It feels like another slap in the fact, to be honest." Kayla Epstein, *Supreme Court Gun Ruling Stuns Las Vegas Shooting Survivors*, BBC (June 14, 2024), https://www.bbc.com/news/articles/c033d5323540 [https://perma.cc/7ACT-QR2R]. Heather Gooze, who previously testified before Congress, told the harrowing story of how she used her finger to plug a hole in a victim's head in an attempt to save his life: "I had my finger in the bullet hole . . . in the back of their head." *Id.* She also explained how she "watched people's lives change right in front of [her] face, as well as [her] own [life]." *Id.*

223 Mueller, *supra* note 222; *see also* Sahara Sajjadi, *AZ Survivor of Las Vegas Massacre Reflects on Return of Bump Stocks*, TUCSON.COM, https://tucson.com/news/state-regional/az-survivor-of-las-vegas-massacre-reflects-on-return-of-bump-stocks/article_bd22ed19-e09f-5dd7-9c10-f401f2a87398.html [https://perma.cc/UJ5A-MLZE] (June 30, 2024) (describing heart-wrenching details of the events and noting that at least one survivor, a gun owner, who did *not* want the ban lifted, was still suffering trauma and kept his guns "locked and loaded").

> with our own eyes and felt it in the fears, tears and heartache of our grieving friends, family and neighbors.
>
> Within days of the shooting, the Bureau of Alcohol, Tobacco and Firearms reinterpreted the National Firearms Act of 1934 and Gun Control Act of 1968 – both of which were intended to outlaw machine guns and parts that can be used to convert a weapon into a machine gun – and issued a ban on bump stocks.
>
> It was a logical step.
>
> If a bump stock allows a semiautomatic gun to fire bullets at the same rate and with the same power as a fully automatic machine gun, then the law should apply. Moreover, the government's responsibility to protect public safety and security would seem to give it the authority to ban weapons and attachments that serve no purpose beyond inflicting mass casualties.
>
> *Yet here we are.*[224]

Following the Supreme Court's ruling, Senators Susan Collins and Martin Heinrich led a bipartisan effort, introducing a bill to immediately reinstate the ban. Their effort was blocked by Pete Ricketts, a Republican senator from Nebraska.[225]

Groundhog Day.

Despite the horrific loss of life and broad, popular support for prohibiting the type of weaponry used by the Las Vegas Massacre killer, members of Congress fell in line with the NRA, which not only declared the ruling in *Cargill* a "victory for the rule of law," but also dismissed Justice Sotomayor's well-reasoned dissent as "cute."[226] Republican Senator Tom Cotton would go a step

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224 *Court Misses Mark with Ill-Advised Ruling to Strike Ban on Bump Stocks*, LAS VEGAS SUN (June 16, 2024, 2:00 AM), https://lasvegassun.com/news/2024/jun/16/court-misses-mark-with-ill-advised-ruling-to-strik/ [https://perma.cc/PB3V-YMWM] (emphasis added).

225 Jalonick, *supra* note 125. Trump, reversing his prior position, plainly signaled opposition to a federal ban. *See* Alison Durkee, *Republicans Poised to Kill Bump Stock Ban—Even After Many Once Supported Restrictions*, FORBES (June 18, 2024, 8:16 AM), https://www.forbes.com/sites/alisondurkee/2024/06/18/republicans-poised-to-kill-bump-stock-ban-even-after-many-once-supported-restrictions/ [https://perma.cc/KN3K-R9ZY]. For example, Senator J.D. Vance, who would join Trump on the presidential ticket a few weeks later, said the push for a ban amounted to "legislating in a way that solves fake problems." *Id.* As discussed in the main text, Senator Vance's statement provoked outrage from Jacky Rosen, a Democratic senator from Nevada. *See infra* notes 229–230 and accompanying text. Meanwhile, Florida Senator Rick Scott opposed a federal ban, stating he was "fine with it being a states issue." Durkee, *supra* note 225. Other Republicans, including Texas Senator John Cornyn and North Carolina Senator Thom Tillis, expressed a willingness to support a ban but asserted that their opposition was due to the failure of the Democrats to seek a bipartisan solution. *See id.*

226 Frank Miniter, *Why the U.S. Supreme Court Stopped an ATF Bump-Stock Ban*, NRA: AM.'S 1ST FREEDOM (June 18, 2024), https://www.americas1stfreedom.org/content/why-the-u-s-supreme-court-stopped-an-atf-bump-stock-ban/ [https://perma.cc/CF5H-G56P]. At least

further, suggesting that a ban on bump stocks "treads close to the line" of violating the Second Amendment.[227] J.D. Vance, Republican Senator from Ohio and future Trump running mate and Vice President-elect, joined the chorus, dismissing the notion that bump stocks contributed to the death toll.[228] Nevada Senator Jacky Rosen, whose constituents were harmed in the onslaught, clapped back.[229] In what was deemed an unusual "fiery response" for the ordinarily mild-mannered Democrat, Senator Rosen brought it home, literally:

> Let him come to Las Vegas. Let him see the memorial for those people who died. Let him talk to those families. It's not a fake problem. Those families are dead . . . . Las Vegas was changed forever because of what the shooter did, and the bump stocks helped him. And let JD Vance come – and I'm going to take him to the memorials. We're going to talk to – talk about our first responders, our ambulance drivers, our police, our firefighters, people at the blood bank, regular people. Shame on him. Shame on him for disrespecting the dead.[230]

The Supreme Court's decision and the failure of Congress to act grabbed headlines for a few days. But the news cycle switched

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one scholar has recognized that the NRA has encouraged anti-government militias. *See* Siegel, *supra* note 95, at 228–29 ("Under [Neal] Knox and [Tanya K.] Metaksa's leadership, the NRA was openly entangled with militias that believed they had a constitutional right to fight against the federal government."). It was only after the Waco standoff in 1993 and the Oklahoma City bombing in 1995 that the NRA began to distance itself from such militants. *See id.* at 229–30.

227 Sarah Fortinsky, *Sen. Cotton Says Banning Bump Stocks 'Treads Close to the Line' of Being Unconstitutional*, THE HILL (June 16, 2024, 10:50 AM) https://thehill.com/homenews/senate/4724511-tom-cotton-bump-stocks-supreme-court-second-amendment/ [https://perma.cc/26KY-NNVJ]. For a discission regarding other arguments that machine guns and/or their functional equivalents should not properly be characterized as "unusual," see *supra* Section III.B.

228 Senator Vance, just weeks away from being tapped as the Republican vice presidential nominee, opposed reinstating the ban: "I think that we have to ask ourselves: Where is the real gun violence problem in this country, and are we legislating in a way that solves fake problems?" Bobic, *supra* note 219. Specifically addressing the Las Vegas Massacre, Vance added, "The question is: How many people would have been shot alternatively?" *Id.*

229 Frank Thorp V & Sahil Kapur, *'Shame on Him for Disrespecting the Dead': Nevada Senator Erupts After Sen. JD Vance's Bump Stock Remarks*, NBC NEWS (June 17, 2024, 6:24 PM), https://www.nbcnews.com/politics/congress/sen-jacky-rosen-erupts-sen-jd-vances-bump-stock-comments-rcna157646 [https://perma.cc/R8RB-DTEE].

230 *Id.* Following the *Cargill* decision, Democratic Representative Dina Titus from Nevada introduced bipartisan legislation, a bill called "Closing the Bump Stock Loophole Act," to codify the ATF's ban. Dick Cooper, *Rep. Titus Releases Statement Following Supreme Court Ruling on Bump Stocks*, CONGRESSWOMAN DINA TITUS (June 14, 2024), https://titus.house.gov/news/documentsingle.aspx?DocumentID=3636 [https://perma.cc/YSF7-X5RZ]. She sent a letter, signed by sixty-two members of Congress, to Speaker of the House Mike Johnson, "urging" him to bring the bill to the floor for a vote. *Id.*

to the dizzying displays of other major Supreme Court decisions that would be handed down in the next two weeks, including a never-before-seen blitz of oral dissents.[231] On June 26, 2024, Justice Sotomayor read her dissent in *SEC v. Jarkesy*, voicing her concern that the Supreme Court was curtailing agency rights and shifting power to the judiciary.[232] The next day, Justice Jackson read her *Moyle v. United States* opinion, concurring in part and dissenting in part, where the Supreme Court failed to reach the merits and instead only temporarily blocked Idaho from enforcing a near-total abortion ban—one that had been challenged as skirting federal requirements for emergency care when a woman's health or life is in danger.[233] Justice Jackson emphatically warned that "storm clouds loom ahead."[234]

One day later, on June 28, 2024, Justice Sotomayor took the bench to read her dissent in *City of Grants Pass v. Johnson*, where the Supreme Court sided with a municipality regarding an outdoor sleeping ban that arguably was selectively enforced only against the unhoused, thereby criminalizing the status of homelessness.[235] That day ended with Justice Kagan reading her

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231 Joan Biskupic, *Oral Dissents Are Back in Vogue at the Supreme Court as Liberals Lament Latest Rulings*, CNN (June 29, 2024, 2:00 AM), https://www.cnn.com/2024/06/29/politics/supreme-court-dissents-sotomayor-kagan-jackson/ [https://perma.cc/74YD-KWKL].

232 *Id.*; *see also* Lawrence Hurley, *Liberal Justice Sotomayor Bemoans 'Dismantling' of Federal Agency Power as Supreme Court Curbs SEC*, NBC NEWS (June 27, 2024, 7:14 AM), https://www.nbcnews.com/politics/supreme-court/supreme-court-curbs-sec-powers-enforce-securities-laws-rcna143446 [https://perma.cc/5B83-9S6R]. *Jarkesy* involved the constitutionality of an SEC proceeding where a monetary fine was imposed by an in-house SEC judge, and the defendant was not given the opportunity for a jury trial. SEC v. Jarkesy, 144 S. Ct. 2117, 2126–27 (2024). In curtailing the power of administrative law judges to hear such cases, Justice Sotomayor cautioned, "Make no mistake: Today's decision is a power grab." *Id.* at 2175 (Sotomayor, J., dissenting).

233 Debra Cassens Weiss, *'Storm Clouds Loom Ahead' After Supreme Court Dismisses Abortion Dispute, Justice Jackson Says*, ABA J. (June 27, 2024, 11:04 AM), https://www.abajournal.com/web/article/storm-clouds-loom-ahead-after-supreme-court-dismisses-abortion-dispute-justice-jackson-says [https://perma.cc/UQ9H-SCA2].

234 *Id.*; *see also* Moyle v. United States, 144 S. Ct. 2015, 2026 (2024) (Jackson, J., dissenting). *Moyle* involved the Emergency Medical Treatment and Active Labor Act. *Id.* at 2023. The majority opinion failed to address the merits of the case. *See id.* at 2025. Yet, as noted by Justice Jackson in her dissent, Justice Alito "suggest[ed], at least in this context, that states have free reign to nullify federal law." *Id.* at 2026. As to the many women imperiled by the uncertainty, Justice Jackson declared that the Court "owe[s] them—and the Nation—an answer." *Id.* at 2026–27.

235 City of Grants Pass v. Johnson, 144 S. Ct. 2202, 2228 (2014) (Sotomayor, J., dissenting) (explaining that "[s]leep is a biological necessity, not a crime," yet the statute at issue punishes unhoused people for that simple act). According to Joan Biskupic, "Gorsuch, who sits at Sotomayor's immediate right on the bench, kept his head turned toward her, listening impassively" while the other Justices "stared out at spectators or

dissent in *Loper Bright Enterprises*, which dealt the death blow to the longstanding *Chevron* doctrine that gave deference to certain administrative agency determinations.[236] Pointing out that such agencies have far more expertise than judges, Justice Kagan, joined by Justices Sotomayor and Jackson, stated, "In one fell swoop, the majority today gives itself exclusive power over every open issue—no matter how expertise-driven or policy-laden . . . ."[237] Justice Kagan bluntly added that "[t]he majority disdains restraint, and grasps for power," and "[i]f opinions had titles, a good candidate for [this one] would be Hubris Squared."[238] In sum, the Supreme Court has turned itself into an "administrative czar."[239]

All of this judicial turmoil occurred amidst the substantial political backlash of the presidential debate on June 27, 2024, which dominated media coverage as calls intensified for President Biden to step aside from the race.[240] The media covered this political fallout nearly twenty-four hours a day, seven days a week until July 1, 2024, when the Supreme Court handed down the long-awaited decision regarding presidential immunity in *Trump v. United States*.[241] Chief Justice Roberts authored the

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down at notes, perhaps anticipating the next opinions, and dissents, to be revealed." Biskupic, *supra* note 231.

236 Loper Bright Enters. v. Raimondo, 144 S. Ct. 2244, 2294 (2024) (Kagan, J., dissenting) ("For 40 years, [the *Chevron* doctrine] has served as a cornerstone of administrative law . . . [but t]oday, the Court flips the script."). Recognizing prior criticism, Justice Gorsuch noted, "Today, the Court places a tombstone on *Chevron* no one can miss." *Id.* at 2275 (Gorsuch, J., concurring).

237 *Id.* at 2295 (Kagan, J., dissenting); *see also* Kelsey Reichmann & Ryan Knappenberger, *After Scathing Kagan Dissent, Experts Warn of Fallout from Chevron Overturn*, COURTHOUSE NEWS SERV. (June 28, 2024), https://www.courthousenews.com/after-scathing-kagan-dissent-experts-warn-of-fallout-from-chevron-overturn/ [https://perma.cc/QDB2-JC94] (characterizing Kagan's dissent as having "excoriated" her colleagues as she "warned of an impending massive shock to the administrative system").

238 *Loper Bright Enters.*, 144 S. Ct. at 2295 (Kagan, J., dissenting) (observing that "[a] longstanding precedent at the crux of administrative governance thus falls victim to a bald assertion of judicial authority"); *see also* Reichmann & Knappenberger, *supra* note 237; Biskupic, *supra* note 231.

239 *Loper Bright Enters.*, 144 S. Ct. at 2295 (Kagan, J., dissenting).

240 Natasha Korecki et al., *'Babbling' and 'Hoarse': Biden's Debate Performance Sends Democrats into a Panic*, NBC NEWS, https://www.nbcnews.com/politics/2024-election/biden-debate-performance-democrats-panic-rcna157279 [https://perma.cc/Y6BZ-BEK4] (June 27, 2024, 8:38 PM); *see also* Tracy Mumford et al., *Why Tonight's Debate Is Different, and New Supreme Court Rulings*, N.Y. TIMES (June 27, 2024), https://www.nytimes.com/2024/06/27/podcasts/trump-biden-debate-supreme-court.html [https://perma.cc/XJY5-RUBK] (hosting a discussion on the presidential debate and recent Supreme Court decisions).

241 Trump v. United States, 603 U.S. 593 (2024).

majority opinion, announced in the last slot on the final day of the term.[242] While the Court held that presidents are not immune for purely personal conduct, they are arguably immune for any act that is in any way related to official conduct.[243] More precisely, the majority held that immunity for official acts, which includes "speaking to and on behalf of the American people . . . extends to the 'outer perimeter' of the President's official responsibilities, covering actions so long as they are 'not manifestly or palpably beyond [his] authority.'"[244]

The majority appeared to suggest there was a different standard—"presumptive immunity"—for corrupt conduct involving *both* official and unofficial acts.[245] Yet here, too, there was a trick-of-the-tongue in terms of evidentiary limitations. In theory, presidential immunity would not extend to known violations of the law that fall outside of presidential authority, such as hatching a plot with the Department of Justice to illegally target political opponents. However, a president would still effectively be immune given that the majority opinion mandated that any evidence pertaining to a president's conduct, whenever they wear their presidential hat, cannot be presented in a criminal prosecution. The rationale was that the potential use of such evidence at a later date could pose a "danger[] of intrusion on the authority and functions of the Executive Branch."[246] Moreover, "[i]n dividing official from unofficial conduct, courts may not inquire into the President's motives."[247] Courts similarly are precluded from "deem[ing] an action unofficial merely because it allegedly violates a generally applicable law."[248] In other words, a president need not be bothered by a blurred line between official and unofficial acts. As further rationalized by the majority, "[i]f official conduct for which the President is immune may be scrutinized to help secure his conviction, *even on charges that purport to be based only on his unofficial conduct*, the 'intended effect' of immunity would be defeated."[249]

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242 *See id.*

243 *Id.* at 615–17.

244 *Id.* at 618 (alteration in original).

245 *Id.* at 642.

246 *Id.* at 624 (quoting Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982)).

247 *Id.* at 618.

248 *Id.* at 619.

249 *Id.* at 631 (emphasis added) (quoting *Nixon*, 457 U.S. at 756). The majority added, "The President's immune conduct would be subject to examination by a jury on the basis of generally applicable criminal laws. Use of evidence about such conduct, even when an

How can a president possibly be convicted for criminal acts falling outside the scope of presidential authority if the prosecution is precluded from offering evidence of the president's conduct? What if a president threatened members of his Cabinet with a Tommy Gun? Given that a president has absolute authority to hold Cabinet meetings and fire Cabinet members, and therefore would have been engaged *at least in part* in an official act, evidence of the decidedly unofficial method of accomplishing that goal could not be presented at trial.[250]

Justice Sotomayor would have the last word for the 2023 Term. In a *tour de force*, she delivered one more scathing oral dissent, joined by Justices Kagan and Jackson, with an aligned concurrence by Justice Barrett.[251] And again, Justice Sotomayor read her dissent from the bench, with a firecracker start and a firecracker finish, both of which echoed themes from her dissent in *Cargill*, as well as the other passionate oral dissents read by Justices Kagan and Jackson that marked the end of the 2023 Term. Again, the Supreme Court was shifting the balance of power, ignoring both common sense and the clear intent of the Founders. As summarized in the first paragraph of Justice Sotomayor's dissent:

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indictment alleges only unofficial conduct, would thereby heighten the prospect that the President's official decisionmaking will be distorted." *Id.*

250 Justice Jackson uses a similar analogy in her dissent, contemplating how a president would be effectively immune from liability if he killed the Attorney General by "poisoning him to death." *Id.* at 694 n.5 (Jackson, J., dissenting). In that circumstance, the issue "is not whether the President has exclusive removal power, but whether a generally applicable criminal law prohibiting murder can restrict *how* the President exercises that authority." *Id.*

251 *See id.* at 650, 657 (Barrett, J., concurring in part; then Sotomayor, J., dissenting). Justice Barrett declined to sign onto Section III.C of the majority opinion, which pertained to the evidentiary exclusion discussed above. *Id.* at 650 (Barrett, J., concurring in part). As such, this critical part of the opinion tallied up to the boys versus the girls. *See* Adam Liptak, *Justice Amy Coney Barrett's Independent Streak Marked Supreme Court Term*, N.Y. TIMES (July 8, 2024), https://www.nytimes.com/2024/07/08/us/politics/amy-coney-barrett-supreme-court-justice.html [https://perma.cc/REV6-7MG4]. In stepping away from the majority, Justice Barrett wrote that she "agree[d] with the dissent," noting the "Constitution does not require blinding juries to the circumstances surrounding conduct for which Presidents *can* be held liable." *Trump*, 603 U.S. at 655 (Barrett, J., concurring). In particular, Justice Barrett presented the example of a president illegally taking a bribe, recognizing the common-sense reality that "excluding from trial any mention of the official act connected to the bribe would hamstring the prosecution." *Id.* at 655–56. In other words, "[t]o make sense of charges alleging a *quid pro quo*, the jury must be allowed to hear about both the *quid* and the *quo*, even if the *quo*, standing alone, could not be a basis for the President's criminal liability." *Id.* at 656.

> Today's decision to grant former Presidents criminal immunity reshapes the institution of the Presidency. It makes a mockery of the principle, foundational to our Constitution and system of Government, that no man is above the law. . . . [T]he Court gives former President Trump all the immunity he asked for and more. Because our Constitution does not shield a former President from answering for criminal and treasonous acts, I dissent.[252]

Justice Sotomayor squarely tackled that trick-of-the-tongue by which the majority claimed something was one thing when it clearly was not. She pointed out that, given the evidentiary gymnastics in the majority opinion, any corrupt act engaged in by a president in their official capacity was shielded from prosecution.[253] As a practical matter, the evidentiary exclusion of any conduct involving any use of presidential powers, even if blatantly illegal, meant that a president could grossly misuse those presidential powers—including condoning, engaging in, or even authorizing violence—with no criminal culpability.[254] That was tantamount to absolute immunity, and a president would effectively be a "king."[255] These concerns, and the aligned concerns of Justice Barrett, were left unaddressed in the majority opinion, thereby suggesting the breadth truly was as broad as it seemed.[256] The potential for *future* usurpation of power and violence was not lost on Justice Sotomayor. As explained in her fiery finish:

> [T]he long-term consequences of today's decision are stark. The Court effectively creates a law-free zone around the President, upsetting the status quo that has existed since the Founding. *This new official-acts immunity now "lies about like a loaded weapon" for any President that wishes to place his own interests, his own political survival, or his own*

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252 *Trump*, 603 U.S. at 657 (Sotomayor, J., dissenting). Notably, Justice Sotomayor omitted "respectfully" from her ending line, which is typically interpreted as a vitriol protest "signal[ing] . . . to the world at large that the majority opinion does not deserve legitimation." Note, *From Consensus to Collegiality: The Origins of the "Respectful" Dissent*, 124 HARV. L. REV. 1305, 1325 (2011).

253 *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

254 In Justice Sotomayor's words: "Whether described as presumptive or absolute, under the majority's rule, a President's use of any official power for any purpose, even the most corrupt, is immune from prosecution. That is just as bad as it sounds, and it is baseless." *Id.* at 659. Although Justice Barrett did not formally join the dissent, this was the exact point she made in her concurrence. *See supra* note 251 and accompanying text.

255 *Trump*, 603 U.S. at 685 (Sotomayor, J., dissenting).

256 Legal excerpts opined that the failure to discuss the concerns raised by the dissenting Justices was unusual and telling. *See* Aysha Bagchi, *'Democracy Turns into a Dictatorship': Experts Warn About SCOTUS Presidential Immunity Ruling*, USA TODAY (July 11, 2024, 5:11 AM), https://www.usatoday.com/story/news/politics/elections/2024/07/11/donald-trump-immunity-supreme-court-powers/74332048007/ [https://perma.cc/B8VS-QVQM].

> *financial gain, above the interests of the Nation.* The President of the United States is the most powerful person in the country, and possibly the world. When he uses his official powers in any way, under the majority's reasoning, he now will be insulated from criminal prosecution. Orders the Navy's Seal Team 6 to assassinate a political rival? Immune. Organizes a military coup to hold onto power? Immune. Takes a bribe in exchange for a pardon? Immune. Immune, immune, immune.
>
> Let the President violate the law, let him exploit the trappings of his office for personal gain, let him use his official power for evil ends. Because if he knew that he may one day face liability for breaking the law, he might not be as bold and fearless as we would like him to be. That is the majority's message today.
>
> Even if these nightmare scenarios never play out, and I pray they never do, the damage has been done. The relationship between the President and the people he serves has shifted irrevocably. In every use of official power, *the President is now a king above the law*.[257]

Justice Kagan summed up her dissent ominously: "With fear for our democracy, I dissent."[258]

Against this chaotic backdrop, the initial outcry over *Cargill*—decided just two weeks prior—morphed from a sizable roar to little more than a whimper. Ironically, at this exact same time, the threat of violent civil unrest dramatically increased.

B. Implications: The Potential Impact of Legalized Bump Stocks (and Machine Guns) on General Criminality and Armed Rebellions

"Victory or death." As noted above, this was the battle cry heard just one day after *Cargill* was handed down when Steve Bannon barked this catchphrase at a political rally in Detroit, Michigan.[259] Bannon talked about the "MAGA army" and "judgment day."[260] The focus was on the 2020 and 2024

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257 *Trump*, 603 U.S. at 684–86 (Sotomayor, J., dissenting) (emphasis added) (internal citations omitted).

258 *Id.* at 686.

259 Hains, *supra* note 23. Similar incendiary rhetoric was repeated again and again on Bannon's podcast, *The War Room*. *See* Sarah Smith, *Steve Bannon Says 'Maga Army' Ready, as He Reports to Prison*, BBC NEWS (July 1, 2024), https://www.bbc.co.uk/news/articles/c80ek470d99o.amp [https://perma.cc/H9DZ-GEJT]. In a BBC interview before going to prison, Bannon asserted that the "Maga army" was ready. *Id.* He proclaimed, "I'm going to be more powerful in prison than I am now." Sara Murray, Katelyn Polantz & Devan Cole, *Steve Bannon Begins Serving 4-Month Sentence in Federal Prison for Defying Congressional Subpoena*, CNN, https://www.cnn.com/2024/07/01/politics/steve-bannon-report-to-prison/index.html [https://perma.cc/H9DZ-GEJT] (July 1, 2024, 11:19 PM).

260 Hains, *supra* note 23; Smith, *supra* note 259.

presidential elections and how supporters needed to fight a "war to the knife" to take back their country.[261] Instead of vilifying those who violently stormed the Capitol on January 6, 2021, they were deemed "patriots," worthy of presidential pardons.[262] Sure, some may have been gawkers, but there were plenty who were armed and ready.[263] America watched live as police were bloodied and maimed. Some in the crowd brought gallows to hang Vice President Mike Pence if he dared certify the results.[264] Others used bear spray and a broad array of other weapons to beat past Capitol police who were doing their best to hold the line.[265] The Proud Boys and Oath Keepers, militant groups whose leaders later would be convicted of sedition, riled the crowd.[266] Employing military tactics, they spearheaded breaking through the doors of Congress. Once inside, the rioters menacingly hunted for Nancy Pelosi, the Speaker of the House.[267]

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261 Zachary B. Wolf, *Trump's Former Top Strategist Pushes the 2024 Election as a 'Victory or Death!' War*, CNN (June 18, 2024, 12:00 AM), https://www.cnn.com/2024/06/18/politics/bannon-trump-election-what-matters/index.html [https://perma.cc/BVY5-W29E].

262 *See* Hains, *supra* note 23; Ryan J. Reilly & Olympia Sonnier, *Trump Says He May Free Every Jan. 6 Rioter. His Team Is Eyeing 'Case-by-Case' Pardons.*, NBC NEWS (April 30, 2024, 9:38 AM), https://www.nbcnews.com/politics/donald-trump/trump-pardon-jan-6-capitol-rioters-rcna149900 [https://perma.cc/R8EB-CH6N].

263 During a congressional hearing regarding the events of January 6, 2021, Cassidy Hutchinson, a White House aide, testified that President Trump was informed that some rally attendees remained outside of the security perimeter "because they had weapons and didn't want to pass through metal detectors." Carl Hulse, *Six Takeaways from Cassidy Hutchinson's Explosive Testimony*, N.Y. TIMES, https://www.nytimes.com/live/2022/06/28/us/jan-6-hearing-today [https://perma.cc/VDX6-W94F] (Oct. 23, 2024).

264 Scott MacFarlane, *Newly Obtained Video Shows Movement of Group Suspected of Constructing Jan. 6 Gallows Hours Before Capitol Siege*, CBS NEWS, https://www.cbsnews.com/news/jan-6-gallows-construction-new-video/ [https://perma.cc/8CFK-QJEN] (Mar. 18, 2024, 8:55 PM).

265 Tom Dreisbach & Tim Mak, *Yes, Capitol Rioters Were Armed. Here Are the Weapons Prosecutors Say They Used*, NPR (Mar. 19, 2021, 5:06 AM), https://www.npr.org/2021/03/19/977879589/yes-capitol-rioters-were-armed-here-are-the-weapons-prosecutors-say-they-used [https://perma.cc/W9UH-XMDF].

266 *See* Tom Dreisbach, *Jan. 6 Defendants Celebrate Trump's Win and Anticipate Pardons*, NPR (Nov. 7, 2024, 4:38 PM), https://www.npr.org/2024/11/07/nx-s1-5181581/2024-election-trump-capitol-riot-pardons [https://perma.cc/QN95-5BNY].

267 *See* Brendan Williams, *Divided We Fall: The Concerted Attack on U.S. Democracy*, 59 WILLAMETTE L. REV. 121, 122–23 (2003). Williams describes the attack on the Capitol where insurrectionists roamed the halls calling, "Where are you, Nancy?" *Id.* at 123. Similar verbiage was used in a later attack on Speaker Pelosi's husband, Paul Pelosi, when a politically-motivated intruder broke into their home and assaulted him with a hammer, resulting in a skull fracture. *Id.* at 122; *see also* Joe Fitzgerald Rodriguez, Heather Knight & Tim Arango, *Man Who Attacked Nancy Pelosi's Husband Is Convicted in California Trial*, N.Y. TIMES (June 21, 2024), https://www.nytimes.com/2024/06/21/us/pelosi-attack-depape-verdict.html [https://perma.cc/E98U-M4GL].

Lawmakers raced for safety, fearing for their lives. And the threat existed well beyond the grounds of the Capitol. Militants were holed up in a Virginia motel with a cache of rifles and other firepower, prepared to transport the weapons to the Capitol at a moment's notice.[268]

Imagine what might have ensued if the insurrectionists were armed with bump stock conversions—the functional equivalent of machine guns—when they stormed through the doors of the U.S. Capitol.[269]

The January 6, 2021, attack on the Capitol was not the only violent show of force against the government, and it would not be the last. During the ramp-up to the 2020 presidential election, militants stormed the Michigan State Capitol, brandishing long guns and threatening lawmakers over COVID-19 mandates.[270] Later, others were arrested for plotting to kidnap and presumably execute Gretchen Whitmer, the Governor of Michigan.[271] Following heated and violent rhetoric after an FBI search of former President Trump's residence at Mar-a-Lago (for wrongfully withheld classified documents), an Ohio man issued a "call to arms" on social media and attacked a local FBI field office.[272] Again, imagine the terror that could have ensued had

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268 *See* Ryan J. Reilly & Daniel Barnes, *Oath Keeper Testifies About Massive Gun Pile Stashed in Hotel on the Eve of Jan. 6*, NBC NEWS (Oct. 12, 2022, 12:26 PM), https://www.nbcnews.com/politics/justice-department/oath-keeper-testifies-massive-gun-pile-stashed-hotel-eve-jan-6-rcna51749 [https://perma.cc/BRX6-2BMS].

269 In terms of pardon power, the *Trump* majority clearly stated, "The President's authority to pardon . . . is 'conclusive and preclusive,' 'disabling the Congress from acting upon the subject.'" Trump v. United States, 603 U.S. 593, 608 (2024) (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637–38 (1952)). Two paragraphs down, the majority added, "Congress cannot act on, and *courts cannot* examine, the President's actions on subjects within his 'conclusive and preclusive' constitutional authority." *Id.* at 609 (emphasis added). In other words, if a president, or presidential candidate subsequently elected, encouraged supporters to engage in violence, then he presumably would have unfettered power to pardon such supporters for any violation of federal law.

270 Louis Casiano, *Michigan Protesters Storm State Capitol in Fight over Coronavirus Rules: 'Men with Rifles Yelling at Us*,*'* FOX NEWS (Apr. 30, 2020, 5:34 PM), https://www.foxnews.com/us/michigan-lansing-coronavirus-protest-capitol-guns-rifles [https://perma.cc/L3A6-M66F].

271 Mitch Smith, *Two Men Convicted in Plot to Kidnap Michigan's Governor*, N.Y. TIMES (Aug. 23, 2022), https://www.nytimes.com/2022/08/23/us/verdict-trial-gretchen-whitmer-kidnap.html [https://perma.cc/3A93-88PW] (also noting the intent was to "instigate a national rebellion").

272 Elizabeth Wolfe et al., *An Armed Man Tried to Enter the FBI's Cincinnati Office and Was Fatally Shot After a Standoff with Police. Here's What We Know*, CNN, https://www.cnn.com/2022/08/12/us/fbi-cincinnati-office-armed-suspect-what-we-know/index.html [https://perma.cc/X55K-2BS8] (Aug. 12, 2022, 7:06 PM). The man wore body armor and carried an AR-15 rifle and a nail gun. *Id.* His posts, which reflected his

these individuals been able to legally purchase bump stocks. Now they can. While seventeen states and the District of Columbia prohibit the sale of bump stocks within their jurisdictional limits,[273] the frank reality is that unless and until there is a national ban, bump stocks are available to anyone, anywhere.[274]

Add to the mix the danger of putting machine guns, or their functional equivalents, in the hands of criminals, thereby arming them with equal or greater firepower than law enforcement.[275] That motivated the passage of the NFA in 1934. And the terror was not just from organized crime. Bonnie and Clyde were their own two-person team of bank robbers. Imagine if modern-day "smash-and-grab" or home invasion criminals added machine guns to their respective arsenals.[276] Whether it be mobsters, common criminals, or insurrectionists, is the Second Amendment really so elastic that it entitles citizens to brandish machine gun weaponry that can be used to terrorize other citizens or overthrow the government?

While the constitutionality of the NFA seemed beyond the reach of a Second Amendment challenge when *Cargill* was handed down, and Justice Alito did expressly invite Congress to enact legislation to reinstall the ban, the seeds have been planted to take the Second Amendment in a different direction. The legal basis to ban machine guns and *a fortiori* bump stock conversions, lies in the recognized ability of government entities to ban "dangerous and unusual" weapons.[277] Yet, as noted in Justice Breyer's dissent in *Heller*, that would *not* cover weapons—no

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belief that the 2020 election had been stolen, became "increasingly politically violent and revolution-minded" just prior to the attack. *Id*. He urged others to join with him and "get whatever you need to be ready for combat." *Id*.

273 *What Are Bump Stocks?*, GIFFORDS, https://giffords.org/what-are-bump-stocks/ [https://perma.cc/BR6M-K33F] (Nov. 1, 2024) (identifying California, Connecticut, Delaware, Florida, Hawaii, Iowa, Illinois, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, New York, Rhode Island, Vermont, Virginia, Washington, and Washington, D.C. as jurisdictions where the sale of bump stocks is prohibited).

274 For example, when California banned semiautomatic weapons, they still could be purchased in neighboring states. *See* Lenett, *supra* note 94, at 580–81.

275 For a discussion of possible consequences, see Brandon del Pozo & Barry Friedman, *Policing in the Age of the Gun*, 98 N.Y.U. L. REV. 1831, 1836 (2023) (noting "the law of guns is on a collision course with the law of policing, the growing ripples of which are being felt all over the country" and examining "how the rapid deregulation and rampant possession of firearms is going to affect policing").

276 *See* Ira P. Robbins, *Deconstructing Burglary*, 57 U.C. DAVIS L. REV. 1489, 1517 (2024) (describing smash-and-grab criminals as "[p]erpetrators, sometimes traveling in large groups, smash[ing] windows or otherwise enter[ing] retail stores").

277 District of Columbia v. Heller, 554 U.S. 570, 627 (2008) (citation omitted).

matter how dangerous—that were not unusual.[278] Justice Breyer argued the majority had settled upon the untenable, namely that *but for* the longstanding NFA ban, the majority would have to find that the Second Amendment afforded protection for the possession of machine guns and like instrumentalities, were they to become commonly marketed.[279] In an eerily prophetic hypothetical that has applicability to bump stocks, Justice Breyer cautioned:

> According to the majority's reasoning, if Congress and the States lift restrictions on the possession and use of machineguns, and people buy machineguns to protect their homes, the Court will have to reverse course and find that the Second Amendment *does*, in fact, protect the individual self-defense-related right to possess a machinegun. On the majority's reasoning, *if tomorrow someone invents a particularly useful, highly dangerous self-defense weapon, Congress and the States had better ban it immediately*, *for once it becomes popular Congress will no longer possess the constitutional authority to do so*. In essence, the majority determines what regulations are permissible by looking to see what existing regulations permit. There is no basis for believing the Framers intended such circular reasoning.[280]

Specifically discussing bump stocks, one emerging scholar recently explored the notion that the more a weapon or accessory becomes used and readily available, the better an argument can be made that possession warrants Second Amendment protection.[281] In other words, even presuming bump stock conversions are "dangerous," they will not be "unusual" if a sufficient number of Americans purchase them. The longer it takes Congress to prohibit bump stocks, the more bump stocks flood the market.[282] And as noted above, the constitutionality of the NFA has never really been litigated. If bump stocks conversions get taken out of the "unusual" bucket, an argument can be made that their functional equivalent—*actual machine guns*—should also be unrestricted.

The National Association for Gun Rights (NAGR) already tested an argument based on common use in a challenge to Connecticut's ban on certain firearms and accessories,

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278 *See id.* at 720–21 (Breyer, J., dissenting).

279 *See id.*; *see also* Stephen P. Halbrook, *Firearm Sound Moderators: Issues of Criminalization and the Second Amendment*, 46 CUMB. L. REV. 33, 70 (2016) (discussing Justice Breyer's argument in the context of gun silencers).

280 *Heller*, 554 U.S. at 721 (Breyer, J., dissenting) (second emphasis added).

281 *See* Oliver Krawczyk, *Dangerous and Unusual: How an Expanding National Firearms Act Will Spell Its Own Demise*, 127 DICK. L. REV. 273, 304–06 (2022).

282 *See id.*

specifically including large capacity magazines.[283] Round one was whether a preliminary injunction should be issued. The district court declined the invitation. As noted at the very top of the court's opinion, Connecticut's law was passed following the devastating shooting at the Sandy Hook Elementary School, where the killer used a semiautomatic gun to "fire[] 154 shots in less than five minutes," killing twenty-six people, most of whom were young children.[284] The NAGR advanced several arguments that pushed *Heller* to the extreme. Per the NAGR, any weapon or accessory that somehow falls into "common use" cannot be restricted regardless of its potential for fatality.[285] In that circumstance, the weapon's danger is irrelevant—even if the weapon is the "most dangerous weapon on earth"—as it would not be "unusual."[286] The court soundly rejected this argument, though it can be expected that the argument will make its way to the Supreme Court, especially if accessories like bump stocks become relatively common.[287]

Put simply, while machine guns are still prohibited, there is no guarantee the NFA will withstand constitutional challenge. And even if the ban on machine guns were to stand, there certainly is no guarantee bump stock conversions would be off-limits if they become commonplace. That danger grows exponentially with each bump stock purchased and with every day that passes following the lifting of the ban. The enormity of the issue begs the question: could the divide over gun legislation be bridged by

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283 *See* Nat'l Ass'n for Gun Rights v. Lamont, 685 F. Supp. 3d 63, 71 (D. Conn. 2023).

284 *Id.* at 70–71; *see also* Megan B. Mavis & Matthew D. Shapiro, *Second Amendment Interpretation and a Critique of the Resistance to Common-Sense Gun Regulation in the Face of Gun Violence: This Is America*, 46 W. STATE L. REV. 85, 100 (2019) (noting the killer "murdered twenty first-grade children and six adults").

