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## RISING VOICES

Volume 54 may be the best volume *Creighton Law Review* has yet had the privilege to publish. The 2020-2021 academic year feels special. Not only has the journal been spaded, cite-checked, and edited in compliance with the social-distancing necessary in the time of COVID-19, this year we will honor three recently retired Creighton professors: Michael Fenner, Kenneth Melilli, and Catherine Mahern.

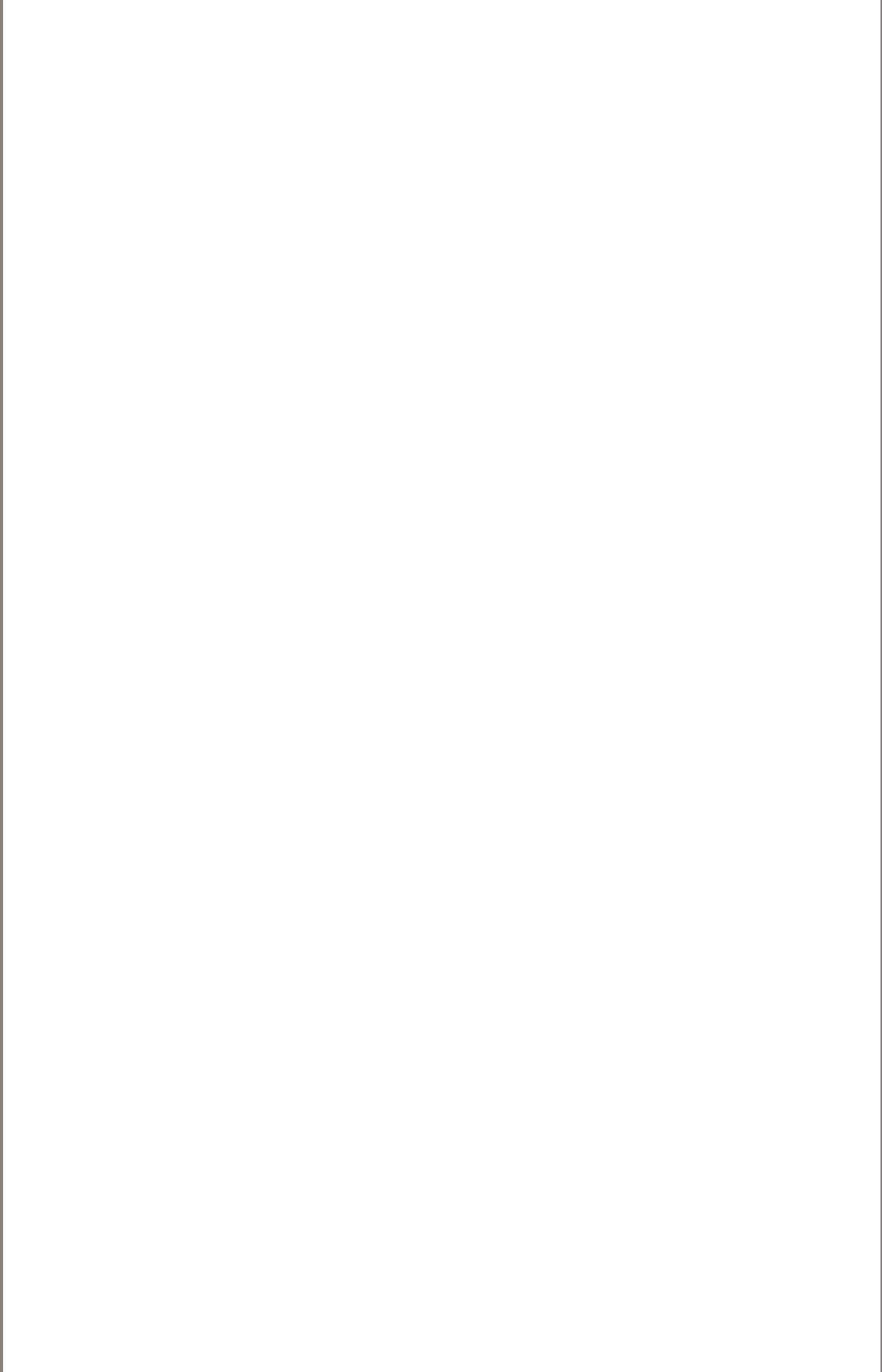
In each issue, we will recognize one of these professors. We will honor their legacy at Creighton by including a tribute from someone who is a friend of the professor and a respected member of the legal community. In Issue 1 of Volume 54, Clarence Thomas, Associate Justice of the United States Supreme Court, has provided a tribute to Professor Fenner. Professor Melilli will be honored in Issue 2, and Professor Mahern will be honored in Issue 3.

When we considered the journal's unique opportunity to recognize these professors for their investment in thousands of law students and their commitment to developing the next generation of legal minds, we wanted to do something unique. After giving it some thought, we decided the best way to continue their legacy was to make our own investment in the next generation by intentionally publishing young scholars.

As you read this and future issues of Volume 54, along with the esteemed and well-published authors you're accustomed to seeing, you may notice that some of these authors are recent law school graduates and current students. We selected the articles of these young authors because, based on the quality of their submissions, it was apparent that they are rising voices, the next generation of legal scholars. The Editorial Board is grateful to each Volume 54 author for partnering with *Creighton Law Review* and trusting the editorial staff to provide a professional process aimed at excellence.

Here's to the next generation of *rising voices*.

*Hallie Hamilton*  
*Editor in Chief*





## A TRIBUTE TO PROFESSOR MICHAEL G. FENNER

JUSTICE CLARENCE THOMAS

I first met Professor Mike Fenner in the spring of 1986. A family friend of my wife to be, Virginia Lamp, and her family had a small reception in Omaha to celebrate our upcoming marriage. Among the attendees were several of Virginia's favorite professors from Creighton Law School. Professor Fenner was one of them. Somehow, we gravitated toward each other, and eventually spent much of the reception talking on the porch.

After that first meeting, we routinely saw each other over the following years. In those days, we visited Omaha regularly, and more often than not visited him and his wife, Anne, at their home, or with him at the law school. As one of the faculty recruiters for the law school, Professor Fenner usually traveled annually to Washington, D.C. We invariably had dinner with him on those visits.

When I became a judge on the D.C. Circuit I gave my first talk at Creighton Law School in 1991, at the behest of Professor Fenner. When I was nominated to the Supreme Court in 1991, he wrote me encouraging notes on a regular basis. Though barely legible, they were invariably uplifting. They always seemed to arrive during some of the most challenging times, written on random letterheads, napkins, or postcards. They usually managed to lift our spirits. Though I had been told that his views were quite different from mine, ours was a friendship that, as fraternal bonds should, transcended personal opinions and views. We enjoyed each other's company and respected each other's independent thoughts and views.

Sometime in 2000, Professor Fenner broached the idea of jointly teaching a weeklong course at Creighton. I agreed. I was not an experienced teacher, but, mercifully, he was an outstanding one. Thus began almost two decades of teaching together. From 2001 to 2019, we taught biannually.

My wife, who had been one of his students, often said that he was a fair, evenhanded, and thoughtful man who went beyond the call of duty to help his students. Because of this, he was one of her favorite professors in law school. That was the explanation for his attendance at the reception celebrating our impending wedding in 1986. Now, I saw those attributes on full display in the classroom. Whether we were eating sandwiches in the office, having breakfast at his favorite diner, enjoying a potluck dinner with students at his home, or working

together in the classroom, he was consistently warm, engaging, intellectually honest, and insightful.

Though I was led to believe that we might be very different in our approach to Constitutional law, no such differences were on display as we simply tried to be honest and help students gain knowledge and confidence. It was, as it should always be in school, about the students, not us. His honesty, decency, and total dedication to students was always at the heart of his work. It was certainly on display when he asked me to consider, then hire, one of the students in our class as a law clerk. Of course, his judgment was once again accurate. The student was an outstanding law clerk.

I have known Professor Fenner for more than three decades, and I certainly count him a friend. I count our two decades co-teaching the short Constitutional Law seminar a joy. It was made all the more joyful because of this good man and outstanding professor. I will always treasure the time we spent together. Selfishly, I will truly miss teaching our class and interacting with Professor Fenner. And, though I completely understand his well-deserved retirement, Creighton Law School will lose one of its finest professors who is truly a gentleman and scholar. The students will lose a teacher of the first order. I will lose the special opportunity to teach with him.

I extend my heartfelt gratitude to Professor Fenner for his friendship and all he has done to make us all better people and better students of the law. And, though I appreciate his decision to retire, I regret that more students will not have the benefit of his teaching and that I will not be able to stand in the classroom with him. I wish him all the best as he spends more time with his wonderful family.

## THE *ALFORD* PLEA TURNS FIFTY: WHY IT DESERVES ANOTHER FIFTY YEARS

MICHAEL CONKLIN<sup>†</sup>

### I. INTRODUCTION

Fifty years ago, in *North Carolina v. Alford*,<sup>1</sup> the United States Supreme Court ruled that it does not violate due process for a judge to accept a guilty plea from a defendant who maintains his innocence.<sup>2</sup> *Alford* pleas are problematic to some, as they allow for the punishing of a defendant who has neither been adjudicated guilty nor admitted guilt. This essay critically evaluates the arguments against *Alford* pleas. It demonstrates that these anti-*Alford* plea arguments are largely a product of misunderstandings regarding innocence determinations, what constitutes coercion, and the impracticality of abolishing the practice. Furthermore, this essay discusses the overlooked benefits *Alford* pleas offer to defendants, victims, the criminal justice system, and society at large.

### II. HISTORY OF THE *ALFORD* PLEA

The practice of negotiating a reduced punishment in return for a guilty plea dates back to the “confessions” of the thirteenth century.<sup>3</sup> Plea bargaining has been on a steady upward trajectory throughout United States history, closely linked to increases in criminalization.<sup>4</sup> In the eighteenth century, jury trials were predominantly “judge-dominated, lawyer-free procedures conducted so rapidly that plea bargaining was unnecessary.”<sup>5</sup> In the nineteenth century, more complex rules of evidence and a more adversarial process resulted in increased caseloads and an accompanying increased incentive to plea bargain.<sup>6</sup> Courts would often invalidate plea agreements in post-Civil War America, allowing defendants to withdraw their pleas based on prece-

<sup>†</sup> Powell Endowed Professor of Business Law, Angelo State University.

1. 400 U.S. 25 (1970).

2. *North Carolina v. Alford*, 400 U.S. 25, 31 (1970).

3. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 13 (1979).

4. *Id.* at 6.