285 *Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102.

286 *Id. But see* Andrew Jay McClurg, *The Rhetoric of Gun Control*, 42 AM. U. L. REV. 53, 63–64 (1992). Professor Andrew Jay McClurg, back in 1992, illustrated the absurdity of such an argument. As posed in syllogistic terms, "The Second Amendment protects an individual's right to keep and bear any type of arm. A nuclear weapon is a type of arm. Therefore, the Second Amendment protects an individual's right to keep and bear nuclear weapons." *Id.*

287 *See Nat'l Ass'n for Gun Rights*, 685 F. Supp. 3d at 102. There is at least one cohort of gun owners who use bump stocks for sport. In an episode of the popular series, *Parts Unknown*, chef and travel documentarian Anthony Bourdain visited Virginia and spoke with gun enthusiasts who were using gun modifications to turn rifles into fully automatic weapons for sport target practice at a backyard gathering; the footage was juxtaposed against ten seconds of "brutal" footage from the Las Vegas Massacre. Jennifer Neal & Nathan Thornburgh, *Parts Unknown Fan Recap: West Virginia*, ANTHONY BOURDAIN PARTS UNKNOWN (Apr. 30, 2018), https://explorepartsunknown.com/west-virginia/parts-unknown-fan-recap-west-virginia/ [https://perma.cc/8HWA-C5YK].

reframing the constitutional issue? And could that begin by simply listening to and respecting each other's rights?

C. Reframing the Constitutional Issue: The Individual and Societal Right to Be Protected from Terror

"I check for escape routes wherever I go . . . A balloon popped at a gay bar I was at, and the whole place went silent . . . I think about it every day."[288] These are but a few comments of many solicited by *The New York Times* for a 2024 article highlighting the impact of gun violence not just on direct victims, but indirect victims too.[289] Readers were asked "whether the threat of gun violence has affected their mental state or the way they lead their lives."[290] In a recent poll, seven out of ten reported experiencing stress, the highest percentage was amongst women, Latino, and Black respondents.[291] As *The New York Times* summarized:

> Some readers said the sheer number of shootings in America has left them numb or resigned. A more sizable group described feeling frustrated, angry and helpless. Some said they now avoid crowded events and public transportation, scan public venues for nearby escape routes or stay at home more often. A handful said they had moved to different cities or even to another country to try to escape the threat.
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> Fear was a unifying thread, regardless of whether someone had directly encountered gun violence.[292]

Social rhetoric pertaining to gun reform typically centers the direct victims. From the children gunned down at Sandy Hook to the children at Uvalde, our hearts naturally turn to the tragic loss of life.[293] In a better world, this alone would move the needle

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288 Christina Caron, *Gun Violence Has Changed Us*, N.Y. TIMES, https://www.nytimes.com/interactive/2023/03/26/well/mind/gun-violence-shootings.html?smid=nytcore-ios-share&referringSource=articleShare [https://perma.cc/NZ3M-KYK7] (Mar. 29, 2023).

289 *See* Mavis & Shapiro, *supra* note 284, at 120. These authors provide an excellent summary of many instances of gun violence, including mass murders. They note that, as of 2019, "the public has now been desensitized to the reality that at any point in time, a person, armed with a firearm, may pose a threat to you in your home, at work, or at school." *Id.* at 120.

290 *Id.* More than six hundred responses were received. *Id.*

291 *Id.* (citing the Harris Poll for the American Psychological Association).

292 *Id.*

293 Nicholas Bogel-Burroughs, *An Uvalde Pediatrician Says He Will 'Never Forget What I Saw' After the Shooting*, N.Y. TIMES, (June 8, 2022), https://www.nytimes.com/2022/06/08/us/uvalde-pediatrician-shooting.html [https://perma.cc/S7GA-SVQY]. In emotional and graphic testimony before Congress, Dr. Roy Guerrero, a pediatrician, described how two of the children's bodies were "pulverized" and "decapitated" by the sheer torrent of bullets. *Id.*

toward sensible gun reform. But it has not. The catchphrase, "Guns don't kill people. People kill people," sums it up.[294] Gun lobbyists characterize mass murders as one-offs by crazed madmen. But if the history of the NFA is instructive, there is a different way to view this issue: from the perspective of *indirect* victims, including society at large.[295]

In the 1930s, when Al Capone and his henchmen terrorized Chicago by shooting members of rival mobs, it is reasonable to presume that many, if not most, Americans really did not care about the *gangsters* that ended their day in a body bag. But they did care about the police officers and law-abiding citizens caught in the crossfire.[296] The chance of being a direct victim may have been low, but the chance of being an *indirect* victim was inevitable and inescapable. The same reasoning applies today. It is not just the carnage of direct victims; it also is the cumulative toll on society.[297]

On June 25, 2024, just nine days after *Cargill* was handed down, Surgeon General Dr. Vivek Murthy issued an advisory declaring gun violence a public health crisis.[298] One of the most alarming findings was that, since 2020, gun violence has been the leading cause of death for children and adolescents ages one through nineteen.[299] Over half of Americans (54%) have reported that they or a family member have experienced a "firearm related incident" and 21% have been threatened with a firearm.[300] A full 19%, nearly one in five, have a family member

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294 *See* Geoffrey S. Corn, *Deterring Illegal Firearms in the Community: Special Needs, Special Problems, and Special Limitations*, 43 CARDOZO L. REV. 1515, 1517 (2022) ("'[G]uns don't kill people. People kill people,' is the common catchphrase" of gun rights proponents, reflecting the argument that the "'problem' is not access to firearms, but the people who use them."); *see also* Siegel, *supra* note 95, at 208 (noting an argument *against* gun control centers on the notion that "[l]aw abiding people, and particularly gun owners, are tired of being blamed for crime").

295 *See* Corn, *supra* note 294, at 1515 (arguing that gun violence is a "public health crisis," especially for "densely populated and economically challenged communities"). "The threat of becoming the intended or innocent victim of gun violence in these communities has become so pervasive that it only seems to make the headlines when the numbers are truly shocking to the general public." *Id.*

296 *See* BAIR, *supra* note 69, at 138 (discussing how "general indifference came to a swift . . . end" following the public shock caused by the extensive and graphic media coverage of the St. Valentine's Massacre, which finally "galvanized" public officials to take action).

297 *See, e.g.*, Corn, *supra* note 294, at 1515.

298 U.S. SURGEON GEN., U.S. PUB. HEALTH SERV., FIREARM VIOLENCE: A PUBLIC HEALTH CRISIS IN AMERICA (2024).

299 *Id.* at 3.

300 *Id.* at 5.

who has died by gunshot.[301] The advisory pointed to the indirect impact of gun violence on the public at large, as reflected in a 2023 study.[302] The numbers were staggering and similar to those cited in *The New York Times* article. As set forth in the advisory with emphasis:

> Nearly 6 in 10 U.S. adults say that they worry "sometimes," "almost every day," or "every day," about a loved one being a victim of firearm violence. Such high levels of exposure to firearm violence for both children and adults give rise to a cycle of trauma and fear within our communities contributing to the nation's mental health crisis.[303]

One manner of reframing the societal issue might rest in that oft-quoted language in the Declaration of Independence regarding the reciprocal American ideal of "life, liberty, and the pursuit of happiness."[304] This simple core principle of freedom lies at the heart of what both laypersons and scholars understand to embody American exceptionalism.[305] It reflects governmental respect for individual rights, as well as each individual's respect for the government and the rights of others.[306] Therein lies the competing interests that could

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301 *Id.* The latter statistic includes suicide. Additional statistics establish that 17% of Americans have witnessed someone being shot, 4% have used a firearm in self-defense, and 4% have been injured by a firearm. *Id.*

302 Shannon Schumacher, *Americans' Experiences with Gun-Related Violence, Injuries, and Deaths*, KFF (Apr. 11, 2023), https://www.kff.org/other/poll-finding/americans-experiences-with-gun-related-violence-injuries-and-deaths/ [https://perma.cc/Y9NB-L6QT].

303 U.S. SURGEON GEN., U.S. PUB. HEALTH SERV., *supra* note 299, at 5; *see also id.* at 14–18 (discussing the "collective toll" on communities).

304 *See* Philip Schuster & David Park, *Shocking the Conscience: Whether the Right to Bear Arms Overrides the Due Process Right to Life*, 56 WILLAMETTE L. REV. 109, 117 (2020) (arguing the life and liberty language in the Due Process Clause of the Fourteenth Amendment creates a substantive right to be free from exposure to extreme gun violence). As argued by these scholars, "Substantive Due Process guarantees for citizens are triggered when gun violence or mass shootings become 'continual, intrusive,' and 'shock the conscience.'" *Id.* (quoting McDonald v. City of Chicago, 561 U.S. 742, 879 (2010) (Stevens, J., dissenting)).

305 For a discussion of the interrelation between judicial constitutional interpretation and general societal understanding of constitutional principles, see Katie R. Eyer, *The Declaration of Independence as Bellwether*, 89 S. CAL. L. REV. 427, 428–29 (2016). Eyer notes that while the phrase "life, liberty and the pursuit of happiness" is in the Declaration of Independence and not the Constitution, the phrase "remains one of the most oft-invoked principles of American 'constitutional' text." *Id.* at 428. Eyer further explains that such phrases "have long played—and continue to play—an outsized role in popular engagement with constitutional values." *Id.* at 429 (footnote omitted).

306 Per Eyers, as of 2016, the phrase "'life, liberty and the pursuit of happiness' can be found 145 times since 1980 in the presidential speeches and documents archived at the American Presidency Project at the University of California at Santa Barbara." *Id.* at 428–29 n.4. By contrast, "the phrase that actually appears in the Constitution—'life, liberty, and property'— appears only seven times in the database during that same time

ultimately be reconciled in a revised judicial construction of the Second Amendment. Gun restrictions *do* hamper the rights of those who enjoy guns, whether for self-defense or sport. Yet *access* to guns, in particular, access to machine guns and their functional equivalent, impinges on the rights of others to live their lives in peace. The WRGO is that there is no practical manner to prohibit access in advance to only those who would use machine guns and bump stocks to terrorize others.

The heavy hand and bulging purse of gun lobbyists often is blamed for the lack of gun reform. Social scientists point to a related hurdle: polarization of political views. Medical doctor Jonathan M. Metzl argues that "[p]ublic health is the *lingua franca* through which liberal America understands guns and the traumas they engender."[307] The problem, inter alia, is tribalism. Liberals may understand themselves, but they do not necessarily understand or appreciate a key fact about the "500 million guns bought and carried by more people in ever-more locales across the" United States.[308] The way these gun owners see it, the "vast majority of guns carried in parks, bars, airports, busses, and other public settings, [a]re not involved in shooting or crimes."[309] And they are right. This is one reason why many of the arguments for gun reform that rely upon mass murder tragedies fall flat to many in this demographic.[310]

Still, Dr. Metzl sees a way that reasonable gun reform laws can gain favor: by "t[ying] gun safety to the defense of the American public square."[311] To that end, Dr. Metzl heralds the new wave of activism that involves efforts directed toward public health, community healing, and improving overall safety. The

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frame." *Id.*; *see also id.* at 428 n.2 (referencing scholarly discussions about the role the Declaration of Independence should play in constitutional interpretations).

307 Jonathan M. Metzl, *Guns Are Not Just a Public Health Problem*, TIME (Feb. 5, 2024, 7:00 AM), https://time.com/6660478/gun-control-america-public-health/ [https://perma.cc/S47C-9CZ8].

308 *Id.*

309 *Id.*

310 *See* Joseph Blocher, *Hunting and the Second Amendment*, 91 NOTRE DAME L. REV. 133, 134–35 (2015). Blocher explains that "roughly half of American gun-owners identify hunting or sport shooting as their primary reason for owning a gun" and that "[h]unting and recreational uses like target shooting and 'plinking' have long been the primary reasons for gun ownership in the United States." *Id.* at 133–34. Plinking is described as "shooting at informal targets like tin cans." *Id.* at 134 n.6. Another major reason is self-defense. *Id.* at 134 n.8. This bolsters Dr. Metzl's assertion that gun owners likely believe only a very small percentage of guns are purchased for criminal purposes. Metzl, *supra* note 307.

311 Metzl, *supra* note 307.

idea is to reduce the need to keep or carry guns for protection.[312] However, as Dr. Metzl observes, such efforts often target urban rather than rural areas. For the latter, the need to have guns can be amplified by geographics, such as relative isolation and the consequent lack of protection by law enforcement.[313] There can also be particular resistance because these constituents are often ignored, except when asked or ordered to comply with public health mandates, such as vaccines.[314] An additional concern is the polarization arising from the current heated political rhetoric, which could also motivate some to keep their guns near for protection. These underlying divisions need to be fixed to move forward with gun reform aimed at improving community safety for all.[315] As explained by Dr. Metzl:

> I've come to believe that in the current moment, when democracy itself is at stake, gun safety needs to improve people's lives in ways that they can see and feel, strengthen the concrete undergirding civil society, and allow blue and red state Americans to imagine broader coalitions based on shared interest rather than on shared anxieties.
>
> In the long run, gun laws by themselves will have relatively little effect in changing the contours of the American gun debate if they don't go hand-in-hand with material investments that take seriously people's safety concerns, and *reward community cohesion over armed tribalism*.[316]

As Dr. Metzl seems to allude, polarization gives rise to a prescient concern about overheated political rhetoric. That concern translated to a potential five-alarm fire following the assassination attempt on then-former President Trump and the availability of bump stock conversions to others fomenting political violence. Could everyone agree that the public square is safer without public access to machine guns and their functional equivalent? Put more plainly, are police officers and ordinary citizens safer? The answer in 1934 was to limit such weaponry to only the military and law enforcement. Most Americans likely would want the same today. Still, as Dr. Metzl acknowledged, most weapons are *not* used for illegal purposes. Most gun owners are *not* terrorists. But the point is not to take guns away from

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312 *Id.*

313 Ness, *supra* note 175, at 1107–08 (noting "distrust of the government" is persistent and recognizing that rural residents are aware that the police may take longer to reach them in an emergency and therefore "believe it is more efficient to handle the situation themselves").

314 *See* Metzl, *supra* note 307.

315 *Id.*

316 *Id.* (emphasis added).

those who would use guns wisely and with respect for the rights of others. The point is to restrict access in advance for those who would use guns for illegal purposes. When that danger becomes so great, it indirectly—and *significantly*—impacts society as a whole, respectful conversations seem appropriate.

Presuming this reasoning resonates on a societal level, the obvious legislative and judicial answer is a balancing test. While the Supreme Court has repeatedly rejected the notion of balancing interests in Second Amendment challenges, isn't that exactly what was at play in terms of the restrictions put in place at the Founding?[317] The constitutional argument for a balancing test already exists; it just needs to be reframed. While it is no doubt proper to look for an analogue in terms of comparable *laws* existing at Founding, it would seem equally appropriate to look for an analogue in terms of *reasoning*—including balancing competing interests—when such prohibitions were put in place.[318]

Your right to swing your fist ends where my nose begins.[319]

The core principle behind the Second Amendment is fixed in time and will never change. The purpose was and is to protect ourselves and others from common enemies, whether that be lions, tigers, and bears, a mob of marauders, or the armed forces of a foreign sovereign.[320] The Second Amendment never intended to facilitate attacks by an individual, group, or one state against another. That was already acknowledged in *Heller*.[321] Both at the Founding and now, the legitimacy and constitutionality of any given law, of course, entails balancing the benefits and burdens

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317 *See* N.Y. State Rifle & Pistol Ass'n v. Bruen, 597 U.S. 1, 22–23 (2022) (citing District of Columbia v. Heller, 554 U.S. 570, 634 (2008) (rejecting an "interest-balancing inquiry")).

318 Blum, *supra* note 83, at 962 (arguing that "gun rights and reasonable regulation is what this country has been doing for over 200 years, until the present impasse") (emphasis omitted). Blum adds, "We often study history so we don't repeat it, but sometimes we need to study history to remind ourselves that the past is worth repeating." *Id.* Per Blum, the Second Amendment should be rewritten to state: "Every person has the right to keep and bear arms, subject to reasonable regulations for public safety." *Id.* (emphasis omitted).

319 Danaya C. Wright, *The Logic and Experience of Law:* Lawrence v. Texas *and the Politics of Privacy*, 15 U. FLA. J. L. & PUB. POL'Y 403, 411 (2004) (discussing the nose-fist adage and judicial use of this "truism"); *see also* David B. Ezra, *Smoker Battery: An Antidote to Second-Hand Smoke*, 63 S. CAL. L. REV. 1061, 1105 (1990) (discussing the adage in the context of exposure to second-hand smoke and finding "the argument that the right to smoke extends to the right to contact others with smoke is unworkable").

320 *See Heller*, 554 U.S. at 595–98.

321 *See id.* at 597–98; *see also* discussion *supra* Section II.A.

impacting the greater good.[322] When it comes to machine guns and bump stocks, balancing competing interests reflects the overarching and fundamental American ideal of freedom and the concordant, inalienable, and reciprocal right to life, liberty, and the pursuit of happiness. Those ideals beat in the heart of our Framers and are embedded in the DNA of all subsequent generations through a living, breathing, and evolving interpretation of the core principles of our Constitution.

In an America hell-bent on punching each other in the nose, valuing the rights of others can wither. Democracy teeters when one side or the other goes too far and in a manner that seeks to shut out the other. That exposes the fragility of democratic rule. But it can also champion the strength of democratic rule when the course corrects. The polarizing debate over "gun rights" and "gun reform" could be the perfect opportunity to begin breaking down tribal blinders.[323] As our future observers likely easily can see from a hindsight view fifty years from now, the correct constitutional resolution was never banning all guns, but neither was it legalizing the functional equivalent of machine guns. Recognizing the answer lies somewhere in the middle might be exactly what is needed to chip away at partisan politics.

V. CONCLUSION

Our future observers, Artemis and Diana, have a distinct advantage over today's mere mortals. They know what happened in the aftermath of the tumultuous times that marked the end of the 2023–2024 Term. If nothing happens and Congress passes a ban on bump stocks, then *Cargill* might be an interesting footnote in Supreme Court history. But if Congress does not act and an armed mob, common criminals, or deranged mass murderers use bump stocks legalized by the Supreme Court to slaughter helpless victims, *Cargill* could go down as one of the Supreme Court's worst and bloodiest decisions. As bluntly put by Justice Sotomayor, that blood will be on the hands of the Justices signing on to the majority opinion in *Cargill*.[324] Blame will also fall on legislators, as well as the populace, for not demanding more.

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322 *See Heller*, 554 U.S. at 635 (recognizing that the Second Amendment "is the very *product* of an interest balancing by the people").

323 *See* DONALD V. GAFFNEY, COMMON GROUND: TALKING ABOUT GUN VIOLENCE IN AMERICA 37–68 (2019) (discussing how to have respectful conversations about gun reform, including questions and reflections).

324 Garland v. Cargill, 602 U.S. 406, 446 (2024) (Sotomayor, J., dissenting) ("Today's decision . . . will have deadly consequences.").

It is this author's hope that such events will never transpire. But *if* they do, future generations will scratch their heads in befuddlement. How could we possibly not have seen that coming? How could we possibly have failed to agree on the relatively simple proposition that any device that essentially converts a weapon into a machine gun should be prohibited under the NFA? After witnessing the Las Vegas Massacre and the scores of other mass murders before and since, how could we possibly not have immediately reinstated the ban before the ink in *Cargill* ran dry?[325]

Turning back to our future observers, a tranquil healing *Solfeggio* rain chime gently awakens Diana and Artemis from their slumber and signals the impending end to their imPlant session. They have borne witness to the context and greater societal impact of *Cargill*, both ugly and nice. IMP offers an additional option:

> IMP: Historical presentation ended. Though I could re-run the underlying components to envision the impact of *Cargill* under different circumstances.
>
> ARTEMIS: Alternate outcomes?
>
> IMP: Exactly. I can predict what the impact of *Cargill* would have been under different scenarios based on the historically known contributing factors.
>
> DIANA: Tell us more.
>
> IMP: I can predict what would have happened if Kamala Harris had won the 2024 U.S. presidential election, if Congress had immediately banned bump stocks, or even if the Las Vegas Massacre had never occurred.

Artemis and Diana exchange a mischievous lets-stump-IMP wink.

> ARTEMIS: IMP, what if we didn't change any of that, but America embraced anti-tribalism?
>
> DIANA: Everyday Americans came together to enact reasonable gun regulations for the common good?

IMP sputters, omitting a plume of electronic smoke, to Artemis and Diana's bemusement.

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325 *See* Calleros, *supra* note 38, at 1253 (discussing the "recognizable historical pattern" whereby societal blinders to injustice deteriorate into surprise and even embarrassment).

IMP: Data overload. Prompt override. You're trying to trick me. Isn't that exactly what happened?

ARTEMIS/DIANA: (*touching hands*) Thank God, yes.

Democracy should not be about who wins. If one side continually won, especially to the exclusion of the other, that would be abhorrent. Democracy is about *both* sides winning.[326] For gun reform, that requires reframing the underlying issues, recognizing the interests of both direct and *indirect* victims, and coming together to listen to each other and find a unified solution for the greater good. Competing rights must be respectfully examined and balanced.[327] Envision an America where political victory laps are replaced with grace, and seemingly irreconcilable differences are met with compromise. The challenge is maintaining the balance by which we can all live our lives in joy, not despair. No doubt, that was and is the blessing and vision of our Founders. Having respectful conversations about banning bump stocks and keeping in place the ban against machine guns is a start. A necessary, simultaneous step is working on healing divisions and imagining a future where all communities—rural, urban, and blends of the two—are safe and sound.

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326 *But see* Nick Visser, *Alito Says One Side of Political Fight Is 'Going to Win,' Private Event Recordings Reveal*, HUFFPOST (June 11, 2024, 12:38 AM), https://www.huffpost.com/entry/samuel-alito-private-remarks-politics_n_6667bf9fe4b019027bc758ba [https://perma.cc/W5RG-K7FX]. In a secretly-recorded conversation with Lauren Windsor, a self-described "advocacy journalist," Justice Alito discussed the deep political divide, stating, "One side or the other is going to win . . . [T]here are differences on fundamental things that really can't be compromised." *Id.*; Keziah Weir, *Lauren Windsor Has a "Substantial Amount" of Secret Recordings She Hasn't Released Yet*, VANITY FAIR (July 2, 2024), https://www.vanityfair.com/news/story/lauren-windsor-secret-recordings [https://perma.cc/ZU3R-VPE9].

327 In 2021, the "Unite" organization, headed by Tim Shriver, began developing the Dignity Index, which is "an eight-point scale for measuring how we talk to each other when we disagree." *Ease Divisions. Prevent Violence. Solve Problems.*, THE DIGNITY INDEX, https://www.dignity.us/about [https://perma.cc/Z728-VNRY] (last visited Oct. 16, 2024). The focus is not so much on the message as it is on the *manner* by which the message is delivered, for instance, with or without contempt. The first step is using the index "as a tool for judging others." *Id.* The next step is using the index as a mirror to see oneself. *Id.* The index discourages reacting to others with contempt; if we replace contempt with dignity, we can begin to have meaningful conversations. *See id.*

"Senator . . . I'm Singaporean!": Privacy Regulation and Data Transfers in Cross-Border Corporations

Michelle Norris

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"Senator . . . I'm Singaporean!": Privacy Regulation and Data Transfers in Cross-Border Corporations

*Michelle Norris**

A recent congressional hearing involving social media companies, including TikTok and Facebook, made headlines when Senator Tom Cotton of Arkansas grilled the TikTok CEO, Shou Zi Chew, repeatedly asking him if he had ties to China or its Communist Party. The Singaporean CEO, who has served as TikTok's CEO since 2021, repeatedly replied, "Senator . . . I'm Singaporean!" While Senator Cotton, evoking McCarthy-era sentiments, was severely criticized for his racism and what appears to be a lack of understanding about corporate governance, another problem emerged.

TikTok, which is a subsidiary of the Chinese-owned ByteDance, operates in countries around the world and stores its data in Malaysia, Singapore, and the United States. In today's global privacy landscape, each of these countries has differing privacy laws that, at times, conflict regarding how to handle and transfer data. The lack of consensus on how to store and transfer consumer data exposes corporations to the potential risk of hacking if proper oversight and precautions are not followed.

Accordingly, with data becoming a new global currency for expanding businesses, governments must work together to find a solution that streamlines the handling, storage, and transfer of data. Using the United States-Mexico-Canada Agreement as a baseline to create a cross-border data transfer treaty, this Article proposes a multilateral agreement akin to the General Data Protection Regulation to protect consumer data and remove confusion about conflicts of law.

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I. INTRODUCTION

On February 1, 2024, Senator Tom Cotton of Arkansas made headlines when he questioned Shou Zi Chew, the Chief Executive Officer (CEO) of the social media corporation, TikTok.[1] The congressional hearing was notable for multiple reasons, one being Senator Cotton's purported misunderstanding regarding Chew's national origin.[2] But while the hearing exposed a clear misunderstanding of the corporate structure of TikTok, as well as the national origin of its CEO, the underlying issue was actually, "Where is the data?" With a twenty percent increase in cyberattacks from 2022 to 2023,[3] paranoia surrounding the use and transfer of data is growing.

The staggering increase in cyberattacks was also accompanied by an increase in victims: the number of individuals whose data was stolen doubled from 2022 to 2023.[4] According to one study, the increase in cyberattacks is likely caused by three things: (1) cloud misconfiguration, (2) new types of ransomware attacks, and (3) increased exploitation of vendor systems.[5] The increased number of attacks is quite troubling given that "people are now living more of their lives online, meaning that corporations, governments, and other types of organizations collect more and more personal data—sometimes with little choice from individuals."[6] Since this personal data is more

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1 *See, e.g.*, Diba Mohtasham, *Tom Cotton Grills Singaporean TikTok CEO: Are You a Chinese Communist?*, NPR (Feb. 1, 2024, 2:07 PM), https://www.npr.org/2024/02/01/1228383578/tom-cotton-tiktok-ceo-singapore-china [https://perma.cc/7KPW-43HU].

2 *See id.* Senator Cotton's interrogation of Chew, recently revisited in an episode of HBO's *Last Week Tonight with John Oliver*, culminated in the question, "Have you ever been a member of the Chinese Communist Party?" LastWeekTonight, *TikTok Ban: Last Week Tonight with John Oliver (HBO)*, YOUTUBE, at 18:17 (Nov. 21, 2024), https://www.youtube.com/watch?v=5CZNlaeZAtw [https://perma.cc/U3WN-LZEB]. An incredulous Chew responded, "Senator, I'm Singaporean, no." *Id.* at 18:20. Cotton retorted, "Have you ever been associated or affiliated with the Chinese Communist Party?" *Id.* at 18:22. Chew calmly reiterated, "No, Senator. Again, I'm Singaporean." *Id.* at 18:25.

3 Stuart Madnick, *Why Data Breaches Spiked in 2023*, HARV. BUS. REV. (Feb. 19. 2024), https://hbr.org/2024/02/why-data-breaches-spiked-in-2023 [https://perma.cc/37E9-RRU8].

4 *Id.*

5 *Id.* (citing STUART E. MADNICK, THE CONTINUED THREAT TO PERSONAL DATA: KEY FACTORS BEHIND THE 2023 INCREASE 2, 8 (2023)).

6 MADNICK, *supra* note 3, at 2.

commonly being used for profitable ventures, it is increasingly of value to cybercriminals.[7]

With today's massive increase in data generation, the number of potential targets for cyberattacks has grown exponentially. In 2018, the world produced 33 zettabytes[8] of data each day—a figure that is accelerating rapidly with the creation of the Internet of Things.[9] Today, it is estimated that 147 zettabytes of data are created each day.[10] It is further estimated that 181 zettabytes of data will be generated in 2025.[11]

Adding to the increased paranoia is general confusion surrounding privacy laws. Currently, there is no federal privacy law. While a proposed bipartisan bill[12] may change the lack of a federal standard governing data privacy, previous efforts to pass a federal privacy law were unsuccessful, leading some experts to believe this bill will meet the same fate.[13] Nevertheless, nineteen

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7 *See id.*

8 A zettabyte is equal to 1,000,000,000,000,000,000,000 bytes. *Zettabyte – The Storage Capacity Unit Explained*, IONOS (Sept. 13, 2021) https://www.ionos.com/digitalguide/websites/web-development/what-is-a-zettabyte/ [https://perma.cc/AVQ2-UF2X].

9 Mwalimu Phiri, *Exponential Growth of Data*, MEDIUM (Nov. 19, 2022), https://medium.com/@mwaliph/exponential-growth-of-data-2f53df89124 [https://perma.cc/ML2J-TTLA]; *see also* Bernard Marr, *How Much Data Do We Create Every Day? The Mind-Blowing Stats Everyone Should Read*, FORBES, https://www.forbes.com/sites/bernardmarr/2018/05/21/how-much-data-do-we-create-every-day-the-mind-blowing-stats-everyone-should-read/ [https://perma.cc/A6GN-F5YS] (Dec. 10, 2021, 8:30 AM) (explaining how the "Internet of Things," a growing network of interconnected smart devices, is driving the exponential growth of data).

10 Fabio Duarte, *Amount of Data Created Daily (2024)*, EXPLODING TOPICS (June 13, 2024), https://explodingtopics.com/blog/data-generated-per-day [https://perma.cc/8JWZ-CMSP].

11 *Id.*

12 *Committee Chairs Rodgers, Cantwell Unveil Historic Draft Comprehensive Data Privacy Legislation*, ENERGY & COM. CHAIR RODGERS (Apr. 7, 2024), https://energycommerce.house.gov/posts/committee-chairs-rodgers-cantwell-unveil-historic-draft-comprehensive-data-privacy-legislation [https://perma.cc/8KA5-FH6K] (describing some of the major rights in the proposed bill); *see also* Rebecca Klar, *5 Things to Know About the Bipartisan Data Privacy Bill*, THE HILL (Apr. 9, 2024, 6:00 AM), https://thehill.com/policy/technology/4581269-5-things-to-know-about-the-bipartisan-data-privacy-bill/ [https://perma.cc/Q9SX-B4GT].

13 Jedediah Bracy, *Stakeholders React to Draft American Privacy Rights Act*, IAPP (Apr. 9, 2024), https://iapp.org/news/a/stakeholders-react-to-draft-american-privacy-rights-act/ [https://perma.cc/6H3C-9MWX]. *But see* Thomas Claburn, *US Legislators Propose American Privacy Rights Act – and it Looks Quite Good*, THE REGISTER (Apr. 9, 2024, 1:32 PM), https://www.theregister.com/2024/04/09/us_federal_privacy_law_apra/ [https://perma.cc/ZG2T-SFYC] (arguing that this latest version of a federal privacy act is better than previous iterations and has a greater potential to pass).

states have passed comprehensive privacy laws, and four more state legislatures are currently considering similar proposals.[14] Each of these laws is unique, with some offering greater protections[15] (like those of California[16] and Colorado[17]) and others that are narrowly written to cover only health data (like those of Washington[18]) or the use of data by social media companies with over one billion dollars in gross annual revenue (like that of Florida).[19]

Comparable to the divide between state privacy laws is the disconnect between international privacy laws.[20] While similar to California and Colorado,[21] the European Union (EU) has its own set of privacy laws: the General Data Protection Regulation (GDPR).[22] The GDPR covers all twenty-seven member

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14 *See* Andrew Folks, *U.S. State Privacy Law Tracker*, IAPP, https://iapp.org/resources/article/us-state-privacy-legislation-tracker/ [https://perma.cc/K9ZV-WL22] (July 22, 2024).

15 See generally *Which States Have Consumer Data Privacy Laws?*, BLOOMBERG L. (Mar. 18, 2024), https://pro.bloomberglaw.com/insights/privacy/state-privacy-legislation-tracker/ [https://perma.cc/NN5G-UBT3], for a discussion on the protections of passed comprehensive privacy laws as of March 2024.

16 The first California privacy law passed by the state legislature was the California Consumer Privacy Act (CCPA). California Consumer Privacy Act of 2018, 2018 Cal. Stat. 1807 (codified as amended at CAL. CIV. CODE §§ 1798.100–.199). This Act was amended by the California Privacy Rights Act and supplemented by the CCPA Regulations, which are passed through an informal rulemaking procedure by the California Privacy Protection Agency. California Privacy Rights Act of 2020, 2020 Cal. Legis. Serv. Proposition 24 (West) (codified at CAL. CIV. CODE §§ 1798.100—.199.100) [hereinafter CPRA]; California Consumer Privacy Act Regulations, CAL. CODE REGS. tit. 11, §§ 7000–7304 (2024).

17 *See, e.g.*, COLO. REV. STAT. ANN. § 6-1-713.5 (West 2024); Colorado Privacy Act, COLO. REV. STAT. ANN. §§ 6-1-1305 to -1313 (West 2024). While discussion about the Colorado Privacy Act is outside the scope of this Article, for more specific information on this Act, see Sarah Rippy, *Colorado Privacy Act Becomes Law*, IAPP (July 8, 2021), https://iapp.org/news/a/colorado-privacy-act-becomes-law/ [https://perma.cc/CJ4Y-BVG6].

18 Washington My Health, My Data Act, WASH. REV. CODE § 19.373 (2024).

19 Florida Digital Bill of Rights, FLA. STAT. § 501.702(9)(a)(5) (2024).

20 *See Data Protection and Privacy Legislation Worldwide*, UN TRADE & DEV., https://unctad.org/page/data-protection-and-privacy-legislation-worldwide [https://perma.cc/XLV5-VSP9] (last visited Mar. 3, 2024) (explaining that 71% of countries have legislation, 9% have draft legislation, 15% have no legislation, and the remaining 5% of countries lack data).

21 *See* Richard Lawne, *GDPR vs U.S. State Privacy Laws: How Do They Measure Up?*, FIELDFISHER (Jan. 3, 2023), https://www.fieldfisher.com/en/insights/gdpr-vs-u-s-state-privacy-laws-how-do-they-measure [https://perma.cc/QK2F-L7WQ].

22 *See* Commission Regulation 2016/679, 2016 O.J. (L 119) 1 (EU) [hereinafter GDPR]. For a discussion on the history of GDPR, see generally *The History of the General Data Protection Regulation*, EUR. DATA PROT. SUPERVISOR, https://www.edps.europa.eu/data-protection/data-protection/legislation/history-general-data-protection-regulation_en [https://perma.cc/7AXD-GV3X] (last visited Mar. 3, 2024).

countries,[23] with countries like the United Kingdom (UK) (which is no longer a part of the EU) de facto adopting GDPR through similar resolutions.[24] With the myriad of international laws passed every day, determining which laws to apply to cross-border corporations engaged in data transfers is becoming increasingly complex. The lack of clarity leaves corporations without a clear set of rules to follow: "Varying jurisdictional regulations are stipulating different levels of personal and business data [to] be stored domestically to incongruent degrees, leaving much ambiguity and uncertainty around legal transfers to and from certain countries."[25]

An example of this complexity has appeared in the case of TikTok. ByteDance, a Chinese corporation that owns TikTok,[26] houses its user data in three places: Malaysia, Singapore, and the United States.[27] All three of these countries currently have contradictory data transfer laws. Using TikTok as an anchor for discussion on conflicting data privacy laws, this Article proposes a solution for (1) corporations dealing with cross-border data transfers when their physical repositories are in different locations, and (2) nations attempting to streamline extraterritorial data transfers. This Article critically analyzes the shortcomings in cross-border data transfer privacy laws and proposes a legal solution to the conflicting laws. Using the United States-Mexico-Canada Agreement (USMCA) (which substitutes

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23 *EEA & UK General Data Protection Regulation (GDPR)*, ACCESS TUFTS, https://access.tufts.edu/eea-uk-general-data-protection-regulation-gdpr [https://perma.cc/9835-4P55] (last visited Mar. 3, 2024). GDPR also applies to all countries in the European Economic Area, such as Iceland, Norway, and Lichtenstein. *Id.*

24 *The Data Protection Act*, GOV.UK, https://www.gov.uk/data-protection [https://perma.cc/73Y7-JYBS] (last visited Mar. 3, 2024). The UK voted to leave the EU in 2016, officially executing the break in 2021. *See Brexit: What You Need to Know About the UK Leaving the EU*, BBC (Dec. 30, 2020), https://www.bbc.com/news/uk-politics-32810887 [https://perma.cc/MV6S-B5X8]. For a discussion on issues and drawbacks of the UK leaving the EU, see generally Michelle R. Norris, *Activating Anti-Trust Pinch Points*: *Microsoft's Activision Merger Conundrum and International Irregularities in Anti-Trust Law*, 12 LOY. U. CHI. J. REGUL. COMPLIANCE 90 (2024).

25 Alex LaCasse, *IAPP GPS 2024: Localization, Adequacy Define Current Data Transfer Landscape*, IAPP (Apr. 4, 2024), https://iapp.org/news/a/iapp-gps-diverging-data-localization-laws-complicate-future-of-crossborder-dataflows/ [https://perma.cc/H7P7-FZ3L].

26 *See Who Owns TikTok's Parent Company, ByteDance?*, TIKTOK: U.S. DATA SEC. [hereinafter *Who Owns TikTok?*], https://usds.tiktok.com/who-owns-tiktoks-parent-company-bytedance/ [https://perma.cc/2BAP-PJRQ] (last visited Apr. 10, 2024).

27 *The Truth About TikTok: Separating Fact from Fiction*, TIKTOK (Apr. 16, 2023), https://newsroom.tiktok.com/en-au/the-truth-about-tiktok [https://perma.cc/CD4V-5JF5].

the North America Free Trade Agreement (NAFTA)[28] as a baseline, this Article proposes a multilateral privacy treaty akin to the GDPR to protect consumer data and remove confusion over conflicts of law.

In Part II, this Article gives the necessary background to understand and appreciate the conflicting laws that govern data transfers, focusing on those countries and the U.S. states where TikTok stores its data. Part III discusses TikTok's data storage, usage, and transfer practices, made all the more imperative by the looming ban or sale of TikTok to be completed by January 19, 2025.[29] The legislation mandating the ban or sale was upheld by the U.S. Court of Appeals for the District of Columbia Circuit on December 6, 2024, and its fate now rests with the Supreme Court, which will hear oral arguments on January 10, 2025.[30] Part IV concludes by analyzing two possible solutions to

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28 *See* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020) (replacing Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289).

29 *See* Lukas I. Alpert, *Trump's Shifting Stance on TikTok Ban Signals a Regulatory Roller Coaster in Second Term*, MARKETWATCH (Nov. 22, 2024, 8:58 AM), https://www.marketwatch.com/story/trumps-shifting-stance-on-tiktok-ban-signals-a-regulatory-roller-coaster-in-second-term-66c2b210 [https://perma.cc/PLA3-WRBA]. At present, the future of TikTok is unclear:

> The fate of TikTok in the U.S. has been up in the air since 2020, when then-President Trump moved to ban the popular video app because of national security concerns. That set off four years of back-and-forth between the app's Chinese owners and the U.S. government, with a possible ban scheduled to go into effect one day before Trump's inauguration in January. One hitch: Trump recently changed his mind, joining TikTok in June and posting on social media, "Those who want to save TikTok in America, vote for Trump."

Wendy Lee & Andrea Chang, *Trump Wanted to Ban TikTok. Will His Return to Office Help Save It?*, L.A. TIMES (Nov. 22, 2024, 3:00 AM), https://www.latimes.com/entertainment-arts/business/story/2024-11-22/donald-trump-bytedance-tiktok-biden [https://perma.cc/863Y-TUR6].

30 *See* Alison Durkee, *Court Refuses to Pause TikTok Ban as Case Heads to Supreme Court*, FORBES (Dec. 13, 2024, 8:09 PM), https://www.forbes.com/sites/alisondurkee/2024/12/13/court-refuses-to-pause-tiktok-ban-as-case-heads-to-supreme-court/ [https://perma.cc/84L5-SAGD] ("The U.S. Court of Appeals for the D.C. Circuit declined to pause its ruling upholding the federal government's law requiring TikTok to divest from Chinese parent company ByteDance or else be banned from U.S. app stores, after TikTok asked for the court to halt the ruling while the company requested the Supreme Court to take up the case."); David Shepardson & Mike Scarcella, *US Appeals Court Upholds TikTok Law Forcing Its Sale*, REUTERS (Dec. 6, 2024, 4:23 PM) https://www.reuters.com/legal/us-appeals-court-upholds-tiktok-law-forcing-its-sale-2024-12-06/ [https://perma.cc/2MD2-5ZQL] ("The decision is a major win for the Justice Department and opponents of the Chinese-owned app and a devastating blow to TikTok parent ByteDance. It significantly raises the prospects of an unprecedented

the current lack of clarity surrounding which privacy laws govern. This section proposes a two-part solution: first, implementing a GDPR *Schrems II*-like provision mitigating risk with cross-border data transfers, and second, a choice-of-law clause to include in TikTok's Terms & Conditions to provide more clarity for users.

II. BACKGROUND

A. Privacy Laws and Data Transfers

To fully understand and appreciate both the risks of data transfers, as well as the need for specific legislation, the governing privacy laws of each location must be discussed in turn. In Section II.A, this Article briefly outlines laws (or the lack thereof) surrounding data transfers, using GDPR as an anchor for discussion. Since TikTok stores its data in three distinct geographical locations (Malaysia, Singapore, and the United States)[31] and is a wholly-owned subsidiary of ByteDance (a Chinese corporation),[32] all four jurisdictions' privacy laws must be discussed to understand their implications regarding conflicts of laws.

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ban in just six weeks on a social media app used by 170 million Americans."); *see also* Mark Sherman, *Supreme Court Will Hear Arguments over the Law that Could Ban TikTok in the US if It's Not Sold*, ASSOCIATED PRESS (Dec. 18, 2024, 11:43 AM), https://apnews.com/article/supreme-court-tiktok-china-us-ban-08d6fffdcd2dde5100fcdf8a452dd5cc [https://perma.cc/94JU-A4TB].

31 Per TikTok's website, "all new U.S. user data is stored automatically in Oracle's U.S. Cloud infrastructure, and access is managed exclusively by the TikTok US Data Security team." *TikTok Facts: How We Secure Personal Information and Store Data*, TIKTOK (Oct. 12, 2023), https://newsroom.tiktok.com/en-us/tiktok-facts-how-we-secure-personal-information-and-store-data [https://perma.cc/964B-H4MS] (explaining TikTok's data collection and storage practices generally).

32 Dan Primack, *Shotgun Divorce: How ByteDance Could Save TikTok from a U.S. Ban*, AXIOS (Mar. 11, 2024), https://www.axios.com/2024/03/11/tiktok-us-ban-bytedance-divest-sell [https://perma.cc/27SJ-L34H]. While ByteDance owns 100% of TikTok, it is important to note that 60% of ByteDance is owned by outside investors, with the remaining 40% owned by ByteDance itself and global employees. *Id.* While the TikTok forced sale dispute will be referenced throughout this Article, an in-depth discussion on the corporate ownership and divestiture proposal is outside the scope of this Article. For a more in-depth discussion of ByteDance and TikTok's corporate structures, see *TikTok Is Not the Only Chinese App Thriving in America*, THE ECONOMIST (Mar. 21, 2024), https://www.economist.com/business/2024/03/21/tiktok-is-not-the-only-chinese-app-thriving-in-america [https://perma.cc/H5CD-5UAY]; Anupam Chander, *Trump v. TikTok*, 55 VAND. J. TRANSNAT'L L. 1145, 1146–56 (2022) (explaining the ownership of TikTok, congressional inquiries, and the proposed ban).

In today's data-driven world, the transfer of data from corporation to corporation, or country to country, is an essential part of international trade.[33] A business may need to transfer data for a variety of reasons, including, but not limited to, providing data to suppliers, sharing data with business partners, increasing operational efficiency, or for purposes of corporate acquisition or merger.[34]

When entities transfer data, two key stakeholders—data processors and data controllers—are used to effect the transfer.[35] A data controller "determines the purposes for which and the means by which personal data is processed."[36] Thus, an entity acts as a data controller if it decides "why" and "how" personal data should be processed.[37] An employee of the entity, acting as its agent, fulfills the entity's tasks as a data controller by "processing personal data within [the] organisation."[38] A data processor, in contrast, "is usually a third party external to the company"[39] that "processes personal data only on behalf of the controller."[40]

While data usage and storage has been vilified in the news at times,[41] it can also make everyday life better. For example, Spotify

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33 *Data Protection Guide for Small Businesses: International Data Transfers*, EUR. DATA PROT. BD. [hereinafter *Data Protection Guide for Small Businesses*], https://www.edpb.europa.eu/sme-data-protection-guide/international-data-transfers_en [https://perma.cc/4XY2-MYYT] (last visited Mar. 12, 2023).

34 *See Top Ten Benefits of Data Sharing in Business and Healthcare*, ATLAN (Dec. 13, 2023), https://atlan.com/benefits-of-data-sharing/ [https://perma.cc/J5J8-PBRG]; *see also Data Protection Guide for Small Businesses*, *supra* note 33.

35 *What Is a Data Controller or a Data Processor?*, EUR. COMM'N, https://commission.europa.eu/law/law-topic/data-protection/reform/rules-business-and-organisations/obligations/controllerprocessor/what-data-controller-or-data-processor_en [https://perma.cc/6T3G-4Q32] (last visited Apr. 3, 2024).

36 *Id.* (emphasis omitted).

37 *Id.*

38 *Id.*

39 *Id.* (emphasis omitted).

40 *Id.*

41 *See, e.g.*, Daron Acemoglu & Simon Johnson, *Big Tech Is Bad. Big A.I. Will Be Worse*, N.Y. TIMES (June 9, 2023), https://www.nytimes.com/2023/06/09/opinion/ai-big-tech-microsoft-google-duopoly.html [https://perma.cc/Z9DP-GTGP] ("History has shown us that when the distribution of information is left in the hands of a few, the result is political and economic oppression."); Scott Thomson, *The Dangers of Too Much Data*, BUILT IN (July 11, 2023), https://builtin.com/data-science/dangers-of-too-much-data [https://perma.cc/LU4J-NWEG]; Solan Barocas & Andrew D. Selbst, *Big Data's Disparate Impact*, 104 CAL. L. REV. 671, 671 (2016) (discussing how "[u]nthinking reliance on data mining can deny historically disadvantaged and vulnerable groups full participation in society"). Big data has also been used by authoritarian governments, such as China, to

recently implemented the use of Artificial Intelligence to generate "daylists," or daily playlists, for users based on their listening habits throughout the day—using and storing data about each user's musical preferences.[42] Data collection also helps healthcare systems track and maintain personal health records, predict the transmission of disease, and devise treatment protocols and potential cures.[43] Regardless of whether big data is morally "good" or "bad" for society, it is here to stay,[44] and its use will continue to become a more prominent part of everyday life.[45]

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disadvantage citizens whom the government deems to conduct themselves in an unsavory manner (e.g., criticizing government actions on social media or online platforms). *See* Nicole Kobie, *The Complicated Truth About China's Social Credit System*, WIRED (June 7, 2019, 7:00 AM), https://www.wired.com/story/china-social-credit-system-explained/ [https://perma.cc/6AMY-JEKC]; Katie Canales & Aaron Mok, *China's 'Social Credit' System Ranks Citizens and Punishes Them with Throttled Internet Speeds and Flight Bans if the Communist Party Deems Them Untrustworthy*, BUS. INSIDER (Nov. 28, 2022, 2:52 PM), https://www.yahoo.com/news/chinas-social-credit-system-ranks-123042422.html [https://perma.cc/P7B3-6JK4]. *But see* Zeyi Yang, *China Just Announced a New Social Credit Law*, MIT TECH. REV. (Nov. 22, 2022), https://www.technologyreview.com/2022/11/22/1063605/china-announced-a-new-social-credit-law-what-does-it-mean/ [https://perma.cc/F77L-HFJ5] (explaining that Western criticism of the program is somewhat misplaced, as "the system that the central government has been slowly working on is a mix of attempts to regulate the financial credit industry, enable government agencies to share data with each other, and promote state-sanctioned moral values—however vague that last goal in particular sounds").

42 *Get Fresh Music Sunup to Sundown with Daylist, Your Ever-Changing Spotify Playlist*, SPOTIFY: FOR THE RECORD (Sept. 12, 2023), https://newsroom.spotify.com/2023-09-12/ever-changing-playlist-daylist-music-for-all-day/ [https://perma.cc/6YJN-M9B9] (explaining how the "daylist" function works); Mike Kaput, *How Spotify Uses AI (and What You Can Learn from It)*, MKTG. A.I. INST. (Jan. 26, 2024), https://www.marketingaiinstitute.com/blog/spotify-artificial-intelligence [https://perma.cc/69YF-E78A] (discussing how Spotify uses AI to improve its user experience, including the "daylist" function).

43 *Eight Ways Big Data Affects Your Personal Life*, MICH. TECH. (Apr. 30, 2020), https://web.archive.org/web/20201031072303/https://onlinedegrees.mtu.edu/news/ways-big-data-affects-your-personal-life [https://perma.cc/WBG7-KJ44].

44 *'Big Data': Here to Stay.... but What Is It?*, SOC'Y FOR COMPUTS. & L. (June 17, 2014), https://www.scl.org/3114-big-data-here-to-stay-but-what-is-it/ [https://perma.cc/7MCU-7A8V]; Sheryl Warf, *IDC: Big Data Analytics Software Market to Record Strong Growth*, QUANTEXA CMTY., https://community.quantexa.com/discussion/1173/idc-big-data-analytics-software-market-to-record-strong-growth [https://perma.cc/63MH-542T] (Feb. 2023) (explaining that "[t]he trend of companies relying on data manipulation to analyze, predict, and swiftly adapt to changing market conditions is here to stay, being fueled by ongoing supply chain and demand shift challenges," and noting that "[i]n the first half of 2022, the EMEA BDA market posted year-on-year revenue growth of 10% in U.S. dollars, while growth in constant currency reached 19.5%").

45 *See* Terence Mills, *Big Data Is Changing the Way People Live Their Lives*, FORBES (May 16, 2018, 8:00 AM), https://www.forbes.com/sites/forbestechcouncil/2018/05/16/big-data-is-changing-the-way-people-live-their-lives/?sh=1d0f41e73ce6 [https://perma.cc/VP6Q-

With big data's emergence, corporations and other entities increasingly rely on user data, making data transfers progressively more common in daily life. The use and storage of personal data has thus become necessary to the everyday operations of most corporations.

B. The Basics of Cross-Border Data Transfers

A data transfer is "the process of moving data from one location to another, either within a single device or between devices and networks."[46] Data is first divided into packets which contain a portion of the data and associated metadata.[47] These data packets are then transferred "over a network using wired connections like Ethernet or wireless connections like Wi-Fi . . . to their destination using IP addresses."[48] This is not, however, the only form in which a data transfer may occur. Data can be transferred using a USB or HDMI for direct device connections.[49]

Transferring data, while deceptively simple in theory, carries significant risk for entities seeking to move large amounts of information.[50] Cybercriminals have taken advantage of the increase in corporate use of data, finding more ways to steal data given its high value in the modern economy.[51] Data transfers do not only carry risks to the individuals or corporations whose data may be stolen by cyber thefts: "Generally, risks with data transfer can include threats to your infrastructure, users, data, services, and operations."[52] Absent proper protections during a

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K4VX]; Jonathan Shaw, *Why "Big Data" Is a Big Deal*, HARV. MAG. (Mar.–Apr. 2014), https://www.harvardmagazine.com/2014/02/why-big-data-is-a-big-deal [https://perma.cc/698L-KVAQ].

46 Marshall Gunnell & Natalie Medleva, *Data Transfer*, TECHOPEDIA, (Aug. 14, 2024), https://www.techopedia.com/definition/18715/data-transfer [https://perma.cc/5ANF-SNCP].

47 *See id.*

48 *Id.*

49 *Id.*

50 *See* Canadian Ctr. for Cyber Sec., *Data Transfer and Upload Protection - ITSAP.40.212*, GOV'T OF CAN. (Dec. 14, 2022), https://www.cyber.gc.ca/en/guidance/data-transfer-upload-protection-itsap40212 [https://perma.cc/K5XD-HYZD].

51 *See id.*

52 *Id.* In 2023, the FBI released a cybercrimes report which found that healthcare, critical manufacturing, and government facilities were targeted with more ransomware attacks than any other critical U.S. infrastructure. *See* Tina Reed, *Health Care Was Biggest Victim of U.S. Ransomware Attacks Last Year*, AXIOS (Mar. 11, 2024), https://www.axios.com/2024/03/11/health-care-ransomware-attacks [https://perma.cc/5AMK-

data transfer, "leakage"[53] can occur, making data vulnerable to cybercriminals.[54] For example, threat actors[55] are "individuals or groups that intentionally cause harm to digital devices or systems."[56] They exploit gaps in data transfers to steal sensitive data[57] or restrict an organization's access to their system, threatening to return access only if a ransom is paid (also known as a "ransomware" attack).[58]

Statistics concerning ransomware and phishing attacks reveal the importance of protecting information, especially during times when the data is most vulnerable, primarily during data transfers. Between 2022 and 2023, "[t]he X-Force Threat Intelligence Index found that ransomware infections declined by

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LRCP]. Furthermore, "[t]he Internet Crime Complaint Center, or IC3, received more than 2,800 complaints identified as ransomware that caused adjusted losses of nearly $60 million in 2023," which included "1,193 complaints from organizations that are part of what the FBI categorizes as belonging to 'critical' infrastructure." *Id.*

53 *See Data Leakage: Common Causes, Examples & Tips for Prevention*, BLUEVOYANT, https://www.bluevoyant.com/knowledge-center/data-leakage-common-causes-examples-tips-for-prevention [https://perma.cc/3HW3-7V9G] (last visited Mar. 16, 2024) (explaining that "[d]ata leakage occurs when sensitive data gets unintentionally exposed to the public in transit, at rest, or in use"). Data leakage is different than a data breach; a data breach is dissimilar from leakage because a data breach is usually the result of an external intrusion (a cyberattack), while a data leak is usually caused by employee negligence (poor e-mail and data transfer practices). *See id.*

54 Data leakage can still expose vulnerabilities in data protection because it "can result in a data breach but does not require exploiting unknown vulnerabilities." *Id.* ("For example, a misconfigured Amazon Web Services (AWS) S3 bucket can cause a leak. S3 buckets provide cloud storage space for uploading files and data.").

55 Throughout this Article, "threat actors" will be used to refer to the malicious actors that conduct cybercrimes to exploit sensitive data. *See generally What Is a Threat Actor?*, IBM, https://www.ibm.com/topics/threat-actor [https://perma.cc/XY2Q-98UC] (last visited Aug. 31, 2024).

56 *Id.*

57 *See, e.g.*, *Threat Actors Exploit Multiple Vulnerabilities in Ivanti Connect Secure and Policy Secure Gateways*, CYBERSECURITY & INFRASTRUCTURE SEC. AGENCY (Feb. 29, 2024), https://www.cisa.gov/news-events/cybersecurity-advisories/aa24-060b [https://perma.cc/6W6C-3QKB]. For further discussion on threat actors, see *Threat Actor*, NIST, https://csrc.nist.gov/glossary/term/threat_actor [https://perma.cc/H8F4-PX7L] (last visited Aug. 31, 2024).

58 Matthew Kosinski, *What Is Ransomware?*, IBM, https://www.ibm.com/topics/ransomware [https://perma.cc/GPW9-MZE7] (June 4, 2024). Recently, "ransomware attacks have evolved," including "double-extortion and triple-extortion tactics that raise the stakes considerably." *Id.* IBM reported:

> Even victims who rigorously maintain data backups or pay the initial ransom demand are at risk. Double-extortion attacks add the threat of stealing the victim's data and leaking it online. Triple-extortion attacks add the threat of using the stolen data to attack the victim's customers or business partners.

Id.

11.5%."[59] But despite that good news, this promising trend was eclipsed by the drastic decrease in time it took threat actors to commit a ransomware attack.

The decrease is likely due to defenders becoming more successful in detecting and preventing ransomware attacks. This positive finding is tempered by the fact that the average attack timeline is just four days: "This speed gives organizations little time to detect and thwart potential attacks."[60]

With the decrease in the time it takes for a threat actor to infiltrate a system, and with the increase in attacks, organizations have less time to react to the threat.[61] Ransom demand amounts, while rarely disclosed by corporations, are reaching seven- and eight-figure amounts.[62] The spike in ransomware amounts, coupled with the decrease in time to thwart attacks, has increased the amount of risk for an entity that uses data.[63] Due to the elevated risk associated with handling data, it is more important than ever for entities to ensure proper risk mitigation during data transfers, especially concerning those that cross borders.

III. THE CURRENT STATE OF PRIVACY LAWS AFFECTING TIKTOK'S DATA STORAGE AND TRANSFER: A BRIEF OVERVIEW

Privacy and cybersecurity laws are relatively novel, with the first federal law dating back to the Computer Security Act of 1987,[64] and the earliest data breach notification law in the United States dating back to 2003.[65] Privacy law development has been characterized as a dialogue between the judicial and legislative branches about its scope and application, where "[i]n

59 *Id.* (emphasis omitted).

60 *Id.* For a discussion on current events in cybersecurity, see Mateo Formaggi, *Cybercrime and Ransomware*, 37 INT'L ENF'T L. REP. 401 (2021). For more information on ransomware, see Edward A. Morse & Ian Ramsey, *Navigating the Perils of Ransomware*, 72 BUS. L. 287 (2017) (providing an overview of ransomware, as well as discussing the risks to organizations and corporations that are the targets of such attacks).

61 *See* Kosinski, *supra* note 58.

62 *Id.*

63 *See generally id.*

64 For a comprehensive timeline of cybersecurity law advancements, see *NIST Cybersecurity Program History and Timeline*, NIST, https://csrc.nist.gov/nist-cyber-history [https://perma.cc/2UWN-ADQM] (last visited Mar. 18, 2024).

65 DANIEL J. SOLOVE & PAUL M. SCHWARTZ, PRIVACY LAW FUNDAMENTALS 1 (2019).

some matters, courts will define new privacy rights."[66] Recently, privacy laws have emerged as a hot-button issue, especially in the context of using and selling personal data.[67] With the emergence of data usage as a critical part of most businesses, many states have passed laws preventing business entities from using consumer data without consent, imposing the requirement that they provide consumers with notice before collecting data,[68] among other consumer protection provisions.[69]

The U.S. Congress has failed to pass any sweeping privacy protections,[70] instead delegating the states to pass their own legislation. At the time of writing this Article, thirteen states have passed individual consumer privacy protection laws.[71] Overseas, the EU was one of the first major governmental bodies to enact a consumer data privacy protection law, requiring each member state to implement it by May 25, 2018.[72] Since then, approximately 71% of countries have passed privacy legislation, with 9% of countries having drafted but not passed privacy legislation, 15% of countries having no legislation concerning

66 *Id.*

67 *See, e.g.*, Brian Fung, *Feds Crack Down Hard on Selling of Personal Data Without Consent*, CNN (Jan. 19, 2024, 2:13 PM), https://www.cnn.com/2024/01/19/tech/ftc-crackdown-data-inmarket-media/index.html [https://perma.cc/M6RF-QAMT] (discussing the Federal Trade Commission's recent ban on corporations selling consumers' personal data without consent); David McCabe, *Biden Acts to Stop Sales of Sensitive Personal Data to China and Russia*, N.Y. TIMES (Feb. 28, 2024), https://www.nytimes.com/2024/02/28/technology/biden-data-sales-china-russia.html [https://perma.cc/F9VZ-3ULR] (explaining the recent presidential order by President Biden that bans the mass sale of consumer data to China and Russia); Sean Lyngaas, *Researchers Find Sensitive Personal Data of US Military Personnel Is for Sale Online*, CNN (Nov. 6, 2023, 9:43 AM), https://www.cnn.com/2023/11/06/politics/data-of-military-personnel-for-sale-online/index.html [https://perma.cc/QA5U-6FUB].

68 *See, e.g.*, CPRA, 2020 Cal. Legis. Serv. Proposition 24 (West) (codified at CAL. CIV. CODE §§ 1798.100–.199.100); COLO. REV. STAT. ANN. § 6-1-713.5 (West 2024); Colorado Privacy Act, COLO. REV. STAT. ANN. §§ 6-1-1305 to -1313 (West 2024).

69 *See, e.g.*, Washington My Health, My Data Act, WASH. REV. CODE § 19.373 (2024); Florida Digital Bill of Rights, Fla. Stat. § 501.702(9)(a)(5) (2024). For more information on the individual rights that each state law gives to consumers, see Folks, *supra* note 14.

70 *See, e.g.*, Informing Consumers About Smart Devices Act, S. 90, 118th Cong. (2023); *see also* Jessica Rich, *After 20 Years of Debate, It's Time for Congress to Finally Pass a Baseline Privacy Law*, BROOKINGS (Jan. 14, 2021), https://www.brookings.edu/articles/after-20-years-of-debate-its-time-for-congress-to-finally-pass-a-baseline-privacy-law/ [https://perma.cc/AU38-8JEC].

71 *See* Folks, *supra* note 14.

72 *See* GDPR, *supra* note 22.

privacy, and the remaining 5% of countries having provided no data on the matter.[73]

China is also among the major countries passing privacy legislation.[74] The China Personal Information Protection Law (PIPL) applies "to organizations and individuals who process personally identifiable information (PII) in China, but also those who process data of Chin[ese] citizens' PII outside of China," and requires subjects to be provided with a privacy notice, the purpose and method of collection, and other requirements.[75]

While an in-depth discussion of each state privacy law in the United States is beyond the scope of this Article, a brief overview of relevant privacy laws in China, Malaysia, and Texas will be discussed below to provide context regarding TikTok data transfers.[76]

A. Current State of Privacy Laws in China

In the early 2000s, China began "establish[ing] a legal framework for privacy and personal information protection."[77] This effort led to China's congressional body passing a series of laws,[78] including PIPL.[79] On August 20, 2021, the thirtieth

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73 *Data Protection and Privacy Legislation Worldwide*, *supra* note 20 ("Africa and Asia show different level[s] of adoption with 61 and 57 per cent of countries having adopted such legislations. The share in the least developed countries in [sic] only 48 per cent.").

74 *See China Privacy Law*, BERKELEY OFF. OF ETHICS, https://ethics.berkeley.edu/privacy/international-privacy-laws/china-privacy-law [https://perma.cc/AVQ3-8E2D] (last visited Mar. 18, 2024) (explaining the basic principles of China's Personal Information Protection Law).

75 *Id.*

76 It is worth noting that TikTok is incorporated under ByteDance in the Cayman Islands and is based out of both California and Singapore. *See* Joe McDonald & Zen Soo, *Why Does US See Chinese-Owned TikTok as a Security Threat?*, ASSOCIATED PRESS (Mar. 24, 2023, 7:24 AM), https://apnews.com/article/tiktok-bytedance-shou-zi-chew-8d8a6a9694357040d484670b7f4833be [https://perma.cc/5KDD-8P63]. Since TikTok does not claim to store its data in California, the Cayman Islands, or Singapore, these locations' privacy laws will not be discussed and are beyond the scope of this Article.

77 Chengxin Peng, Guosong Shao & Wentong Zheng, *China's Emerging Legal Regime for Privacy and Personal Information Protection*, 15 TSINGHUA CHINA L. REV. 191, 193 (2023) (discussing the emerging legal regime to protect Chinese citizens' personal data).

78 One example is the Tort Law of 2009, which "for the first time, formally included the right to privacy as one of [the] protected civil rights." *Id.* at 193 n.3; *see also Tort Liability Law of the People's Republic of China*, THE CENT. PEOPLE'S GOV'T OF THE PEOPLE'S REPUBLIC OF CHINA (Dec. 26, 2009), https://www.gov.cn/flfg/2009-12/26/content_1497435.htm [https://perma.cc/S2V9-8RN8]. It is worth noting that China's cultural definition of privacy is very different than its western counterpart. Specifically, "privacy is not part of our traditional culture [but rather is] imported from the West into

meeting of the Standing Committee of the Thirteenth National People's Congress of the People's Republic of China (NPC) enacted PIPL.[80] PIPL went into effect on November 1, 2021, and "provides direction on many topics, including rules for the processing of personal and sensitive information . . . ."[81] PIPL "also introduces rules for personal information protection processors [and] data subject rights, [as well as] outlines requirements regarding international data transfers to third parties."[82]

Specifically concerning data transfers, "Article 38 of PIPL . . . provides several conditions (or legal paths) that must be met before a cross-border data transfer may occur."[83] To satisfy Article 38, the transfer must have either: (1) "passed the security assessment organized by the State cyberspace administration in accordance with Article 40 hereof"; (2) "been certified by a specialized [body] in accordance with the provisions of the State cyberspace administration in respect of the protection of personal information"; (3) "concluded a contract with an overseas recipient according to the standard contract formulated by the State cyberspace administration, specifying the rights and obligations of both parties"; or (4) "satisfied other conditions prescribed by laws, administrative regulations, or the State cyberspace administration."[84]

Article 38 denotes specific requirements that a data handler must satisfy to transfer Chinese citizens' data outside the

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our system." Sam Pfeifle, *China's Evolving Views on Privacy*, IAPP (Sept. 28, 2017), https://iapp.org/news/a/chinas-evolving-views-on-privacy/ [https://perma.cc/TDD5-CQXS] (quoting a close adviser to the Chinese government). Instead, China "recognize[s] privacy as a civil right, as a right relating to the civil code," rather than a "constitutional right," and is for "the purpose of promoting social harmony, and, therefore, this is very different from the western system, which is based on human rights and freedoms." *Id.*

79 *See Rules for Cross-Border Provision of Personal Information*, PIPL PERS. INFO. PROT. L. (Mar. 2, 2022), https://personalinformationprotectionlaw.com/PIPL/category/rules-for-cross-border-provision-of-personal-information/ [https://perma.cc/TSX3-8SZU].

80 *Personal Information Protection Law of the People's Republic of China*, PIPL PERS. INFO. PROT. L., https://personalinformationprotectionlaw.com/ [https://perma.cc/U8GJ-F2QG] (last visited Mar. 18, 2024).

81 *Id.*

82 *Id.*

83 Samuel Yang, Christopher Fung & Leann Wu, *Will China's New Certification Rules Be a Popular Legal Path for Outbound Data Transfers?*, IAPP (Aug. 16, 2022), https://iapp.org/news/a/will-chinas-new-certification-rules-be-a-popular-legal-path-for-outbound-data-transfers/ [https://perma.cc/2YN3-3ZMG].

84 *Rules for Cross-Border Provision of Personal Information*, *supra* note 79.

country's border.[85] In 2022, Chinese lawmakers made it more challenging to transfer data outside of the country by permitting only the following mechanisms to conduct a data transfer: (1) "successful completion of a government-led security assessment"; (2) "obtaining certification under a government-authorized certification scheme"; or (3) "implementing a standard contract with the party(-ies) outside of China receiving the data."[86]

On June 30, 2022, China released draft provisions for public consultation which stated that "only companies that meet certain thresholds can rely on the standard contract to transfer personal information overseas."[87] Furthermore, the standard contract proposed in the draft provisions is limited to "a 'personal information processing entity' . . . which is essentially equivalent to a 'data controller' under the . . . 'GDPR.'"[88] Lastly, the contract would have to be filed with the government, with uncertainty about whether the document will be redacted in any way on a public docket.[89] Yet, this option is only available to a corporation that: (1) "is not a Critical Information Infrastructure (CII) operator"; (2) "processes the personal information of less than 1 million individuals"; (3) "has transferred the personal information of less than 100,000 individuals on a cumulative basis since January 1 of the previous year"; and (4) "has transferred the sensitive personal information of less than 10,000 individuals on a cumulative basis since January 1 of the previous year."[90]

Lastly, a corporation may file for certification with China to engage in cross-border transfers.[91] The certification "is intended to provide a basis for the implementation of one of the personal information protection certification schemes under the PIPL, namely, the certification for processing activities involving certain cross-border data transfers," and is similar in nature to

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85 *See generally id.*

86 Yan Luo & Xuezi Dan, *Cross-Border Data Transfer Developments in China*, COVINGTON (July 2, 2022), https://www.insideprivacy.com/international/china/cross-border-data-transfer-developments-in-china/ [https://perma.cc/9MU3-BK72].

87 *Id.*

88 *Id.* (emphasis omitted).

89 *Id.*

90 *Id.*; *see also* Qian Sun, *Cross-Border Data Transfer Mechanism in China and Its Compliance*, CAL. LAWS. ASS'N (Mar. 10, 2023), https://calawyers.org/business-law/cross-border-data-transfer-mechanism-in-china-and-its-compliance/ [https://perma.cc/6RWL-V7LL].

91 Luo & Dan, *supra* note 86.

the EU's Binding Corporate Rules.[92] China's certification process is similar to the EU's Binding Corporate Rules, in that "both are intended for use by multinational companies and both set forth detailed information to be specified in a legally binding and enforceable agreement between/among the parties."[93] While the EU's Binding Corporate Rules are similar in some aspects to China's certification process, there are also notable differences:

> [T]he overseas recipient needs to promise to accept the supervision of the Chinese certification body and "accept the jurisdiction of the relevant Chinese laws and regulations on personal information protection", while in the BCR, the EU party with delegated responsibilities commits to submit to the jurisdiction of the courts, or other competent authorities in the EU, in case of violation of the BCR by a non-EU party.[94]

The stringency of these provisions led China to relax the requirements for cross-border data transfers on March 22, 2024, just six months after drafting proposed updates to PIPL.[95] Some key changes made include the distinction that "non-important" data, or data that is "collected and generated during activities such as 'international trade, cross-border transportation, academic cooperation, cross-border manufacturing or marketing' is exempted . . . if the data does *not* contain personal information or important data."[96] Additionally, a data processing entity[97] must declare important data that is to be transferred.[98] The new provisions also allow the transfer of emergency data ("transfers . . . necessary to protect the life, health, and physical

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92 *Id.*

93 *Id.*

94 *Id.*

95 *See* Yan Luo & Xuezi Dan, *China Eases Restrictions on Cross-Border Data Flows*, COVINGTON & BURLING LLP (Mar. 25, 2024), https://www.insideprivacy.com/uncategorized/china-eases-restrictions-on-cross-border-data-flows/ [https://perma.cc/4R78-JGZ5].

96 *Id.* (emphasis added).

97 Under PIPL, a "handler" is a data controller designated by a non-Chinese corporation during a data transfer to oversee the transfer. *China's Personal Information Protection Law (PIPL)*, UC IRVINE OFF. OF RSCH. (Mar. 9, 2022), https://news.research.uci.edu/irb-hrp/chinas-personal-information-protection-law-pipl/ [https://perma.cc/978Z-86XT]. Corporations seeking to conduct a cross-border transfer of information from China to an outside country must designate a "handler" (or "controller," the term used by GDPR) to be responsible for transferring the information outside China. *Id.* This handler reports to the Chinese government. *Id.* Furthermore, transfers of "sensitive data out of Mainland China . . . must be assessed and approved by the Cyberspace Administration of China." *Id.*

98 Luo & Dan, *supra* note 95.

safety of a natural person") and employee data that is necessary to carry out "cross-border human resources management."[99] Thus, while the new provisions provide carveouts for specific types of data transfers, many of the strict requirements—such as a contract on file with the government—still exist.[100]

B. Current State of Privacy Laws in Malaysia

Malaysia passed its first comprehensive data protection law in 2010, titled the Personal Data Protection Act (PDPA).[101] Malaysia's PDPA was passed by the Malaysian Parliament on June 2, 2010, and went into force on November 15, 2013.[102] Since the initial passing of the PDPA, the Malaysian Personal Data Protection Commissioner has identified twenty-two main issues with its administration and enforcement, five of which have been targeted in proposed amendments to the PDPA.[103] These five amendments were proposed but tabled in October 2022.[104] The next year, in October 2023, Malaysia's Deputy Minister of Communications, Teo Nie Ching, announced that "preparation of the bill to amend the PDP is in the final stages" and that she expects Malaysia's legislative body to review the proposals in March 2024.[105] By the end of October 2024, the bill had received royal assent and was published in Malaysia's *Federal Gazette*, with its provisions scheduled to become effective in early 2025.[106]

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99 *Id.*

100 *See id.* Other carveouts include an exemption "based on 'negative lists' established by free trade zones" and "data originating outside of China that merely transits through China without involving any domestic personal information or important data." *Id.* Furthermore, the newer, relaxed provisions still require notice, separate consent for the transfer, and a personal information protection impact assessment, as outlined in Article 10 of PIPL. *Id.*

101 Personal Data Protection Act 2010 (Act 709) (Malay.).

102 DLA PIPER, DATA PROTECTION LAWS OF THE WORLD: MALAYSIA 2 (2023), https://www.dlapiperdataprotection.com/?t=law&c=MY [https://perma.cc/MJ79-GNTT] (click "DOWNLOAD current countries" hyperlink).

103 *Id.*

104 *Id.*; *see also Cloud Compliance Center: Malaysia*, BAKER MCKENZIE, https://resourcehub.bakermckenzie.com/en/resources/cloud-compliance-center/apac/malaysia/ [https://perma.cc/FQ99-3T7M] (last visited Apr. 11, 2024).

105 DLA PIPER, *supra* note 104, at 2.

106 *News Alert: The Gazetting of the Personal Data Protection (Amendment) Act 2024*, RAJAH & TANN ASIA (Oct. 22, 2024), https://www.rajahtannasia.com/viewpoints/news-alert-the-gazetting-of-the-personal-data-protection-amendment-act-2024/ [https://perma.cc/7HXU-3NYJ]; Robert Healey, *Navigating Malaysia's Personal Data Protection Amendment Bill 2024: Are You Ready for PDPA Compliance?*, FORMITI, https://formiti.com/navigating-

In its pre-amendment state, the law was widely regarded as inadequate at addressing data privacy issues, especially in contrast with the more recently updated and robust GDPR.[107] The Malaysian PDPA is a reactive law, designed mainly to create criminal liability for violations of the law:

> The [PDPA] primarily focuses on regulating criminal and constitutional aspects of privacy breaches. Laws, such as the Personal Data Protection Act 2010 (Malaysia) and the Penal Code (Malaysia), only provide criminal sanctions in cases where an individual's privacy is violated. The protection of personal liberties, including the right to privacy, is outlined in Article 5(1) of the Federal Constitution (Malaysia). However, constitutional protection *only offers remedies for privacy breaches committed by the executive and legislative branches of the government*, excluding infringements of privacy between private individuals. As a result, there is a clear gap or deficiency in Malaysian law . . . .[108]

In a cybersecurity breach in 2022, Malaysia's PDPA was put to the test and largely failed.[109] Malaysia experienced a major governmental cybersecurity breach when "personal details of 22 million Malaysians, allegedly from the National Registration Department, were leaked and sold online."[110] While the Malaysian government subsequently launched an investigation, the government largely downplayed what had occurred.[111] No fines were ever issued.[112] Although this is only one incident, it reveals much about the inadequacy of the current data security and privacy laws in Malaysia, especially as compared to GDPR.

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malaysias-personal-data-protection-amendment-bill-2024-are-you-ready-for-pdpa-compliance/ [https://perma.cc/F7C4-EHZU] (last visited Dec. 21, 2024).

107 Adnan Trakic et al., *It Is Time to Recognize the Tort of Invasion of Privacy in Malaysia*, 13 INT'L DATA PRIVACY L. 229, 310 (2023) ("In contrast to European countries, the status of privacy laws in Malaysia is regarded as inadequate. There is a notable absence of comprehensive legal frameworks for privacy protection, with the Personal Data Protection Act 2010 (the 'PDPA') being the primary legislation that addresses only data protection concerns."); *see also* Aaron Raj, *Is Data Privacy Just a Pipedream in Malaysia?*, TECHWIRE ASIA (Feb. 2, 2023), https://techwireasia.com/02/2023/is-data-privacy-just-a-pipe-dream-in-malaysia/ [https://perma.cc/3FQN-JJ6D] (explaining that Malaysia has fallen short on enforcement of its data protection laws).

108 Trakic et al., *supra* note 107, at 300 (emphasis added).

109 Raj, *supra* note 107.

110 *Id.*

111 *Id.*; *see also Data of 22.5 Million Malaysians Born 1940-2004 Allegedly Being Sold for US$10k*, STRAITS TIMES (May 18, 2022, 5:52 PM), https://www.straitstimes.com/asia/se-asia/data-of-225-million-malaysians-born-1940-2004-allegedly-being-sold-for-us10k [https://perma.cc/3RVM-ZMBT].