5. John H. Langbein, *Understanding the Short History of Plea Bargaining*, 13 L. & SOC'Y REV. 261, 261 (1979).

6. *Id.*

dents prohibiting incentives in return for guilty pleas.<sup>7</sup> In the early twentieth century, increased criminalization and the accompanying increases in caseloads helped form our modern plea system.<sup>8</sup>

The percentage of convictions from guilty pleas in federal courts from 1908 to 1916 rose from 50% to 72%.<sup>9</sup> By 1925, almost 90% of criminal convictions were the result of guilty pleas.<sup>10</sup> In the 1970 case of *Brady v. United States*,<sup>11</sup> the United States Supreme Court reluctantly upheld the constitutionality of plea bargaining.<sup>12</sup> This case secured the modern, more lenient standard that plea agreements are only required to be “voluntary.”<sup>13</sup> According to this new standard, as long as a plea is not the result of “actual or threatened physical harm or [made] by mental coercion overbearing the will of the defendant,”<sup>14</sup> it is considered voluntary. The advent of DNA testing in the 1990s increased awareness of innocent defendants who had accepted guilty pleas.<sup>15</sup> But this awareness did little to stall the growth of plea bargaining, which continued on its upward trajectory to the present, where 97% of federal felony convictions are the result of a plea.<sup>16</sup>

The Supreme Court decided in *Alford* that it does not violate due process for a judge to accept a guilty plea from a defendant who maintains his innocence.<sup>17</sup> However, the Court also stipulated that acceptance of such a plea is left to the discretion of the trial court judge.<sup>18</sup> Therefore, *Alford* does not create a legal right for defendants to have their pleas accepted.<sup>19</sup>

7. Lucian E. Dervan & Vanessa A. Edkins, *Criminal Law: The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1, 8 (2013).

8. *Id.* at 9-10.

9. *Id.* at 10.

10. *Id.*

11. 397 U.S. 742 (1970).

12. *Brady v. United States*, 397 U.S. 742, 743 (1970) (upholding a plea where the defendant claimed his acceptance of a fifty-year plea offer was the result of induced fear of the threat of the death penalty if he went to trial).

13. *Brady*, 397 U.S. at 750.

14. *Id.*

15. Allison D. Redlich & Reveka V. Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUM. BEHAV. 611, 611 (2016).

16. Emily Yoffe, *Innocence Is Irrelevant*, ATLANTIC (Sept. 2017), <https://www.theatlantic.com/magazine/archive/2017/09/innocence-is-irrelevant/534171/>.

17. *North Carolina v. Alford*, 400 U.S. 25, 38 (1970).

18. *Alford*, 400 U.S. at 38 n.11 (“Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead.”).

19. *Id.*

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Because *Alford* pleas are guilty pleas,<sup>20</sup> Federal Rule of Criminal Procedure 11 requires that they be made voluntarily, knowingly, and intelligently, “with sufficient awareness of the relevant circumstances and likely consequences.”<sup>21</sup> One significant difference between traditional pleas and *Alford* pleas is that the defendant’s admission of guilt in a traditional plea generally serves as the required “factual basis” for the judge’s acceptance of the plea.<sup>22</sup> In an *Alford* plea, the judge must establish the factual basis for accepting the plea based on an independent assessment.<sup>23</sup>

The notion of punishing someone in the absence of an adjudication of guilt and without an admission of guilt may strike laypeople as problematic.<sup>24</sup> And some legal scholars are vehemently opposed to it, as demonstrated by the Albert W. Alschuler quote, “[i]f anything short of torture can shock your conscience, *Alford* pleas should.”<sup>25</sup> Regardless, *Alford* pleas are recognized as necessary by criminal justice experts<sup>26</sup> and practiced in forty-seven states and the District of Columbia.<sup>27</sup>

## III. REFUTING THE ARGUMENTS AGAINST ALFORD PLEAS

## A. ARBITRARINESS

Because *Alford* pleas are at the discretion of prosecutors and judges,<sup>28</sup> they can be arbitrarily applied. Particular judges,<sup>29</sup> prosecutors,<sup>30</sup> and even defense attorneys<sup>31</sup> may not allow *Alford* pleas.

20. Allison D. Redlich & Asil Ali Ozdogru, *Alford Pleas in the Age of Innocence*, 27 BEHAV. SCI. & L. 467, 468 (2009) (“To be clear, *Alford* pleas are guilty pleas.”).

21. *Brady*, 397 U.S. at 748.

22. *Alford*, 400 U.S. at 32.

23. *State v. Newton* 552 P.2d 682, 686 (Wash. 1976) (en banc) (“[T]he factual basis for [a guilty] plea may come from any source the trial court finds reliable, and not just the admissions of [the] defendant.”).

24. Stephanos Bibas, *Harmonizing Substantive-Criminal-Law Values and Criminal Procedure: The Case of Alford and NOLO Contendere Pleas*, 88 CORNELL L. REV. 1361, 1363 (2003) (stating that *Alford* pleas “undermine the procedural values of accuracy and public confidence in accuracy and fairness”); *United States v. Bednarski*, 445 F.2d 364, 366 (1st Cir. 1971) (“[T]he public might well not understand or accept the fact that a defendant who denied his guilt was nonetheless placed in a position of pleading guilty and going to jail.”).

25. Albert W. Alschuler, *Straining at Gnats and Swallowing Camels: The Selective Morality of Professor Bibas*, 88 CORNELL L. REV. 1412, 1412 (2003).

26. Bibas, *supra* note 24 at 1370, 1374 (referring to those who criticize *Alford* pleas as “[t]he few”).

27. Redlich & Ozdogru, *supra* note 20, at 471.

28. *North Carolina v. Alford*, 400 U.S. 25, 38 n.11 (1970).

29. *See Alford*, 400 U.S. at 38 n. 11 (explaining that the trial judge has the ultimate discretion on whether to accept an *Alford* plea).

30. James W. Diehm, *Pleading Guilty While Claiming Innocence: Reconsidering the Mysterious Alford Plea*, 26 U. FLA. J.L. & PUB. POL’Y 27, 38 (2015).

31. *Id.* at 38, 42-43.

Therefore, a defendant in one case may be afforded an *Alford* plea while another similarly situated defendant may not.<sup>32</sup> Furthermore, Indiana, Michigan, and New Jersey have complete bans on *Alford* pleas, thus creating an additional element of geographic arbitrariness.<sup>33</sup> This arbitrariness is not only unfair, but also damages the reputation of the legal system.

### *Response*

In a limited sense, *Alford* pleas are somewhat arbitrary.<sup>34</sup> But it is unclear how pointing this out supports the abolishment of the practice. In the absence of *Alford* pleas, traditional plea bargaining would still be arbitrary. Meaning, similarly situated defendants may receive vastly disparate non-*Alford* plea offers—or no plea offer at all—based on numerous arbitrary factors. It is a peculiar proposal to deny one defendant the benefit of an *Alford* plea on the arbitrariness grounds that some other similarly situated defendant might not be offered an *Alford* plea. While abolishing the practice of *Alford* pleas does remove any arbitrariness involved, it is difficult to see who benefits from this course of action. The defendant who was not offered an *Alford* plea receives no benefit, while the defendant who would have been offered an *Alford* plea is worse off.

The focus on making the criminal justice system less arbitrary is somewhat misguided. Using this expansive definition of the word “arbitrary,” many aspects of the criminal justice system would qualify. Variables such as the makeup of the jury, officer errors in gathering evidence, jurisdiction where the crime occurred, and quality of legal representation all affect legal outcomes. Even factors as trivial as how hungry the judge is,<sup>35</sup> the recent performance of a local sports team,<sup>36</sup> and the weather<sup>37</sup> affect trial outcomes.

32. *Id.* at 38.

33. Jenny Elayne Ronis, *The Pragmatic Plea: Expanding Use of the Alford Plea to Promote Traditionally Conflicting Interests of the Criminal Justice System*, 82 TEMP. L. REV. 1389, 1399 (2010).

34. And even this concession may be too generous. Arbitrary is defined as “existing or coming about seemingly at random or by chance or as a capricious and unreasonable act of will.” *Arbitrary*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/arbitrary> (last visited Mar. 9, 2020).

35. Kurt Kleiner, *Lunchtime Leniency: Judges’ Rulings Are Harsher When They Are Hungrier*, SCI. AM. (Sept. 1, 2011), <https://www.scientificamerican.com/article/lunch-time-leniency/> (finding that judges are significantly more likely to grant a parole request when they are not hungry).

36. Ozkan Eren & Naci Mocan, *Emotional Judges and Unlucky Juveniles*, 10 AM. ECON. J.: APPLIED ECON. 171, 173 (2018), <https://www.aeaweb.org/articles?id=10.1257/app.20160390> (finding that an unexpected loss from a prominent team in the state correlated with an increase in the duration of sentences handed down the following week).

37. Anthony Heyes & Sooddeh Saberian, *Temperature and Decisions: Evidence from 207,000 Court Cases*, 11 AM. ECON. J.: APPLIED ECON. 238, 240 (2019) (finding that a

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## B. COLLATERAL CONSEQUENCES

There are collateral consequences that defendants may not take into consideration when they decide to accept an *Alford* plea. These misunderstandings are not surprising given the amorphous nature by which *Alford* pleas allow defendants to assert their innocence while simultaneously entering a guilty plea. For example, a defendant may not be aware that the lack of remorse inherent in an *Alford* plea can be an aggravating factor that increases the harshness of sentencing.<sup>38</sup> Defendants may also find it more difficult to be released on parole for this same reason.<sup>39</sup> In sex offender cases, *Alford* pleas may add points to the assessment of defendants' level of risk posed to society due to their refusal to accept responsibility for their actions.<sup>40</sup>

*Response*

Ensuring that defendants are aware of the consequences of their legal decisions is a valid concern. Federal Rule of Criminal Procedure 11 requires that the defendant understand:

the nature of each charge to which the defendant is pleading; any maximum possible penalty, including imprisonment, fine, and term of supervised release; any mandatory minimum penalty; any applicable forfeiture; the court's authority to order restitution; the court's obligation to impose a special assessment; . . . the court's obligation to . . . appl[y] [the] Sentencing Guideline[s], and the court's discretion to depart from those guidelines under some circumstances.<sup>41</sup>

Furthermore, in *Brady v. United States*,<sup>42</sup> the United States Supreme Court held that in order for a guilty plea to be accepted, the defendant must be "fully aware" of the consequences.<sup>43</sup> It is true that taking away options defendants have—such as *Alford* pleas—would serve to limit the potential for defendants to be misinformed. But the more pragmatic course of action seems to be simply ensuring that defendants are informed regarding all potential consequences.