112 Raj, *supra* note 107.

Concerning cross-border transfers, Malaysia currently prohibits the transfer of Malaysian users' data outside the country "unless the Malaysian Minister of Communications and Digital has specifically exempted the jurisdiction from the restriction via publication" in the *Federal Gazette*, a mechanism for issuing official government notices.[113] As of April 2024, "the Minister has yet to specify any country to which personal data may be transferred without any restrictions."[114]

C. Current State of Privacy Laws in Texas

In the United States, TikTok primarily stores data in Virginia and Oregon.[115] However, it anticipates moving all of its U.S. users' data from these physical storage locations to Oracle cloud servers; this endeavor has been named "Project Texas."[116] Oracle Corporation is a company based in Austin, Texas, and is subject to the privacy laws of the state.[117]

On June 18, 2023, Texas became the tenth state to enact comprehensive data privacy legislation.[118] The Texas Data and Privacy Security Act (TDPSA) is effective as of July 1, 2024, and shares many salient features with other states' privacy laws, such as those of Utah, Colorado, and Connecticut.[119] The TDPSA

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113 *Cloud Compliance Center: Malaysia*, *supra* note 104.

114 *Id.*

115 Mary Zhang, *TikTok's Data Center Locations and Use of Oracle Cloud*, DGTL INFRA (Feb. 18, 2024) https://dgtlinfra.com/tiktok-data-centers-cloud-locations/ [https://perma.cc/ALQ4-2QLX].

116 *Id.*; *When Will Project Texas Be Fully Operational?*, TIKTOK: U.S. DATA SEC., https://usds.tiktok.com/when-will-project-texas-be-fully-operational/ [https://perma.cc/BE24-LPKV] (last visited Dec. 21, 2024) (describing Project Texas as an ongoing effort).

117 *See id.*; Emily Baker-White, *Leaked Audio from 80 Internal TikTok Meetings Shows that US User Data Has Been Repeatedly Accessed from China*, BUZZFEED NEWS (June 17, 2022, 9:31 AM), https://www.buzzfeednews.com/article/emilybakerwhite/tiktok-tapes-us-user-data-china-bytedance-access [https://perma.cc/R77Y-2U3B] ("TikTok would hold US users' protected private information, like phone numbers and birthdays, exclusively at a data center managed by Oracle in Texas (hence the project name).").

118 F. Paul Pittman & Abdul M. Hafiz, *Texas Passes Comprehensive Data Privacy Law*, WHITE & CASE LLP (July 19, 2023), https://www.whitecase.com/insight-alert/texas-passes-comprehensive-data-privacy-law [https://perma.cc/RJ8N-Z4X4]; TEX. BUS & COM. CODE ANN. §§ 541.001–.205 (West 2024); Joe Duball, *Texas Latest to Add Comprehensive State Privacy Law*, IAPP (June 2, 2023), https://iapp.org/news/a/texas-latest-to-add-comprehensive-state-privacy-law/ [https://perma.cc/96FP-C8EN].

119 Pittman & Hafiz, *supra* note 118. It is worth noting that the "majority of the law takes force 1 July 2024 while provisions for recognition of universal opt-out mechanisms take effect 1 Jan. 2025." *Texas' Comprehensive Privacy Bill Signed into Law*, IAPP (June 20, 2023), https://iapp.org/news/b/texas-comprehensive-privacy-bill-signed-into-law

confers data rights upon individuals, including the right to access, delete, correct, and opt out of sales.[120] It applies to any corporation that "conducts business in Texas or produces products or services that are consumed by Texas residents (which is likely broader than the 'targeting' language seen in certain other State Data Privacy Laws)."[121] Similar to most other state privacy laws, Texas does not provide a private right of action for privacy violations.[122] Additionally, similar to the GDPR and some other states, Texas defines differences between processors and controllers, and delegates responsibilities of each.[123] Data controllers are obligated, inter alia, to: (1) "[l]imit the collection of personal data to what is adequate, relevant, and reasonably necessary in relation to disclosed purposes for which such data is processed"; (2) "[a]dopt and implement reasonable administrative, technical, and physical data security practices"; (3) "[c]learly disclose if the controller sells consumers' sensitive personal data or biometric data"; and (4) "[w]hen in possession of de-identified data, take reasonable measures to ensure that the data cannot be associated with an individual, commit publicly to maintaining data as de-identified data, and obligate any recipients of the data to comply with the TDPSA."[124]

While the law is considered comprehensive, and does define a "[s]ale of personal data" as "the sharing, disclosing, or transferring of personal data for monetary or other valuable consideration by the controller to the third party," it does not define cross-border data transfers between states or countries.[125]

[https://perma.cc/CCZ4-98CH]; *see also* Matt Stringer, *New Texas Data and Privacy Security Act Aims to Increase Protections for Online User Data*, THE TEXAN (June 19, 2023), https://thetexan.news/state/legislature/88th-session/new-texas-data-and-privacy-security-act-aims-to-increase-protections-for-online-user-data/ [https://perma.cc/KEN2-KA3D].

120 IIAP, US STATE PRIVACY LEGISLATION TRACKER 2024, at 1 (2024), https://iapp.org/media/pdf/resource_center/State_Comp_Privacy_Law_Chart.pdf [https://perma.cc/KAQ9-ZR2Z].

121 Devika Kornbacher, *The Texas Data Privacy Law: An Overview*, CLIFFORD CHANCE (Dec. 31, 2023), https://www.cliffordchance.com/insights/resources/blogs/talking-tech/en/articles/2023/12/the-texas-data-privacy-law-an-overview.html [https://perma.cc/29RR-EX4U] (outlining the major key takeaways from TDPSA).

122 IIAP, *supra* note 120, at 1.

123 Kornbacher, *supra* note 121.

124 Pittman & Hafiz, *supra* note 118; *see also* Natasha G. Kohne & Joseph Hold, *Texas Data Privacy Act: What Businesses Need to Know*, AKIN GUMP (July 28, 2023), https://www.akingump.com/en/insights/alerts/texas-data-privacy-act-what-businesses-need-to-know [https://perma.cc/7BMP-CUEC].

125 TEX. BUS. & COM. CODE ANN. § 541.001(28) (West 2024).

Currently, the law more clearly defines what is *not* a sale or transfer of data than what *is* the sale or transfer of data.[126] Notably absent is any policy for transferring data outside the state or country, or otherwise providing guidance beyond the handling of deidentified data, leaving corporations with little guidance for transferring consumer data through interstate commerce or abroad.

D. Current State of Privacy Laws in Singapore

Singapore governs the use and transfer of private information through its data protection law, the Personal Data Protection Act.[127] The Singaporean PDPA was enacted in 2012 and amended in 2020 to better align with GDPR.[128] The PDPA amendments took effect on February 1, 2021, and "strengthen[ed] organisational accountability and consumer protection, while giving organisations the confidence to harness personal data for innovation."[129]

The objectives of Singapore's PDPA include recognizing individual data rights, and the "need to protect individuals' personal data . . . of organisations to collect, use or disclose personal data for legitimate and reasonable purposes."[130] The PDPA is also meant to be a "data protection regime" which "safeguard[s] personal data from misuse and . . . maintain[s] individuals' trust in organisations that manage their data."[131] Finally, PDPA seeks to establish trust in entities that collect data in order to strengthen Singapore's place in the world economy.[132]

126 *See id.*

127 *PDPA Overview*, PERS. DATA PROT. COMM'N SING., https://www.pdpc.gov.sg/overview-of-pdpa/the-legislation/personal-data-protection-act [https://perma.cc/UBT6-KWJQ] (last visited Apr. 11, 2024).

128 *Id.*; DLA PIPER, DATA PROTECTION LAWS OF THE WORLD: SINGAPORE 2 (2023), https://www.dlapiperdataprotection.com/?t=law&c=SG [https://perma.cc/6Y7S-NJTY].

129 *Amendments to the Personal Data Protection Act (PDPA) Take Effect from 1 February 2021*, PERS. DATA PROT. COMM'N SING. (Jan. 29, 2021), https://www.pdpc.gov.sg/news-and-events/announcements/2021/01/amendments-to-the-personal-data-protection-act-take-effect-from-1-february-2021 [https://perma.cc/46DX-YXFL].

130 *PDPA Overview*, *supra* note 127.

131 *Id.*

132 *Id.*

Furthermore, Singapore has clear policies in place that guide cross-border data transfers.[133] In 2018, Singapore was the sixth member country to join the Asia-Pacific Economic Corporation (APEC).[134] As of April 2024, Canada, Japan, the Republic of Korea, the Philippines, Singapore, Chinese Taipei, and the United States follow these data transfer guidelines for extraterritorial transfers.[135] APEC's cross-border transfer principles, or Cross-Border Privacy Rules (CBPRs) designated under the Cross-Border Privacy Enforcement Agreement (CPEA),[136] are designed to streamline transfer while recognizing that "regulatory barriers threaten to undermine opportunities created by the digital economy at a time when companies are relying increasingly on digital technologies and innovations to continue business operations and recover economically."[137] The CBPR system was developed with recognition "that growing Internet connectivity and the digitisation of the global economy have resulted in the rapid increase in the collection, use, and transfer of data across borders, a trend that continues to accelerate."[138] APEC's mission statement also illustrates its purpose to "bridge different regulatory approaches to data protection and privacy."[139] Similar to the EU's *Schrems II* guidance, APEC's purposes are to ensure a clear standard for data transfers, facilitate data sharing and communications

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133 *See Singapore Joins APEC Cross-Border Privacy Rules and Privacy Recognition for Processors Systems*, PERS. DATA PROT. COMM'N SING. (Mar. 6, 2018), https://www.pdpc.gov.sg/news-and-events/announcements/2018/03/singapore-joins-apec-cross-border-privacy-rules-and-privacy-recognition-for-processors-systems [https://perma.cc/K5RJ-PXLU].

134 *Id.*; *see also Global Cross-Border Privacy Rules Declaration*, U.S. DEP'T OF COM., https://www.commerce.gov/global-cross-border-privacy-rules-declaration [https://perma.cc/8J7T-54UT] (last visited Apr. 11, 2024).

135 *Global Cross-Border Privacy Rules Declaration*, *supra* note 134.

136 *See APEC Cross-Border Privacy Enforcement Arrangement (CPEA)*, ASIA-PAC. ECON. COOP. [hereinafter *APEC CPEA*], https://www.apec.org/groups/committee-on-trade-and-investment/digital-economy-steering-group/cross-border-privacy-enforcement-arrangement [https://perma.cc/9X9A-Q6CY] (Feb. 2024) (outlining the principles and aims of the CPEA).

137 *Id.*

138 *Id.; see also APEC CPEA*, *supra* note 136 (outlining the principles and aims of the CPEA).

139 *Global Cross-Border Privacy Rules Declaration*, *supra* note 134. Differences between the EU's data transfer processes and APEC's processes will subsequently be discussed in comparison to the *Schrems II* decision. *See infra* Section III.B.

between countries, and address privacy challenges accompanying the use and transfer of personal data.[140]

E. Potential U.S. Federal Privacy Law

On April 7, 2024, Republican House Representative Cathy McMorris Rodgers and Democratic Senator Maria Cantwell, both serving the state of Washington, released a draft of the bipartisan American Privacy Rights Act of 2024 (Act),[141] which was introduced in the House of Representatives on June 25, 2024.[142] The surprising unveiling garnered mixed reviews and skepticism, especially from regulators in states with already robust privacy laws like California.[143] The skepticism from stakeholders is not misplaced; Congress has previously tried to pass federal privacy legislation and failed.[144]

The new 140-page Act seeks to create protections for consumers and clarify guidelines for entities to follow when

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140 *APEC CPEA*, *supra* note 136.

141 American Privacy Rights Act of 2024, H.R. 8818, 118th Cong. (2024).

142 *See* Jedidiah Bracy, *New Draft Bipartisan US Federal Privacy Bill Unveiled*, IAPP (Apr. 7, 2024), https://iapp.org/news/a/new-draft-bipartisan-us-federal-privacy-bill-unveiled/ [https://perma.cc/A42W-5VFX] (explaining the details and major takeaways of the proposed bipartisan bill). *See generally* Robinson & Cole LLP, *Congress Introduces Promising Bipartisan Privacy Bill*, THE NAT'L L. REV. (Apr. 11, 2024), https://natlawreview.com/article/congress-introduces-promising-bipartisan-privacy-bill [https://perma.cc/V6RF-58KL] (suggesting that, although previous attempts at passing a federal privacy law failed, this attempt seems more promising given the significant increase and usage of personal data); Bracy, *supra* note 13 (chronicling the reactions from corporations in the technology realm that believe the bill will curtail Californians' privacy rights and will create confusing opt-in/opt-out rules).

143 *See* Bracy, *supra* note 13. California Privacy Protection Agency (CPPA) Executive Director Ashkan Soltani stated that his organization is reviewing the legislation but is "disappointed that the proposed approach to preemption is substantively the same as . . . the [one the] CPPA Board voted to oppose" in the American Data Protection and Privacy Act. *Id.* Further, "Americans shouldn't have to settle for a federal privacy law that limits states' ability to advance strong protection in response to rapid changes in technology and emerging threats in policy—particularly when Californians' fundamental rights are at stake." *Id.* Soltani believes that Congress's bill is flawed and should change its approach: "Congress should set a floor, not a ceiling." *Id.*

144 *See* Müge Fazlioglu, *U.S. Federal Privacy Regulation Tracker*, IAPP, https://iapp.org/resources/article/us-federal-privacy-legislation-tracker/ [https://perma.cc/5ZRG-735B] (Aug. 2024); Jeewon K. Serrato, Shruti Bhutani Arora & Christine Mastromonaco, *The United States Moves Towards a Comprehensive Privacy Law (One More Time)*, PILLSBURY (April 22, 2024), https://www.pillsburylaw.com/en/news-and-insights/american-privacy-rights-act.html [https://perma.cc/MKK6-JATP].

handling personal information.[145] Notable provisions include an anti-discrimination clause prohibiting entities from discriminating against users based on the data collected (which appears in some form in every state privacy law passed thus far).[146] It is not clear whether the passing of this proposed Act, however, would change the U.S.-UK or EU-U.S. data bridges, but passing a sweeping law would likely improve relationships since a previous concern with data transfers from Western European nations surrounded the lack of federal privacy legislation.[147] As of April 2024, the standard for privacy transfers between the United States and EU is the EU-U.S. Privacy Shield Framework.[148]

IV. *SCHREMS* AND CPEA: CURRENT U.S. CROSS-BORDER DATA TRANSFER POLICIES

Two prevailing methods of cross-border transfers include the EU's *Schrems I* and *Schrems II* decisions,[149] the EU-U.S. Privacy Shield Framework,[150] and APEC's CPEA.[151] Each are discussed in turn below.

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145 *See* Jennifer Gregory, *New Proposed Federal Data Privacy Law Suggests Big Changes*, SECURITYINTELLIGENCE (Mar. 1, 2024), https://securityintelligence.com/news/american-privacy-rights-act-federal-data-privacy-law/ [https://perma.cc/7HFU-X8VE]. *See generally* Cobun Zweifel-Keegan, *Top Takeaways from the Draft American Privacy Rights Act*, IAPP (Apr. 11, 2024), https://iapp.org/news/a/top-takeaways-from-the-draft-american-privacy-rights-act/ [https://perma.cc/67QJ-YFZR] (discussing key takeaways from the proposed Act, including similarities between Senator Cantwell's previous privacy bill, the Consumer Online Privacy Act, and the previously proposed American Data Privacy and Protection Act).

146 *See* Bracy, *supra* note 142.

147 *See* Kelvin Chan, *Europe Signs Off on a New Privacy Pact that Allows People's Data to Keep Flowing to US*, ASSOCIATED PRESS (July 10, 2023, 9:07 AM), https://apnews.com/article/data-privacy-cybersecurity-europe-us-7bfc7c2be54a81068b5b16dff32ed9c6 [https://perma.cc/6UPA-MYJ5] ("Washington and Brussels long have clashed over differences between the EU's stringent data privacy rules and the comparatively lax regime in the U.S., which lacks a federal privacy law.").

148 *See, e.g.*, *EU-U.S. Privacy Shield*, U.S. DEP'T OF COM., https://www.commerce.gov/tags/eu-us-privacy-shield [https://perma.cc/N5AW-EL6P] (last visited Apr. 12, 2024); *Welcome to the Data Privacy Framework (DPF) Program*, DATA PRIV. FRAMEWORK PROGRAM [hereinafter *Privacy Shield Framework*], https://www.dataprivacyframework.gov/ [https://perma.cc/TKW5-C7WR] (last visited Apr. 12, 2024); *see* discussion *infra* Section III.C.

149 Case C-362/14, Schrems v. Data Prot. Comm'r (*Schrems I*), ECLI:EU:C:2015:650 (Oct. 6, 2015); Case C-311/18, Data Prot. Comm'r v. Facebook Ir. Ltd. (*Schrems II*), ECLI:EU:C:2020:559 (July 16, 2020).

150 *Privacy Shield Framework*, *supra* note 148.

151 *APEC CPEA*, *supra* note 136.

A. *Schrems* Decisions and U.S.-EU Privacy Shield

The debate over U.S. and EU privacy policies is not a new concept; in fact, the debate over privacy governance dates back to the dawn of the internet.[152] In October 1998, the EU's Directive on Data Protection was implemented, blocking EU citizens' personal information from being transferred to countries deemed to "lack adequate protection of privacy."[153] Even then, the EU criticized America's lack of uniform privacy protections.[154] While much has changed in the data privacy and cybersecurity sector since 1998,[155] one thing has not: a lack of federal privacy laws in the United States. Comparatively, the EU has long recognized privacy as a right, beginning in 1948 with the passage of the United Nations Declaration of Human Rights.[156] In 1995, the EU passed the Data Protection Directive, which was bolstered by the Right to Be Forgotten in 2012 and supplanted by the GDPR in 2018.[157] Meanwhile, in the United States, federal legislators took a piecemeal approach, passing area-specific laws like the Privacy Act of 1974,[158] the Children's Online Privacy Protection Act,[159]

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152 While "node-to-node" communication was first created in the late 1960s, the "birth" of the internet is said to be January 1, 1983. Evan Andrews, *Who Invented the Internet?*, HISTORY (Oct. 28, 2019), https://www.history.com/news/who-invented-the-internet [https://perma.cc/Q6XX-AS8S] (detailing events leading up to the creation of the internet and subsequent developments in internet technology post-creation).

153 Peter P. Swire & Robert E. Litan, *Avoiding a Showdown over EU Privacy Laws*, BROOKINGS INST. (Feb. 1, 1998), https://www.brookings.edu/articles/avoiding-a-showdown-over-eu-privacy-laws/ [https://perma.cc/Z4DZ-5YY4].

154 *See id.*

155 *See, e.g.*, *The 21st-Century Evolution of Cyber Security*, ICAEW (Oct. 9, 2023), https://www.icaew.com/insights/viewpoints-on-the-news/2023/oct-2023/the-21stcentury-evolution-of-cyber-security [https://perma.cc/C2PA-A563] (explaining the major evolutions in cybersecurity since the early 2000s); *History of Privacy Timeline*, UNIV. OF MICH. INFO. & TECH. SERVS.: SAFE COMPUTING, https://safecomputing.umich.edu/protect-privacy/history-of-privacy-timeline [https://perma.cc/7W8X-4VQU] (last visited Apr. 12, 2024) (chronologizing the history of privacy rights in the United States and other major Western privacy developments, such as passing the EU Data Protection Derivative in 1995).

156 *See History of Privacy Timeline*, *supra* note 155.

157 *See id. See generally* Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the Protection of Natural Persons with Regard to the Processing of Personal Data and on the Free Movement of Such Data and Repealing Directive 95/46/EC, 2016 O.J. (L 119) 1 (EU).

158 Privacy Act of 1974, 5 U.S.C. § 552(a).

> No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [subject to 12 exceptions].

Id.

the Gramm Leach Bliley Act,[160] and the Health Insurance Portability and Accountability Act.[161]

In 2011, as a result of data transfers between the United States and EU, an Austrian student named Max Schrems filed a series of lawsuits before the Court of Justice of the European Union (CJEU).[162] "When a professor invited Facebook privacy lawyer Ed Palmieri to speak to the class, Schrems was shocked by the lawyer's limited grasp of the severity of data protection laws in Europe" and, as a result, "decided his thesis paper for the class would be about Facebook's misunderstanding of privacy law in his home continent."[163] "In the course of his research, [Schrems] discovered that Facebook's dossiers on individual users are hundreds of pages long and include information users thought had been deleted."[164] After returning to Austria, he started an activist group (on Facebook, ironically), disseminating the information he discovered.[165] The information Schrems posted garnered intense media attention, eventually leading to a probe by European privacy regulators.[166] A series of lawsuits would eventually upend the data transfer system between the two countries and create tensions between the two global forces.[167]

In *Schrems I*, *Schrems v. Data Protection Commissioner*, the CJEU invalidated the data sharing provision known as the "Safe Harbor Framework."[168] In the decision, the CJEU held that the Safe Harbor provision failed to adequately protect EU data

159 Children's Online Privacy Protection Act, 15 U.S.C. §§ 6501–6506.

160 Gramm Leach Bliley Act, 15 U.S.C §§ 6801–6809.

161 42 U.S.C. § 1320(d); *see also Health Information Privacy Act*, U.S. DEP'T OF HEALTH & HUMAN SERVS., https://www.hhs.gov/hipaa/index.html [https://perma.cc/3ERR-3249] (last visited Apr. 12, 2024).

162 Ryan Beckstrom & Kyle Peterson, *US Intelligence Law & EU Data Transfer Requirements: Tools for Assessing US Law & Implementing Supplementary Measures to Meet EU Protection Levels*, 36 UTAH BAR J. 44, 44 (2023).

163 *Id.*; *see also* Kashmir Hill, *Max Schrems: The Austrian Thorn in Facebook's Side*, FORBES, https://www.forbes.com/sites/kashmirhill/2012/02/07/the-austrian-thorn-in-facebooks-side/?sh=7d0dde0d7b0b [https://perma.cc/QYU6-TLN2] (Mar. 27, 2012, 11:07 AM).

164 Hill, *supra* note 163.

165 *Id.*

166 *Id.*

167 *See id.*

168 *Schrems I*, *supra* note 149, at ¶¶ 96–106.

subjects' personal data from large-scale collection by U.S. national security and law enforcement agencies.[169]

Since 2016, the EU-U.S. Privacy Shield governed cross-border data transfers between Europe and the United States to protect European citizens' data.[170] When *Schrems II* eventually made its way to the CJEU, the result upended data transfer practices by invalidating the EU-U.S. Privacy Shield.[171] The *Schrems II* court in *Data Protection Commissioner v. Facebook Ireland Ltd.* found that U.S. surveillance laws did not afford European data subjects "adequate levels of protection as required under the [EU's] Charter of Fundamental Rights" and the GDPR.[172] Moreover, the CJEU concluded that the U.S. Foreign Intelligence Surveillance Act (FISA) infringed on EU data subjects' rights because the Act was overly broad and lacked redress.[173] Since the CJEU did not fully analyze the problematic language in FISA, some uncertainty still looms after the decision.[174]

The result of these judicial decisions, in combination with the EU's data transfer directives, created strict requirements for data transfers, leaving the United States to scramble to change its practices and policies for U.S.-EU data transfers. The CJEU's decision "maintained its position that supervisory authorities are

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169 Robert Stankey, *EU Court Opinion Puts Pressure on Reform of U.S.-EU Safe Harbor for Data Transfers*, DAVIS WRIGHT TREMAINE LLP (Sept. 23, 2015), https://www.dwt.com/insights/2015/09/eu-court-opinion-puts-pressure-on-reform-of-useu-s [https://perma.cc/8WED-T6VH].

170 Council Regulation 2016/679, art. 45, 2016 O.J. (L 119) 1, 61(EU); *EU-U.S. Privacy Shield Framework Principles*, U.S. DEP'T OF COM., https://www.privacyshield.gov/privacy-shield-principles-full-text [https://perma.cc/3WU2-5U5T] (last visited Sept. 7, 2024). *See generally* The Harv. L. Rev. Ass'n, *National Security Law – Surveillance – Court of Justice of the European Union Invalidates the EU-U.S. Privacy Shield. – Case C-311/18, Data Protection Commissioner v. Facebook Ireland Ltd., ECLI:EU:C:2020:559 (July 16, 2020)*, 134 HARV. L. REV. 1567, 1567 (2021); Press Release, U.S. Dep't of Com., U.S. Secretary of Commerce Wilbur Ross Statement on Schrems II Ruling and the Importance of EU-U.S. Data Flows (July 16, 2020), https://useu.usmission.gov/u-s-secretary-of-commerce-wilbur-ross-statement-on-schrems-ii-ruling-and-the-importance-of-eu-u-s-data-flows/ [https://perma.cc/7M2L-AWB6].

171 Council Regulation 2016/679, art. 45, 2016 O.J. (L 119) 1, 61 (EU); *EU-U.S. Privacy Shield Framework Principles*, *supra* note 170.

172 *Schrems II*, *supra* note 149, at ¶¶ 178, 185–186, 201; Council Regulation 2016/679, art. 45, 2016 O.J. (L 119) 1, 61 (EU); *see EU-U.S. Privacy Shield Framework Principles*, *supra* note 170 (explaining that under GDPR, EU data subjects have a "fundamental right" to protection concerning the processing of personal data).

173 *See Schrems II*, *supra* note 149, at ¶¶ 184, 192.

174 *See* The Harv. L. Rev. Ass'n, *supra* note 170, at 1567–68.

required to suspend or prohibit the transfer of data to the third country when it believes that the protection required by EU law cannot be ensured by other means."[175] The threat of suspending all U.S.-EU data transfers meant that entities' activities involving EU consumers could be halted indefinitely if the United States failed to address the CJEU's concerns. As a result, when entities engage in cross-border transfers between the United States and EU, the proper level of protection turns on two requirements: (1) whether "both the contractual clauses agreed between the controller or processor established in the [EU] and the recipient of the transfer established in the third country concerned"; and (2) whether, with regard to "any access by the public authorities of that third country to the personal data transferred, the relevant aspects of the legal system of that third country."[176] After *Schrems II*, the European Commission released Standard Contractual Clauses that must be used between controllers and processors when transferring between the two economies.[177] These clauses were meant to resolve the issue of proportionality in *Schrems II*—that legislation must include "clear and precise rules governing the scope and application of the measure in question and imposing minimum safeguards."[178]

Finally, on June 18, 2021, the European Commission adopted its final Supplementary Measures Recommendations for implementation, creating a six-step roadmap to assess third-country measures to mitigate the risks that inhere when transferring data.[179] However, the European Commission's standard is still vague. Governed by the "rule of law" and "respect for human rights,"[180] the Commission's standards leave much to be desired. Although the European standard lacks

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175 *The Definitive Guide to Schrems II*, ONETRUST DATAGUIDANCE (Nov. 22, 2022), https://www.dataguidance.com/resource/definitive-guide-schrems-ii [https://perma.cc/3R94-WCR8].

176 *Schrems II*, *supra* note 149, ¶¶ 104–105 (noting that "the assessment of the level of protection afforded in the context of such a transfer must," inter alia, consider the applicable laws of a third country "as regards any access by the public authorities of that third country to the personal data transferred," or in other words, holding that GDPR applies to data subjects' information when transferred *outside* the EU).

177 *See The Definitive Guide to Schrems II*, *supra* note 175.

178 *Schrems II*, *supra* note 149, ¶ 176; *see also* The Harv. L. Rev. Ass'n, *supra* note 170, at 1570.

179 *See The Definitive Guide to Schrems II*, *supra* note 175.

180 Council Regulation 2016/679, art. 45, 2016 O.J. (L 119) 2 (EU).

complete clarity, generally speaking, it provides more guidance than APEC's CPEA.

B. APEC's CPEA

As early as 1998, APEC published a *Blueprint for Action on Electronic Commerce*, "emphasiz[ing] that the potential of electronic commerce cannot be realised without government and business cooperation."[181] Subsequently, in 2004, APEC released a privacy framework to encourage effective privacy protection while simultaneously promoting the free flow of information and the resulting economic growth between member countries.[182] In 2007, this framework was updated and expanded on through the Data Privacy Pathfinder program, which was "aimed at promoting consumer trust and business confidence in cross-border data flows" and included "general commitments regarding the development of a Cross-Border Privacy Rules system."[183] The CPEA became effective on July 16, 2010, and was last updated in 2019.[184]

The CBPRs that govern CPEA have four main components: (1) "[r]ecognition criteria for organisations wishing to become an APEC CBPR System certified Accountability Agent"; (2) "[i]ntake questionnaire for organisations that wish to be certified as APEC CBPR System compliant by a third-party CBPR system certified Accountability Agent"; (3) "[a]ssessment criteria for use by APEC CBPR System certified Accountability Agents when reviewing an organisation's answers to the intake questionnaire"; and (4) "[a] regulatory cooperative arrangement (the CPEA) to ensure that each of the APEC CBPR system program requirements can be enforced by participating APEC economies."[185] The system is run by the Joint Oversight Panel, which administers the cross-border data transfers and ensures compliance with the CPEA.[186]

While the CPEA is meant to reduce barriers to information flow, it requires APEC member economies to "develop their own

181 *APEC CPEA*, *supra* note 136.

182 *Id.*

183 *Id.*

184 *Id.*

185 *About CBPRs*, CROSS BORDER PRIV. RULES SYS., https://cbprs.org/about-cbprs/ [https://perma.cc/9LHF-YZVH] (last visited Aug. 30, 2024); *see also Global Cross-Border Privacy Rules Declaration*, *supra* note 134.

186 *About CBPRs*, *supra* note 185.

internal business rules on cross-border privacy procedures, which must be assessed as compliant with the minimum requirements of the APEC system by . . . an Accountability Agent."[187] This system is known as an "accountability system," meaning that "when personal information is to be transferred . . . the personal information controller *should* obtain the consent of the individual *or* exercise due diligence and take reasonable steps to ensure that the recipient person or organization will protect the information consistently with [APEC] Principles."[188] While both have flaws, APEC's competing data transfer regime allows for more flexibility in comparison to the EU's *Schrems I* and *Schrems II* guidelines. The self-regulatory nature of APEC's data transfer rules,[189] however, could arguably leave less-responsible corporations, governed by more-relaxed enforcement agents, to handle data in such a way that exposes personal information to undue risk. In cases such as TikTok, where data subjects span the globe, the transfer and use of subject data can become complex to ensure compliance, especially when de- and re-identifying data are involved. Coupled with a lack of clear guidance from prevailing authorities, businesses like TikTok are left to their own devices to decipher these different standards. If deciphered incorrectly, incur the wrath of governments and the public alike.[190]

C. TikTok's Data Structure: Data Storage, Transfer, and Usage Practices

Beginning in early 2023, Congress has called social media magnates, including Facebook CEO Mark Zuckerberg and TikTok CEO Shou Zi Chew, to testify before Congress about their

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187 Applications to Serve as Accountability Agents in the Asia Pacific Economic Cooperation (APEC) Cross Border Privacy Rules (CBPR) System, 77 Fed. Reg. 44582 (July 30, 2012).

188 Dan Jerker B. Svantesson, *The Regulation of Cross-Border Data Flows*, 1 INT'L DATA PRIV. L. 180, 183 (2011) (emphasis added).

189 *See* W. Gregory Voss et al., *Privacy, E-Commerce, and Data Security*, 47 INT'L LAWYER 99, 110 (2013).

190 When the U.S. government compelled the CEOs of TikTok and other social media corporations to testify about their business practices and, in the case of TikTok's CEO, ties to other governments, TikTok users generally saw Congress as the problem; the hearings did not bolster public trust in social media companies either. *See* Kyle Chayka, *The TikTok Hearings Inspired Little Faith in Social Media or in Congress*, NEW YORKER (Mar. 24, 2023), https://www.newyorker.com/culture/infinite-scroll/the-tiktok-hearings-inspired-little-faith-in-social-media-or-in-congress [https://perma.cc/NE4B-2SCG].

data-use practices and marketing techniques.[191] While the main focuses of the hearings were Chew's national origin and algorithmic marketing toward children, the biggest takeaway was that Congress does not understand data privacy.[192] Although attention was directed at Chew's alleged ties to China,[193] the real issue became exceedingly clear: who has control of the data?

Per TikTok's website, the corporation stores its data in three locations: Malaysia, Singapore, and the United States.[194] For U.S. users, TikTok explains that the corporation has spent $1.5 billion on creating an ultra-secure platform that disallows "unauthorized foreign access to [user] data and the systems that deliver [that] content."[195] This system is powered by Oracle's cloud-based security structure.[196] TikTok further notes that its data security plan includes appointing other independent third-party assessors to continually check and maintain the data environment on an ongoing basis.[197] By default, TikTok stores

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191 *Id.*; *see also Watch: Meta, TikTok and Other Social Media CEOs Testify in Senate Hearing on Child Exploitation*, PBS NEWS (Jan. 31, 2024), https://www.pbs.org/newshour/politics/watch-live-ceos-of-meta-tiktok-x-and-other-social-media-companies-testify-in-senate-hearing [https://perma.cc/W8EA-SF9Q] (summarizing the hearings where Zuckerberg and Chew were both questioned about their marketing techniques concerning their targeted practices towards children, as well as extraterritorial influence in the case of TikTok).

192 *See* Barbara Ortutay & Haleluyah Hadero, *Meta, TikTok and Other Social Media CEOs Testify in Heated Senate Hearing on Child Exploitation*, ASSOCIATED PRESS, https://apnews.com/article/meta-tiktok-snap-discord-zuckerberg-testify-senate-00754a6bea92aaad62585ed55f219932 [https://perma.cc/SL4K-H7V6] (Jan. 31, 2024, 5:26 PM) ("Sexual predators. Addictive features. Suicide and eating disorders. Unrealistic beauty standards. Bullying. These are just some of the issues young people are dealing with on social media — and children's advocates and lawmakers say companies are not doing enough to protect them."). The January 2024 hearing was not the first time Congress has questioned social media executives. *See, e.g.*, *Disinformation Nation: Social Media's Role in Promoting Extremism and Misinformation: Hearing Before the Subcomm. on Commc'ns & Tech., Subcomm. on Consumer Prot. & Com., H. Comm. on Energy & Com.*, 117th Congress 2 (2021); Chayka, *supra* note 190 (criticizing Congress and commenting that public perception of Congress's understanding of social media and technology is severely lacking).

193 *See* CNA, *"No, I'm Singaporean": TikTok CEO Chew Shou Zi Responds to U.S. Senator's Questions About China Ties*, YOUTUBE, at 0:37 (Jan. 31, 2024), https://www.youtube.com/watch?v=RgLQCfypDLk [https://perma.cc/P55F-QVD9].

194 *Who Owns TikTok?*, *supra* note 26; *see also The Truth About TikTok*, *supra* note 27.

195 *TikTok U.S. Data Security*, TIKTOK, at 0:25–0:34, https://usds.tiktok.com/?gad_source=1 [https://perma.cc/Z2RD-LUJH] (last visited Apr. 13, 2024).

196 *Id.* at 0:45–0:49.

197 *Id.* at 0:56–1:01.

data in the United States and is managed by United States Data Security (USDS), a U.S. company which operates separately from TikTok and its parent company, ByteDance.[198] TikTok has also worked with USDS to hire an additional 1,000 employees to support this system.[199] TikTok is in the process of appointing an independent board of directors with "strong cybersecurity credentials" to "prevent unauthorized foreign access" to user data.[200] Finally, TikTok is engaged in deleting "historic data" to further protect its users.[201] Its detailed privacy and cybersecurity plan is a clear response to the pending ban or forced sale of platform.[202] Yet, TikTok argues that its data security plan is "the first of its kind" among social media platforms and ensures American users' data is not misused.[203]

In December 2022, TikTok announced the creation of the USDS Trust and Safety Team to "work on compliance, safety strategies, and moderation for content involving U.S. users' private data."[204] As recently as 2023, the corporation opened its first Dedicated Transparency Center in Maryland, "allowing Oracle engineers to begin inspecting and testing TikTok source code."[205] This was likely done to ensure TikTok's code does not

198 *Id.* at 1:02–1:19.

199 *Id.* at 1:19–1:25.

200 *Id.* at 1:26–1:39.

201 *Id.* at 1:42–1:48.

202 *See* sources cited *supra* notes 29–30; *see also* Kevin Freking, Haleluya Hadero & Mary Clare Jalonick, *House Passes a Bill that Could Lead to a TikTok Ban if Chinese Owner Refuses to Sell*, ASSOCIATED PRESS, https://apnews.com/article/tiktok-ban-house-vote-china-national-security-8fa7258fae1a4902d344c9d978d58a37 [https://perma.cc/R45P-ZWQ3] (Mar. 13, 2024, 4:56 PM) (explaining that, per the proposed bill, if the Chinese company ByteDance refuses to sell TikTok and separate from its subsidiary, the bill will ban the social media platform in the United States). The national ban on TikTok is rooted in Congress's belief that the social media company, if its continued ownership is in Chinese hands, poses a "national security threat." *Id.* While a full discussion of the TikTok ban is beyond the scope of this Article, for more information on the ban, see Sarah E. Needleman, *Why TikTok Could Be Banned and What Comes Next*, WALL ST. J. (Mar. 15, 2024, 2:04 PM), https://www.wsj.com/tech/tiktok-ban-explained-7198e7f9 [https://perma.cc/5GR6-7DCW] (explaining the proposed divestiture and potential ramifications of the forced sale).

203 *TikTok U.S. Data Security*, *supra* note 195, at 0:06–0:16, 1:58–2:00.

204 Cormac Keenan, *Strengthening How We Protect and Secure Our Platform in the US*, TIKTOK: U.S. DATA SEC. (Dec. 8, 2022), https://usds.tiktok.com/strengthening-how-we-protect-and-secure-our-platform-in-the-us/ [https://perma.cc/FZ3Q-MPRY].

205 *Dedicated Transparency Center*, TIKTOK: U.S. DATA SEC., https://usds.tiktok.com/dedicated-transparency-center/ [https://perma.cc/L5ZE-EF42] (last visited Sept. 2, 2024).

have any "back doors" that may allow threat actors to illegally access TikTok's cloud storage.

With TikTok's data privacy and cybersecurity practices making headlines, the corporation retooled its data storage and transfer practices in May 2022,[206] and in June 2022 rerouted all new U.S. user traffic to "a secure environment in the Oracle Cloud Infrastructure," rather than to hubs in Virginia and Singapore.[207] While preexisting U.S. data is likely still located in Virginia and Singapore, both places have robust, comprehensive privacy and cybersecurity laws.[208] TikTok follows all state and local laws regarding the management of private data.[209]

Among the types of data TikTok collects, per its website, are personal information (such as name, age, phone number, and profile photo), user-generated content (posts and comments), technical and behavioral information (users' browsing and search history), network information (IP addresses, mobile carrier information), and more.[210]

While it admittedly collects significant amounts of user data, TikTok does *not* collect the following: (1) "Mac addresses, WIFI SSID, IMEI, or SIM serial number[s]"; (2) "Face ID, Fingerprint ID, and facial, body or voice information for the purpose of uniquely identifying a person"; or (3) "[c]ell-based station ID, SMS, email and voicemail content during normal app activities."[211] This data is akin to data collected by other social media platforms like Facebook, Instagram, and Snapchat.[212]

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206 *Launching U.S. Data Security*, TIKTOK: U.S. DATA SEC., https://usds.tiktok.com/launching-u-s-data-security/ [https://perma.cc/EH7Q-AJF4] (last visited Sept. 2, 2024).