10°F increase in outdoor temperature reduced favorable outcomes by 6.55%, despite the judgments being made indoors).

38. Bryan H. Ward, *A Plea Best Not Taken: Why Criminal Defendants Should Avoid the Alford Plea*, 68 Mo. L. REV. 913, 921-22 (2003); see also *Smith v. Commonwealth*, 499 S.E.2d 11 (Va. Ct. App. 1998). In *Smith v. Commonwealth*, the court rejected the notion that an *Alford* plea required the trial court to disregard the defendant's lack of remorse. *Smith*, 499 S.E.2d. at 12. The court maintained that an *Alford* plea is the same as any other guilty plea for sentencing purposes. *Id.* at 14.

39. Ward, *supra* note 38, at 914.

40. *Id.* at 934-35.

41. FED. R. CRIM. P. 11(b)(1)(G)-(M).

42. 397 U.S. 742 (1970).

43. *Brady v. United States*, 397 U.S. 742, 755 (1970) (quoting *Shelton v. United States*, 246 F.2d 571, 572 n.2 (5th Cir. 1957) (en banc), *rev'd*, 356 U.S. 26 (1958)).

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## C. HINDERS REHABILITATION

*Alford* pleas hinder defendants' contrition, education, and reform.<sup>44</sup> In the absence of *Alford* pleas, defense attorneys would be incentivized to "persuade clients to face up to [their crimes]."<sup>45</sup> Only after defense attorneys "break down their clients' illusions and denials"<sup>46</sup> can the rehabilitation process begin.

*Response*

It is true that denial is detrimental to a criminal's treatment and reform,<sup>47</sup> especially for sex offenders.<sup>48</sup> But it is unclear that a coerced, one-time confession made in order to avoid the devastating consequences of a trial conviction really serves as an admission for purposes of contrition and long-term reform.

Defense attorneys often must convince delusional clients of the unlikely odds of success at trial. But that is very different from a duty to "provide moral as well as legal counsel, advising clients that it is right to admit their crime"<sup>49</sup> and should therefore try to "penetrat[e] clients' denials . . ."<sup>50</sup> This practice requires defense attorneys to play the role of judge and not only predict the likelihood of success at trial, but the ultimate innocence or guilt of their clients—a determination that is sometimes even unknowable to the defendants themselves.<sup>51</sup> Placing this burden on defense attorneys is even more problematic when done during plea bargaining. At such an early stage in the trial process, the investigation into the defendant's culpability is often incomplete. Informing a defendant who insists on his innocence that it is in his best interest to accept a plea offer may often be good advice. But trying to convince a defendant who insists on his innocence that he is in fact guilty may violate the duty of a defense attorney to zealously advocate for his client.<sup>52</sup>

44. Bibas, *supra* note 24, at 1389.

45. *Id.* at 1405.

46. *Id.* at 1375.

47. *Id.* at 1395 (using the first step of the twelve-step Alcoholics Anonymous program as just one example).

48. *Id.* at 1393-1400.

49. *Id.* at 1405.

50. *Id.*

51. This could be due to the defendant not having a memory of the incident. Curtis J. Shipley, *The Alford Plea: A Necessary but Unpredictable Tool for the Criminal Defendant*, 72 IOWA L. REV. 1063, 1063 (1987). Another way a defendant could be uncertain as to his ultimate innocence or guilt is if the crime required a specific *mens rea*. In close scenarios, it could be unclear even to the defendant if his mental state rises to the required level.

52. See MODEL RULES OF PROF'L CONDUCT r. 1.1 (AM. BAR ASS'N 1983) ("A lawyer shall provide competent representation to a client."); MODEL RULES OF PROF'L CONDUCT r. 1.3 (AM. BAR ASS'N 1983) ("A lawyer shall act with reasonable diligence and prompt-



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The perplexing notion that defense attorneys at the plea-bargaining stage would be able to ascertain with certainty whether a defendant who maintains his innocence is lying is present in some anti-*Alford* advocacy literature. For example, “[c]riminal defense attorneys are occasionally confronted with a conundrum—a defendant who insists that he is innocent, yet against whom the evidence is overwhelming. Such defendants refuse to admit their guilt . . . .”<sup>53</sup> The use of the subjective term “overwhelming” is telling. The burden of proof in criminal trials is so high that—in a sense—“overwhelming” evidence is always required for a conviction. This further demonstrates the impracticality of defense attorneys determining their clients’ guilt or innocence. Where exactly is the line for how much evidence is required to “overwhelm” their clients’ assertions of innocence? Furthermore, beliefs that initially appear to be “overwhelmingly” supported by the evidence may become far less clear once additional evidence is considered. Meaning, the guilt of defendants that initially appears “overwhelming” may become much less so after a trial.

Even if one assumes that rare cases exist when a defense attorney can be absolutely certain of his client’s guilt, how are defense attorneys supposed to draw the line between defendants that are absolutely guilty—and therefore in need of persuasion to accept a plea—and those who are only highly likely to be guilty? Finally, the objection that *Alford* pleas hinder the process of defense attorneys persuading clearly guilty defendants to confess to their crimes is largely a moot point. This is because in cases where the defendant is so obviously guilty, a prosecutor is unlikely to offer—and a judge is unlikely to accept—an *Alford* plea.<sup>54</sup>

## D. VIOLATES RIGHT AGAINST SELF-INCRIMINATION

Some claim that *Alford* pleas violate a defendant’s constitutional right against self-incrimination.<sup>55</sup> This claim usually comes in one of two forms. The defendant may claim that this constitutional infringement stems from post-conviction treatment that requires the disclo-

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ness in representing a client.”); see also MODEL RULES OF PROF’L CONDUCT, pmbl. (explaining that “a lawyer zealously asserts the client’s position under the rules of the adversary system,” “can be a zealous advocate on behalf of a client,” and has an “obligation zealously to protect and pursue a client’s legitimate interests”).

53. Ward, *supra* note 38, at 913. It should be noted that other anti-*Alford* advocates do recognize the impossibility of knowing who is guilty and innocent. See, e.g., Redlich & Ozdogru, *supra* note 20, at 468 (“We note at the outset that we cannot provide data or insight into the proportion of persons who enter *Alford* pleas who are factually innocent.”).

54. North Carolina v. *Alford*, 400 U.S. 25, 38 n.11 (1970).

55. U.S. CONST. amend. V.

sure of illegal conduct.<sup>56</sup> Or, the claim may stem from when a defendant—in order to accept an *Alford* plea—is required to admit to actions associated with his guilty plea.<sup>57</sup>

#### *Response*

It is true that an *Alford* plea may require court-ordered counseling which in turn might require an admission of guilt.<sup>58</sup> Guilty pleas—of which *Alford* pleas are a subset—do waive the right against compulsory self-incrimination.<sup>59</sup> But there are protections against the use of statements obtained through court-required counseling being used against the defendant.<sup>60</sup> Therefore, the practice does not incur Fifth Amendment implications.<sup>61</sup> Even anti-*Alford* plea advocates admit that “the self-incrimination argument has few legs to stand on when contesting a post-conviction requirement that defendants acknowledge their guilt.”<sup>62</sup>

#### E. PROMOTES EFFICIENCY OVER ACCURACY

While the efficiency that *Alford* pleas bring to the criminal justice system is beneficial, accuracy should be more important.<sup>63</sup> More specifically, the accuracy in not punishing innocent defendants is more important than efficiency.<sup>64</sup>

#### *Response*

This objection lacks substance because there is no objective, quantifiable matrix by which to measure the tradeoff between accuracy and efficiency.<sup>65</sup> Therefore, the only way the objection would be meaningful is if it were altered to be more absolute such as, “No amount of efficiency gain could possibly justify any loss in accuracy of identifying innocent defendants.”<sup>66</sup> But such an absolute position is clearly un-

56. Ward, *supra* note 38, at 937.

57. *Id.* at 938.

58. *Id.* at 927.

59. Boykin v. Alabama, 395 U.S. 238, 243 (1969).

60. Ward, *supra* note 38, at 938.

61. *Id.*

62. *Id.*

63. Bibas, *supra* note 24, at 1382.

64. *Id.*

65. For example, it would be nonsensical for the objector to claim that for every “unit” of efficiency gained by the *Alford* plea, two “units” of accuracy are lost.

66. See Redlich & Ozdogru, *supra* note 20, at 487 (providing an example of this more absolutist position with “there are many who would argue that, even if only a small percentage of [those who entered an *Alford* plea] were innocent, it would be too many”).

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tenable. The criminal justice system makes numerous tradeoffs between efficiency and accuracy.

Anti-*Alford* plea advocates correctly point out that efficiency is not the final word on what criminal justice policies should be adopted. But it is unclear that the benefits in efficiency from *Alford* pleas would be outweighed by the costs of decreased accuracy. It is also not clear that the gains in efficiency from *Alford* pleas are accompanied by a net loss in accuracy. The two are not mutually exclusive. Increased efficiency from *Alford* pleas frees up law enforcement and court resources that can then be invested in more accurate determinations of innocence—therefore increasing accuracy.

## F. COERCION

As with traditional plea bargains, *Alford* pleas are highly coercive. The average sentence disparity between what is offered in a plea and what would result from a trial conviction is 500%.<sup>67</sup> This extreme disparity serves to coerce defendants into accepting a plea instead of going to trial to prove their innocence.

*Response*

The existence of the *Alford* plea serves to increase the autonomy of defendants; it in no way decreases the defendant's autonomy through coercion. The option of going to trial is always present. An *Alford* plea is simply an additional option. Presenting an additional option to a decisionmaker while keeping the original option available cannot be said to be coercive no matter how attractive the new option is perceived. The fact that 97% of convictions are the result of guilty pleas<sup>68</sup> is not evidence of coercion, only evidence of how advantageous pleas are to defendants. This comes as no surprise, as *Alford* pleas provide numerous ancillary benefits to the defendant, such as the ability to save face. They allow defendants to more easily protect valuable relationships and more successfully seek future employment.<sup>69</sup> Another benefit of an *Alford* plea is the flexibility it offers the defendant. This flexibility is demonstrated in *Falkner v. Foshaug*,<sup>70</sup> where the defendant was able to win on a malpractice theory because he maintained his innocence through the use of an *Alford* plea.<sup>71</sup>

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67. Berthoff v. United States, 140 F. Supp. 2d 50, 68 (D. Mass. 2001).

68. Yoffe, *supra* note 16.

69. Bibas, *supra* note 24, at 1378.

70. 29 P.3d 771 (Wash. Ct. App. 2001).