207 *See Routing 100% of All New U.S. User Traffic to the Oracle Cloud Infrastructure*, TIKTOK: U.S. DATA SEC., https://usds.tiktok.com/routing-100-of-all-new-u-s-user-traffic-to-the-oracle-cloud-infrastructure/ [https://perma.cc/KRG9-UJ28] (last visited Sept. 2, 2024).

208 *See* Virginia Consumer Data Protection Act, VA. CODE ANN. §§ 59.1-575 to 585 (West 2023) (amended 2024); *see also PDPA Overview*, *supra* note 127 and accompanying text.

209 *See Privacy Policy*, TIKTOK, https://www.tiktok.com/legal/page/us/privacy-policy/en [https://perma.cc/CT9G-ANCZ] (Aug. 19, 2024); *Learn About Data*, TIKTOK, https://www.tiktok.com/privacy/learn-about-data/en [https://perma.cc/4ULU-ME6H] (last visited Apr. 11, 2024) (explaining what types of data TikTok does and does not collect and how that data is used).

210 *Learn About Data*, *supra* note 209.

211 *Id.*

212 *See Privacy Policy*, FACEBOOK: META PRIV. CTR., https://www.facebook.com/privacy/policy/ [https://perma.cc/GDV4-CZ5Z] (last visited Apr. 13, 2024) (covering all Meta platforms, including Facebook and Instagram); *see also Privacy Policy*, SNAP INC.,

Since Snapchat and Meta are both U.S. corporations,[213] their data protection and privacy policies, while scrutinized, have never been threatened by an outright ban.

The U.S. government argues that there is a fundamental threat to national security based on ByteDance's majority ownership stake in the app because "TikTok collects sensitive data on U.S. users and may enable the [Chinese] government to conduct influence operations to shape public opinion."[214] Critics of TikTok allege that it is heavily influenced by ByteDance, which controls what content is shown to U.S. users or "compel[s] TikTok to turn over user data in accordance with various [Chinese] laws that govern cyber and data security."[215] TikTok has wholly denied these allegations,[216] which stem from a 2022 Buzzfeed investigation finding that "China-based employees of ByteDance have repeatedly accessed nonpublic data about US TikTok users."[217] Yet, in this same report, leaked audio caught an external auditor assisting TikTok in shutting off Chinese access to sensitive information like Americans' birthdays and phone numbers, stating, "I feel like with these tools, there's some backdoor to access user data in almost all of them."[218] It was also heard in the leaked audio that "everything is seen in China," and "[i]n another September meeting, a director referred to one Beijing-based engineer as a 'Master Admin' who 'has access to everything.'"[219] While this is certainly concerning, it is worth noting that this discovery came at a time when TikTok was attempting to close any "back doors" to TikTok's U.S. user data[220]

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https://values.snap.com/privacy/privacy-policy [https://perma.cc/J4E5-KNV8] (last visited Apr. 13, 2024).

213 FACEBOOK, INC. AMENDED & RESTATED CERTIFICATE OF INCORPORATION 2–3 (2021), https://s21.q4cdn.com/399680738/files/doc_downloads/governance_documents/2024/06/Meta-Platforms-A-R-Certificate-of-Incorporation-06-18-2024.pdf [https://perma.cc/XZM5-CS6Z] (proving that Meta Platforms, Inc. is a Delaware corporation); AMENDED AND RESTATED CERTIFICATE OF INCORPORATION OF SNAP INC. 1 (2017), https://www.sec.gov/Archives/edgar/data/1564408/000119312517029199/d270216dex32.htm [https://perma.cc/EWE9-7ASW] (proving that Snap Inc. is a Delaware corporation).

214 *See* Kristen Busch, *TikTok: Recent Data Privacy and National Security Concerns*, CONG. RSCH. SERV. (Mar. 29, 2023), https://crsreports.congress.gov/product/pdf/IN/IN12131 [https://perma.cc/VV28-DAMZ].

215 *Id.*

216 *Id.*

217 Baker-White, *supra* note 117; *see also* Busch, *supra* note 214.

218 *See* Baker-White, *supra* note 117.

219 *Id.*

220 *Id.*

while the United States still only had a few states with data privacy laws.[221] It is not significant that the discovered breach in their system by Chinese actors happened when only one state had enacted privacy laws to govern the use of private data.[222] True, TikTok has (or *had*) a problem with Chinese access to U.S. user information, but the corporation has taken significant steps to address the issue; in the meantime, no comprehensive federal legislation or clear cross-border data transfer guidance existed.[223]

V. CONFLICT OF LAWS: PROPOSED SOLUTION FOR SAFE AND EFFICIENT DATA STORAGE AND TRANSFERS IN THE AGE OF CLOUD COMPUTING

With data becoming a new global currency for expanding corporations, leaders in technology must work together to find a solution that governments can use to streamline the handling, storage, and transfer of data. If world leaders do not come together to find a solution through treaties, corporations will be left to fill in the gaps.

While it is clear Congress does not have a clear grasp on cross-border data transfer and information governance, the assumption is that TikTok, a corporation owned partially by non-U.S. investors and shareholders, does not have adequate data protection. However, the ownership of TikTok does not necessarily mean that the data is less safe than data held in the United States. In fact, other storage locations, such as Singapore, have had data privacy laws in place long before the United States began passing state-specific privacy laws.[224]

Congressional fear surrounding the handling of data outside the United States is misplaced, as U.S. regulation of data usage has been perpetually behind the curve compared to the EU and other foreign technological centers, which has led to tensions between other world powers (as evidenced by the *Schrems* cases). Even China, with very different views on personal privacy than

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221 In June 2022, when the audio of the TikTok meeting was leaked, California was the only state to have enacted a comprehensive privacy law. *See* Folks, *supra* note 14.

222 *See id.*

223 It is worth noting that, in 2022, the United States had a data bridge established with the EU and APEC countries; however, as previously discussed, these policies are less than clear. *See supra* Sections IV.A–B.

224 See *supra* Part III, for a discussion on Singapore's data privacy laws.

the United States, passed strict privacy laws years prior to the earliest state privacy law.[225] The attitude Congress currently has toward extraterritorial data policies, other than those originating in the United States, is inappropriate. The United States has attempted on multiple occasions to pass a federal privacy law without success, leaving American citizens' data to be handled in a piecemeal fashion, entirely dependent on whether an individual's state of residence has *any* data privacy protections at all (which the majority of states do not).[226]

A. USMCA as a Basis for a Multilateral Cross-Border Data Transfer Provision

While a discussion of a federal comprehensive privacy law is beyond its scope, this Article proposes a multilateral provision within an existing treaty akin to GDPR to govern cross-border data transfers. Adopting a streamlined process by way of a multinational treaty will create increased consistency and transparency, providing corporations that handle significant amounts of user data, like TikTok, an opportunity to prove that they can adequately follow the rules, without first banning the corporation for alleged misconduct that could leave individuals and business owners without access to their intellectual property.

Rather, implementing a multilateral solution through the signing of a treaty with specific guidelines on cross-border data transfers will encourage compliance and create certainty where there currently are only loose instructions. By using an existing treaty as a basis for these guidelines, the United States can streamline the adoption of new terms and add additional signers to fast-track regulation.

The USMCA would provide an adequate basis for a multilateral agreement for cross-border data transfers. The USMCA is a "21st century, high standard trade agreement [aimed at] supporting mutually beneficial trade resulting in freer markets, fairer trade, and robust economic growth in North

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225 See *supra* Part III, for a discussion on China's data privacy laws.

226 See *supra* Part III, for a discussion on the current proposed federal privacy law. See *supra* Part I, for a discussion on the piecemeal privacy laws that are currently in place in the United States. As of April 2024, fourteen states have comprehensive privacy laws with varying degrees of protection. *See* Folks, *supra* note 14.

America."[227] The USMCA, which is a replacement for NAFTA,[228] was enacted on July 1, 2020, with the objective to "create[] a more balanced environment for trade, . . . support[] high-paying jobs for Americans, and . . . grow[] the North American economy."[229] Since the USMCA is already in place and would simply require an amendment signed by countries that wish to participate, this would be significantly simpler than starting a new agreement from scratch. To amend the USMCA, the parties would use instructions outlined in the Vienna Convention.[230] Using the Vienna Convention to amend the USMCA would allow for the existing terms to remain in effect and for members to continue the relationship as it currently exists in the agreement, while permitting the addition of new, specific terms for cross-border data transfers.[231] More specifically, Chapter Nineteen, the "Digital Trade" section[232] of the USMCA, already contains the foundation for an amendment to govern extraterritorial data transfers. Chapter Nineteen defines key technical terms such as "computing facility," "information content provider," and "personal information."[233] With additional definitions such as "data controller," "data processor," and other key terms found in privacy laws such as CPRA[234] and GDPR, the definition section can be bolstered to support key privacy terms and educate corporations seeking to engage in data overseas transfers.

Furthermore, adopting standards that comply with *Schrems* guidance and APEC's CPEA could appease foreign entities such as the European Commission and would allow for a greater

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227 *United States – Mexico – Canada Agreement*, INT'L TRADE ADMIN., https://www.trade.gov/usmca [https://perma.cc/E8KY-EEEK] (last visited Dec. 12, 2023).

228 *See* United States-Mexico-Canada Agreement Implementation Act, Pub. L. No. 116-113, 134 Stat. 11 (2020) (replacing Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289).

229 *United States – Mexico – Canada Agreement*, *supra* note 227.

230 Vienna Convention on the Law of Treaties art. 39, May 23, 1969, 1155 U.N.T.S. 331.

231 The Vienna Convention provides: "Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended." *Id.* art. 40. Additionally, "[t]he amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement." *Id.*

232 United States-Mexico-Canada Agreement, Nov. 30–Dec. 18, 2018, https://ustr.gov/sites/default/files/files/agreements/FTA/USMCA/Text/19-Digital-Trade.pdf [https://perma.cc/BL7C-F2Q4].

233 *Id.* art. 19.1, at 1–2.

234 CPRA, 2020 Cal. Legis. Serv. Proposition 24 (West) (codified at CAL. CIV. CODE §§ 1798.100—.199.100).

exchange of information between Europe and the United States, as well as other countries. While APEC's CPEA does provide guidance for data transfers, one aspect that would need to be approved if used as a basis for a multilateral cross-border data transfer law would be the creation of an enforcement entity to monitor the transfer of data, similar to what the EU-U.S. Privacy Shield was supposed to do. Since APEC's CPEA is already governed by the U.S. Department of Commerce,[235] creating an enforcement subsidiary within the Department of Commerce that is comprised of privacy, cybersecurity experts, and attorneys to review and approve cross-border transfers would be a significant step toward enforcing a baseline. A recurring criticism of current privacy regimes, including the GDPR, is that enforcement of privacy laws has fallen substantially short of what was anticipated by the public.[236]

Similar to the GDPR, the USMCA could be utilized to govern all member states and constituents of the countries that sign the treaty. Also, Chapter Nineteen could adopt regulations comparable to the CBPRs outlined in APEC's CPEA. While adopting these rules is the first step, the rules would need to be further developed to account for current unclear provisions and emerging issues in privacy and cybersecurity.

Adopting this standard in a multilateral treaty that builds on the current rules in APEC's CPEA leverages existing structures, expanding on what some major players in the world economy have already endorsed. By improving existing standards, it may take less time to draft and adopt legislation that addresses the imminent need for transparent governance.

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235 *See Global Cross-Border Privacy Rules*, *supra* note 134.

236 *See* Adam Satariano, *Europe's Privacy Law Hasn't Shown Its Teeth, Frustrating Advocates*, N.Y. TIMES [hereinafter Satariano, *Europe's Privacy Law*], https://www.nytimes.com/2020/04/27/technology/GDPR-privacy-law-europe.html [https://perma.cc/QM3X-BHXZ] (Apr. 28, 2020); Ilse Heine, *3 Years Later: An Analysis of GDPR Enforcement*, CTR. FOR STRATEGIC & INT'L STUD. (Sept. 13, 2021), https://www.csis.org/blogs/strategic-technologies-blog/3-years-later-analysis-gdpr-enforcement [https://perma.cc/GZ7H-LMLA]; Anda Bologa, *Fifty Shades of GDPR Privacy: The Good, the Bad, and the Enforcement*, CEPA (Feb. 7, 2023), https://cepa.org/article/fifty-shades-of-gdpr-privacy-the-good-the-bad-and-the-enforcement/ [https://perma.cc/SBH6-DH6V]. *But see* Adam Satariano, *Meta Fined $1.3 Billion for Violating E.U. Data Privacy Rules*, N.Y. TIMES (May 22, 2023) [hereinafter Satariano, *Meta Fined*], https://www.nytimes.com/2023/05/22/business/meta-facebook-eu-privacy-fine.html [https://perma.cc/7PHX-YWJU].

Establishing a specific enforcement body with the power to issue fines or sanctions would also give this solution teeth by encouraging enforcement. While the GDPR has provisions allowing for fines, even after the *Schrems* cases, Facebook has yet to pay a single fine,[237] undermining the GDPR's enforcement capabilities.[238] By leveraging the USMCA as a basis to adopt and enhance APEC's CPEA, the United States can establish a new standard, propelling the United States out of the data privacy stone age into a modern era.

B. Likelihood of Adoption and the Future of Cross-Border Data Governance

While the United States has not previously made data privacy a priority, the massive media attention from the TikTok hearings, coupled with frustration from one of our biggest trade partners, the EU,[239] makes it clear that American lawmakers must act imminently to address major deficiencies in data privacy stemming from current incremental state legislation.[240] With the addition of advanced Artificial Intelligence models to the mix,[241] if the United States does not find and approve a

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237 *See The Definitive Guide to Schrems II*, *supra* note 175 (explaining that, in *Schrems II*, the CJEU "declared the EU-US Privacy Shield . . . invalid" but did not institute any fines). Facebook has not yet paid a fine in this case because after receiving a landmark fine of 1.2 million Euros, Facebook requested a stay in the case and appealed the fine. Jon Brodkin, *Facebook Hit with Record €1.2 Billion GDPR Fine for Transferring EU Data to US*, ARS TECHNICA (May 22, 2023, 9:36 AM), https://arstechnica.com/tech-policy/2023/05/facebook-ordered-to-pay-e1-2-billion-fine-and-stop-storing-eu-user-data-in-us/ [https://perma.cc/HL88-BR5X].

238 *But see* Satariano, *Meta Fined*, *supra* note 236. This fine came after the *Schrems* decision, which did not result in fines initially:

> The penalty, announced by Ireland's Data Protection Commission, is potentially one of the most consequential in the five years since the European Union enacted the landmark data privacy law known as the General Data Protection Regulation. Regulators said the company failed to comply with a 2020 decision by the European Union's highest court that Facebook data shipped across the Atlantic was not sufficiently protected from American spy agencies.

Id.

239 *U.S.-EU Trade and Economic Relations*, CONG. RSCH. SERV., https://crsreports.congress.gov/product/pdf/IF/IF10931 [https://perma.cc/4BUQ-JNFM] (June 9, 2023).

240 *See* Folks, *supra* note 14.

241 *See* Dr. Mark van Rijmenam, *Privacy in the Age of AI: Risks, Challenges, and Solutions*, DIGITAL SPEAKER (Feb. 17, 2023), https://www.thedigitalspeaker.com/privacy-age-ai-risks-challenges-solutions/ [https://perma.cc/25KQ-MQYD]; *see also* Gai Sher & Ariela Benchlouch, *The Privacy Paradox with AI*, REUTERS (Oct. 31, 2023, 10:15 AM),

solution that addresses the significant lack of guidance in the use of data, private data will be unnecessarily exposed to risk. At the same time, current policies made by ill-informed politicians have led to stifling international business.

Still, the EU displays how government policies are upending the borderless way that data has traditionally moved. As a result of data protection rules, national security laws, and other regulations, companies are increasingly being pushed to store data within the country where it is collected, rather than allowing it to move freely to data centers around the world.[242]

The longer the United States waits to pass comprehensive privacy laws that include clear guidelines and the creation of an enforcement body surrounding cross-border data transfers, the further behind it will be in the figurative "Space Race"[243] of data supremacy. As data-driven technology permeates into everyday life for most Americans,[244] the cost of neglecting to regulate the business of data will become an insurmountable hurdle. Finding a way to open borders for data transfers while still enabling safeguards to protect user data will ultimately improve productivity and boost economic activity.

VI. CONCLUSION

With the monumental surge of data generation in today's society,[245] coupled with a tremendous increase in social media

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https://www.reuters.com/legal/legalindustry/privacy-paradox-with-ai-2023-10-31/ [https://perma.cc/9FAE-ETFR]. *But see* Thomas H. Davenport & Thomas C. Redman, *How AI Is Improving Data Management*, MIT SLOAN MGMT. REV. (Dec. 20, 2022), https://sloanreview.mit.edu/article/how-ai-is-improving-data-management/ [https://perma.cc/A4TJ-UVP8]; *see also* Scott Clark, *How AI Is Being Used to Protect Customer Privacy*, CMS WIRE (Nov. 4, 2021), https://www.cmswire.com/customer-experience/how-ai-is-being-used-to-protect-customer-privacy/ [https://perma.cc/2VRF-BKXV].

242 *See* Satariano, *Europe's Privacy Law*, *supra* note 236.

243 *What Was the Space Race?*, NAT'L AIR & SPACE MUSEUM (Aug. 23, 2023), https://airandspace.si.edu/stories/editorial/what-was-space-race [https://perma.cc/6Z4G-8QYT] (explaining the origins of the "Space Race" and its significance).

244 *See* Jeffrey Gottfried, *Americans' Social Media Use*, PEW RSCH. CTR. (Jan. 31, 2024), https://www.pewresearch.org/internet/2024/01/31/americans-social-media-use/ [https://perma.cc/6G2D-8JXR] (explaining that "YouTube and Facebook are by far the most used online platforms among U.S. adults . . . [and] TikTok's user base has grown since 2021").

245 "According to the latest estimates, 402.74 million terabytes of data are created each day," and around 147 zettabytes of data are expected to be produced in 2024. Duarte, *supra* note 10.

use,[246] it is imperative that the U.S. government takes steps to properly address the lack of clear guidance surrounding cross-border data transfers. As of January 2024, statistics conclude that an astounding 88% of Americans use social media.[247] With the current population of the United States at roughly 335 million,[248] that would mean that roughly 295 million Americans use social media platforms and have their personal data stored by social media corporations like TikTok.[249] The way that corporations use consumer data has changed the international landscape of data use and transfers. "Love, [h]ate or [f]ear it, TikTok [h]as [c]hanged America."[250]

While TikTok is certainly not the first corporation to use massive quantities of consumer data to run its business, its high-profile status, coupled with a contentious congressional hearing that went viral, brought to light the greater issue: where is the data? The proper handling, transfer, and storage of consumer data will continue to be of pivotal importance for corporations and countries alike as the world economy increasingly relies on the use of personal data for a myriad of purposes, such as improving user experience and bettering business models.

By using an already developed and government-approved treaty like the USMCA, the United States can streamline the amendment of a successful multilateral treaty to create guidance in an essential area of international commerce. Amending the USMCA using the Vienna Accords and adding improved data transfer provisions to Chapter Nineteen based on APEC's CPEA can establish certainty in a currently ambiguous space in

246 *See* Gottfried, *supra* note 244.

247 *Number of Social Media Users in the United States from 2020 to 2029*, STATISTICA, https://www.statista.com/statistics/278409/number-of-social-network-users-in-the-united-states/ [https://perma.cc/RZ3K-J54B] (last visited Oct. 9, 2024).

248 *See U.S. and World Population Clock*, U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045223 [https://perma.cc/JS33-RQSV] (last visited Apr. 14, 2024).

249 According to a recent survey, roughly 170 million Americans use TikTok, which is about half of the U.S. population. Sapna Maheshwari, *Love, Hate or Fear It, TikTok Has Changed America*, N.Y. TIMES (Apr. 19, 2024), https://www.nytimes.com/interactive/2024/04/18/business/media/tiktok-ban-american-culture.html [https://perma.cc/LDQ2-ANPK].

250 *Id.*

international commerce.[251] Having the Department of Commerce act as an enforcement agency would also streamline the adoption of cross-border data provisions, since this government entity is already the governing body for APEC's CPEA.[252]

While APEC's CPEA and governing data privacy rules are a good starting point for a solution, much can be done to improve the guidelines, given that the "accountability" system does not necessarily encourage strict compliance. Giving the Department of Commerce the power to fine entities that violate the data transfer provisions would give these new laws real bite.

Although the EU's GDPR and APEC's CPEA both have flaws and lack much-needed specificity, their principles and rules can give the United States an idea of where to start. Congress must prioritize the adoption of a treaty with clear guidance for entities that engage in cross-border data transfers and must also implement lessons learned from the *Schrems* decisions. Only then can the United States finally exit the digital dark age and propel itself into a new age of data supremacy.

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251 For a discussion on the "international efforts toward achieving interoperability of privacy and data protection," see Christopher Docksey & Kenneth Propp, *Government Access to Personal Data and Transnational Interoperability: An Accountability Perspective*, OSLO L. REV., Nov. 14, 2023, at 1, 1.

252 *See APEC CPEA*, *supra* note 136.

Preemption's Climate Action Gap: How *Chevron U.S.A. Inc. v. County of Monterey* Perpetuates Big Oil Capture in California

Lilia Alameida

CONTENTS

Preemption's Climate Action Gap: How *Chevron U.S.A. Inc. v. County of Monterey* Perpetuates Big Oil Capture in California

Lilia Alameida[*]

The oil and gas industry has argued that the use of unconventional extraction methods, such as fracking, is one way to reduce emissions, combat climate change, and bolster national security through energy independence. While fracking increases extraction output, modern research suggests that fracking increases the risk of earthquakes, water contamination, and disastrous spills. These risks deserve special attention in California, which is particularly susceptible to water scarcity and increased seismic activity.

In light of these concerns, the California state legislature enacted multiple amendments to the mandate of the California Geologic Energy Management Division (CalGEM), including the ambitious goal of reaching net-zero emissions by 2045. However, according to recent data, CalGEM's enforcement efforts have not advanced emissions targets—unless California triples its greenhouse gas reduction rate, it will fail to reach net-zero by 2045.

This Note identifies the pervasive influence of regulatory, legislative, and executive capture by Big Oil as a primary obstacle to California's climate progress and argues that the California Supreme Court's holding in Chevron U.S.A. Inc. v. County of Monterey *will only perpetuate Big Oil capture. Big Oil wields its influence by lobbying for favorable agency oversight and through campaign donations granted in exchange for industry-friendly votes. Consequently, Big Oil capture has produced a climate action gap, forcing locals to take action in the absence of judicial or genuine legislative intervention.* Chevron*'s reasoning frustrates California's climate progress as it effectively ratifies CalGEM's extraction-heavy focus, rendering CalGEM's concurrent environmental directive superfluous. Ultimately,* Chevron *degrades political accountability and the countervailing force of citizen plaintiffs, exacerbating the climate action gap by vitiating an important check on state power and discouraging local innovation.*

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* Lilia Alameida is a third-year law student at Chapman University Dale E. Fowler School of Law. She extends her heartfelt gratitude to Professor Lan Cao for her invaluable guidance during the writing process and her unwavering support and encouragement over the past three years. She would also like to thank her Papa for his unyielding devotion to his grandchildren and for inspiring her to pursue a career in law. To her friends, she thanks them for the precious memories and for making law school enjoyable. She thanks her partner for his steadfast love and support and for always encouraging her to be better and do better. Finally, to her parents: she cannot thank them enough for their unconditional love, as well as their commitment to her education—all that she is, or hopes to be, she owes to them.

I. INTRODUCTION

We are in a new environmental era. According to a 2017 U.S. Climate Science Special Report, by the twenty-second century, the global temperature will rise by five to ten degrees Fahrenheit should the yearly emissions rate continue to increase as it has since 2000.[1] Since the turn of the twentieth century, hydraulic fracturing (fracking) has generated controversy due to its negative externalities such as methane leaks, air pollution, water contamination, and increased seismic activity.[2] The oil and gas industry has argued that the use of unconventional extraction methods such as fracking is one way to reduce emissions, combat climate change, and bolster national security through energy independence.[3] Environmental advocates have criticized this position as a mere "half-truth" because methane—the greenhouse gas most commonly associated with fracking—is a super pollutant eighty-six times more powerful than carbon dioxide at warming the climate over a twenty-year period.[4]

In 2000, fracking accounted for just two percent of U.S. oil production, but by 2015, fracking produced fifty percent of the country's oil supply and more than half of its natural gas.[5] The recent expansion of fracking is primarily due to rapid economic and population growth, which has increased demand for oil and gas.[6] The traditional drilling approach involves purely vertical drilling, which makes it difficult to maximize extraction when a

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1 *See* Rebecca Lindsey & Luann Dahlman, *Climate Change: Global Temperature*, CLIMATE.GOV (Jan. 18, 2024), https://www.climate.gov/news-features/understanding-climate/climate-change-global-temperature [https://perma.cc/94Z3-ERS5].

2 For a further description, see *infra* Section II.B.

3 For a further description, see *infra* Section II.A; *see also* Thomas W. Merrill, *Four Questions About Fracking*, 63 CASE W. RSRV. L. REV. 971, 991 (2013) (explaining that "[t]he most important contributor" to America's declining carbon dioxide levels is "the big shift in power generation from coal to natural gas" because "[p]ower plants that run on natural gas emit about 50 percent of the greenhouse gasses emitted by plants generated by coal").

4 *See* Ava Tomasula y García, *How Fracking's Methane Leaks Aggravate Climate Change*, AIDA (Feb. 14, 2019), https://aida-americas.org/en/blog/how-fracking-s-methane-leaks-aggravate-climate-change [https://perma.cc/9WJE-3HZ9].

5 *See* Matt Egan, *Oil Milestone: Fracking Fuels Half of U.S. Output*, CNN BUSINESS (Mar. 24, 2016, 12:40 PM), http://money.cnn.com/2016/03/24/investing/fracking-shale-oil-boom/ [https://perma.cc/XGL3-XWA8]; *see also* Marcelo Prince & Carlos A. Tovar, *How Much U.S. Oil and Gas Comes from Fracking?*, WALL ST. J., https://www.wsj.com/articles/how-much-u-s-oil-and-gas-comes-from-fracking-1427915636 [https://perma.cc/NHB7-R8KZ] (Apr. 1, 2015, 6:53 PM).

6 *See Fracking Chemicals and Fluids Market Size, Share & Trends Analysis Report*, GRAND VIEW RSCH., https://www.grandviewresearch.com/industry-analysis/fracking-chemicals-fluid-market [https://perma.cc/GZK4-RT5P] (last visited Nov. 19, 2024).

reserve extends horizontally.[7] This deficiency, along with the decreasing availability of conventional, vertically-accessible reserves, propelled the expansion of non-traditional, well-stimulation treatment methods (WSTs) like fracking.[8]

Fracking is a technique used to increase the yield of unconventional oil, defined as natural gas or oil trapped in tight, impermeable rock formations such as shale.[9] "In shale formations, organic matter in the soil generates gas molecules that absorb onto the matrix of the rock. Over time, tectonic and hydraulic stresses fracture the rock, and natural gas (e.g., methane) migrates to fill the fractures or pockets."[10] The fracking process involves blasting large amounts of fracking fluid (or frac fluid) into the well's pipe-casings at pressures high enough to crack the rock and propel the fossil fuels to the surface for extraction.[11] The frac fluid used in this process requires copious amounts of essential resources, such as water, and the method as a whole runs the risk of causing earthquakes, water contamination, and disastrous spills.[12] When such risks manifest, oil and gas companies often find shelter in the warm embrace of

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7 *See* ETHAN N. ELKIND & TED LAMM, LEGAL GROUNDS: LAW AND POLICY OPTIONS TO FACILITATE A PHASE-OUT OF FOSSIL FUEL PRODUCTION IN CALIFORNIA 16, 28 (2020). Under the traditional production approach, the developer uses a drill string (a steel column with a drill bit and pipe that delivers fluids) to drill the well to 5,000 feet for crude oil and 6,500 feet for natural gas. *See id.* at 4. A mixture of water, clay, and chemicals maintains the pressure while drilling, after which a steel pipe well casing with cement is inserted into the well to seal it and provide structural support. *See id.* The well casing is then perforated to allow the hydrocarbons to rise to the wellhead. *See id.* A series of valves (sometimes referred to as a "Christmas tree") or a pump jack (appearing like a horse head going up and down) is placed at the surface to control pressure and pump fluids to the surface if there's insufficient reservoir pressure. *See id.* Well operators are permitted to employ underground injections to enhance oil recovery, maintain pressure, prevent land caving, and dispose of wastewater. *See id.*

8 *See* Melissa Denchak, *Fracking 101*, NRDC (Apr. 19, 2019), https://www.nrdc.org/stories/fracking-101 [https://perma.cc/ZU8K-SHAX]. Non-traditional methods, such as WSTs, include fracking, acid injection, and explosives. *See* ELKIND & LAMM, *supra* note 7, at 4. Fracking involves injecting additional water, chemicals, and other materials into the ground to produce hydrocarbons trapped in rock formations that are hard to access by drilling alone. *See id.* The oil's viscosity is reduced by converting significant amounts of water into steam and injecting it into the ground, making it easier to produce. *See id.* Despite the fact that the injection technique generates nearly 50% more emissions than traditional methods, more than 40% of California's oil production is produced by way of well stimulation injection treatments because it requires substantial energy consumption in order to heat the water into steam and refine the heavy oil it produces. *See id.*

9 *See* Denchak, *supra* note 8.

10 Robinson Twp. v. Commonwealth, 83 A.3d 901, 914 (Pa. 2013).

11 *See* Denchak, *supra* note 8.

12 *See infra* Section II.B.

the United States' market-driven legal scheme, utilizing confidential business information laws to withhold disclosure of the hundreds of chemical additives in their frac fluid.[13]

While some states take a proactive, cautionary approach to fracking and permit local restrictions or prohibit the method altogether, others practice a reactive, development-first approach and respond to risks by amending regulations.[14] Despite California's proclaimed status as the "global leader on climate change," the state's fracking regulations have largely followed the reactive, development-first approach, giving rise to tensions between environmental health and degradation on one hand and state overreach and local governance on the other.[15] In California, the emergence of these tensions stems from (1) the proliferation of "non-traditional" oil and gas WSTs, such as fracking; (2) the state's strong interest in fracking arising from its status as the nation's seventh-largest oil producer; (3) an outdated state statutory scheme that inhibits environmentally conscious action at the local level; and (4) the pervasive influence of "Big Oil"[16] capture.

In 1915, the California state legislature created the California Geologic Energy Management Division (CalGEM) for the purpose of "ensur[ing] the safe development and recovery of energy resources."[17] Division 3 of California's Public Resources Code, which this Note will refer to as the California Oil and Gas Act (COGA), was enacted in 1939 and codified CalGEM's responsibilities and powers, establishing a state regulatory framework for the oil and gas industry.[18] The COGA grants local

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13 *But see* CAL. HEALTH & SAFETY CODE §§ 38532–38533 (West 2024). California's SB 4 includes (arguably) one of the toughest disclosure provisions in the nation and will be discussed more in the following sections of this Note. *See infra* discussion Section III.C.

14 *See* David B. Spence, *Federalism, Regulatory Lags, and the Political Economy of Energy Production*, 161 U. PA. L. REV. 431, 434–35 (2013).

15 *Getting Started with Climate Resilience*, CAL. GOVERNOR'S OFF. OF LAND USE & CLIMATE INNOVATION, https://opr.ca.gov/climate [https://perma.cc/GR4R-ZA3S] (last visited Nov. 19, 2024).

16 *See generally* Naomi Oreskes & Jeff Nesbit, *How 'Big Oil' Works the System and Keeps Winning*, YALE CLIMATE CONNECTIONS (Dec. 10, 2021), https://yaleclimateconnections.org/2021/12/how-big-oil-works-the-system-and-keeps-winning/ [https://perma.cc/TC4N-5Y3N] (providing a brief history of major oil companies and their continued dominance in the energy sector despite the growing calls to stop climate change).

17 *Oil and Gas*, CAL. DEP'T OF CONSERVATION, https://www.conservation.ca.gov/calgem/Pages/Oil-and-Gas.aspx [https://perma.cc/TLZ5-PFZ7] (last visited Nov. 19, 2024).

18 *See id.*; *see also* CAL. PUB. RES. CODE §§ 3000–3473 (West 2024).

governments the authority to regulate the *location* of gas and oil operations, reserving to the State, through CalGEM, the concurrent authority to promulgate technical standards and to permit operations and extraction *methods*.[19]

The evolution of CalGEM's mandate generally reflects a shift from prioritizing recovery to incorporating environmental considerations and local concerns.[20] For most of the twenty-first century, CalGEM has operated under a dual mandate of maximizing recovery and preventing harm to public health and the environment, although the agency has unduly prioritized extraction to the detriment of environmentalism.[21]

CalGEM's disregard for its environmental mandate directly contradicts California's legislative history, which clearly indicates that CalGEM must give adequate consideration to public health and environmental concerns.[22] In 2013, the California legislature enacted Senate Bill 4 (SB 4) to "enhance environmental protection around WST/fracking" and respond to the increasingly prevalent use of fracking, the lack of scientific data on the practice, and growing public concern regarding government and industry transparency and accountability.[23] Among other provisions, SB 4 requires companies to disclose the chemical composition of their frac fluid on a public website and establishes a separate set of regulatory and permitting requirements for oil production by way of WSTs and fracking.[24]

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19 *See* Application for Leave to File Amici Curiae Brief in Support of Appellants; Proposed Brief of League of Cal. Cities & Cal. State Ass'n of Cntys. at 30, Chevron U.S.A., Inc. v. County of Monterey, 532 P.3d 1120 (Cal. 2023) (No. H045791).

20 *See infra* Section III.B.

21 *See* PUB. RES. § 3106.

22 *See id.* § 3002 (showing that AB 1057 amended "Division" to refer to the California Geologic Energy Management Division in the California Department of Conservation); *see also id.* § 3108.5 (explaining that the new purposes of the laws include "protecting public health and safety and environmental quality . . . in a manner that meets the energy needs of the state"); CAL. HEALTH & SAFETY CODE § 38562.2(C)(1) (West 2024).

23 *See* ELKIND & LAMM, *supra* note 7, at 17.

24 *See infra* Section III.C; *see also* ELKIND & LAMM, *supra* note 7, at 16 (noting that the WST injection method generates nearly fifty percent more emissions than traditional methods); Janet Wilson, *Are California Oil Companies Complying with the Law? Even Regulators Often Don't Know.*, PROPUBLICA (Mar. 22, 2021, 6:00 AM), https://www.propublica.org/article/are-california-oil-companies-complying-with-the-law-even-regulators-often-dont-know [https://perma.cc/3G3P-WUYV] (explaining that SB 4 has done little to slow WST approvals despite being advertised as one of the most stringent disclosure laws in the nation). CalGEM has struggled to establish a centralized public database, resulting in a waste of tens of millions of taxpayer dollars while Texas was able to establish a centralized database at a budget of $105,000. *Id.* CalGEM failed to

Enacted in 2013, Sections 3160(n) and 3161(b)(3)(C) (WST Sections) permit local entities to conduct their own environmental review of an oil well operator's use of WST methods. The enactment of the WST sections suggests that the legislature identified the expansion of local oil and gas regulatory authority as a means of enabling efficient responses to localized environmental issues.[25]

Other ancillary state acts further support this interpretation of the WST Sections. In November 2019, following multiple high-profile spill events, the California Department of Conservation (CalGEM's parent agency) announced a temporary moratorium on approvals of new high-pressure steam injection wells in addition to a WST and fracking permit review and public health regulatory review. Assembly Bill 1057 (AB 1057), enacted in 2020, clarified that CalGEM is responsible for "protecting public health and safety and environmental quality."[26] In 2021, Governor Gavin Newsom issued an executive order directing CalGEM to "initiate regulatory action" and phase out the issuance of new hydrofracking permits by January 2024.[27] Most notably, California has adopted an ambitious goal of net-zero emissions by 2045.[28]

Despite the increasing flux of pro-environmental policy, CalGEM continues to prioritize recovery by consistently misinterpreting its mandate as "offer[ing] minimal authority to

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has done little to slow WST approvals despite being advertised as one of the most stringent disclosure laws in the nation). CalGEM has struggled to establish a centralized public database, resulting in a waste of tens of millions of taxpayer dollars while Texas was able to establish a centralized database at a budget of $105,000. *Id.* CalGEM failed to accomplish the same after five years, multiple authorizations for budget requests, and a total estimated project budget of nearly $80 million. *Id.*

25 *See* PUB. RES. §§ 3160(n), 3161(b)(3)(C); *infra* Section III.C.

26 *See* PUB. RES. § 3011.

27 *See Governor Newsom Takes Action to Phase Out Oil Extraction in California*, GOVERNOR GAVIN NEWSOM (Apr. 23, 2021) [hereinafter Newsom Press Release], https://www.gov.ca.gov/2021/04/23/governor-newsom-takes-action-to-phase-out-oil-extraction-in-california/ [https://perma.cc/X9NP-59D3]; *see also* Wilson, *supra* note 24.

28 *See* CAL. HEALTH & SAFETY CODE § 38562.2(c) (West 2024). The provision declares:

> It is the policy of the state to do both of the following: (1) Achieve net zero greenhouse gas emissions as soon as possible, but no later than 2045, and to achieve and maintain net negative greenhouse gas emissions thereafter. This goal is in addition to, and does not replace or supersede, the statewide greenhouse gas emissions reduction targets in Section 38566. (2) Ensure that by 2045, statewide anthropogenic greenhouse gas emissions are reduced to at least 85 percent below the statewide greenhouse gas emissions limit established pursuant to Section 38550.