71. Falkner v. Foshaug, 29 P.3d 771, 777 (Wash. Ct. App. 2001).

Pleas are required to be made knowingly, intelligently, and voluntarily.<sup>72</sup> The existence of a disparity between plea offer and trial sentence upon conviction does nothing to render the defendant's acceptance of the plea to be unknowing, unintelligent, or involuntary. An analogy serves to illustrate: If someone accepted a \$30,000 offer for his \$20,000 car, this extreme disparity would in no way serve to negate how the offer was accepted knowingly, intelligently, and voluntarily. Furthermore, anyone who claimed to be acting on behalf of the seller's best interest by proposing a ban on such generous automobile offers would rightly be viewed with great skepticism.

Coercion is a highly peculiar issue for an anti-*Alford* advocate to present in support of abolition. This is because removing the *Alford* plea would serve to *increase* the level of coercion defendants face. Defendants who would have accepted an *Alford* plea would now be forced to begrudgingly admit guilt in order to avoid trial, thus functionally creating a forced confession. This is illustrated in the *Alford* case itself, where the three dissenting justices, Brennan, Douglas, and Marshall, stated that Henry Alford's plea was not voluntary because he was "so gripped by fear of the death penalty."<sup>73</sup> But without the *Alford* plea, this gripping fear of the death penalty would have likely caused him to confess to a crime he maintained he did not commit.

#### G. INNOCENCE

"[The United States plea-bargain system] is marvelously designed to secure conviction of the innocent."<sup>74</sup> The notion that innocent people should not be punished is axiomatic in the U.S. criminal justice system.<sup>75</sup> The system is designed with trials as the mechanism by which guilt is determined. These trials provide defendants with numerous constitutional protections that are lost when a plea offer is accepted.

Furthermore, there are many features of the criminal justice system that incentivize innocent defendants to accept pleas, even if they

72. ABA STANDARDS FOR CRIM. JUSTICE PLEAS OF GUILTY, at xvi (AM. BAR ASS'N 1999), [https://www.americanbar.org/content/dam/aba/publications/criminal\\_justice\\_standards/pleas\\_guilty.pdf](https://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/pleas_guilty.pdf) (discussing the objective of the ABA standards is to "maximize the fairness of the process and the likelihood that the defendant has entered such a plea knowingly and voluntarily, fully understanding the consequences").

73. *North Carolina v. Alford*, 400 U.S. 25, 40 (1970) (Brennan, J., dissenting) (quoting *Brady v. United States*, 397 U.S. 742, 750 (1970)).

74. Alschuler, *supra* note 25, at 1414.

75. *Blackstone's Ratio: Is It More Important to Protect Innocence or Punish Guilt?*, CATO INST., <https://www.cato.org/policing-in-america/chapter-4/blackstones-ratio> (last visited Mar. 9, 2019) ("The American system, grounded in the British Common Law, has long erred on the side of protecting innocence. . . . As the preeminent English jurist William Blackstone wrote, '[B]etter that ten guilty persons escape, than that one innocent suffer.'").

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might be better off going to trial. Examples include unreasonably high bail that forces defendants to remain in prison while awaiting trial, the risk of being treated unfairly by a judge who would have preferred the case plead out, overcharging, and public defenders whose compensation structure incentivizes biased advice to convince defendants to accept pleas.

*Response*

The notion that *Alford* pleas promote the punishing of innocent defendants stems from misunderstandings regarding the nature of innocence in criminal trials. While defendants who enter an *Alford* plea are allowed to do so while maintaining their innocence, their innocence can only be known with certainty by the defendant.<sup>76</sup> At the plea stage of a trial, prosecutors and judges make probabilistic determinations as to the defendant's guilt based on the limited information available at the time.

Given the scale of *Alford* pleas, innocent defendants have certainly accepted them.<sup>77</sup> Therefore, *Alford* pleas have been the mechanism by which innocent people have been punished. But the knowledge that a large-scale criminal justice policy will imprison some innocent people is not *per se* justification for its abolishment. Furthermore, the fact that defendants accepting *Alford* pleas maintain their innocence does not mean that, as a group, the majority are innocent. Even anti-*Alford* plea advocates admit that a "substantial majority" of *Alford* pleas are from guilty defendants.<sup>78</sup> One survey of defense attorneys concluded that "[a]lmost all interviewees agreed that innocent defendants use [*Alford* pleas] infrequently."<sup>79</sup>

It is important to note that an innocent defendant who would have been offered an *Alford* plea is not going to be freed if *Alford* pleas are abolished. Rather, he will be faced with the dilemma of either entering a false confession in order to receive the benefits of a plea or facing the harsh consequences of a trial. Forcing innocent defendants into this dilemma in an effort to protect them from accepting an *Alford*

76. And sometimes even the defendant cannot know if he is guilty or innocent. See *supra* note 51.

77. See Diehm, *supra* note 30, at 34 (estimating that 3% of federal defendants and 6.5% of state defendants entered *Alford* pleas). With over two million people incarcerated in the U.S.—the vast majority in state prisons—this essay estimates that 100,000 inmates accepted *Alford* pleas. While it is ultimately unknowable exactly who is innocent and who is not, it is incredibly unlikely that all 100,000 currently incarcerated defendants who accepted *Alford* pleas are guilty.

78. Alschuler, *supra* note 25, at 1417.

79. Bibas, *supra* note 24, at 1378.

plea is highly counterintuitive and counterproductive.<sup>80</sup> “Pressing innocent defendants to confess would generate only a sense of victimization and of the cruelty and hypocrisy of our legal system.”<sup>81</sup> It would also cause “serious negative externalities” on society at large by damaging the public’s perception of a just legal system.<sup>82</sup>

Simply put, it makes no sense to deny innocent defendants who refuse to lie about their guilt the benefits afforded to their guilty counterparts or their innocent counterparts who are willing to lie to accept a traditional plea. Such a policy would serve to punish those who are least deserving of punishment—the innocent with a moral code so stringent that they are not willing to lie even to avoid the consequences of trial which may include death.

Additionally, innocent defendants would be confronted by an additional dilemma when facing the coercion to enter a traditional guilty plea or face trial. Namely, a traditional guilty plea, which requires an innocent defendant to admit guilt is technically the crime of perjury or making a false statement.<sup>83</sup>

The high burden of proof in criminal court, the protections afforded defendants, and the requirement that jury verdicts be unanimous, all help protect against innocent defendants accepting pleas. This is because the likelihood of a defendant accepting a plea is—in part—a function of his predicted likelihood of conviction at trial.

Studies into the thought process of innocent defendants who are confronted with a plea offer also support the notion that false pleas are rare. Innocent defendants are more likely than their guilty counterparts to insist on a trial.<sup>84</sup> This is due to perceptions of fairness,<sup>85</sup> an unwillingness to lie,<sup>86</sup> and increased confidence that the truth will

80. Naturally, it would be ideal to simply drop the charges against all innocent defendants, but this statement is operating under the real-world conditions that we cannot identify who is innocent and guilty with absolute certainty at the plea-bargaining stage of a trial.

81. Alschuler, *supra* note 25, at 1422.

82. Bibas, *supra* note 24, at 1386.

83. See *United States v. Dunnigan*, 507 U.S. 87, 94 (1993) (“A witness testifying under oath or affirmation [commits perjury under federal law] if she gives false testimony concerning a material matter with the willful intent to provide false testimony, rather than as a result of confusion, mistake, or faulty memory. This federal definition of perjury by a witness has remained unchanged in its material respects for over a century. It parallels typical state-law definitions of perjury . . .”).

84. See Avishalom Tor, Oren Gazal-Ayal & Stephen M. Garcia, *Fairness and the Willingness to Accept Plea Bargain Offers*, 7 J. EMPIRICAL L. STUD. 97, 99 (2010).

85. Redlich & Shteynberg, *supra* note 15, at 613. For a real-life example of how a defendant can be driven to seemingly irrational behavior based on a sense of unfairness, see the case of *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), as discussed in Tor, Gazal-Ayal & Garcia, *supra* note 84, at 98-99.

86. Redlich & Shteynberg, *supra* note 15, at 613.

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somehow come out at trial.<sup>87</sup> Reading some anti-*Alford* plea literature causes one to question whether the writers understand that innocence is ultimately unknowable. The following quote provides an example: “Defense attorneys have reported advising defendants to plead guilty although the attorneys themselves had no doubt of their innocence.”<sup>88</sup> Defense attorneys simply cannot make such an absolute determination—especially not at the plea-bargaining stage of trial.

The following anti-*Alford* plea analogy provides another example: “To use Dostoyevsky’s example, no hope of good consequences can justify society’s murdering a single innocent child.”<sup>89</sup> But Dostoyevsky’s position assumes that it is known that the child to be murdered is innocent. Again, this is not analogous to *Alford* pleas, because they are precluded if the court knows of the defendant’s innocence—or even of the defendant’s unlikelihood of conviction at trial. A more analogous example than the one from Dostoyevsky would be this: As a society we are accepting of the fact that some non-zero amount of defendants are convicted and sentenced for crimes they did not commit. This understanding is acceptable because we do not know, at the time, which convicted defendants are innocent. In the same way, it is acceptable to allow some innocent defendants to enter *Alford* pleas and therefore receive punishment since we do not know which defendants are innocent.

Finally, pointing out features of the criminal justice system that incentivize innocent defendants to accept a plea—such as unreasonably high bail—does little to justify the abolishment of *Alford* pleas. The same argument would apply to traditional pleas. Rather than abolishing *Alford* pleas, enacting legislation aimed at reforming the bail system would be a far more pragmatic and targeted approach to addressing this issue.

## H. VIOLATES CRIMINAL BURDEN-OF-PROOF STANDARDS

Retributive justice requires a high degree of certainty to punish someone accused of a crime.<sup>90</sup> *Alford* pleas apply a standard of proof significantly less than the “beyond a reasonable doubt” standard afforded defendants in criminal trials.<sup>91</sup>

87. See W. Larry Gregory, John C. Mowen & Darwyn E. Linder, *Social Psychology and Plea Bargaining: Applications, Methodology, and Theory*, 36 J. PERSONALITY & SOC. PSYCHOL. 1521, 1521 (1978).

88. Alschuler, *supra* note 25, at 1422.

89. Bibas, *supra* note 24, at 1384.

90. Lauren Hartz, “*I Ain’t Shot No Man*”: *Reconciling Alford Pleas and Punishment Theory*, 6 DARTMOUTH L.J. 368, 376 (2008).