Id.

deny permits based on environmental considerations."[29] In 2020, CalGEM's staff mostly consisted of engineers and geologists engaged in technical assessments of drilling applications, and its planning materials neither credited issues of public health and environmental protection nor "identif[ied] a need for environmental scientists, air or water quality experts, or climate change experts."[30] Since AB 1057 did not clarify exactly *how much* weight CalGEM was expected to give to extraction versus environmentalism, it ultimately failed to correct the agency's disregard for its environmental directive.[31]

Research suggests that the doctrine of regulatory capture may explain why CalGEM has continued to disproportionately focus on extraction to the detriment of environmentalism, even in light of the environmental amendments to its mandate.[32] Regulatory capture occurs when "organized groups successfully act to vindicate their interests through government policy at the expense of the public interest."[33] In California, Big Oil wields its influence through common mechanisms such as lobbying and campaign donations in exchange for favorable agency oversight or votes opposing environmental policies that would restrict oil and gas development.[34]

Over the past decade, multiple CalGEM supervisors have been terminated due to impermissible personal investments in oil and gas companies, and the agency has consistently failed to enforce noncompliance measures against violators.[35] As a result of CalGEM's susceptibility to capture, the agency's "cooperative enforcement" may be toeing the line of collusion.[36] According to recent data, CalGEM's enforcement efforts have not advanced emissions targets—unless California *triples* its greenhouse gas reduction rate, the state will fail to reach net zero by 2030.[37] Big

29 *See* ELKIND & LAMM, *supra* note 7, at 24; *see also* PUB. RES. § 3106(b) (noting that COGA's WST Sections do not completely foreclose permit denials based on environmental considerations, although it requires that supervision of oil operations focus on "increasing the ultimate recovery of underground hydrocarbons").

30 ELKIND & LAMM, *supra* note 7, at 15.

31 *See id.*

32 *See* PUB. RES. § 3106.

33 Michael A. Livermore & Richard L. Revesz, *Regulatory Review, Capture, and Agency Inaction*, 101 GEO. L.J. 1337, 1343 (2013).

34 *See id.* at 1343–44.

35 *See infra* Section VI.C.

36 *See infra* Section VI.C.

37 *See* Alejandro Lazo, *California Isn't on Track to Meet Its Change Mandates - and a New Analysis Says It's Not Even Close*, CALMATTERS (Mar. 14, 2024),

Oil lobbying efforts have also successfully captured the legislature, inducing state policymakers to contradict the wishes of their constituents by blocking environmental bills that the industry believes will decrease production.[38] Today, state legislators on both sides of the aisle continue to receive tens of thousands of dollars in campaign donations from oil and gas special interest groups.[39]

The analysis set forth in this Note suggests that, by degrading agency and legislative oversight, Big Oil capture has produced a climate action gap, forcing locals to take action to remedy or prevent environmental harm in the absence of legislative or judicial intervention.[40] One way environmental advocacy groups and local governments have urged courts to "check" agency and legislative action or inaction is by refraining from preempting local oil and gas ordinances.[41]

In *Chevron U.S.A. Inc. v. County of Monterey*, the California Supreme Court missed a valuable opportunity to curb the pervasive effects of Big Oil capture and draw a stark comparison of California's governing oil and gas regulatory scheme with the state legislature's explicit policy of transitioning away from fossil fuels and achieving carbon neutrality by 2045.[42] In *Chevron*, oil and gas companies brought an action to preempt a Monterey County ordinance called "Measure Z," a voter's initiative comprised of three provisions which, if enacted, would prohibit: (1) wastewater injection (LU-1.22), (2) land uses in support of drilling new wells (LU-1.23), and (3) land uses in support of fracking (LU-1.21).[43]

The *Chevron* court preempted Measure Z's prohibitions on wastewater injection and drilling on the premise that they contradicted COGA by impermissibly attempting to regulate methods.[44] The court did so despite the fact that local authority

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https://calmatters.org/environment/climate-change/2024/03/california-climate-change-mandate-analysis/ [https://perma.cc/V8CC-DJWY].

38 *See infra* Section VI.D.

39 *See supra* Part I.

40 *See* ELKIND & LAMM, *supra* note 7, at 24; *see also* CAL. PUB. RES. CODE § 3106(b) (West 2024).

41 *See infra* Sections VI.A, VI.D.

42 *See* Chevron U.S.A. Inc. v. County of Monterey (*Chevron II*), 532 P.3d 1120, 1125–26 (Cal. 2023); *see also* CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024); Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 537 (Cal. 1993) (holding that a clear indication of preemptive intent must be established to displace inherent local authority).

43 *See Chevron II*, 532 P.3d at 1125–26; *see also infra* Section V.B.

44 *See id.* at 1127.

over zoning and land use issues *such as drilling* has been well settled for decades: "Nearly a century ago . . . the California Supreme Court acknowledged that local regulation of 'the [location] of oil wells' was properly within the local entity's police power."[45] Thus, to justify preempting LU-1.23, Measure Z's drilling prohibition, the *Chevron* court characterized the ban as an impermissible attempt to regulate production methods, blatantly disregarding Section 3690 of COGA, which expressly recognizes a local government's right to "enact and enforce laws . . . [that] regulat[e] the conduct and location of oil production activities."[46] Although Measure Z's ban on fracking was not at issue due to a lack of standing, COGA's legislative evolution, the broader regulatory authority granted to local governments by the WST Sections, and California's ambitious climate policy of net-zero by 2045 suggests that California courts should exercise extreme restraint before preempting local ordinances that regulate fracking.[47]

In the context of Big Oil capture, the consequences stemming from *Chevron* can hardly be understated. In holding that courts may give the recovery authority controlling weight, *Chevron* renders CalGEM's environmental mandate superfluous, thus perpetuating Big Oil capture by allowing CalGEM to continue to engage in lenient enforcement and ignore environmental factors when deciding whether to issue a permit.[48] Instead of addressing California's muddled, contradictory regulatory scheme, *Chevron* creates greater confusion regarding the scope of state versus local regulatory authority, thereby encouraging environmentally adverse Big Oil litigation and degrading preemption's primary benefit of uniformity.[49]

At the very least, *Chevron* exacerbates state-local tensions and discourages local innovation by discrediting the countervailing force of citizen plaintiffs in favor of preemption.[50] For California's Big Oil-captured policymakers, *Chevron* will serve as a convenient

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45 Chevron U.S.A., Inc. v. County of Monterey (*Chevron I*), 285 Cal. Rptr. 3d 247, 256–57 (Cal. Ct. App. 2021), *aff'd*, 532 P.3d 1120 (Cal. 2023).

46 *See Chevron II*, 532 P.3d at 1126–27, 1126 n.6; *see also* CAL. PUB. RES. CODE §§ 3690, 3160(n), 3161(b)(3)(C) (West 2024); City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 496 (Cal. 2013) ("[P]reemption by state law is not lightly presumed.").

47 *See infra* Section V.C.iii.

48 *See infra* Part VII.

49 *See infra* Section V.C.iii.

50 *See infra* Part VII.

shield against political accountability.[51] By confining local environmentalists to grassroots-level activism and leaving them without any enforcement authority that is genuinely incentivized to prioritize environmental considerations, *Chevron* enables lawmakers to continue parading purely performative legislation.

Part II of this Note examines the process of fracking and its rapid proliferation in the United States in the latter half of the twentieth century. Part II also compares the benefits and risks associated with fracking, including its environmental and socioeconomic impacts, and recounts the ongoing public debate regarding the method's overall utility.

Part III examines California's current oil and gas regulatory scheme and climate policy. It describes the legislative evolution of CalGEM's mandate and notes that it has been amended so as to signal that CalGEM must reorient its extraction-heavy focus to regulate oil and gas development in the interest of public health and environmentalism. It further explains that, contrary to CalGEM's partiality toward Big Oil, an environment-first interpretation is more consistent with California's twenty-first century climate policy, most notably the state's desire to phase out fracking in favor of clean energy.[52]

Part IV addresses preemption: the issue that most often arises when local governments enact environmentally focused ordinances that prohibit or restrict certain extraction activities in an effort to fill the climate action gap produced by capture.[53] Part IV provides a general background on the preemption doctrine, as well as a more focused background on preemption in California.[54] It offers a brief introduction to the concept of charter cities and notes that both the legislature and the courts have historically deferred to local judgment with respect to municipal affairs.[55] Lastly, Part IV compares the risks and benefits associated with preemption.[56]

Part V examines the reasoning behind *Chevron*'s holding and considers whether it contradicts legislative intent and California's common-law preemption doctrine.[57] Part V then analyzes the preemption of oil and gas ordinances in

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51 *See infra* Part VI.
52 *See infra* Part III.
53 *See infra* Part IV.
54 *See infra* Sections IV.A–B.
55 *See infra* Section IV.A.
56 *See infra* Section IV.C.
57 *See infra* Part V.

Pennsylvania and Colorado, explaining that both states have generally lagged behind California in recognizing local regulatory authority, even over pure zoning issues.[58] It notes that, unlike California, neither Pennsylvania nor Colorado has a climate policy that requires such a significant reduction in fossil fuel production.[59] It further explains that, until the twenty-first century, Pennsylvania and Colorado's regulatory schemes precluded consideration of environmental risks. Part V then examines a preemption case in each respective state and the legislative evolution of their regulatory mandates, contrasting these findings with *Chevron* to highlight the irrationality of the California Supreme Court's holding. Part V concludes that *Chevron*'s logic has multiple holes, resulting, in part, from the court's failure to adequately consider the evolution of CalGEM's mandate and the legislature's intent to grant local governments at least partial regulatory authority over WST methods.[60] Finally, Part V explains why *Chevron* may mark the emergence of "hyper preemption" in California, and notes how routine preemption of local environmental ordinances will widen the climate action gap.[61]

Part VI applies the analysis developed in Parts I through V to the Doctrine of Capture to explain why *Chevron* should have been decided differently.[62] It reveals that agency capture has produced a lack of agency oversight and enforcement, and it observes that legislative and executive capture has precluded corrective action at the state level.[63] This Note concludes by suggesting that, unless the California Supreme Court corrects course, *Chevron* will perpetuate Big Oil capture and exacerbate the climate action gap by degrading political accountability and the "countervailing force of citizen plaintiffs," thereby discouraging local innovation.[64]

II. FRACKING

The twenty-first century has been marked by the expansion of fracking. California has a significant interest in permitting fracking operations. Spread over areas of southern and central

58 *See infra* Section V.C.
59 *See infra* Section V.C.
60 *See infra* Section V.C.
61 *See infra* Section V.C.
62 *See infra* Part VI.
63 *See infra* Part VI.
64 *See infra* Part VI.

California, the Monterey Shale oil play "compris[es] two-thirds of the United States's total estimated shale oil reserves and cover[s] 1,750 square miles."[65]

A. Benefits

The primary benefit of fracking is economic. Citizens are most likely to recognize these benefits at the gas pump. The explanation is one of simple economics: supply and demand. Fracking reduces consumer costs by increasing the domestic oil and gas supply.[66] For the federal government, fracking strengthens national security by fostering energy independence.[67] By bolstering the domestic oil and gas supply, the United States can reduce reliance on foreign resources, especially in regards to oil-rich countries that may be hostile toward American policies, such as Saudi Arabia.[68]

B. Consequences

i. Environmental Impacts

Since fracking increases access to previously inaccessible reserves, it also enables well operators to "increasingly encroach upon densely populated urban and suburban areas."[69] In the 2000s, contaminated water and gas leak incidents linked to fracking led to public uproar.[70] In the 2010 film *Gasland*, American citizens recounted how the exposure to methane and other toxic chemicals in their water supply was so extreme that they could light their tap water on fire.[71] A study by the Food and Water Watch noted that "[a]cross the country – from Wyoming to

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65 Norimitsu Onishi, *Vast Oil Reserve May Now Be Within Reach, and Battle Heats Up*, N.Y. TIMES (Feb. 3, 2013), https://www.nytimes.com/2013/02/04/us/vast-oil-reserve-may-now-be-within-reach-and-battle-heats-up.html [https://perma.cc/VH4U-AQ8M].

66 *See* Thomas W. Merrill & David M. Schizer, *The Shale Oil and Gas Revolution, Hydraulic Fracturing, and Water Contamination: A Regulatory Strategy*, 98 MINN. L. REV. 145, 158–59 (2013).

67 *See* Phillip M. Bender, *California Creates New Regulatory Regime for "Fracking,"* ABA SECTION ENV'T, ENERGY & RES.: TRENDS, Nov.–Dec. 2013, at 13–14, 17.

68 *See* Merrill & Schizer, *supra* note 66, at 161–63; *see also Oil and Petroleum Products Explained: Oil Imports and Exports*, U.S. ENERGY. INFO. ADMIN., https://www.eia.gov/energyexplained/oil-and-petroleum-products/imports-and-exports.php [https://perma.cc/69MQ-9YLG] (last visited Dec. 14, 2024).

69 Jade Wolansky, *Quiet Suffocation: California Oil and Gas Production near Communities of Color Is a Public Health Crisis*, 52 U. PAC. L. REV. 387, 389 n.9 (2021).

70 *See* Rachel A. Kitze, *Moving Past Preemption: Enhancing the Power of Local Governments over Hydraulic Fracturing*, 98 MINN. L. REV. 385, 389 (2013).

71 *See id.*

Texas to Pennsylvania – fracking has polluted essential drinking water sources," with some residents forced to truck in water.[72]

In 2016, the U.S. Environmental Protection Agency finally acknowledged that fracking contaminates water, correcting an earlier report that found "no evidence that fracking systematically contaminates water."[73] The EPA report conceded:

> [There is] evidence that fracking has contributed to drinking water contamination in *all* stages of the process: acquiring water to be used for fracking, mixing the water with chemical additives to make fracking fluids, injecting the chemical fluids underground, collecting the wastewater that flows out of fracking wells after injections, and storing the used wastewater.[74]

In 2015, the EPA estimated that approximately 100 to 3,700 fracking fluid spills occur every year.[75]

Since fracking significantly contributes to atmospheric methane, natural gas leaks also present a risk to public health and emissions goals.[76] Although fracking proponents argue the method is less harmful than coal mining, methane leaks from oil and gas extraction make fracking's environmental impact worse than that of coal.[77] This is because methane is "a superpollutant 87 times more powerful than CO2 at warming the climate over a 20-year period."[78] Thus, once the methane leakage rate exceeds 2.4%, any climate benefits that fracking achieves are effectively negated.[79]

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72 Romain Coetmellec, *9 Ways Fracking Is the Worst – Climate Change Is Top of the List*, FOOD & WATER WATCH, https://www.foodandwaterwatch.org/2021/10/15/9-ways-fracking-is-the-worst-climate-change-is-top-of-the-list/ [https://perma.cc/AN3C-7W3V] (Mar. 31, 2023) (explaining that the pollutant produced by natural gas, methane, traps eighty-six times more heat than carbon dioxide, so although fracking proponents argue the method marks an improvement from reliance on coal, methane leaks from oil and gas extraction likely make the environmental impact of fracking much worse than coal).

73 Coral Davenport, *Reversing Course, E.P.A. Says Fracking Can Contaminate Drinking Water*, N.Y. TIMES (Dec. 13, 2016), https://www.nytimes.com/2016/12/13/us/reversing-course-epa-says-fracking-can-contaminate-drinking-water.html [https://perma.cc/LA36-VFTZ].

74 *Id.* (emphasis added).

75 *See California's Fracking Fluids*, EWG (Aug. 12, 2015), https://www.ewg.org/research/californias-fracking-fluids [https://perma.cc/JXK3-CBZX].

76 *See* Nick Stockton, *Fracking's Problems Go Deeper than Water Pollution*, WIRED (June 18, 2015, 1:28 PM), http://www.wired.com/2015/06/frackings-problems-go-deeper-water-pollution/ [https://perma.cc/Q6P4-WM4E].

77 *See* JOHN FLEMING, KILLER CRUDE: HOW CALIFORNIA PRODUCES SOME OF THE DIRTIEST, MOST DANGEROUS OIL IN THE WORLD 15 (2021), https://www.biologicaldiversity.org/programs/climate_law_institute/pdfs/June-2021-Killer-Crude-Rpt.pdf [https://perma.cc/N383-UWDU].

78 *Id.*

79 *See id.*

Although oil companies estimate leakage to be minimal, independent studies indicate individual leaks often greatly exceed these estimates.[80] Similarly, local research indicates that fossil fuel production in California produces greater environmental harm than coal production.[81] For example, in 2019, San Joaquin Valley recorded a methane leakage rate of 4.8%, far exceeding the 2.4% threshold.[82] A 2015 blow-out of natural gas storage in Aliso Canyon, California, emitted over 109,000 metric tons of methane over a four-month period.[83] The Aliso Viejo leak "effectively doubled the methane emissions of the entire Los Angeles metropolitan area, creating enough pollution to match the annual output of nearly 600,000 cars," or the methane emissions of a medium-sized European Union country.[84] CalGEM's response was criticized as "too little, too late," as it took nearly four months to plug the leak.[85] The delay prolonged the displacement of thousands of residents, who were forced to evacuate due to methane-exposure symptoms such as nausea and headaches.[86] In hindsight, the leak offered credence to concerns regarding the obsolescence and weaknesses of state regulations, and it reignited claims of failed agency oversight by CalGEM.

The potential for groundwater contamination by fracking is especially alarming in the context of California's persistent and severe drought conditions, which have put a strain on the state's

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80 *See* Benjamin L. McCready, Note, *Like It or Not, You're Fracked: Why State Preemption of Municipal Bans Are Unjustified in the Fracking Context*, 9 DREXEL L. REV. ONLINE 61, 69–70 (2016).

81 *See id.*

82 *See* FLEMING, *supra* note 77, at 16.

83 *See Methane Progress in California*, ENV'T DEF. FUND, https://www.edf.org/climate/methane-progress-california [https://perma.cc/RW83-LY93] (June 3, 2019) (estimating the impact of the methane leaked during the Oct. 23, 2015 through Feb. 11, 2016 Aliso Viejo incident as equivalent to: 9,156,000 metric tons of carbon dioxide released; 1,030,268,900 gallons of gas burned; or 21,545,930 U.S. dollars of natural gas waste); *see also* Sarah Zhang, *California Has a Huge Gas Leak, and Crews Can't Stop It Yet*, WIRED (Dec. 15, 2015, 7:00 AM), http://www.wired.com/2015/12/massive-gas-leak-california/ [https://perma.cc/B7C2-B72N] (discussing a two-month methane leak from a natural gas storage site that has since been fixed).

84 Oliver Milman, *LA Gas Leak: Worst in US History Spewed as Much Pollution as 600,000 Cars*, THE GUARDIAN (Feb. 26, 2016, 12:23 PM), https://www.theguardian.com/environment/2016/feb/26/los-angeles-aliso-canyon-gas-leak-methane-largest-us-history [https://perma.cc/BX5L-5XHU]; *see also Methane Progress in California*, *supra* note 83.

85 *See* Zhang, *supra* note 83.

86 *See id.*

groundwater resources.[87] Importantly, "[g]roundwater is a vital resource in California and accounts for almost 60 percent of [the] State's water supply in drought years."[88] Although California boasts one of the most comprehensive frac fluid disclosure laws in the United States, a study by the Environmental Working Group determined that disclosures continue to reveal that fracking fluids generally contain a myriad of harmful chemicals known to cause cancer, reproductive harm, hormone disruption, and harm to aquatic life, among other consequences.[89]

Increased seismic activity represents another primary danger associated with fracking.[90] To dispose of flowback fluid—frac fluid that returns to the surface after the shale is fractured—operators usually inject it back into an underground formation.[91] The use of underground injection has increased the prevalence of earthquakes in states such as Ohio, Oklahoma, and Arkansas due to the high pressure required to inject the fluid back into the ground.[92] Underground injection also increases the risk of rupture, as was the case in 2006, when injection at illegal pressure limits and a lack of agency oversight led to a major rupture in downtown Los Angeles, forcing over one hundred low-income tenants to evacuate after crude oil waste filled the basement of their apartment building.[93]

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87 See *Track California Water Conditions*, CALIFORNIA WATER WATCH, https://cww.water.ca.gov/ [https://perma.cc/LMU3-JZX7] (last visited Dec. 14, 2024), for continuing updates on California's water conditions.

88 *See* Kitze, *supra* note 70, at 390 (noting that fracking has particularly significant environmental consequences in the southwestern states, where water scarcity is an issue, because each well uses around five million gallons of water drawn from groundwater sources).

89 *See California's Fracking Fluids*, *supra* note 75. The Environmental Working Group analysis determined that, per mandatory disclosures by California drillers, fracking fluids typically contain chemicals that can be hazardous to human health:

> [These include] 15 listed under California's Proposition 65 as known causes of cancer or reproductive harm . . . 25 likely to contain impurities of Proposition 65-listed chemicals . . . 5 that the European Union has associated with an increased risk of cancer . . . 6 associated with reproductive harm . . . 3 linked to clear evidence of hormone disruption . . . 12 listed under the federal Clean Air Act as Hazardous Air Pollutants known to cause cancer or other harm . . . [and] 93 associated with harm to aquatic life.

See id.

90 *See* Spence, *supra* note 14, at 488.

91 *See* Duke Off. of News & Commc'ns, *New Tracers Can Identify Fracking Fluids in the Environment*, DUKE NICHOLAS SCH. OF THE ENV'T (Oct. 19, 2014), https://nicholas.duke.edu/news/new-tracers-can-identify-fracking-fluids-environment [https://perma.cc/6MQG-U6EL] ("Deep-well injection is the preferable disposal method, but injecting large volumes of wastewater into deep wells can cause earthquakes in sensitive areas.").

92 *See id.*; Spence, *supra* note 14, at 488–89.

93 *See* Wilson, *supra* note 24.

ii. Socioeconomic Impacts

Most scholarship has focused on fracking's environmental rather than socioeconomic impacts.[94] Socioeconomic impacts attempt to show how an activity changes a community's social dynamic and economic status.[95] Fracking can "fundamentally change the character of an area for the duration of fracking activities."[96] This is known as the "boomtown" effect, whereby a state or city experiences "population 'booms' due to a sudden influx of oil and gas workers."[97] During a boom, primarily adult males relocate to these cities to make a quick profit.[98] Often, this leads to overcrowding, tensions between longtime residents and newcomers, and increases in the local crime rate, the cost of living, and social dislocation.[99]

Municipalities have generally attempted to exercise regulatory authority over fracking operations by analogizing them to "nuisances from which they are allowed to protect their citizens."[100] Generally, the construction of fracking facilities requires substantial amounts of activity, including increased truck and heavy machinery traffic.[101] This, in turn, increases noise and air pollution.[102] The aesthetic of the surrounding area also undergoes significant changes following the construction of on-site storage facilities built to capture flowback water.[103]

III. LEGAL BACKGROUND

A. Oil and Gas Regulation

Generally, states retain the authority to regulate oil and gas extraction activities that occur within their boundaries.[104] State and local laws still apply on federal lands and are rarely

94 *See* Joel Minor, *Local Government Fracking Regulations: A Colorado Case Study*, 33 STAN. ENV'T L.J. 59, 59–60 (2013).

95 *See id.* at 71.

96 Spence, *supra* note 14, at 444.

97 *See* Minor, *supra* note 94, at 72.

98 *See id.* at 79.

99 *See id.* at 79–81, 85–87.

100 *See* James K. Pickle, Note, *Fracking Preemption Litigation*, 6 WASH. & LEE J. ENERGY, CLIMATE, & ENV'T 295, 298 (2014).

101 *See* Spence, *supra* note 14, at 444.

102 *See id.*

103 *See id.*

104 *See* Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands; Rescission of a 2015 Rule, 82 Fed. Reg. 61924, 61926 (Dec. 29, 2017) (to be codified at 43 C.F.R. pt. 3160).

preempted by federal law.[105] In the event that state law applies stricter regulation requirements than federal law, extraction activities that occur on federal lands must meet the state's stricter standard.[106] Across the United States, local governments have taken action to regulate fracking.[107]

B. The California Oil & Gas Act: CalGEM's Contradictory Mandate

In California, CalGEM, an agency within California's Department of Conservation, retains primary responsibility for overseeing state oil and gas operations.[108] Subdivision (b) of the COGA was added in 1961 and requires the state supervisor to, inter alia, oversee "the drilling, operation, maintenance, and abandonment of wells."[109] Essentially, subdivision (b) designates the state supervisor—not local government—responsible for ensuring well owners or operators are permitted to "utilize all methods and practices known to the oil industry *for the purpose of increasing the ultimate recovery of underground hydrocarbons*."[110]

In recognition of the adverse environmental and health impacts produced by oil drilling operations, the California legislature amended subdivision (a) in 1970, expanding the supervisor's role beyond mere maximization of resource extraction so as to encompass "*prevent[ion], as far as possible, [of] damage to life, health, property, and natural resources*."[111] Two

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105 *Id.*

106 *See id.*; *see also* ROBERT L. BRADLEY JR., OIL, GAS, AND GOVERNMENT: THE U.S. EXPERIENCE 133 (1996).

107 *See e.g.*, Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014) (finding the city's fracking ban was invalid as it was preempted by the Colorado Oil and Gas Conservation Act); Norse Energy Corp. v. Town of Dryden, 964 N.Y.S.2d 714, 724 (N.Y. App. Div. 2013) (stating that the Oil, Gas, and Solution Mining Law "does not preempt, either expressly or impliedly, a municipality's power to enact a local zoning ordinance banning all activities related to the exploration for, and the production or storage of, natural gas and petroleum within its borders"); State *ex rel.* Morrison v. Beck Energy Corp., 989 N.E.2d 85, 99 (Ohio Ct. App. 2013), *aff'd*, 37 N.E.3d 138 (Ohio 2015) (holding that certain drilling ordinances were in direct conflict with and preempted by state law); Robinson Twp. v. Commonwealth, 83 A.3d 901, 913 (Pa. 2013), *aff'd in part*, *rev'd in part on other grounds*, 147 A.3d 536 (Pa. 2016) (finding that a statute restricting municipalities right to restrict fracking unconstitutional under the Environmental Rights Amendment); Ne. Nat. Energy, LLC v. City of Morgantown, No. 11-C-411, slip op. 6285, at *9 (Cir. Ct. Monongalia Cnty. Aug. 12, 2011) (concluding "that the State's interest in oil and gas development and production" justifies the West Virginia Department of Environmental Protection exclusively controlling this area of the law).

108 *See e.g.*, CAL. PUB. RES. CODE § 3106 (West 2024).

109 *Id.* § 3106(b).

110 *Id.* (emphasis added).

111 *Id.* § 3106(a) (emphasis added).

years later, the legislature added subdivision (d) to promote the responsible development of oil and gas resources, for instance, by addressing environmental problems created by drilling and extraction operations.[112] In practice, these amendments have produced contradictory and competing interests: (1) to administer the state's regulations to enhance oil and gas recovery and ensure an adequate state supply of oil and gas (*extraction prong*) and (2) to protect the environment from the harmful consequences of extraction activities (*environmental prong*). The confusion generated by these competing interests has rendered courts more likely to preempt local oil and gas initiatives that prioritize environmentalism over extraction.[113]

C. Senate Bill 4: The WST Sections

The California legislature attempted to address public concern regarding the environmentally risky use of fracking by enacting SB 4, which required CalGEM to create and implement an enhanced permitting and disclosure process for fracking.[114] SB 4 also required disclosure of all chemicals used in the fracking process.[115] Included in SB 4 are two sections of note: Sections

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112 *See id.* § 3106(d).

113 *See* Justin Hedemark, *Taming the West: Senate Bill 4 and California's Struggle to Regulate Fracking*, 8 GOLDEN GATE U. ENV'T L.J. 119, 128 (2015) (asserting that [CalGEM's] responsibility to maximize hydrocarbon recovery and allow fracking while also protecting "life, health, property, and natural resources" creates seemingly contradictory and competing interests) (quoting PUB. RES. § 3106(a)).

114 *See* PUB. RES. §§ 3160(b)(1)(A), 3160(g), 3160(j). Under SB 4's permitting process, a well owner and operator must apply for a permit with CalGEM prior to commencing WSTs. *See id.* § 3160(d)(1). The permit must include the well number, when stimulation will occur, a water management plan, a list of chemicals used in the stimulation process, the size and direction of the fractures, a groundwater monitoring plan, and an estimated amount of produced waste. *See id.* § 3160(d)(1)(A)–(G). Prior to applying, the well operator is expected to assist CalGEM in completing an Environmental Impact Report and notifying neighbors located near the site of the pending permit. *See id.* § 3160(d)(6)(A).

115 *See id.* §§ 3160(b)(1)(A), 3160(g). The disclosure requirements outlined in SB 4 were intended to grant the public a means of discerning potential WSTs or fracking-related toxic exposure, and further to require CalGEM to post a "full disclosure of the composition and disposition of well stimulation fluids, including, but not limited to, hydraulic fracturing fluids, acid well stimulation fluids, and flowback fluids" on a public website within sixty days of the well's last stimulation treatment. *See id.* § 3160(j)(2). While disclosure is still subject to certain trade secret protections, SB 4 presumes that the identities of chemicals used in frac fluid are unprotected. *See id.* § 3160(j)(1). In California, trade secrets are governed by Section 1060 of the California Evidence Code, the Uniform Trade Secrets Act, and the California Public Records Act. *See id.* § 3160(j)(4)(D). California Public Resources Code Section 3160(j) applies only to frac fluid suppliers and requires disclosure of chemical constituents to CalGEM, even if the supplier claims a trade secret. *See id.* § 3160(j)(3). If the trade secret is invalid, CalGEM must release the information to the public. *See id.* § 3160(j)(7). Then the company may only avoid disclosure by instituting a suit for trade secret status within 60 days and obtaining a court

3160 and 3161 (WST Sections).[116] These provisions expanded the scope of local authority by granting local lead agencies shared regulatory authority over WSTs, allowing local agencies to conduct their own environmental assessment of a well operator's use of WST independent of any environmental review conducted by CalGEM.[117]

Local governments have advocated for greater regulations because they believe the legislature is too accommodating to the oil and gas industry to the detriment of environmental and health protections. According to The Citizen Action Network, an environmental organization that initiated the petition process to garner support for a Butte County fracking ban, "the basic position [is] that [local entities] can't rely on federal and state people" or the "la[x] . . . language in SB4."[118] Although scientific studies required by SB 4 proved that stricter regulations are needed to mitigate the negative environmental and public health impacts produced by fracking, local governments have only been successful in advocating for broader authority over the location of extraction, *not* the methods of extraction.[119] Successful advocacy has been limited to extraction location due to the competing interests underlying California's regulatory scheme—*extraction versus environment*.

D. California's Twenty-First Century Climate Policy: Net-Zero by 2045

CalGEM's "Big Oil-friendly" interpretation of the COGA and the ensuing routine preemption of local environmental ordinances directly contradicts California's climate policy—specifically, the state's explicit policy of net-zero emissions by 2045.[120] According to the California Energy Commission, "California is leading the nation toward a 100 percent clean energy future and addressing

order. *See id.* § 3160(j)(8). If CalGEM is satisfied with the trade secret claim, the agency is not required to disclose it. *See id.* § 3160(j)(9)(A). Members of the public may then request disclosure directly from CalGEM, which must thereafter notify the company of their obligation to substantiate their trade secret status in court. *See id.*

116 *See id.* §§ 3160, 3161.

117 *See id.* § 3161(b)(3)(C) ("This paragraph does *not* prohibit a local lead agency from conducting its own EIR.") (emphasis added).

118 *Butte County, California, Fracking Ban Initiative, Measure E (June 2016)*, BALLOTPEDIA, https://ballotpedia.org/Butte_County,_California,_Fracking_Ban_Initiative,_Measure_E_(June_2016) [https://perma.cc/KJK2-UWL4] (last visited Nov. 19, 2024).

119 *See* Wolansky, *supra* note 69, at 390–92.

120 *See Chevron I*, 285 Cal. Rptr. 3d at 252–53; *see also* CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024).

climate change for all."[121] On its face, this statement is true. Compared to other states, "California has been a national leader in regulatory policymaking on issues ranging from forestry management, scenic land protection, air pollution, and coastal zone management to energy efficiency and global climate change."[122] In 1947, California assisted other states and the federal government in research and enforcement efforts pertaining to air quality after becoming the first state to enact an air pollution control statute.[123]

As legislative history supports, in 1972, the California legislature's *purpose* in adding to the text of subdivision (d) was to strengthen CalGEM's role in handling environmental issues.[124] In 2019, the legislature clarified that, under the COGA, CalGEM bears the affirmative duty of "protecting public health and safety and environmental quality."[125] Two years later, Governor Newsom directed CalGEM to "initiate regulatory action" to phase out the issuance of new hydrofracking permits by January 2024.[126] More recently, California Health and Safety Code Section 38562.2(c)(1), enacted in 2023, designates CalGEM as one of the primary agencies responsible for helping California "[a]chieve net zero greenhouse gas emissions as soon as possible, but no later than 2045."[127]

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121 *Renewable Energy*, CAL. ENERGY COMM'N, https://www.energy.ca.gov/programs-and-topics/topics/renewable-energy [https://perma.cc/9TKK-Y4JA] (last visited Nov. 19, 2024).

122 DAVID VOGEL, CALIFORNIA GREENIN': HOW THE GOLDEN STATE BECAME AN ENVIRONMENTAL LEADER 4 (2018).

123 *See id.* at 4–5.

124 *Chevron I*, 285 Cal. Rptr. 3d at 255 (alteration in original) (quoting Cal. Res. Agency, Enrolled Bill Report, S.B. 1022, 1972 Reg. Sess. (Cal. 1972)); *see also California Announces New Oil and Gas Initiatives*, CAL. DEP'T OF CONSERVATION (Nov. 19, 2019), https://www.conservation.ca.gov/index/Pages/News/California-Establishes-Moratorium-on-High-Pressure-Extraction.aspx [https://perma.cc/85D5-FQES].

125 CAL. PUB. RES. CODE § 3011 (West 2024).

126 Newsom Press Release, *supra* note 27.

127 CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024); *see also Governor Newsom Calls Out Big Oil on Continued Push for Drilling in Neighborhoods*, GOVERNOR GAVIN NEWSOM (Feb. 3, 2023), https://www.gov.ca.gov/2023/02/03/governor-newsom-calls-out-big-oil-on-continued-push-for-drilling-in-neighborhoods/ [https://perma.cc/6YJM-99GC]; *see also* Exec. Order B-55-18 to Achieve Carbon Neutrality (Sept. 10, 2018), https://www.ca.gov/archive/gov39/wp-content/uploads/2018/09/9.10.18-Executive-Order.pdf (discussing California's goal of achieving carbon neutrality by no later than 2045). *But see* CAL. CODE REGS. tit. 14, § 1765.11 (West 2024) ("On [February 3, 2023], the Secretary of State certified that a referendum against Senate Bill 1137 (Gonzalez, Chapter 365, Statutes of 2022) qualified for the November 2024 ballot. Senate Bill 1137 is, therefore, stayed until and unless a majority of voters approve Senate Bill 1137 in the November 2024 general election.").

IV. PREEMPTION

Generally, preemption is one of the biggest obstacles to enacting a local, pro-environmental ordinance that restricts certain oil and gas production activities.[128] Although California's climate policy suggests that preemption should not extend to local ordinances that restrict environmentally risky oil and gas activities, this has not been the case. Instead, California courts have preempted such ordinances, effectively permitting CalGEM to continue ignoring the environmental prong of its mandate.[129] This is alarming in light of the fact that Big Oil continues to exert substantial influence over industry-related regulations.[130] California courts have implicitly ratified CalGEM's misinterpretation of its mandate, giving legislators little to no incentive to forgo the benefits of being on the "good side" of Big Oil. Consequently, California is left to operate under a weak regulatory framework marked by little to no oversight of the environmental factors associated with extraction. This Section (IV) provides an overview of the preemption doctrine to contextualize the argument set forth in Section V, which concludes that routine preemption of local environmental oil and gas ordinances have left locals without any regulatory authority that is *actually* incentivized to consider the environmental impacts of oil and gas production.

A. Levels of Authority

i. Federal

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128 *See, e.g.*, Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014) (preempting Longmont's ban on fracking and the storage and disposal of fracking waste under Colorado's Oil and Gas Conservation Act); Range Res.–Appalachia, LLC v. Salem Twp., 964 A.2d 869, 877 (Pa. 2009) (preempting a local ordinance that attempted to regulate surface and land development attendant to oil and gas drilling because it overlapped with state regulations by setting the *methods* of extraction (i.e., permitting procedures) and imposing bonding requirements).

129 *See, e.g.*, Warren E&P, Inc. v. City of Los Angeles, No. 23STCP00060, at *1, *11–15 (Cal. Super. Ct. Sept. 6, 2024) (preempting a City of Los Angeles ordinance prohibiting new drilling, finding that the home rule doctrine did "not save [it] from such preemption").

130 *See* Dan Bacher, *Elk Grove News – Big Oil Pumped $25.4 Million into Lobbying California Officials in 2023*, CONSUMER WATCHDOG (Feb. 26, 2024), https://consumerwatchdog.org/in-the-news/elk-grove-news-big-oil-pumped-25-4-million-into-lobbying-california-officials-in-2023/ [https://perma.cc/KXA3-H2U9] (explaining that in California, Big Oil has exerted its influence and "captured" oil and gas regulations through mechanisms such as, inter alia, lobbying, campaign spending, and the placement of regulatory shills).

Although this Note does not discuss federal preemptive authority, it is important to note that the federal government certainly retains regulatory authority over oil and gas development. The Commerce Clause grants Congress the power to regulate interstate commerce, and the U.S. Supreme Court has broadly interpreted this regulatory authority to include *any* activity that substantially affects interstate commerce.[131] Oil and gas production is an economic activity that substantially affects interstate commerce and is rarely, if ever, conducted purely intrastate, so the federal government retains regulatory authority.[132]

ii. State

Under the Tenth Amendment of the U.S. Constitution, all "powers not delegated to the [federal government] by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[133] With respect to the exercise of state power over local governments, a state's authority is sometimes further restricted by state constitutions.[134]

iii. Local Authority & California's "Charter Cities"

Article XI, Section 7 of the California Constitution provides that "[a] county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[135]

Furthermore, under Article XI, Section 5, subdivision (a), a charter city such as Monterey County "gain[s] exemption, *with respect to its municipal affairs*, from the 'conflict with general laws' restrictions of Article XI, Section 7."[136] Charter cities are considered "supreme and beyond the reach of legislative

131 *See* United States v. Lopez, 514 U.S. 549, 558–64 (1995) (explaining that Congress can regulate an activity under the Commerce Clause if it "substantially affects" interstate commerce); *see also* United States v. Morrison, 529 U.S. 598, 611 (2000) (requiring activities that are regulated under the Commerce Clause to be "some sort of economic endeavor") (citing *Lopez*, 514 U.S. at 559–60).

132 *See* Spence, *supra* note 14, at 436.

133 U.S. CONST. amend. X.

134 *See* Richard Briffault, *Preemption: The Continuing Challenge*, 36 J. LAND USE & ENV'T L. 251, 255 (2021) (discussing Pennsylvania's environmental protection article, which required the invalidation of a state ban on local fracking restrictions).

135 CAL. CONST. art. XI, § 7.

136 Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 536 n.1 (Cal. 1993) (alteration in original) (quoting Bishop v. City of San Jose, 460 P.2d 137, 140 (Cal. 1969) (en banc)).

enactment" with respect to municipal affairs.[137] The concept of charter cities is more than a century old and reflects "the principle that the municipality itself knew better what it wanted and needed than the state at large."[138]

Grants of municipal charters represent the earlier version of recent "home-rule" statutes, which presume a local government is authorized to act unless such act is explicitly prohibited by state law or charter. The primary benefit of home rule is that it enables localities to adequately address issues that state-level actors consider to be of secondary importance. In practice, it serves a vital role in ensuring local governments are not silenced due to their lack of political bargaining power.

In *California Federal Savings & Loan Ass'n v. City of Los Angeles*, the California Supreme Court established a guide for determining the scope of home-rule authority. First, the local provision at issue must regulate a "municipal affair."[139] In a preceding case, *Ex parte Braun*, the California Supreme Court held that levying taxes to support local expenditures is an example of a municipal affair.[140] Although *Braun* gave rise to confusion regarding the meaning of "municipal affairs,"[141] California courts have routinely noted that this confusion is largely unavoidable, as "the constitutional concept of municipal affairs is not a fixed or static quantity," but rather is assessed based on the specific facts and circumstances of the case.[142] In fact, this confusion may be a *necessary* ingredient of the home-rule doctrine, which has become "a means of adjusting the political relationship between state and local governments in discrete areas of conflict."[143] By granting municipal charters, state governments have, in effect, acknowledged that the state-local power balance is in constant flux and that, in certain areas, the state should make every effort to defer to the judgment of local governments.

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137 Cal. Fed. Sav. & Loan Ass'n v. City of Los Angeles, 812 P.2d 916, 922 (Cal. 1991) (quoting *Ex parte* Braun, 74 P. 780, 786 (Cal. 1903)).

138 State Bldg. & Constr. Trades Council v. City of Vista, 279 P.3d 1022, 1027 (Cal. 2012) (quoting Fragley v. Phelan, 58 P. 923, 925 (Cal. 1899)).

139 *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 917.

140 *Ex parte* Braun, 74 P. 780, 783 (Cal. 1903).

141 *See Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 922.

142 Pac. Tel. & Tel. Co. v. City of San Francisco, 336 P.2d 514, 517 (Cal. 1959).

143 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1028 (quoting *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 926).

Second, the court "must satisfy itself that the case presents an actual conflict between [local and state law]."[144] This is resolved by asking whether the state law addresses a matter of "statewide concern."[145] Whether a matter is one of statewide concern turns "on the meaning and scope of the state law in question and the relevant state constitutional provisions."[146]

Third and finally, the court must resolve whether the law is "'reasonably related to . . . resolution' of that concern and 'narrowly tailored' to avoid unnecessary interference in local governance."[147] In other words, home rule charter cities must still defer to applicable general state laws, even where such laws contradict their charters, if the subject matter of the law is one of statewide concern rather than a purely local concern.[148]

While courts give "great weight to the factual record that the Legislature has compiled" and the factual findings of the trial court, these factors are not controlling, and "[t]he decision . . . is ultimately a legal one."[149] Thus, the judiciary often plays a central role in either upholding or preempting local initiatives. Charter cities have experienced the most success by persuading courts to uphold local provisions that address *purely* local matters, such as public works contracts funded exclusively by city revenues,[150] or the supply of water by a city to its inhabitants.[151] However, other charter cities have been permitted to regulate *even* in areas where state involvement is well settled,

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144 *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 925.

145 *Id.*

146 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1028; *see also* CAL. CONST. art. 11, § 11; Abbott v. City of Los Angeles, 349 P.2d 974, 979 (Cal. 1960).

147 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1027 (citation omitted) (first quoting *Cal. Fed. Sav. & Loan Ass'n*, 812 P.2d at 925; and then quoting *id.* at 930); *see also* Fiscal v. City of San Francisco, 70 Cal. Rptr. 3d 324, 341 (Cal. Ct. App. 2008) (explaining that a charter city can escape a finding of state preemption by demonstrating its local ordinance relates to a purely municipal affair under the home rule doctrine).

148 *See* Bishop v. City of San Jose, 460 P.2d 137, 140 (Cal. 1969).

> As is made clear in the leading case of Pipoly v. Benson, . . . local governments (whether chartered or not) do not lack the power, nor are they forbidden by the Constitution, to legislate upon matters which are not of a local nature, nor is the Legislature forbidden to legislate with respect to the local municipal affairs of a home rule municipality.

Id.

149 *State Bldg. & Constr. Trades Council*, 279 P.3d at 1028.

150 *See id.* at 1026–27 (holding that public works contracts funded exclusively by city revenues constitute municipal affairs over which a charter city has paramount power under Article XI, Section 5 of the California Constitution).

151 *See* City of Pasadena v. Charleville, 10 P.2d 745, 746–47 (Cal. 1932) (holding that the supply of water by a city to its inhabitants is understood to be a municipal affair).

as in *Beverley Oil Co. v. City of Los Angeles*, where the California Supreme Court acknowledged charter cities' "unquestioned right to regulate the business of operating oil wells within [their] city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing."[152]

B. General Preemption Doctrines

In *Sherwin-Williams Co. v. City of Los Angeles*, the California Supreme Court listed three general ways in which preemption arises in the state-local context: "if the local legislation 'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'"[153] "Local legislation is 'duplicative' of general law when it is coextensive therewith."[154] A local law is "'contradictory' to general law when it is inimical thereto."[155] "Finally, local legislation enters an area that is 'fully occupied' by general law when the Legislature has expressly manifested its intent to 'fully occupy' the area, or when it has impliedly done so."[156] To determine whether state legislation has expressly or impliedly occupied a given area, the court asks whether:

> (1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.[157]

Should the court find preemption by conflict or by intent to occupy the field, the issue is resolved by examining whether state law, as opposed to local law, predominates in the area of

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152 Beverly Oil Co. v. City of Los Angeles, 254 P.2d 865, 868 (Cal. 1953) (quoting Pac. Palisades Ass'n v. City of Huntington Beach, 237 P. 538, 539–40 (Cal. 1925)).

153 Sherwin-Williams Co. v. City of Los Angeles, 844 P.2d 534, 536 (Cal. 1993) (quoting Candid Enters., Inc. v. Grossmont Union High Sch. Dist., 705 P.2d 876, 885 (Cal. 1985) (citation omitted)).

154 *Id.* at 537; *see also In re* Portnoy, 131 P.2d 1, 2 (Cal. 1942) (identifying "duplication" where local legislation is intended to enforce the same criminal prohibition as general law).

155 *Sherwin-Williams Co.*, 844 P.2d at 537; *see also Ex parte* Daniels, 192 P. 442, 445–47 (Cal. 1920) (identifying a "contradiction" where local legislation attempts to set a lower maximum speed limit for automobiles than the one established by general law).

156 *Sherwin-Williams Co.*, 844 P.2d at 537 (citations omitted).

157 *In re* Hubbard, 396 P.2d 809, 815 (Cal. 1964) (en banc).

legislation.[158] Typically, the resolution of an implied preemption issue involves the question of whether the state law sets a floor, allowing local governments to add more stringent regulations, or whether it sets a ceiling, prohibiting any further restrictions at the local level.[159] Oil and gas regulations typically set a regulatory ceiling rather than a floor in order "to provide a stable environment for industry to operate," meaning preemption is more likely to occur when the local ordinance establishes stricter standards than those set by the state.[160] However, because local zoning authority is well settled in California and is generally considered a municipal affair, a substantial gray area exists where the local law is both stricter than the state's *and* an exercise of zoning authority.

C. Costs Versus Benefits of Preemption

The primary benefit of preemption is uniformity in the implementation of state policies.[161] The preemption of local regulations that are inconsistent with state goals promotes uniformity by providing industries with a predictable regulatory framework.[162] In regard to fracking, states feel they are better positioned to regulate the activity because they possess greater knowledge of their state's geology and energy needs.[163] Irrespective of this benefit, California's courts have sought to protect local police power by "presum[ing], absent a clear indication of preemptive intent from the Legislature," that preemption does *not* apply to common exercises of local power, such as the enactment of land-use ordinances.[164]

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158 *Sherwin-Williams Co.*, 844 P.2d at 536.

159 *See* Briffault, *supra* note 134, at 258; *see also* Graco, Inc. v. City of Minneapolis, 937 N.W.2d 756, 761 (Minn. 2020) (holding that a local ordinance which set a higher minimum wage than the state's was not impliedly preempted by conflict as the state law merely set a floor, and therefore "the [two] provisions [were] not irreconcilable"—compliance with the local ordinance did not leave local employers with no other option but to violate the state law); *cf.* City of Corvallis v. Pi Kappa Phi, 428 P.3d 905, 912 (Or. Ct. App. 2018) (explaining that state law set a ceiling by imposing a knowing prerequisite for liability, thus preempting stricter local law that created a strict liability offense).

160 Kitze, *supra* note 70, at 394; *see also* Paul S. Weiland, *Federal and State Preemption of Environmental Law: A Critical Analysis*, 24 HARV. ENV'T L. REV. 237, 242 (2000).

161 Weiland, *supra* note 160, at 242–43.

162 *Id.*

163 Pickle, *supra* note 100, at 298; *see also* Jason Schumacher & Jennifer Morrissey, *The Legal Landscape of "Fracking": The Oil and Gas Industry's Game-Changing Technique Is Its Biggest Hurdle*, 17 TEX. REV. L. & POL. 239, 260 (2013).

164 Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 840 (Cal. 2006) (Moreno, J., dissenting).

Generally, state-local preemption has the potential to produce a myriad of negative consequences. First, preemption often overlooks local attempts to address a real and urgent problem, as well as the unique knowledge that supports such attempts. Proponents of greater local control argue that when a state grants municipal charters or home rule authority, such authority encompasses the power to adopt local fracking ordinances because "fracking is an issue of local concern [due to] its potential negative effects on local communities."[165] By preempting local ordinances without addressing underlying local concerns regarding fracking's environmental impact, courts leave locals disillusioned and with little to no political capital, further stymieing California's climate progress.

Second, preemption devalues the wisdom of federalism and threatens California's status as a global leader in climate and clean energy.[166] Under the United States' federalist system of government, states retain the capacity to influence policy at the national level.[167] As stated by Justice Louis Brandeis: "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[168] California's "ability to remain the most important source of environmental policy innovation in the United States over so many decades and across such a diverse range of policy areas is a significant accomplishment."[169] Scholarship suggests that California's recent climate policy "could form the latest chapter of the 'California effect'—a phenomenon that occurs when laws and regulations passed by California ripple outward, spreading to other states

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165 Pickle, *supra* note 100, at 300; *see also* Jesse J. Richardson, Jr., *Local Regulation of Hydraulic Fracturing*, 117 W. VA. L. REV. 593, 598–99 (2014). The Richardson article offers a list of the local impacts of fracking that give municipalities cause for concern, including "'noise, light and other visual impacts,' road damage, blasting, dust and traffic," as well as odors, "potential groundwater contamination, methane emissions, habitat fragmentation, and 'degradation of environmentally sensitive areas.'" *Id.* (citation omitted). Socioeconomic concerns include "compatibility of the activity to nearby property uses, the impact of the activity on property values in the area, 'adequate off-site infrastructure, services [such as police and fire protection], affordable housing, and . . . the [general] health and safety of the community.'" *Id.* at 598 (alterations in original) (citation omitted).

166 VOGEL, *supra* note 122, at 7.

167 *See id.*

168 New State Ice Co. v. Liebmann, 285 U.S. 262, 281 (1932) (Brandeis, J., dissenting).

169 VOGEL, *supra* note 122, at 6.

and beyond."[170] Preemption directly contradicts the California effect by discouraging innovative experimentation at the local level, thereby eliminating potential creative solutions to environmental issues.[171]

Third, preemption increases the strain on state administrative and judicial resources by generating a considerable amount of litigation. Beyond California, courts in West Virginia, Pennsylvania, New York, Ohio, and Colorado have been consistently asked to determine whether state regulations preempt local fracking ordinances.[172]

V. PREEMPTION'S CLIMATE ACTION GAP: *CHEVRON U.S.A. INC. V. COUNTY OF MONTEREY*

A. Preemption of Local Oil & Gas Regulations in California: The COGA & WST Sections

The COGA & the WST Sections establish California's oil and gas regulatory scheme.[173] Under the COGA's division of authority, local governments have authority to regulate the *location* of oil and gas operations, while the state retains concurrent authority to regulate the *methods* of oil and gas operations.[174] The California Supreme Court reaffirmed this standard in *Chevron U.S.A. Inc. v. County of Monterey*, holding that the COGA grants the state the authority to regulate the "manner" of oil and gas production *to the exclusion of* municipal regulations.[175]

In *Chevron*, the California Supreme Court considered whether the COGA preempted "Measure Z," a Monterey County

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170 MATTHEW H. AHRENS, ALLAN T. MARKS & ALLISON SLOTO, THE CALIFORNIA EFFECT: VISIONARY CLIMATE DISCLOSURE LAWS WILL HAVE FAR-REACHING IMPACT 1 (2023), https://www.milbank.com/a/web/tu9QCEzJJUaeBGAvsByF4K/8nwQAL/environmental-client-alert-october-2023-ca-climate-discourse-lawsx2.pdf [https://perma.cc/F7BP-YNMB].

171 *See* Kitze, *supra* note 70, at 395.

> Communities often lead the country on environmental issues when they are able to experiment with approaches to land use and the protection of natural resources. Even more broadly, local governments have carefully guarded their right to determine what kind of communities they will live in and how their land is used. Preemption inhibits the ability of local communities to create and fulfill their own unique visions of how they will live.

Id.

172 *See supra* notes 128–129 and accompanying text.

173 *See* CAL. PUB. RES. CODE § 3106(a) (West 2024).

174 *See id.*

175 *Chevron II*, 532 P.3d at 1123.

ballot initiative enacted to address the environmental effects of oil and gas production.[176] Ultimately, the *Chevron* court found that Measure Z's prohibitions on land uses in support of wastewater injection and the drilling of new wells were preempted by state law, but it failed to consider whether the prohibition on fracking was preempted due to a lack of standing.[177]

i. Justiciability: Standing & Ripeness

The concept of justiciability stems from the common law principle that courts should only decide *actual* controversies.[178] Essential to a determination of justiciability are the closely related doctrines of standing and ripeness.[179] Ripeness refers to the adequacy of the factual record and asks whether the court has enough information to "permit an intelligent and useful decision."[180] An unripe case is one in which the parties seek a judicial determination of a question of law despite the lack of an actual dispute or controversy.[181] In deciding whether a claim is ripe, courts evaluate both (1) "the fitness of the issues for judicial decision" and (2) "the hardship to the parties of withholding court consideration."[182] In the context of a request for declaratory or injunctive relief, standing and ripeness overlap, requiring a petitioner to show a "very significant possibility of future harm."[183] Past injury is insufficient.[184] However, California's

176 For more information on Measure Z, see *Measure Z*, PROTECT MONTEREY CNTY., https://protectmontereycounty.org/measure-z/ [https://perma.cc/8EAF-E2K8] (last visited Oct. 31, 2024).

177 *Chevron II*, 532 P.3d at 1123.

178 *See, e.g.*, Wilson & Wilson v. City Council of Redwood City, 120 Cal. Rptr. 3d 665, 677 (Cal. Ct. App. 2011); Ass'n of Irritated Residents v. Dep't of Conservation, 218 Cal. Rptr. 3d 517, 532 (Cal. Ct. App. 2017); Parkford Owners for a Better Cmty. v. County of Placer, 268 Cal. Rptr. 3d 653, 659 (Cal. Ct. App. 2020).

179 *See Parkford Owners for a Better Cmty.*, 268 Cal. Rptr. 3d at 659.

180 *Id.*; *see also* Cmtys. for a Better Env't v. State Energy Res. Conservation & Dev. Comm'n, 277 Cal. Rptr. 3d 486, 493–94 (Cal. Ct. App. 2017) ("[T]he ripeness doctrine is primarily bottomed on the recognition that judicial decisionmaking is best conducted in the context of an actual set of facts so that the issues will be framed with sufficient definiteness to enable the court to make a decree finally disposing of the controversy.") (quoting Pac. Legal Found. v. Cal. Coastal Comm'n, 655 P.2d 306, 314 (Cal. 1982) (en banc)).

181 *Cmtys. for a Better Env't*, 227 Cal. Rptr. 3d at 492.

182 Johnson v. Cal. Dep't of Health Care Servs., No. 22STCP00750, 2023 Cal. Super. LEXIS 20926, at *17 (Cal. Super. Ct. Apr. 4, 2023) (quoting Los Altos El Granada Invs. v. City of Capitola, 43 Cal. Rptr. 3d 434, 449 (Cal. Ct. App. 2006)).

183 Coral Constr., Inc. v. City of San Francisco, 10 Cal. Rptr. 3d 65, 73–74 (Cal. Ct. App. 2004). For more information on when an injunction may be granted by California courts, see CAL. CIV. PROC. CODE § 526 (West 2024).

184 *See* CIV. PROC. § 526.

standing requirements vary widely from statute to statute.[185] For example, California courts are imbued with discretion to waive the requirement that a plaintiff demonstrate a potential future injury where the claim is brought in the public interest.[186]

B. *Chevron U.S.A. Inc. v. County of Monterey*

In 2016, 73,877 Monterey County voters endorsed Measure Z.[187] The initiative faced tough opposition, in part due to the significant position Monterey County holds in California's oil industry, ranking fourth statewide in oil production.[188] Despite Big Oil's efforts to oppose Measure Z, local residents resonated with the grassroots campaign "Protect Monterey County" and its mission of "defend[ing] the right of all communities to protect their water, health and future."[189] Measure Z is comprised of three Monterey County ordinances: LU-1.21, LU-1.22, and LU-1.23.[190] When enforced, LU-1.21 would forbid the use of land "in support of well stimulation treatments" throughout Monterey County's unincorporated areas.[191] LU-1.22 would prohibit unincorporated land use "in support of oil and gas wastewater injection or oil and gas wastewater impoundment."[192] Finally, LU-1.23 would ban land uses that facilitate the drilling of new oil and gas wells in those same unincorporated areas of the county.[193] Identical provisions would also amend Monterey County's local

185 *See* CIV. PROC. § 367 ("Every action must be prosecuted in the name of the real party in interest, *except as otherwise provided by statute*.") (emphasis added).

186 *See, e.g.*, Hernandez v. Atl. Fin. Co., 164 Cal. Rptr. 279, 284 (Cal. Ct. App. 1980) (allowing a suit for an injunction *on behalf of the general public* under Section 17204 of the California Business Professions Code because "the statute . . . expressly authoriz[ed] the institution of action by any person on behalf of the general public").

187 *See Monterey County, California, Ban on Oil and Gas Drilling, Measure Z (November 2016)*, BALLOTPEDIA, https://ballotpedia.org/Monterey_County,_California,_Ban_on_Oil_and_Gas_Drilling,_Measure_Z_(November_2016) [https://perma.cc/UL4T-D53J] (last visited Nov. 1, 2024).

188 *See* Paul Rogers, *Fracking Ban: Environmentalists Declare Victory on Monterey Measure Z*, THE MERCURY NEWS (Nov. 9, 2016, 1:18 AM), https://www.mercurynews.com/2016/11/09/fracking-ban-environmentalists-declare-victory-on-monterey-measure-z/ [https://perma.cc/E5ZS-W4JS].

189 PROTECT MONTEREY CNTY., https://protectmontereycounty.org [https://perma.cc/CME2-QLRK] (last visited Oct. 31, 2024).

190 *See Chevron II*, 532 P.3d at 1122–23.

191 *Chevron I*, 285 Cal. Rptr. 3d at 250.

192 *Id.*

193 *Id.*

coastal program and its plan to revitalize the former Fort Ord military base.[194]

In *Chevron U.S.A. Inc. v. County of Monterey*, mineral rights holders Chevron U.S.A. Inc., Aera Energy LLC, California Resources Corporation, Trio Petroleum, and the National Association of Royalty Owners-California, Inc. brought an action for declaratory and injunctive relief, alleging that Measure Z was preempted by the COGA.[195] The California Supreme Court ultimately held that the COGA preempted ordinances LU-1.22 and LU-1.23, reasoning that said ordinances contradicted the COGA. The Court explained that because LU-1.22 prohibits the use of certain production techniques, it contradicts CalGEM's mandate, which requires the agency to "supervise oil operation[s] in a way that permits well operators to 'utilize *all* methods and practices' the supervisor has approved."[196] The *Chevron* court then compared the dispute over Measure Z to *Big Creek Lumber Co. v. County of Santa Cruz*, where the Court addressed a local ordinance that restricted timber harvesting and operations to certain zone districts and parcels.[197] The *Big Creek* court held that the local timber ordinance was not preempted because it only regulated *where* timber operations occurred in the locality—not *how* they were conducted in the state. The *Chevron* court reasoned that, unlike the *Big Creek* timber ordinance, Measure Z "usurped [CalGEM's] statutorily granted authority" to decide what methods are suitable in each proposed case.[198]

As to LU-1.23, the Court held that although the ordinance "appears to regulate *where* oil production can take place, i.e., nowhere in the County," its language was overbroad in that it encompassed oil production methods that "require[] the drilling of new wells—such as wastewater and steam injection wells—in order to continue extracting oil from existing oil fields."[199] The Court presumed that LU-1.23 was actually a covert attempt to ban methods of oil production merely because the ordinance described "the drilling of new oil wells as 'Risky Oil Operations.'"[200]

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194 *Id.*; *see also Fort Ord Property Development*, CITY OF MONTEREY, https://monterey.gov/city_hall/community_development/planning/planning_projects/fort_ord_property_development.php [https://perma.cc/YEK9-3S98] (last visited Dec. 15, 2024).

195 *Chevron II*, 532 P.3d at 1122 & n.1.

196 *Id.* at 1125 (quoting CAL. PUB. RES. CODE § 3106(b) (West 2024)).

197 Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 835–36 (Cal. 2006).

198 *Chevron II*, 532 P.3d at 1126 (quoting PUB. RES. § 3106(b)).

199 *Id.* at 1127.

200 *Id.* (alterations in original).

The Court declined to rule on the legality of LU-1.21's fracking ban due to a lack of standing, as no plaintiff was using nor proposing to use WSTs in Monterey County.[201] Regardless, the California Court of Appeal's opinion discusses SB 4's WST Sections.[202] Ultimately, the California Supreme Court refused to draw any connection between Measure Z's fracking prohibition and the WST Sections, holding that, at most, the WST Sections "*may* reflect a legislative intent to carve out [WSTs] as an area of shared regulatory authority."[203] In affirming the appellate court's judgment, the California Supreme Court explained that, under the COGA, the State's oil and gas supervisor retains the authority to determine permissible *methods* of oil and gas drilling.[204] In effect, *Chevron* ratifies CalGEM's extraction-heavy focus, rendering the agency's concurrent environmental directive superfluous by implying that CalGEM lacks the authority to deny or limit permits based on environmental considerations.

C. Is California *Really* Leading on Climate?

This Section compares the evolution of the oil and gas regulatory scheme and the prevalence of state-local preemption in California with that of Pennsylvania and Colorado to highlight the irrationality of the *Chevron* holding. Unlike lawmakers in Pennsylvania and Colorado, California's legislature has not expressed an intent to wholly supersede local regulatory authority over oil and gas activity. Instead, California has attempted to take heed of and respond to local concerns by expanding local authority over setback requirements and incorporating environmental directives into CalGEM's legislative mandate.[205] Although WST and fracking activity has increased significantly nationwide over the past two decades, it is generally less prevalent in California, where fracked wells have produced only twenty percent of the state's oil and gas production.[206] Additionally, California has adopted a comprehensive framework of climate policies underscoring its clear intent to transition from

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201 *See id.* at 1123.

202 *Chevron I*, 285 Cal. Rptr. 3d at 256 (first quoting PUB. RES. § 3160(n); and then citing PUB. RES. § 3161(b)(3)(C)); *see also id.* at 250 n.3 (stating that Chevron conceded at the outset of the Phase 1 trial that it was not using well stimulation techniques or hydraulic fracturing but argued that "the possibility that Chevron might in the future use well stimulation or may need to or may decide to [was] enough for standing").

203 *Chevron II*, 532 P.3d at 1126 n.6 (emphasis added).

204 *See id.* at 1125–26.

205 *See supra* Sections III.B–C.

206 *See* ELKIND & LAMM, *supra* note 7, at 4.

fossil fuels to renewable energy.[207] This framework clearly indicates that, in interpreting the COGA, courts must give weight to CalGEM's environmental directive. When taken together, the above factors suggest that, contrary to *Chevron*, local ordinances restricting fracking should be upheld as consistent with the evolution of CalGEM's mandate and California's twenty-first century climate policy, and as a necessary method of citizen enforcement.

i. Pennsylvania

Pennsylvania has experienced a recent expansion of fracking, with 7% of the state's labor income and 9% of the total gross domestic product coming from oil and gas activities.[208] Pennsylvania's Oil and Gas Act (PA Act) is similar in substance to the COGA in that it outlines the division of state-local regulatory authority and prohibits local ordinances restricting state development of oil and gas.[209] However, unlike the COGA, the PA Act was written so as to expressly preempt nearly *all* local oil and gas regulations, with the critical provision providing that "*all* local ordinances and enactments purporting to regulate oil and gas well operations are hereby superseded."[210] The PA Act also precluded local authority over the location of wells.[211]

In 2009, the Pennsylvania Supreme Court issued two decisions interpreting the PA Act before it was eventually repealed in 2012.[212] The Court outlined a method versus location distinction, holding that local governments retain authority over the location of wells while the state holds regulatory power over the methods utilized to operate the well.[213] Three years later, the

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207 *See* CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024).

208 *See New Analysis: Pennsylvania's Abundant Natural Gas and Oil Resources Provide over $75 Billion in Economic, Trade & Job Benefits*, AM. PETROLEUM INST. (May 16, 2023), https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-pa-2023 [https://perma.cc/Z6VC-2A5C].

209 58 PA. CONS. STAT. § 3304 (2012).

210 Oil and Gas Act, Pub. L. No. 223, § 601, 2 Pa. Laws 1140, 1180–81 (1984) (emphasis added) (current version at 58 PA. CONS. STAT. § 3302, *invalidated by* Pa. Gen. Energy Co., LLC v. Grant Twp., 139 F. Supp. 3d 706, 717 (W.D. Pa. 2015).

211 *See id.* § 205, at 1149–50 (current version at 58 PA. CONS. STAT. § 3215, *invalidated by* Robinson Twp. v. Commonwealth, 83 A.3d 901, 1000 (Pa. 2013).

212 *See* Act of Feb. 14, 2012, Pub. L. No. 13, § 3504(3), 1 Pa. Laws 87, 177; *see also* Huntley & Huntley, Inc. v. Borough Council, 964 A.2d 855, 863–64 (Pa. 2009); Range Res. Appalachia, LLC v. Salem Twp., 964 A.2d 869, 877 (Pa. 2009).

213 *See Huntley*, 964 A.2d at 863–64.

> [T]he closely-contested question centers on whether the *location* of a well in a particular zoning district constitutes a feature of a natural gas well operation

Pennsylvania legislature enacted Act 13, thereby enabling the state to expand the use of unconventional extraction methods in order to develop the Marcellus Shale Play, a shale formation estimated to contain up to ten percent of North America's natural gas deposits.[214] Shortly thereafter, Robinson Township, along with six other municipalities, two residents and elected local officials, a nonprofit environmental group, and a physician, filed a fourteen-count petition alleging that Act 13 violated Pennsylvania's Environmental Rights Amendment (ERA) codified in Article I, Section 27 of the Pennsylvania Constitution.[215] Ultimately, the Supreme Court of Pennsylvania held that Act 13's expansion violated "the commonwealth's duties as trustee of the public natural resources" under the ERA.[216]

The approach taken by the *Robinson Township* plaintiffs may prove useful for California's environmentalists. Besides California's aggressive climate policy, the state also has a public trust doctrine establishing citizens' rights to healthy natural resources, similar to Pennsylvania laws.[217] In *National Audubon*

> that is regulated by the Oil and Gas Act. On this topic, although Huntley develops that the Act places some restrictions on the siting of wells - most notably, setback requirements designed to prevent damage to existing water wells, buildings and bodies of water, as well as measures intended to protect attributes of Pennsylvania's landscape such as parks, forests, game lands, scenic rivers, natural landmarks, and historical and archeological sites, it does not automatically follow that the placement of a natural gas well at a certain location is a feature of its operation.

Id. (emphasis added) (citations omitted); *see also Range Res. Appalachia*, 694 A.2d at 877 (preempting a local ordinance that attempted to regulate surface and land development attendant to oil and gas drilling because it overlapped with state regulations by setting the *methods* of extraction, such as permitting procedures and imposed bonding requirements).

> [T]he Pennsylvania Supreme Court adopted a "how versus where" distinction . . . [in which] local governments retain limited control over the location of gas wells within their communities, but are preempted from regulating any aspect of the wells' operation, even if the operations affect the community's health, safety and welfare.

Kitze, *supra* note 70, at 399.

214 *See Robinson*, 83 A.3d at 915; *see also* John C. Dernbach, James R. May & Kenneth T. Krist, *Robinson Township v. Commonwealth of Pennsylvania: Examination and Implications*, 67 RUTGERS U. L. REV. 1169, 1169 (2015).

215 *See Robinson*, 83 A.3d at 913–14 (explaining the ERA provides that the people of Pennsylvania "have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment," and charges the state government, as trustee of these resources, with corresponding conservation and maintenance responsibilities) (citation omitted).

216 *Id.* at 984–85.

217 *See* Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L.Q. 53, 84–85 (2010).

Society v. Superior Court, the California Supreme Court invoked the public trust doctrine to protect California's water resources.[218] The Court explained that the public trust "is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands."[219] Since fracking is a water-intensive activity that involves the risk of water contamination "in all stages of the process," there is a real argument that the public trust doctrine should apply to uphold fracking ordinances that limit the fracking industry's water rights in order to remedy harm done to public trust waters.[220]

ii. Colorado

Colorado's oil and gas production statistics are similar to California's, with oil and gas reform emerging in 2018 in connection with the state's democratic transition.[221] However, unlike California, the economic benefits of oil and gas development are much more salient in Colorado.[222] For example, in 2021, the oil and gas industry provided 12% of Colorado's labor income, compared to only 5% of California's, and contributed 11% of Colorado's total gross domestic product, but only 6% of California's.[223] The Colorado Oil and Natural Gas Act of 1951 (CO Act) set forth a uniform framework for the development of a statewide oil and gas industry.[224] Among other things, it gave the Colorado Oil and Gas Commission (COGCC) authority to "make

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218 *See* Nat'l Audubon Soc'y v. Super. Ct., 658 P.2d 709, 732 (Cal. 1983).

219 *Id.* at 724.

220 Davenport, *supra* note 73 (stating an EPA report "found evidence that fracking has contributed to drinking water contamination in all stages of the process," from acquisition, preparation, underground injection, wastewater collection, and all the way through post-operation storage); *see* Kundis Craig, *supra* note 217 (explaining that environmentalists might invoke the public trust doctrine in response to excessive water extraction that impacts navigable waters or other fracking activities that risk polluting surface water or groundwater).

221 *See* ELKIND & LAMM, *supra* note 7, at 19; Tara K. Righetti, Hannah J. Wiseman & James W. Coleman, *The New Oil and Gas Governance*, 130 YALE L.J.F. 51, 65 (2020).

222 *New Analysis: California's Abundant Natural Gas and Oil Resources Provide over $217 Billion in Economic, Trade & Job Benefits* [hereinafter *California Analysis*], AM. PETROLEUM INST. (May 16, 2023), https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-ca-2023 [https://perma.cc/DT2G-YF82]; *New Analysis: Colorado's Abundant Natural Gas and Oil Resources Provide Over $48 Billion in Economic, Trade & Job Benefits* [hereinafter *Colorado Analysis*], AM. PETROLEUM INST. (May 16, 2023) https://www.api.org/news-policy-and-issues/news/2023/05/16/api-pwc-co-2023 [https://perma.cc/L92W-PSW8].

223 *California Analysis*, *supra* note 222; *Colorado Analysis*, *supra* note 222.

224 *See* Oil and Gas Conservation Act, ch. 230, 1951 Colo. Sess. Laws 651 (codified at COLO REV. STAT. § 34-60-101 (2024)).

and enforce rules, regulations, and orders pursuant to" the CO Act.[225] Similar to the PA Act, the CO Act provided for heavy state regulation up until the mid-1990s, when population growth led to an increase in land use and encroachment issues that largely stemmed from oil and gas development.[226]

Until recently, the Colorado Supreme Court has been unreceptive to environmentalists.[227] In *Colorado Oil and Gas Ass'n v. City of Longmont*, the Court struck down a municipal charter provision that banned fracking and the storage and disposal of fracking waste, holding it was preempted by the CO Act.[228] In *Martinez v. Colorado Oil & Gas Commission*, plaintiffs, a group of youth activists, brought a suit to determine whether the COGCC, in accordance with the CO Act, properly declined to engage in rulemaking to consider a proposed rule.[229] Among other things, the rule would have prohibited the COGCC from issuing drilling permits "unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change."[230] For support, the plaintiffs cited the Colorado General Assembly's declaration calling for responsible and balanced oil and gas development, carried out "*in a manner consistent with* . . . protection of the environment."[231]

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225 COLO. REV. STAT. § 34-60-105(1)(a).

226 *See* Ralph A. Cantafio, *The Changing Landscape of Land Use Law and Regulations Impacting the Colorado Oil and Gas Industry: From the Colorado Oil and Gas Conservation Act of 1951 to Senate Bill 181 of 2019*, 6 TEX. A&M J. PROP. L. 31, 33 (2020) (explaining that at the time the CO Act was passed, Colorado's population was 1,325,089, but by 2015, it had grown to 5,456,571).

227 *See, e.g.*, City of Longmont v. Colo. Oil & Gas Ass'n, 369 P.3d 573, 577 (Colo. 2016); City of Fort Collins v. Colo. Oil & Gas Ass'n, 369 P.3d 586, 589 (Colo. 2016).

228 *See* Colo. Oil & Gas Ass'n v. City of Longmont, No. 13CV63, 2014 WL 3690665, at *14 (Colo. Dist. Ct. July 24, 2014); *see also* Voss v. Lundvall Bros., 830 P.2d 1061, 1067 (Colo. 1992) (explaining that Colorado courts consider four factors when faced with a preemption question: "whether there is a need for statewide uniformity of regulation; whether the municipal regulation has an extraterritorial impact; whether the subject matter is one traditionally governed by state or local government; and whether the Colorado Constitution specifically commits the particular matter to state or local regulation").

229 *See* Colo. Oil & Gas Conservation Comm'n v. Martinez, 433 P.3d 22, 24–25 (Colo. 2019).

230 *Id.* at 25.

231 *Id.* at 26; *see* COLO. REV. STAT. §§ 34-60-102(1)(a)(I), 34-60-105(1) (2024); *see also id.* § 34-60-106(2)(a) (providing that COGCC has broad authority to "make and enforce rules, regulations, and orders" and "to do whatever may reasonably be necessary" to carry

The COGCC refused to consider the proposed rule, claiming a lack of statutory authority under the CO Act to "readjust" the balance of its mandate and "conditio[n] new oil and gas drilling on a finding of no cumulative adverse impacts."[232] In response, the *Martinez* plaintiffs argued that the COGCC's interpretation rendered the phrase "in a manner consistent with . . . protection of the environment" superfluous.[233] The Denver District Court upheld the COGCC's decision, but a divided Court of Appeals reversed, holding that the COGCC erred in interpreting its mandate as requiring a balancing between development and environmental considerations. Rather, the court held that the COGCC was responsible for fostering balanced development in the public interest by developing *subject to* the protection of the environment.[234] In other words, the court determined the phrase "in a manner consistent with" denoted "*more* than a mere balancing."[235]

In support of its holding, the court cited "the evolution of the General Assembly's regulation of the oil and gas industry in Colorado and its numerous alterations to the language of the Act," which originally "contained no qualifying language" regarding environmental protections.[236] The court reasoned that these alterations "reflect[ed] the General Assembly's general movement away from unfettered oil and gas production and the incorporation of public health, safety, and welfare as a check on that development."[237] The Supreme Court of Colorado thereafter reversed, holding that the COGCC did not have the authority to

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out the provisions of the CO Act, and is thereby authorized to regulate "the drilling, producing, and plugging of wells and all other operations for the production of oil and gas").

232 *Colo. Oil & Gas Conservation Comm'n*, 433 P.3d at 25.

> It is declared to be in the public interest and the commission is directed to . . . [r]egulate the development and production of the natural resources of oil and gas in the state of Colorado in a manner that protects public health, safety, and welfare, including protection of the environment and wildlife resources.

COLO. REV. STAT. § 34-60-102(1)(a)(I).

233 *Colo. Oil & Gas Conservation Comm'n*, 433 P.3d at 26.

234 Martinez v. Colo. Oil & Gas Conservation Comm'n, 434 P.3d 689, 693 (Colo. App. 2017).

235 *Id.* (emphasis added).

236 *Id.* at 694–95. Until 1994, the CO Act read: "It is hereby declared to be in the public interest to foster, encourage, and promote the development, production, and utilization of the natural resources of oil and gas in the state of Colorado." *Id.* at 695 (quoting Oil and Gas Conservation Act, ch. 208, sec. 10, § 100-6-22, 1955 Colo. Sess. Laws 648, 657). The language, "in a manner consistent with protection of public health, safety, and welfare," was added in 1994. *Id.* (citation omitted). In 2007, the CO Act was completed with the addition of an amendment stating: "It is declared to be in the public interest to foster . . . responsible, balanced [resource] development." *Id.* (citation omitted).