91. *Id.*

*Response*

This argument is misleading because the higher “beyond a reasonable doubt” standard is taken into consideration during the plea process. The prosecutor’s decision of what plea to offer, the defendant’s decision of what plea to accept, and the judge’s decision of what plea to allow are all predicated on the likelihood of conviction at trial—where the stringent “beyond a reasonable doubt” standard applies. Furthermore, the logic in this argument would apply equally to *Alford* pleas and traditional pleas alike. Therefore, if consistently applied, it would lead to the abolishment of all plea bargaining. This is simply not practical. No large city in the United States has abolished plea bargaining for a long period of time.<sup>92</sup>

## I. HARM TO SOCIETY

When *Alford* pleas are allowed, society is harmed in many ways. The practice of accepting *Alford* pleas “breed[s] public doubt and lack of respect for the criminal justice system.”<sup>93</sup> *Alford* pleas “cause citizens to suspect coercion and injustice,”<sup>94</sup> “muddy the criminal law’s moral message,”<sup>95</sup> and “permit equivocation and ambiguity when clarity is essential.”<sup>96</sup> Furthermore, “unjustified leniency is a spur to further criminal activity” and “the criminal gloats[] at the law’s impotence.”<sup>97</sup>

*Response*

Lay people claiming to lose respect for the criminal justice system due to *Alford* pleas does not mean that the alternative of abolishing the practice would result in increased respect. This is a complicated issue that requires a careful examination of the nuanced costs and benefits on both sides. The fact that only three states have banned the practice<sup>98</sup> demonstrates how the decisionmakers who understand the process generally support *Alford* pleas.

Anti-*Alford* plea advocates such as the ones quoted in the above argument are quick to point out the alleged downsides of the practice. But that is only one side of the equation. These alleged downsides

92. Scott W. Howe, *The Value of Plea Bargaining*, 58 OKLA. L. REV. 599, 612-13 (2005) (“In the modern era no large city in the United States has gone for a long period without some form of widely practiced plea bargaining.”).

93. Diehm, *supra* note 30, at 41.

94. Alschuler, *supra* note 25, at 1418.

95. Bibas, *supra* note 24, at 1363.

96. *Id.* at 1364.

97. Ralph Adam Fine, *Plea Bargaining: An Unnecessary Evil*, 70 MARQ. L. REV. 615, 618, 627 (1987).

98. Redlich & Ozdogru, *supra* note 20, at 471.



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must be weighed against the positive effects of *Alford* pleas—something anti-*Alford* advocates often neglect. On the issue of how the practice affects the public at large, there are numerous benefits that outweigh any potential downsides. For example, abolishing *Alford* pleas would likely result in more trials.<sup>99</sup> This would result in further judicial delays for future cases and the use of limited resources that could be more efficiently used elsewhere to prevent and punish crime.

As this criticism alleges, a criminal justice system that allows the punishment of someone who maintains his innocence could negatively affect society's views. But abolishing *Alford* pleas would result in the coercing of innocent defendants to admit guilt,<sup>100</sup> which would likewise “tarnish[] the integrity of the court.”<sup>101</sup> *Alford* pleas make future job prospects easier for defendants<sup>102</sup> and avoid “embarrassment and shame before family and friends.”<sup>103</sup> Therefore, they help defendants move on to productive, law-abiding lives, which is a clear benefit to society.

While there are no quantitative studies analyzing this, basic principles of negotiation dictate that, since defendants benefit from maintaining their innocence, an *Alford* plea can result in a harsher sentence than a traditional plea for similarly situated defendants.<sup>104</sup> Given the extreme disparity between the punishment received from a plea bargaining or a trial conviction,<sup>105</sup> this is a benefit of *Alford* pleas.

Finally, the attempt to bifurcate how *Alford* pleas affect society apart from how they affect defendants is misguided. This is because every member of society may one day be accused of a crime where the option of an *Alford* plea would benefit them immensely. In this way, the benefits that *Alford* pleas offer defendants are also benefits to society at large.

## J. HARM TO VICTIMS

“[W]hen a defendant enters an *Alford* plea, the victim is deprived of the chance to receive either acknowledgement of wrongdoing by the defendant or a guilty verdict by the jury, and is only left with the

99. This is because some defendants benefit greatly from the ability to maintain their innocence in an *Alford* plea. Once this aspect is removed and they are left with only a traditional plea offer where they must admit guilt, the alternative of going to trial becomes less unsatisfactory by comparison.

100. See *supra* Part III.F.

101. Shipley, *supra* note 51, at 1073.

102. Bibas, *supra* note 24, at 1378.

103. *Id.* at 1377.

104. Ward, *supra* note 38, at 914 (“Availing oneself of an *Alford* plea may result in a stiffer sentence than that imposed on someone who merely pleads guilty.”).

105. Berthoff v. United States, 140 F. Supp. 2d 50, 68 (D. Mass. 2001).



court's entry of a guilty verdict."<sup>106</sup> "[T]here is no closure resulting from a procedure where the proceedings are terminated by a process where the defendant is permitted to continue to deny culpability while receiving a reduced sanction."<sup>107</sup>

### *Response*

The claim that *Alford* pleas do not provide victims closure is false. *Alford* pleas allow immediate closure compared to the closure eventually received after a trial and the exhaustion of all subsequent appeals. *Alford* pleas also save victims from reliving their victimization through testifying in court. Additionally, they avoid the possibility of the ultimate lack of closure a victim can receive—going through the uncertainty, inconvenience, and trauma of a trial only to see the defendant acquitted. For some crimes, this outcome of a victim experiencing his victimizer being acquitted is more likely than a conviction.<sup>108</sup>

A further benefit of *Alford* pleas is how they help victims pursue legal recourse in civil court. Because *Alford* pleas are guilty pleas, collateral estoppel applies.<sup>109</sup> Therefore, a defendant who enters an *Alford* plea is generally precluded from relitigating his innocence in a future civil proceeding.<sup>110</sup>

## IV. ARGUMENTS FOR ALFORD PLEAS

### A. THE ALFORD CASE AS ILLUSTRATIVE

The facts of the *Alford* case illustrate the benefits *Alford* pleas offer. When confronted with overwhelming evidence of his guilt, Henry Alford chose to accept a plea offer that resulted in a thirty-year sentence in order to avoid a trial that could have resulted in the death penalty.<sup>111</sup> The notion of barring *Alford* pleas and therefore forcing a course of action that could result in Henry Alford's death is surely

106. Claire L. Molesworth, *Knowledge Versus Acknowledgement: Rethinking the Alford Plea in Sexual Assault Cases*, 6 SEATTLE J. FOR SOC. JUST. 907, 930 (2007).

107. Diehm, *supra* note 30, at 40.

108. *FAQ Detail: What is the Probability of Conviction for Felony Defendants?*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=QA&iid=403> (last visited Mar. 9, 2020). Defendants originally charged with felony assault have a 45% conviction rate. *Id.* And even this statistic is generous because it does not count crimes committed where no arrest was made. John Gramlich, *Most Violent and Property Crimes in the U.S. Go Unsolved*, PEW RES. CTR. (Mar. 1, 2017), <https://www.pewresearch.org/fact-tank/2017/03/01/most-violent-and-property-crimes-in-the-u-s-go-unsolved/>. Less than half of violent crimes and less than 20% of property crimes result in an arrest (another instance where the victim receives no closure). *Id.*

109. Bibas, *supra* note 24, at 1373.

110. *Id.*

111. *North Carolina v. Alford*, 400 U.S. 25, 29 (1970).

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worse than any of the arguments against the practice discussed in this essay.

**B. CIVIL TRIAL ANALOGY**

Settlement offers in civil proceedings share similarities with plea offers in criminal proceedings. Comparing the two provides insight into the desirability of allowing the accused to take responsibility while maintaining innocence. For example, consider when opposing civil litigants reach a settlement agreement whereby the defendant agrees to pay the plaintiff without an admission of wrongdoing—which is similar to an *Alford* plea in criminal court. It is difficult to see the harm of such a practice. The plaintiff and the defendant both benefit from the arrangement—otherwise they would not have agreed to the settlement. And the courts and society benefit from the more efficient use of resources. Banning civil settlements where the plaintiff maintains he has done no wrong is as impractical and unnecessary as banning *Alford* pleas.

**C. BENEFITS ATTORNEY–CLIENT RELATIONSHIP**

By allowing innocent defendants to maintain their innocence during their plea, *Alford* pleas reduce the risk of ethical dilemmas caused by an innocent defendant lying in court to receive a traditional plea.<sup>112</sup> Without an *Alford* plea option, an attorney is faced with the dilemma of allowing an innocent client to lie in court or to deny his client the benefits of a plea offer.<sup>113</sup> Therefore, the existence of *Alford* pleas promotes honesty between an attorney and his client.<sup>114</sup> This increased honesty allows the attorney to better assess the strength of the case, better plan trial strategy, minimize potentially harmful surprises, and better advise the defendant.<sup>115</sup>

**D. REDUCES THE ROLE OF JUDGES AS THOUGHT POLICE**

*Alford* pleas save judges the arduous task of delving into the psyche of each defendant to determine if he is in fact confessing guilt. *Alford* pleas also save judges from having to regulate the defendant's out-of-court speech. This is because—with traditional pleas—issues can arise when a defendant states his willingness to confess guilt in

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112. Shipley, *supra* note 51, at 1074.

113. *Id.*

114. *Id.*

115. *Id.*



court to obtain a plea but then makes contradictory statements regarding his innocence.<sup>116</sup>

## V. CONCLUSION

Anti-*Alford* advocates present valid criticisms of the practice. However, many of these criticisms are far less persuasive when understood in their proper context, when the effects of abolishment are considered, and when the downsides are balanced against the benefits. For example, the criticism that *Alford* pleas are arbitrary is significantly weakened when put in the context of the inherent arbitrariness of the criminal justice system overall.<sup>117</sup> Also, the coercion present in *Alford* pleas may seem problematic until the alternative of coerced confessions is considered. When one carefully weighs the benefits and downsides of *Alford* pleas, it quickly becomes apparent that the first fifty years of the practice has provided an overall benefit to defendants, victims, courts, and society.

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116. See, e.g., *Commonwealth v. Gordy*, 73 A.3d 620, 628 (Pa. Super. Ct. 2013) (“Appellant pled guilty on one occasion. He then moved to withdraw his pleas. His motion alleged his innocence, a fair and just reason to grant plea withdrawal in this case.”).

117. See *supra* notes 35-37 and accompanying text.

## OUR CONFLICTING LIBERTY HERITAGE FROM ENGLAND AND FRANCE

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### I. INTRODUCTION

The original tension of the United States of America is that it was formed based on the highly conservative nature of the English Common Law, made manifest in the Constitution of the United States, but also in the highly progressive spirit of the French Enlightenment, made manifest in the Declaration of Independence. The English Common Law looks back at past authority and embraces it by relying on precedent. The French Enlightenment looked back at past authority and rejected it in full. The Constitution is a legal document. The Declaration is an aspirational one. The word liberty appears in both. The Fifth and Fourteenth Amendments of the Constitution state that the government shall not deprive any person of “life, liberty, or property, without the due process of law.”<sup>1</sup> The Declaration states that “Life, Liberty and the pursuit of Happiness” are among the inalienable rights possessed by human beings.<sup>2</sup>

Abraham Lincoln believed the Declaration and Constitution must always be viewed together and that the Declaration was the more important document, the Constitution being merely the first rough draft of making manifest the ideals of the Declaration.<sup>3</sup> It has been noted that at Gettysburg, Lincoln improved the Constitution for all time, implicitly changing its meaning “by appeal from its letter to the spirit.”<sup>4</sup> But what was the origin of this spirit?

At a time when Substantive Due Process may be one United States Supreme Court vote away from disappearing, I defend a progressive interpretation of the liberty interest of Substantive Due Process by arguing that the spirit of the French Enlightenment and the Declaration must instruct the interpretation of the Constitution with its English Common Law basis. Part II provides a legal background for the twin streams of constitutional interpretation that have defined our legal history. Part III examines in detail England, the Common

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<sup>†</sup> The author would like to dedicate this article to the memory of my father, James P. Hart, Jr., who gave me my love for law and history.

1. U.S. CONST. amends. V, XIV.

2. DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

3. GARRY WILLS, LINCOLN AT GETTYSBURG 101 (Simon & Schuster, 1992).

4. *Id.* at 38.

Law, and its impact on the Constitution. Part IV examines the French Enlightenment, its aspirations and historical accomplishments, and its impact on the Declaration of Independence. Part V concludes that the progressive spirit of the Enlightenment must instruct the understanding of liberty as originally received from the English Common Law.

## II. BACKGROUND

The doctrine of Substantive Due Process, at its core, addresses the question of the meaning of a liberty interest. Under this doctrine, if a fundamental right is present, the United States Supreme Court reviews a statute abridging it by strict scrutiny; the law must be narrowly tailored to a compelling state interest.<sup>5</sup> If such a right is not present, the Court uses rational basis review; the law must only be rationally related to a legitimate state goal.<sup>6</sup> The right to contraception, abortion, autonomy over one's body, autonomy over raising one's children, and the right to engage in consensual sexual relationships all come under the doctrine of Substantive Due Process. Justices who believe in a more conservative interpretation of the word liberty, that it means only freedom from incarceration, deny that Substantive Due Process exists—Justice Scalia famously called it an “oxymoron.”<sup>7</sup> They believe that the cases that guaranteed such rights, such as *Griswold v. Connecticut*<sup>8</sup> (contraception), *Roe v. Wade*<sup>9</sup> and *Casey v. Planned Parenthood*<sup>10</sup> (abortion), *Skinner v. Oklahoma*<sup>11</sup> (autonomy over one's body), and *Obergefell v. Hodges*<sup>12</sup> (same sex marriage) were wrongly decided.<sup>13</sup> Justices who take a more liberal view of the word liberty, that it encompasses the liberty of thought and behavior, adhere to the notion of Substantive Due Process and believe that these cases were correctly decided.

Thus, the meaning of the word liberty is critical. When looking to our roots for the answer, different answers come from the two nations that formed the intellectual basis for the United States of America: England and France. The conservative view that liberty means freedom from bodily restraint only is inherited from the English Common Law. The progressive view that liberty means freedom of mind and

5. See, e.g., *Moore v. East Cleveland*, 431 U.S. 494, 504-07 (1977).

6. See *Moore*, 431 U.S. at 498-500.

7. *United States v. Carlton*, 512 U.S. 26, 39 (1994) (Scalia, J., dissenting).

8. 381 U.S. 479 (1965).

9. 410 U.S. 113 (1973).

10. 503 U.S. 833 (1992).

11. 316 U.S. 535 (1942).

12. 135 S. Ct. 2584 (2015).

13. See, e.g., Jamal Greene, *The Meming of Substantive Due Process*, 31 CONST. COMMENT 253, 259 (2016).

soul is inherited from the French Enlightenment. Thus, the systems must be compared to achieve a full understanding of what liberty means.

The English Common Law is inherently conservative systemically. It is proudly and unapologetically built on the foundation of the past. In code law countries that use a modern version of the Roman Law, whether the *Code Napoleon* or other, legislators discuss and adopt a series of rules of law that make sense to them going forward.<sup>14</sup> Any statute agreed upon is entirely forward looking, and may not be applied retroactively in a substantive sense. As was said in ancient Rome, *nulla poena sine lege*, no punishment without law.<sup>15</sup> Since all Roman law was codified, this could more accurately be translated as no punishment without a statute.

If code law countries start the legal process by looking forward, the English Common Law looks back. If a defendant is being sued, the court will be bound if years in the past another court with superior jurisdiction made a ruling concerning a similarly situated defendant. Today, if a revocation of a contract offer is communicated to the recipient after the recipient has posted an acceptance, the revocation is void, based solely on the strength that in 1818 a court at the King's Bench made a similar ruling in *Adams v. Lindsell*.<sup>16</sup>

Where the English Common Law embraced past authority, the French Enlightenment rejected it. There were two primary forces that had governed Europe after the collapse of Rome on September 4, 426: the Church and the Monarchy.<sup>17</sup> It is not sufficient to say that the *philosophes* of the Enlightenment merely challenged both; they destroyed both. Where the English Common Law looked back in time for what to embrace, the French Enlightenment looked back in time for what to reject. The might and wit of Voltaire, Diderot, Montesquieu, Rousseau, *et al.* destroyed what 2,000 years of armed conflict had not.

The *philosophes* concentrated first on the Church. The Church had such power that Edward Gibbon, perhaps too much so, credits it with causing the fall of Rome.<sup>18</sup> Since its founding as a Kingdom in

14. See generally 3 JOHN H. WIGMORE, A PANORAMA OF THE WORLD'S LEGAL SYSTEMS 981-1098 (St. Paul West Publishing Co., 1928) (providing a historical perspective of the development of the English Common Law and the legal system in code law countries).

15. See RICHARD BAUMAN, CRIME AND PUNISHMENT IN ANCIENT ROME 124-25 (Routledge, 1996).

16. (1818) 106 Eng. Rep. 250; 1 Barn. & Ald. 681.

17. See generally WILL DURANT, THE AGE OF FAITH (Simon & Schuster, 1950) (providing a comprehensive history of the emergence of the Church and then the royal houses of Europe).

18. See generally EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 145-49 (W.H. Smith Publishers Inc., 1985).

800 B.C., thence to a Republic and on to an Empire, Rome had withstood a millennium of foreign invasion. Yet it could not withstand the power of the Church. As the historian Will Durant has written, "Caesar and Christ had met in the arena, and Christ had won."<sup>19</sup> The Church then survived as a dominant ruling force for 2,000 years, against all manner of attack. It survived a split in the Papacy in the Fourteenth Century, with contesting Popes in Rome and Avignon for nearly 70 years. It survived the corruption and depravity of the Borgias. It survived as a ruling force through the challenge from within of the Reformation and the separation by Henry VIII. It survived as a ruling force the challenge from without of the Renaissance, when "man turned his back towards death and face towards life."<sup>20</sup> Yet after the attack of the Enlightenment, it ceased to function as a governing institution.

The Age of Voltaire paved the way for Rousseau, Revolution, and the assault on the Monarchy. The Enlightenment gave people the confidence and ability to reason for themselves and judge what they saw; when looking at royal houses that had governed them, the judgment was harsh. The Enlightenment led to the death of Louis XVI. Napoleon's subsequent ascendancy caused such panic in the other royal houses of Europe that they declared war on him and France, and they were rewarded with obliteration at the battle of Austerlitz in 1805. In the opening years of the Nineteenth Century before he crowned himself Emperor, Napoleon was seen as liberating Europe from tyrants. Puccini's *Tosca* captured the time and place perfectly: the rebels cheering Napoleon's victory at Marengo, and Baron Scarpia trembling at Napoleon's advance.<sup>21</sup> Napoleon, of course, was subsequently deposed twice, as was Charles X after the Bourbon Restoration.<sup>22</sup> It would be a century before World War I ended most of the royal houses for all time, but it was the Enlightenment that set the groundwork.

The Constitution of the United States is largely shaped by the English Common Law. The Declaration of Independence is largely shaped by the French Enlightenment. To begin the exploration of this contradiction, we turn our attention back 1,000 years.

19. WILL DURANT, *CAESAR AND CHRIST* 652 (Simon & Schuster, 1944).

20. The origins of this saying are unclear; for an overview of the era, see generally WILL DURANT, *THE RENAISSANCE* (Simon & Schuster, 1953).

21. See GIACOMO PUCCINI, *TOSCA* Act 2 (premiered January 14, 1900 in Rome).

22. See generally WILL DURANT & ARIEL DURANT, *THE AGE OF NAPOLEON* (Simon & Schuster, 1975) (providing an overview of the history of the age of Napoleon).



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## III. THE ENGLISH COMMON LAW

## A. THE COMMON LAW

It was so long ago that England looked different.<sup>23</sup> Winters were colder; the Thames froze with some regularity.<sup>24</sup> There were denser and wider forests and therefore fewer meadows.<sup>25</sup> Droughts were more common.<sup>26</sup> The English Channel, having widened in earlier centuries, provided protection and isolation to the island nation. John H. Wigmore notes that this physical situation played an important role in the development of English law: “In the first place, it was an island, and therefore isolated, and thus its peoples and customs tended to unity.”<sup>27</sup>

Upon this terrain, forbidding yet beautiful at once, William arrived with his conquering army from Northern France in 1066. At first, no effort was made to adapt to the customs of the inhabitants of the Island.<sup>28</sup> The Normans viewed the Britons as “louts and boors,” and “ruled by the force of sharpened steel.”<sup>29</sup> In the nature of things, members of the opposite sexes found reason to get along, and there was some initial exchange of cultural ideas.

Any such progress was greatly halted by William’s death in 1087. He was succeeded by his son William II, who was succeeded by another of his sons, Henry I, but there was much disagreement as various relatives asserted rights to the throne. The young country dissolved into civil war for decades.<sup>30</sup> Upon this chaotic scene emerged Henry II, the grandson of Henry I, in 1154.