237 *Martinez*, 434 P.3d at 695.

condition development on a finding of no adverse environmental impacts and could only consider such impacts *after* taking into consideration cost-effectiveness and technical feasibility.[238]

Although this judicial assist saw Colorado-based Big Oil companies gain yet another win, the glory was short-lived. Colorado's 2018 elections resulted in a huge win for Democrats, who swiftly moved to restructure the COGCC's regulatory mandate after gaining control of both houses.[239] On April 3, 2019, the General Assembly passed SB 19-181, Protect Public Welfare Oil and Gas Operations ("SB 181").[240] Although SB 181 made many changes to the state's regulatory scheme, "the most pivotal change was the legislature's placement of the regulation of the surface impacts of oil and gas exploration firmly in the control of local communities, as coequals with the state."[241] This directly undermined Colorado Supreme Court precedent, which routinely interpreted state law as setting the ceiling, rather than the floor, for local regulation.[242] In effect, it signaled a departure from state preemption of local control "in a major producing state [which] might portend a broader shift toward local governance" in the oil and gas field.[243] Most notably, SB 181's amendment of the COGCC's mission "from fostering the development of oil and gas to regulating it" marked a direct rejection of the commission's disproportionate focus on development.[244]

iii. California

a. Local Authority Over Zoning & Land Use Issues Is Well Settled in California

Compared to Pennsylvania and Colorado, local authority over zoning and land use issues in California has been well settled for decades: "Nearly a century ago, the California Supreme Court . . . acknowledged that local regulation of 'the business of operating oil wells' was properly within the local entity's police power."[245] Conversely, it took the Pennsylvania legislature until 2012 to repeal certain express preemption

238 *See Colo. Oil & Gas Conservation Comm'n*, 433 P.3d at 25.

239 *See* Daniel E. Kramer, *Springtime for Home Rule over Oil and Gas*, 48 COLO. LAW. 36, 36 (2019).

240 *Id.*

241 *Id.*

242 *See id.*

243 Righetti, Wiseman & Coleman, *supra* note 221, at 65.

244 Kramer, *supra* note 239, at 39.

245 *Chevron I*, 285 Cal. Rptr. 3d at 256–57 (citation omitted).

provisions.[246] Colorado experienced similar stagnation until 2019, when a state democratic shift produced environmentally focused regulatory amendments that are arguably more progressive and innovative than California's.[247] This is surprising in light of the scholarly consensus as of 2017, which posits that "California's legal structure concerning home-rule authority and fracking regulation suggests that local fracking bans stand a better chance of surviving a preemption challenge in California than they d[o] in Colorado."[248]

b. Strict Adherence to the Contemporaneous Administrative Construction Doctrine Produces Absurd Results

The *Chevron* court found that the contemporaneous administrative construction weighs in favor of preemption and, therefore, that the WST Sections do not *necessarily* expand local authority to encompass regulatory power over certain production methods. The contemporaneous construction doctrine provides that "a court or agency decision or practice interpreting an ambiguous statute may be considered a contemporaneous construction."[249] Although the *Chevron* court avoided ruling on the status of Monterey's fracking ordinance, the state's well-settled recognition of local zoning authority and the doctrine of stare decisis suggest that California courts should avoid rigid adherence to the contemporaneous administrative construction doctrine.

Previously, in *Big Creek Lumber*, the California Supreme Court listed factors courts should consider when determining the scope of local authority under a state statute, including legislative history, contemporaneous administrative construction, and public policy.[250] Like in *Big Creek Lumber*, the legislative history of the COGA "expressly preserves and plainly contemplates the exercise

246 *See* 58 PA. CONS. STAT. § 601.205 (2012).

247 *See* Kramer*, supra* note 239, at 36–37.

248 William C. Mumby, *Trust in Local Government: How States' Legal Obligations to Protect Water Resources Can Support Local Efforts to Restrict Fracking*, 44 ECOLOGY L.Q. 195, 221 (2017).

249 Small Bus. in Telecomms. v. Fed. Commc'ns Comm'n, 251 F.3d 1015, 1022 n.9 (D.C. Cir. 2001).

250 Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 829 (Cal. 2006) (listing the relevant factors for analysis as the "ostensible objects to be achieved, the evils to be remedied, the legislative history, public policy, contemporaneous administrative construction, and the statutory scheme of which the statute is a part").

of local authority."[251] Furthermore, the addition of the WST Sections and its language permitting local lead agencies to conduct their own fracking-related environmental impact review lends credence to the local concern that states generally "lack information regarding the localized impacts of fracking operations."[252] By giving disproportionate weight to the contemporaneous administrative construction doctrine, the *Chevron* court effectively ratifies CalGEM's disregard of its environmental mandate. Consequently, *Chevron* widens the climate action gap by directly contradicting legislative intent to reorient CalGEM's focus so as to encompass greater environmental considerations.

c. *Chevron*'s Preemption of Measure Z's Drilling Ban Creates Greater Confusion

By mischaracterizing Measure Z's drilling ban as an improper regulation of a "method" or "manner" of extraction in order to simultaneously justify preemption and avoid undermining local zoning authority, *Chevron* creates greater confusion regarding the method versus location distinction and negates the primary benefit of preemption: uniformity.[253] It is likely the court itself recognized this fallacy, as footnote nine potentially concedes that Measure Z could be fairly categorized as a "land use ordinance," which would warrant a presumption against preemption.[254] Nevertheless, the *Chevron* court doubled down: "Regardless of whether Measure Z qualifies as a 'land use ordinance,' . . . any presumption that might apply is amply rebutted by the fact that the measure clearly contradicts" the state's authority to regulate extraction methods in the interest of maximizing recovery. [255] As a result, the *Chevron* opinion fails to provide any clarification regarding how courts should interpret land use ordinances that also address fracking. While fracking proponents would argue that Measure Z's fracking ban is distinct from the drilling prohibition in that it references WST methods rather than just drilling, it can just as easily be understood as a "prohibition[] on oil production based on zoning laws."[256]

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251 *Id.*; *see also* CAL. PUB. RES. CODE § 3690 (West 2024) ("This chapter shall not be deemed a preemption by the state of any existing right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities.").

252 Elena Pacheco, *It's a Fracking Conundrum: Environmental Justice and the Battle to Regulate Hydraulic Fracturing*, 42 ECOLOGY L.Q. 373, 377 (2015).

253 *See Chevron II*, 532 P.3d at 1127.

254 *See id.* at 1129 n.9.

255 *Id.*

256 *See id.* at 1127.

d. The 1976 AG Opinion Does *Not* Support Preemption of Measure Z's Drilling Ban

Prior to *Chevron*, the California Supreme Court did not address the preemptive effect of the COGA and instead relied on a 1976 opinion by the California Attorney General (AG Opinion) that affirmed local prohibitory power is not preempted under the COGA so long as it does not address the "manner" of extraction.[257] Until the *Chevron* opinion, the AG Opinion's interpretation of the COGA had "stood the test of time," and its clear and comprehensive guidance regarding the balance between state and local authority likely explained the lack of judicial opinions interpreting the COGA.[258] Among other things, the AG Opinion concluded that the state retains authority over "technical aspects of exploration and production," whereas local governments may exercise authority with respect to "land use, environmental protection, aesthetics, public safety, and fire and noise prevention."[259] For example, a law assigning permitting authority to the state would not preempt "a valid prohibition of drilling . . . by a county or city in all or part of its territory."[260] Thus, at the very least, an application of the AG Opinion suggests that Measure Z's drilling prohibition should *not* have been preempted.

The uncertainty created by *Chevron*'s conclusion that Measure Z's drilling prohibition impermissibly attempts to regulate production "methods" also increases the "unwarranted litigation risk for local governments" and "threatens to convert [the COGA] into a cudgel the oil industry can use to threaten cities and counties over virtually any local oil and gas zoning regulation—even regulations that would *permit* the drilling of new oil and gas wells as a conditional use."[261] Like the *Martinez* plaintiffs, who argued that the COGGC's interpretation of its mandate rendered its environmental directives superfluous, California environmentalists have warned that CalGEM's interpretation "creates a danger of placing profits over environmental protection."[262]

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257 *See* 59 Op. Cal. Att'y Gen. 461 (1976), 1976 Cal. AG LEXIS 82.

258 *See* Petition for Review at 32, *Chevron II*, 532 P.3d 1120 (No. 16-CV-3978), https://www.biologicaldiversity.org/programs/climate_law_institute/pdfs/21-11-19-PMC-Solorio-Petition-for-Review.pdf [https://perma.cc/2LGB-KS5V].

259 *Id.* at 30, 32.

260 *Id.* at 30–31 (alteration in original).

261 *Id.* at 33–34.

262 Hedemark, *supra* note 113, at 128.

e. *Chevron* Fails to Meet California's Heightened, Stringent Standard for Preemption

When considered in light of the COGA's Section 3012, which allows local prohibitions on "the drilling of oil wells," and the AG Opinion, *Chevron*'s conclusion that Measure Z impermissibly attempts to regulate production "methods" defies the court's own heightened, stringent standard for preemption.[263] The California Supreme Court has repeatedly held that "absent a *clear* indication of preemptive intent from the Legislature," traditional exercises of local land use authority are presumed to survive preemption.[264] In the court's own words, preemption is only implicated where the state law is "so overshadowing that it obliterates all vestiges of local power as to a subject where municipalities have traditionally enjoyed a broad measure of autonomy."[265]

f. *Chevron* Contradicts Legislative Intent to Expand Shared Regulatory Authority

Unlike Pennsylvania and Colorado pre-SB 181, the California legislature has never evinced a clear intent to establish exclusive state regulatory authority over oil and gas activities. In fact, there is greater legislative support for the opposite conclusion. The evolution of CalGEM's mandate, like the COGCC's, reflects a shift from prioritizing recovery to incorporating environmental considerations.[266] Legislative history confirms that California has never enacted a law similar to Pennsylvania's Act 13 that establishes or "require[s] . . . local governments [to] allow oil and gas development as of right throughout their communities."[267] As of the *Chevron* decision, the legislature has not enacted any subsequent amendments restricting CalGEM's environmental directives or prioritizing the expansion of WSTs such as fracking.[268] To the contrary, California has taken action to *preserve and strengthen* local authority, as evidenced by SB 4's savings clause, which provides

263 *See Chevron II*, 532 P.3d at 1127; CAL. PUB. RES. CODE § 3012 (West 2024); Big Creek Lumber Co. v. County of Santa Cruz, 136 P.3d 821, 830 (Cal. 2006).

264 *Big Creek Lumber Co.*, 136 P.3d at 827 (emphasis added); *see also* City of Riverside v. Inland Empire Patients Health & Wellness Ctr., Inc., 300 P.3d 494, 499 (Cal. 2013).

265 *Big Creek Lumber Co.*, 136 P.3d at 830 (citation omitted).

266 *See Chevron I*, 285 Cal. Rptr. 3d at 254–55.

267 Richardson, *supra* note 165, at 617; *see also* 58 PA. CONS. STAT. § 3304(b)(5) (2024), *invalidated by* Robinson Twp. v. Commonwealth, 83 A.3d 901, 977–82 (Pa. 2013).

268 *See Chevron II*, 532 P.3d at 1125.

that CalGEM must still comply with existing local laws and regulations.[269]

Moreover, *Chevron*'s conclusion that the legislature intended for Section 3012 to preclude local authority over the "conduct . . . of oil production activities" is illogical when the time of enactment and the statutory language of each provision is considered.[270] In 1961, the California legislature added Section 3012 for the purpose of acknowledging that cities may prohibit "the drilling of oil wells."[271] Section 3690, added in 1971, provides:

> This chapter shall not be deemed a preemption by the state of any *existing* right of cities and counties to enact and enforce laws and regulations regulating the conduct and location of oil production activities, including, but not limited to, zoning, fire prevention, public safety, nuisance, appearance, noise, fencing, hours of operation, abandonment, and inspection.[272]

Notably, Section 3690, enacted ten years after Section 3012, uses the language "*existing* right of cities and counties."[273] Thus, the legislature clearly considered cities and counties to have regulatory authority over oil and gas operations as early as 1961.[274] Despite having access to such a sizable legislative record, unlike the Colorado Court of Appeals, the *Chevron* court gave it little to no weight in its ultimate decision to ratify CalGEM's extraction-friendly focus.[275]

D. How *Chevron* Exacerbates the Climate Action Gap

> *"Local governments' most basic responsibility is to safeguard community health and safety. But they can't fight pollution or climate change if they don't have the full range of tools to address oil and gas projects in their own backyards."*
>
> — Stephen Jenkins[276]

Giving the "recovery authority controlling weight" would be a nonissue were it not for California's explicit goal of achieving

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269 *See* CAL. PUB. RES. CODE § 3160(n) (West 2024).

270 *Chevron II*, 532 P.3d at 1126 n.6.

271 *See* PUB. RES. § 3012.

272 *Id.* § 3690 (emphasis added).

273 *Id.* (emphasis added).

274 *See id.* § 3012.

275 *See Chevron II*, 532 P.3d at 1129.

276 Stephen Jenkins, *New California Bill Aims to Restore Local Governments' Ability to Limit or Ban Certain Oil and Gas Extractions*, JD SUPRA (Apr. 4, 2024), https://www.jdsupra.com/legalnews/new-california-bill-aims-to-restore-6489341/ [https://perma.cc/N9JD-9AD3].

net-zero by 2045 and the embarrassingly low levels of progress achieved thus far. Such lackluster progress has left local governments disillusioned and with no other option but to adopt a grassroots approach to environmentalism.[277] The longer this trend continues, the greater the likelihood of the emergence of "hyper preemption," a form of preemption involving "intentional, extensive, and sometimes punitive state efforts to block local action across a wide range of domains."[278] Hyper preemption often consists of "state laws displacing local regulation of a subject without putting state regulation in its place."[279]

Chevron is indicative of hyper preemption because it effectively leaves Californians without any regulatory authority that is incentivized to genuinely prioritize environmental considerations. Although the state has designated CalGEM responsible for promulgating regulations that both maximize extraction *and* comport with the state's environmental objectives, the agency has disproportionately focused on maximization to the detriment of environmentalism. By preempting local oil and gas ordinances, courts allow the legislature to shirk the concerns underlying local initiatives while simultaneously stripping local governments of the power to close the climate action gap. Thus, instead of addressing environmental issues, preemption widens the action gap by precluding local environmentally conscious regulation and "replacing" it with a "sham" environmental directive that, in practice, lacks substance.[280]

Given that the rise of hyper preemption is largely shaped by Republican policies and the polarized, partisan state of modern American politics, its emergence in California—a "blue state" that often touts its liberal policies as one of the main driving factors of its economic success—would be politically

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277 *See, e.g.*, Samantha Maldonado, Bruce Ritchie & Debra Kahn, *Plastic Bags Have Lobbyists. They're Winning.*, POLITICO (Jan. 20, 2020, 8:11 AM), https://www.politico.com/news/2020/01/20/plastic-bags-have-lobbyists-winning-100587 [https://perma.cc/Y3NB-EMTK] (explaining how California environmentalists used local grassroots momentum to win a referendum upholding a plastic bag ban in 2016, overcoming a $5.5 million campaign by the bag alliance in the process).

278 Briffault, *supra* note 134, at 251 (listing this "wide range of domains" as including firearms regulation, the treatment of immigrants, workplace equity, environmental protection, anti-discrimination laws, and more).

279 *Id.* at 260 (stating that hyper preemption often consists of state laws displacing local regulation of a subject without putting state regulation in its place).

280 *See id.*

embarrassing.[281] At the local level, it would likely increase distaste for the state government. At the national level, strict preemption of local fracking ordinances would degrade the climate policies that qualify California as a climate and clean energy leader: policies such as the nation's first economy-wide greenhouse gas limit, or the state's commitment to terminating "the issuance of new hydraulic fracturing permits by 2024."[282] On a global scale, the consequences can hardly be understated.

VI. CAPTURE BY BIG OIL

A. Routine State-Local Preemption Perpetuates Capture & Exacerbates the Climate Action Gap

Despite California's aggressive climate policy and purported "divorce" from Big Oil, Pennsylvania and Colorado—states with (apparently) less stringent environmental policies and greater oil and gas interests than California—have been more receptive to local environmental fracking initiatives.[283] This Note suggests that this discrepancy may be due to the pervasive effect of capture, which has directly undermined California's "innovative" climate policies. In California, Big Oil has exerted its influence and "captured" oil and gas regulations in eight different ways:

> (1) lobbying; (2) campaign spending; (3) serving on and putting shills on regulatory panels; (4) creating Astroturf groups; (5) working in collaboration with media; (6) sponsoring awards ceremonies and dinners, including those for legislators and journalists; (7) contributing to nonprofit organizations; and (8) creating alliances with labor unions, mainly construction trades.[284]

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281 *See id.*; *see also, e.g.*, ALEXANDER HERTEL-FERNANDEZ, STATE CAPTURE: HOW CONSERVATIVE ACTIVISTS, BIG BUSINESSES, AND WEALTHY DONORS RESHAPED THE AMERICAN STATES – AND THE NATION 238–42 (2019) (describing how state legislatures have preempted progressive, local legislation); Maldonado, *supra* note 277; Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 1997–98 (2018) ("[T]he preponderance of new preemption actions and proposals have been advanced by Republican-dominated state governments, embrace conservative economic and social causes, and respond to . . . relatively progressive city regulations.").

282 *See, e.g.*, CAL. HEALTH & SAFETY CODE § 38562.2(c)(1) (West 2024); *see also* Cal. Exec. Order No. N-79-20 (Sept. 23, 2020), https://www.gov.ca.gov/wp-content/uploads/2020/09/9.23.20-EO-N-79-20-Climate.pdf [https://perma.cc/4Y2W-D4YT].

283 Sabrina Valle, *California and Big Oil Are Splitting After Century-Long Affair*, REUTERS (Jan. 29, 2024, 3:36 PM), https://www.reuters.com/sustainability/climate-energy/california-big-oil-are-splitting-after-century-long-affair-2024-01-29 [https://perma.cc/K3Z6-ZBDV]; *see supra* Section V.C.

284 Bacher, *supra* note 130.

As a result, *Chevron*'s holding bears larger, unforeseen consequences. By suggesting that courts may give greater weight to CalGEM's recovery mandate, *Chevron* perpetuates capture by (1) ratifying CalGEM's extraction-heavy focus, (2) generating unnecessary confusion regarding the scope of local land use authority, and (3) degrading California's well-settled, heightened preemption standard.[285] Consequently, *Chevron* will likely encourage environmentally adverse Big Oil litigation, thereby exacerbating state-local tensions and generating additional obstructions to the achievement of California's climate targets.[286]

B. Regulatory Capture

> *"California's regulatory record on oil and gas does not justify claims that it has the toughest environmental regulations in the world."*
>
> — John Fleming[287]

Regulatory capture occurs when "organized groups successfully act to vindicate their interests through government policy at the expense of the public interest."[288] Policies that contradict "the public interest are those that would be difficult to defend to an informed and neutral observer on the grounds of social welfare, efficiency, distributional equity, or the fulfillment of moral duties."[289] Generally, organized interest groups exert influence through mechanisms such as campaign contributions in exchange for friendly agency oversight (or, in many cases, a lack thereof).[290]

C. Agency Capture

> *"No program of environmental regulation is better than its enforcement system."*
>
> — Peter Seth Menell & Richard B. Stewart[291]

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285 *See supra* Section V.C.iii.

286 *See* ELKIND & LAMM, *supra* note 7, at 32–33.

287 Fleming, *supra* note 77, at 14.

288 Livermore & Revesz, *supra* note 33, at 1343; *see also* DANIEL CARPENTER & DAVID MOSS, *Introduction to* PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 13 (2014) (defining capture as "the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interests of the regulated industry, by the intent and action of the industry itself").

289 Livermore & Revesz, *supra* note 33, at 1343.

290 *See id.*

291 PETER SETH MENELL & RICHARD B. STEWART, ENVIRONMENTAL LAW AND POLICY 531 (1994).

Agency capture is an offshoot of regulatory capture whereby "regulators within the bureaucracy" are influenced to adopt policies in favor of special interests to the detriment of the public interest.[292] One example of an environmental anti-capture measure is the citizen suit provision, which allows citizens to bring suit against violators of environmental statutes independent of the regulatory agency.[293] Congress first addressed the issue of agency capture in the early 1970s.[294] In response to criticism that regulatory agencies were particularly susceptible to capture by special interests, Congress imposed additional controls on environmental agencies to "reduce administrative discretion and expand public participation."[295]

Scholarship suggests that agency bias towards overregulation manifests from a conglomeration of agency behavior related to self-aggrandizement, risk aversion, and a steadfast commitment to the mandate.[296] The self-aggrandizement theory argues that agency officials adopt an economic mindset and aim to increase their "salary, prerequisites of the office, public reputation, power, patronage, [and the] output of the bureau" by maximizing their agency's performance.[297]

The self-aggrandizement theory is clearly present in California, where Big Oil has been successful at placing shills on regulatory panels.[298] While CalGEM officials often go on to work for the oil and gas industry, many have been terminated due to conflicts of interest and the inability to view their agency position as anything more than a protracted, private-sector job interview.[299] For example, in 2019, Governor Newsom fired former Oil & Gas Supervisor Ken Harris in light of a watchdog report that revealed Harris "had personal investments in a dozen

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292 *Id.*; *see also* Matthew D. Zinn, *Policing Environmental Regulatory Enforcement: Cooperation, Capture, and Citizen Suits*, 21 STAN. ENV'T L.J. 81, 82 (2002) ("Many commentators have come to believe that the adversarial interest group politics of pollution regulation create massive transaction costs and that those costs should encourage agencies and interest groups to adopt cooperative approaches to problem-solving.").

293 *See* Zinn, *supra* note 292, at 84.

294 *See id.* at 83.

295 *Id.*

296 Livermore & Revesz, *supra* note 33, at 1351.

297 *Id.* at 1351 (alteration in original) (noting, however, that a *concrete* link between agency budgets and regulatory overzealousness has not been established).

298 *See* discussion *infra* notes 300–301.

299 *See* Fleming, *supra* note 77, at 14.

of the world's top petroleum companies."[300] In 2023, Udak-Joe Ntuk resigned from his position as California's Oil & Gas Supervisor "against the backdrop of a 745% uptick in new oil drilling permits issued in the fourth quarter of 2022."[301] According to consumer advocate Liza Tucker, "CalGEM had gone rogue in permitting oil and gas wells."[302] Although Ntuk claimed CalGEM's main priority is protecting the environment and public health, the agency's budget requests stated it lacked the resources needed to "prosecute enforcement actions in a timely manner" and "adequately protect the health and safety of the citizens of the state."[303] Kobi Naseck, Coalition Coordinator of Voices in Solidarity Against Oil in Neighborhoods, has petitioned Governor Newsom "to appoint a leader who will enable CalGEM to do what Supervisor Ntuk could not: . . . *actually* do its job of regulating oil and gas."[304] Interestingly, Naseck invoked the term "capture" when expressing suspicion as to whether CalGEM's "new leader will be another Big Oil-captured official or someone who is actually up to the task."[305]

Agencies may subscribe to the "precautionary principle" and engage in risk-averse behavior, especially in light of scientific uncertainty, or conversely, they may use such uncertainty to ignore risks rather than regulate them.[306] To avoid being replaced, agency officials may seek to curb regulatory costs by shying away from proactive practices meant to prevent

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300 Ann Alexander, *Governor Newsom Starts to Lead California Out of Its Oily Mire*, NRDC (Sept. 20, 2019), https://www.nrdc.org/bio/ann-alexander/gov-newsom-starts-lead-california-out-its-oily-mire [https://perma.cc/GZ8N-4GY7].

301 Dan Bacher, *Breaking: Top California Oil Regulator Resigns After a 745% Uptick in New Oil Drilling Permits*, CONSUMER WATCHDOG (Jan. 19, 2023), https://consumerwatchdog.org/in-the-news/breaking-top-california-oil-regulator-resigns-after-a-745-uptick-in-new-oil-drilling-permits/ [https://perma.cc/76LC-ZFPQ].

302 *Id.*

303 Wilson, *supra* note 24 (explaining that in 2019 and 2020, CalGEM issued only 35 out of 87, and 19 out of 138, respectively, of the orders requested by staff, although the agency itself declined to provide the final count).

304 Bacher, *supra* note 301 (emphasis added).

305 *Id.*

306 *See* Cass R. Sunstein, *The Paralyzing Principle*, REGULATION, Winter 2002–2003, at 32, 32; *cf.* Thomas O. McGarity, *Our Science Is Sound Science and Their Science Is Junk Science: Science-Based Strategies for Avoiding Accountability and Responsibility for Risk-Producing Products and Activities*, 52 U. KAN. L. REV. 897, 934 (2004); Wendy E. Wagner, *The "Bad Science" Fiction: Reclaiming the Debate over the Role of Science in Public Health and Environmental Regulation*, 66 LAW & CONTEMP. PROBS. 63, 64–67 (2003).

regulatory failures.[307] They may also attempt to reduce agency expenditures by practicing "cooperative enforcement," negotiating and compromising with violators rather than punishing noncompliance by administrative or judicial action.[308] The primary danger of cooperative enforcement is the significant risk that cooperation will turn into collusion: "that agencies will be *too* nice, letting bad actors get away with prolonged and significant violations of the law."[309]

In California, agency capture has rendered CalGEM predisposed to ignore risks rather than regulate them. A 2022 audit of CalGEM's injection and WST programs revealed that the agency approved dozens of injection projects under "dummy" files in order to avoid regulatory review.[310] Despite environmental disasters such as the Aliso Viejo Canyon leak, CalGEM continues to refrain from bringing noncompliance actions in response to illegal pollution, instead choosing to engage in cooperative enforcement.[311] For example, in response to a 2019 oil investigator's concern that Nasco Petroleum was injecting water at pressure levels that exceeded the legal limit, thus increasing the risk of rupture and water contamination, CalGEM did not order Nasco to cease operations or suspend permit approvals. Instead, the agency stated it had "taken less stringent measures," choosing to "proactively engage with operators at risk of non-compliance"—a clear indication of cooperative enforcement.[312]

Even in light of legislation such as SB 1137, which established a 3,200-foot setback requirement for new wells, the number of rework permits issued has increased by seventy-six percent.[313] Although local zoning authority has been established in California for over a century, "[m]ore than half of these permits were for wells located within 3,200 feet of homes, schools,

307 *See* Livermore & Revesz, *supra* note 33, at 1352 ("Costs are often immediate and felt by an identifiable and concentrated group, whereas the benefits of regulating often address latent, long-term risks experienced by a diffuse population.").

308 *See* Zinn, *supra* note 292, at 83.

309 *Id.*

310 *See* OFF. OF STATE AUDITS & EVALUATIONS, DEP'T OF FIN., REP. NO. 20-3480-030, CALIFORNIA DEPARTMENT OF CONSERVATION, UNDERGROUND INJECTION CONTROL AND WELL STIMULATION TREATMENT PROGRAMS, PERFORMANCE AUDIT 24 (2020).

311 *See* Wilson, *supra* note 24.

312 *See id.*

313 For updates on CalGEM's permitting review, see Kyle Ferrar, *CalGEM Permit Review Q1 2023: Well Rework Permits Increase by 76% in California*, FRACTRACKER ALLIANCE (Apr. 14, 2023), https://www.fractracker.org/2023/04/calgem-permit-review-q1-2023/ [https://perma.cc/M56Q-8PPU].

healthcare facilities, or other sensitive receptors."[314] Although CalGEM has severely decreased the issuance of new drilling permits, any environmental or public health benefits have been effectively reduced by the dramatic increase in rework permits.[315]

Data suggests that Governor Newsom's characterization of CalGEM's enforcement efforts as "very aggressive" is a mere half-truth.[316] From 2018 to 2020, less than twenty percent of CalGEM enforcement orders were actually implemented, and in 2020, CalGEM collected zero dollars in fines from the $191,669 it issued in civil penalties.[317] From 2015 to 2020, CalGEM received a generous budget of nearly $80 million to establish a centralized public enforcement database, yet it failed to do so despite the fact that Texas was able to accomplish the same with a budget of only $105,000.[318]

In response to watchdog reports, some legislators have called for an oversight hearing and are considering legislation "to tighten CalGEM's enforcement" and increase transparency.[319] State Senator Henry Stern has echoed these concerns, stating that "[i]f [CalGEM] is either unable or unwilling to do the job, then the Legislature is going to have to force them to do it."[320] As stated by an organizer for the Central California Environmental Justice Network, "CalGEM issuing hundreds of permits to negligent oil companies so they can continue drilling in our communities just months after they released an emergency rule to block neighborhood drilling is exactly why [local frontline communities] don't trust them."[321] In essence, by prioritizing extraction rather than environmental considerations, CalGEM continues to frustrate state-local tensions and exacerbate the climate action gap, forcing local citizens to either take up environmental causes themselves or hold out for genuine legislative or judicial intervention.

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314 *Id.*

315 *See id.*

316 *See* Wilson, *supra* note 24.

317 *Id.*

318 *Id.*

319 *Id.*

320 *Id.*

321 Dan Bacher, *Climate Activists Protest Approval of Hundreds of Neighborhood Oil Drilling Permits in California*, CONSUMER WATCHDOG (Mar. 17, 2023), https://consumerwatchdog.org/in-the-news/the-daily-kos-climate-activists-protest-approval-of-hundreds-of-neighborhood-oil-drilling-permits-in-california/ [https://perma.cc/D8US-8N69].

D. Legislative & Executive Capture

While recent legislation clearly shifts CalGEM's mandate to prioritize public health and the environment, state policymakers have fallen prey to the influence of capture, leaving California's climate policy toothless in the absence of judicial correction. In 2023, two-thirds of the bills opposed by Big Oil were extinguished in light of an alliance with the building trades union.[322] Although environmentally friendly laws such as AB 1057 suggest that the California legislature has not been subject to capture by Big Oil, the state has struggled to make any real environmental progress.[323] In 2022, the environmental group EnviroVoters gave California a "D" rating—its lowest-ever score since annual scorecards were first released in 1973.[324]

Environmental advocacy groups believe California lags in regulatory oversight because the oil industry "remains a 'huge force' in California politics."[325] From 2018 to 2022, special interest groups tied to the Western States Petroleum Association and Chevron, among other companies, spent $72 million on lobbying efforts.[326] In 2023, Chevron was the top-spending lobbyist.[327]

According to EnviroVoters, 52% of California legislators—100% of Republicans and 38% percent of Democrats—receive contributions from oil companies.[328] For instance, Democrat Rudy Salas, who represents oil-rich Kern County, has received more than $343,000 in campaign donations from the oil and gas industry over the past

322 Ryan Sabalow & Jeremia Kimelman, *How Big Oil Wins in Green California*, CALMATTERS (Dec. 19, 2023), https://calmatters.org/politics/2023/12/california-big-oil/ [https://perma.cc/9L62-C93S].

323 *See* CAL. PUB. RES. CODE §§ 3002, 3011 (West 2024); CAL. HEALTH & SAFETY CODE § 38562.2(C)(1) (West 2024).

324 Liza Gross, *California's Climate Reputation Tarnished by Inaction and Oil Money*, INSIDE CLIMATE NEWS (Mar. 16, 2022), https://insideclimatenews.org/news/16032022/california-climate-inaction-oil-money [https://perma.cc/NFL2-R9U9].

325 Matt Vasilogambros, *California Just Can't Quit Big Oil*, STATELINE (May 8, 2023, 5:00 AM), https://stateline.org/2023/05/08/california-just-cant-quit-big-oil/ [https://perma.cc/3APA-3VP2].

326 Lindsey Holden, Ari Plachta & Phillip Reese, *Oil Spends Millions at California Capitol. Did It Weaken Newsom Crusade Against High Gas Prices?*, THE SACRAMENTO BEE, https://www.sacbee.com/news/politics-government/capitol-alert/article273734515.html [https://perma.cc/WV4Q-NY9X] (Mar. 30, 2023).

327 Bacher, *supra* note 130.

328 CAL. ENV'T VOTERS, 2023 CALIFORNIA ENVIRONMENTAL SCORECARD 2 (2023).

decade.[329] In support of Big Oil, Republican State Senator Shannon Grove has characterized environmental policies that restrict oil development as "just another attack on the oil industry."[330] This lobbying money likely precluded the enactment of environmental legislation to establish setback requirements, ban fracking, and prohibit offshore drilling in state waters.[331] Although California considers itself to be a climate leader, it is now one of the *only* major oil-producing states with no setback requirements.[332]

Recent legislative activity suggests that *Chevron*'s result and reasoning are incorrect. On May 22, 2024, the California legislature enacted AB 3233 as a direct response to the confusion generated by *Chevron* and as a means of "giv[ing] more power back to the local governments."[333] AB 3233 clarifies that a local government can "prohibit oil and gas operations in its jurisdiction" and "limit or . . . ban specific types of extraction methods or operations."[334] It also requires CalGEM to "reduce harm from oil and gas activities."[335] Most notably, it explicitly provides that CalGEM's *primary* purpose is to preserve

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329 *See* Laurel Rosenhall, *Oil Industry Spends Millions to Boost California Democrats*, CALMATTERS, https://calmatters.org/politics/2018/11/california-democrats-big-oil-money/ [https://perma.cc/L3WM-3CBR] (June 23, 2020).

330 Matt Vasilogambros, *Even California Struggles with Quitting Big Oil*, GOVERNING (May 11, 2023), https://www.governing.com/climate/even-california-struggles-with-quitting-big-oil [https://perma.cc/PQ9A-LBH4].

331 *See* Vasilogambros, *supra* note 325.

332 *See* CAL. CODE REGS. tit. 14, § 1765.11 (West 2024) (noting that a referendum against SB 1137 qualified for the November 2024 ballot, and as a result, SB 1137 was stayed "until and unless a majority of voters approve" SB 1137 at that time); Julie Cart, *Controversial Measure Overturning Oil Well Restrictions Won't Be on California Ballot*, CALMATTERS, https://calmatters.org/environment/2024/06/oil-ballot-california/ [https://perma.cc/7YDF-23UE] (Sept. 25, 2024) ("The oil industry's decision [to withdraw its ballot measure challenging SB 1137] will mean that the state rules protecting homes and schools near oil and gas wells will go into effect. The companies instead will fight them in court."); *see also* COLO. COMMON CAUSE, DRILLING AND DOLLARS: THE COLORADO OIL AND GAS INDUSTRY'S STREAM OF POLITICAL INFLUENCE 2–3 (2020), https://www.commoncause.org/colorado/wp-content/uploads/sites/6/2020/06/Common-Cause-Report_5.pdf [https://perma.cc/C9D5-7S49] (analyzing Colorado as an exemplar of a successful regulatory redesign, noting that the legislature successfully passed SB 181 to expand local regulatory authority to encompass at least some say over production methods in spite of the fact that Big Oil spent over $4 million on lobbying efforts between 2015 and 2019 and outnumbered committee members in favor of the bill by six-to-one at the hearing).

333 Jenkins, *supra* note 276.

334 *Id.*

335 *Id.*

"California's air, water, environment, and natural resources, and advancing the state's climate goals."[336]

California environmentalists looking to hold their state legislators accountable must also recognize the risk of executive capture. Although Governor Newsom has levied multiple attacks on Big Oil, even going so far as to institute litigation under claims of deception, cover-up, and environmental damage, he has not, as promised, "brought Big Oil to their knees."[337] Despite accusing his fellow Democrats of becoming "wholly-owned subsidiaries of the fossil fuel industry," Governor Newsom signed a measly seven of the twenty-one bills opposed by Big Oil in 2023.[338] Although Governor Newsom has vowed to hold Big Oil responsible for clean-up costs, in 2023, CalGEM spent "more than $34 million in taxpayer money to clean up 171 oil wells in Santa Barbara's Cat Canyon alone."[339] Moreover, AB 1057's widely acclaimed setback requirements may not even take effect, and companion bill AB 1440—which was passed by both houses and would have directed CalGEM to consider damage prevention before approving the use of certain production methods—was vetoed by none other than Governor Newsom himself.[340] In the wake of capture's pervasive effects, *Chevron* will further reduce political accountability by suggesting that California courts will refuse to act as a "check" on the legislature.

VII. CONCLUSION

By suggesting that courts are predisposed to defer to state authority, *Chevron* degrades political accountability and the "countervailing force of citizen plaintiffs," exacerbating the climate action gap by vitiating an important check on state power.[341] Generally, "the Legislature hold[s] the bar high when they know there's an alternative floating around out there."[342] Rather than holding California's Big Oil-captured policymakers accountable for their purported policies and positions, *Chevron* serves as a

336 *Id.*

337 Brandon Dawson, *Opinion: If Gavin Newsom Really Wanted to Go After Big Oil, Here's What He Would Do*, L.A. TIMES (Apr. 7, 2023, 3:30 AM), https://www.latimes.com/opinion/story/2023-04-07/gavin-newsom-oil-gas-wells-price-gouging-climate [https://perma.cc/6EZ7-MBEW].

338 Sabalow & Kimelman, *supra* note 322.

339 Dawson, *supra* note 337.

340 *See* ELKIND & LAMM, *supra* note 7.

341 *See* Zinn, *supra* note 292, at 84.

342 Maldonado, Ritchie & Kahn, *supra* note 277.

convenient shield against political accountability, enabling legislators to continue parading purely performative legislation.

Historically, courts have avoided entertaining citizen suits that implicate regulatory agencies "either because they view citizen plaintiffs as presumptively intermeddlers, or because they are unwilling to scrutinize the quasi-political judgments inherent in agency enforcement."[343] *Chevron* goes one step further, as the court's refusal to scrutinize CalGEM's misinterpretation of its mandate implicitly ratifies CalGEM's disproportionate focus on extraction. Consequently, *Chevron* widens the climate action gap by eliminating the judiciary as a sympathetic forum, effectively confining environmentalists to grassroots-level activism.[344]

"The risk of capture in enforcement shows that courts' uncritical deference to agency enforcement is misplaced."[345] By allowing CalGEM to maintain that the COGA precludes any authority to deny permits based on environmental considerations, *Chevron* creates an echo chamber and increases the risk of agency capture. In essence, *Chevron* renders the environmental provision of the COGA practically meaningless.[346] Consequently, Big Oil will interpret *Chevron* as a clear signal that California courts would rather preempt local oil and gas ordinances that restrict development instead of scrutinizing misguided agency action, even where such action contradicts the state's broader scheme of climate and energy law.

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343 Zinn, *supra* note 292, at 85.

344 *See, e.g.*, Pacheco, *supra* note 252, at 373. Because local environmentalism and opposition to fracking stand in stark contrast to the state's embrace of Big Oil and prioritization of output maximization, this has led both groups to "tur[n] to the courts to answer the question: Who gets to regulate fracking?" *Id.* Preemption decides the question in favor of the state, thereby resulting in the waste of activist resources, preclusion of environmental solutions, and discouragement of future good-faith efforts. *See id.*

345 Zinn, *supra* note 292, at 174.

346 *See* CAL. PUB. RES. CODE §§ 3106(a), 3011(a) (West 2024).

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