It was Henry’s purpose to unify the island. To achieve that, he knew that he had to have a cohesive structure of law throughout the land. The new King had the wisdom to know that the Norman conquest was recent enough that had he attempted to impose any foreign law on the Britons, it would be rejected.<sup>31</sup> “Digests and codes imposed in the Roman manner by an omnipotent state on a subject people were alien to the spirit and tradition of England.”<sup>32</sup> Rather, he sent advisors to the corners of the island to study the customs that already ex-

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23. RICHARD BARBER, *HENRY PLANTAGENET 1-2* (Roman and Littlefield Inc., 1964).

24. *Id.* at 1.

25. *Id.* at 2.

26. *Id.* at 1.

27. 3 WIGMORE, *supra* note 14, 1054.

28. 1 WINSTON CHURCHILL, *A HISTORY OF THE ENGLISH-SPEAKING PEOPLES* 169 (Dodd, Mead and Company, 1956).

29. *Id.*

30. *See generally id.* at 166-98 (providing historical background on William the Conqueror and subsequent rulers).

31. *Id.* at 216.

32. *Id.* at 224.

isted. Henry II is known as the father of the English Common Law because he created structures that preserved existing customs, not because his court arrived at new legal principles *per se*.

These structures of preservation included a system of royal courts designed to handle the increasing number of cases, an increased use of the jury, and a system of writs. Through these structural changes, Henry “gave to English law a conservative spirit which guarded and preserved its continuity from that time on in an unbroken line.”<sup>33</sup>

The law, with its conservative nature established in the first instance by the study of existing customs, took hold fast. In the 1100s, a foreign traveler in England noted that, “England was wholly given over to the study of law.”<sup>34</sup> The pride in the law was such that even monks studied secular as well as sacred law; as it was said at the time, *nullus clericus sine causidicus*, no cleric without the law.<sup>35</sup> Westminster Hall, which would hold the trial of King Charles I, of Warren Hastings, and otherwise be the center of English legal life, was built in 1099.

This initial system of studying past customs provided the origin of precedent and our system of relying on past decisions rather than forward looking statutes. Already the law “rested on the unwritten custom of the land as declared by the inhabitants and interpreted, developed, and applied by the judges. Lawyers could only ascertain it by studying reports and records of ancient decisions.”<sup>36</sup> To aid in this endeavor, they organized themselves into Inns of Court.

The original fourteen have coalesced into the modern four: Lincoln’s Inn, Gray’s Inn, Inner Temple, and Middle Temple.<sup>37</sup> The legal apprentices lived, ate, and learned the law together.<sup>38</sup> Critically, these Inns were as conservative structurally as the law was substantively. The Inns were “the fortress[es] from which an army of professional devotees fought stubbornly in defence of English law.”<sup>39</sup>

And who were these devotees? They were, unsurprisingly, sons of the English ruling class. This had quite literally been true since the Normans.<sup>40</sup> As Fortescue wrote, “Only the sons of gentlemen do study the law in these hostels; there is scarce an eminent lawyer who is not

33. *Id.* at 221.

34. 3 WIGMORE, *supra* note 14, at 1061.

35. *Id.* at 1062.

36. 1 CHURCHILL, *supra* note 28, at 223.

37. 3 WIGMORE, *supra* note 14, at 1064.

38. *Id.*

39. *Id.* at 1081.

40. *Id.* at 1083.

a gentleman by birth and fortune.”<sup>41</sup> Of all of the fine attributes of the English ruling class, accepting change is not one of them.

In the Thirteenth Century, the early English scholar Henry de Bracton wrote his famous *De Legibus Angliae*.<sup>42</sup> Whereas the great Code of Justinian was just that, code law, Wigmore notes that Bracton “composed most of his text from his observations of cases decided in court. So his book represented in substance a native English, not a Romanesque, practice of law.”<sup>43</sup> It was not that Roman law simply failed to take hold; it was actively rejected.<sup>44</sup> In the late 1400s, Chief Justice Fortescue wrote *De Laudibus Legum Angliae*, or *In Praise of the English Law*.<sup>45</sup> Not only did it praise the English Common Law system, it actively attacked Roman code law. The imperial designs of Charles V of France (where Roman law was practiced) and the blatant corruption of Rodrigo Borgia (Pope Alexander VI) made it somewhat easier for England, swelling with patriotism, to reject anything Roman. In the Sixteenth Century, Fortescue’s successor, Chief Justice Coke, continued this theme with his *Institutes on the Lawes of England*.<sup>46</sup>

Nor is there disagreement when viewed from across the English Channel. Justinian’s Code from 533 A.D. specifically rejects the idea of precedent, stating it to be “impossible” that a previous legal ruling be considered binding.<sup>47</sup> This spread across the continent and the centuries. Edwin Patterson has noted that, “The categorical rejection of case law as ‘binding’ was continued in civil law countries, with some modifications.”<sup>48</sup> The most famous modern incarnation is, of course, the Code Napoleon; in France a single decision of the highest court is not considered binding (“*en droit*”) on that court or any other.

In addition to continuing the work of Fortescue in solidifying the continuity of the conservative nature of the English Common Law, Sir Edward Coke, followed by Sir William Blackstone, famously espoused the English idea of Natural Law. Blackstone described Natural Law as follows:

Thus, when the Supreme Being formed the universe, and created matter out of nothing, he impressed certain principles upon that matter . . . so, when he created man . . . he laid

41. *Id.* (quoting SIR. JOHN FORTESCUE, *DE LAUDIBUS LEGUM ANGLIAE* (ca. 1543)).

42. *Id.* at 1062.

43. *Id.* at 1064.

44. *See id.* at 1077.

45. *Id.* at 1078.

46. *Id.* at 1078-79.

47. EDWIN W. PATTERSON, *JURISPRUDENCE: MEN AND IDEAS OF THE LAW* 207 (The Foundation Press, Inc., 1953).

48. *Id.*

down certain immutable laws . . . and gave him the faculty of reason to discover the purport of those laws.<sup>49</sup>

Winston Churchill described the views of Chief Justice Sir Edward Coke in a similar way: “Coke himself was reluctant to admit that law could be made, or even changed. It existed already, merely awaiting revelation and expostulation.”<sup>50</sup> “The law was already there, in the customs of the land, and it was only a matter of discovering it by diligent study and comparison of recorded decisions in earlier cases, and applying it to the particular dispute before the court.”<sup>51</sup>

Note the implications towards a conservative viewpoint. It is conservative enough to rely on precedent rather than statute. It is equally conservative enough to have the law preserved by a conservative part of society. Yet Blackstone and Coke achieved a new level of conservatism, perhaps unwittingly; *if the law existed in nature, how could it be changed? On what basis could it be challenged?* Patterson describes this theory as one in which the law is “absolute, immutable and of universal validity for all times.”<sup>52</sup> One is reminded of the lyrics of Sir William Gilbert in Gilbert & Sullivan’s *Iolanthe*:

The Law is the true embodiment  
Of everything that’s excellent.  
It has no kind of fault or flaw,  
And I, my Lords, embody the Law.<sup>53</sup>

It should be noted that Sir William was in possession of a law degree.

#### B. THE INFLUENCE ON THE CONSTITUTION

Which leads us to the United States of America. The English Common Law came over with the Mayflower. Justice Story has written, “Our ancestors brought with them the general principles of the common law, and claimed it as their birthright . . . .”<sup>54</sup> King George III instructed the Virginia Council, “the disposing of all causes happening within the same” should be “done as near to the common laws of England and the equity thereof as may be.”<sup>55</sup> There was no objection. It was noted a century later that, “the common law of England is

49. 1 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE ENGLISH LAW 38-40 (University of Chicago Press, 1979) (1763).

50. 2 WINSTON CHURCHILL, A HISTORY OF THE ENGLISH-SPEAKING PEOPLES 155 (Dodd, Mead & Co., 1956).

51. 1 CHURCHILL, *supra* note 28, at 224.

52. PATTERSON, *supra* note 47, at 333.

53. WILLIAM S. GILBERT & ARTHUR SULLIVAN, IOLANTHE act 1, sc. 2 (1882), <https://gsarchive.net/iolanthe/iolib.pdf>.

54. 3 WIGMORE, *supra* note 14, at 1100 (quoting Justice Story (1853)).

55. *Id.* at 1098-99 (quoting King George III, *Instruction to the Virginia Council* (1606)).

the common law of the plantations.”<sup>56</sup> Critically, on the eve of our Revolution in 1774, the Continental Congress wrote that it was fitting to declare that, “the respective colonies are entitled to the common law of England.”<sup>57</sup>

The Inns of Court themselves influenced the Constitution. Arthur Middleton, afterwards Chairman of the Committee of Five at Philadelphia to draft the Constitution, studied at Middle Temple.<sup>58</sup> The Commentaries on the English Law of Sir William Blackstone, a former apprentice at Middle Temple, were of such popularity that 2,500 copies were sold in the colonies before independence was declared.<sup>59</sup> More than 200 American lawyers had trained at one of the Inns in the 1700s.<sup>60</sup> Several of them became Chief Justices of state supreme courts, and critically, several sat in the Constitutional Convention.<sup>61</sup>

Numerous Justices have noted how the English Common Law instructed the drafting of the Constitution. While there is great debate as to whether and how that history should be applied in modern times, there is far less disagreement than it seems on the actual historical influence.

Take, for example, the Second Amendment. In *McDonald v. City of Chicago*,<sup>62</sup> Justice Alito noted the impact of English legal history on the Framers’ approach to drafting the Second Amendment:

[T]he 1689 English Bill of Rights explicitly protected a right to keep arms for self-defense, and . . . by 1765, Blackstone was able to assert that the right to keep and bear arms was “one of the fundamental rights of Englishmen.”

Blackstone’s assessment was shared by the American colonists. As we noted in *Heller*, King George III’s attempt to disarm the colonists in the 1760’s and 1770’s “provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.”

The right to keep and bear arms was considered no less fundamental *by those who drafted and ratified the Bill of Rights*. “During the 1788 ratification debates, the fear that the federal government would disarm the people in order to

56. *Id.* at 1099 (quoting Mr. West, attorney general to the Board of Trade (1720)).

57. Resolved, N.C.D. 5, 1st Continental Cong. (1774), <https://www.ushistory.org/declaration/related/decres.html#:~:text=5,the%20course%20of%20that%20law>.

58. 3 WIGMORE, *supra* note 14, at 1083.

59. *Id.* at 1098.

60. *Id.*

61. *Id.*

62. 561 U.S. 742 (2010).

impose rule through a standing army or select militia was pervasive in Antifederalist rhetoric." . . . This is surely powerful evidence that the right was regarded as fundamental in the sense relevant here.<sup>63</sup>

Justice Alito further noted that St. George Tucker, Professor of Law at William and Mary during the drafting of the Bill of Rights, cited Blackstone describing "the right to keep and bear arms as 'the true palladium of liberty' and explained that prohibitions on the right would place liberty 'on the brink of destruction.'"<sup>64</sup> Justice Scalia relied similarly on English history and context in another Second Amendment case, *District of Columbia v. Heller*.<sup>65</sup> Justice Scalia refers to the Restoration and Revolutionary period in England as to why the right is so important:

[W]hen the able-bodied men of a nation are trained in arms and organized, they are better able to resist tyranny . . . . [English] history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights.<sup>66</sup>

Critically, the English Common Law and legal history were instructive in drafting the Fifth Amendment, its phrases and the meaning of the word liberty later borrowed by the Fourteenth Amendment. Justice Thomas gave a detailed description of what the word liberty meant at English law, and it is worth quoting at length:

As used in the Due Process Clauses, "liberty" most likely refers to "the power of locomotion, of changing situation, or removing one's person to whatsoever place one's own inclination may direct; without imprisonment or restraint, unless by due course of law." That definition is drawn from the historical roots of the Clauses and is consistent with our Constitution's text and structure.

Both of the Constitution's Due Process Clauses reach back to Magna Carta . . . . Although the 1215 version of Magna Carta was in effect for only a few weeks, this provision was later reissued in 1225 with modest changes to its wording as follows: "No freeman shall be taken, or imprisoned, or be disseised of his freehold, or liberties, or free customs, or be

63. *McDonald*, 561 U.S. at 768-69 (citations omitted) (emphasis added).

64. *Id.* at 769 (quoting 1 BLACKSTONE'S COMMENTARIES, EDITOR'S APP. 300 (S. Tucker ed., 1803)).

65. 554 U.S. 570 (2008).

66. *Heller*, 554 U.S. at 598.

outlawed, or exiled, or any otherwise destroyed; nor will we not pass upon him, nor condemn him, but by lawful judgment of his peers or by the law of the land.”

. . . .

The Framers drew heavily upon Blackstone’s formulation, adopting provisions in early State Constitutions that replicated Magna Carta’s language, but were modified to refer specifically to “life, liberty, or property.” State decisions interpreting these provisions between the founding and the ratification of the Fourteenth Amendment almost uniformly construed the word “liberty” to refer only to freedom from physical restraint . . . .

In enacting the Fifth Amendment’s Due Process Clause, the Framers similarly chose to employ the “life, liberty, or property” formulation . . . . When read in light of the history of that formulation, it is hard to see how the “liberty” protected by the Clause could be interpreted to include anything broader than freedom from physical restraint.

. . . .

. . . As one later commentator observed, “[L]iberty in the eighteenth century was thought of much more in relation to ‘negative liberty’; that is, freedom from, not freedom to, freedom from a number of social and political evils, including arbitrary government power.” Or as one scholar put it in 1776, “[T]he common idea of liberty is merely negative, and is only the absence of restraint.”<sup>67</sup>

Agree or disagree with Justice Thomas’s jurisprudence, this history is generally not questioned. English law from the Magna Carta through Blackstone was utterly consistent, that liberty meant only not being in a prison of some sort. Thus are we presented with overwhelming evidence of what the liberty interest passed to us from England meant in its original form. To contemplate the liberty interest passed from the Enlightenment we now turn our gaze across the English Channel to that fairest country on earth, France.

#### IV. THE FRENCH ENLIGHTENMENT

##### A. THE ENLIGHTENMENT

The Age of Enlightenment extended, of course, past the borders of France; France cannot, and does not, claim the movement entirely for herself. England gave us Locke, Germany gave us Kant, and Scotland

67. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632-35 (2015) (Thomas, J. dissenting) (emphasis omitted) (citations omitted).

gave us Hume. Nevertheless, France remained the epicenter of it all, and “all educated Europe looked to France for the latest notions.”<sup>68</sup> It is not surprising; during the Early and Middle Ages, many of the precious documents and much of the learning and knowledge survived the 1,000 years of darkness between the fall of Rome and the Renaissance in the safety of French hands.

The *philosophes* led the movement. They were a group of great minds and huge personalities; often eccentric, sometimes incorrect in hindsight, yet always questioning and searching. They did not accept conditions as they found them. If the Renaissance “turned its back towards death and face towards life”<sup>69</sup> and embraced beauty and humanity, the *philosophes* built on this legacy and used reason to replace ignorance. That of course had a cascading effect; the more knowledge one acquires in life, the more knowledge one desires. Though the *philosophes* admitted the limitations of reason (especially Hume, if he truly can be considered one), there was no doubt that the reasoning of the Enlightenment threw off the two main pillars that had ruled during the Early and Middle Ages: the Catholic Church and the Monarchy. Rather than viewing liberty as merely freedom from bodily restraint, they sought a broader liberty, that of soul and mind.

During its first period, the Enlightenment aimed itself squarely at the Church. It was not aimed at God *per se*; even Voltaire, while attacking every aspect of organized religion, professed a belief in God for his entire life<sup>70</sup> (though it is said he did decline to reject Satan on his deathbed as “this was no time to be making enemies”). The argument was, in the words of the great historian Will Durant, “an argument between the *philosophes* and Catholic Christianity as it then existed in France.”<sup>71</sup>

Numerous reasons existed for the *philosophes* to argue against the rule of the Church. Like in England, the Church in France was monumentally wealthy in gold and land; unlike England, the French Church was accountable to a foreign power.<sup>72</sup> While refusing to pay taxes, it drained a tremendous amount of money away from a populace often desperately poor.<sup>73</sup> When Jefferson arrived in France, he was amazed that a country with the most perfect soil and air on earth could produce so much hunger. The Church controlled nearly all of the schools, “inculcating the minds of the young with stupefying ab-

68. WILL DURANT & ARIEL DURANT, *THE AGE OF VOLTAIRE* 606 (Simon & Schuster, Inc., 1965).

69. *See supra* note 20.

70. DURANT, *supra* note 68, at 606.

71. *Id.*

72. *Id.* at 608.

73. *Id.*



surdities.”<sup>74</sup> The Church had been behind the massacres of Huguenots and numerous other sects. The *philosophes* saw and rejected this past, initially aiming their strongest intellectual guns at the Church. They sought liberty of the soul from the superstition of the practices of the day.

Voltaire must be mentioned first. The approach of Voltaire’s intellectual attack, as with other *philosophes*, was somewhat new.<sup>75</sup> They were not “solemn recluses, talking to themselves or their like in esoteric gibberish.”<sup>76</sup> They wrote, if not for the ‘common man’ (who most likely could not read), then in a manner and style that was accessible. They used wit; they prized brevity and clarity. Responding to a 1,000-page treatise arguing that all political systems and decisions could be attributed to the weather, Voltaire responded as Durant describes: “He thought it more likely that England had gone Protestant because Anne Boleyn was beautiful than because Henry VIII was cold.”<sup>77</sup> This style popularized the movement, and again “all educated Europe looked to France for the latest notions.”<sup>78</sup> So did young men across the Atlantic.

Voltaire’s ire had risen when he was young, his brilliance in writing causing him both exile<sup>79</sup> and imprisonment<sup>80</sup> sanctioned by both the Church and Crown. They picked the wrong enemy.

His works often included the expression *écrasez l’infâme*, or “crush the infamous,” referring to abuses by the clergy and royalty.<sup>81</sup> The phrase refers to abuses of the people by royalty and the clergy that Voltaire saw around him and the superstition and intolerance that the clergy bred within the people.<sup>82</sup> His numerous writings chipped away piece by piece at the rule of the Church. In *Candide*, Voltaire used a conversation between an old man and Candide in Eldorado mercilessly.<sup>83</sup> After initial inquiries as to the tenets of the old man’s religion, Candide asked to see some of their priests.<sup>84</sup> The old

74. *Id.*

75. *Id.* at 606.

76. *Id.*

77. *Id.* at 357.

78. *Id.*

79. *Id.* at 41.

80. *Id.* at 3.

81. *Écrasez L’infâme*, MERRIAM-WEBSTER.COM, <https://www.merriam-webster.com/dictionary/%C3%A9crasez%20l%27inf%C3%A2me> (last visited Aug. 18, 2020); see also GOOGLE TRANSLATE, <https://translate.google.com/?um=1&ie=UTF-8&hl=en&client=tw-ob#view=home&op=translate&sl=fr&tl=en&text=%C3%A9crasez%20l%27inf%C3%A2me> (last visited Sept. 14, 2020).

82. See generally DURANT, *supra* note 68, at 736-44.

83. Aslan, *What Ways Did Voltaire Criticize the Church and Religion?*, GRADESAYER.COM (Feb. 26, 2012, 5:53 AM), <https://www.gradesaver.com/candide/q-and-a/what-ways-did-voltaire-criticize-the-church-and-religion-64689>.

84. *Id.*

man responded that they all had direct relationships with God and therefore had no need of priests as an intermediary.<sup>85</sup> Candide replied in surprise: “What! You have no monks who teach, argue, rule, plot and burn people who don’t agree with them?” The old man did not understand.<sup>86</sup> In his 1763 *Treatise on Toleration*, Voltaire attacked more directly and with less humor the persecution caused by the Catholic Church.<sup>87</sup> These are but two examples of a lifetime’s work.

Nor did Voltaire limit his attack on the Church to the written word. He was so outraged by the case of Jean Calas that he waded into the dense French legal system.<sup>88</sup> In 1761, Jean Calas was falsely accused of murdering his own son; in reality, his only crime was being an outspoken Protestant. The Catholic Church ordered witnesses to come forth with nothing more than hearsay and threatened excommunication for those who did not do so.<sup>89</sup> This use of blackmail by way of superstition was precisely what offended Voltaire the most. He spent years clearing Calas’ name, which he succeeded in doing in 1778. Upon returning to Paris from Toulouse, Voltaire was publicly embraced by Benjamin Franklin. Voltaire said, “Superstition sets the whole world in flames; philosophy quenches them.”<sup>90</sup> Describing his life, the great historian Will Durant wrote, “When we cease to honor Voltaire we are unworthy of freedom.”<sup>91</sup>

Any such discussion must include the *Encyclopedie* of Denis Diderot. Diderot had a youth of wide but unfocused learning; “he never learned discipline, but he learned nearly everything else.”<sup>92</sup> This broad knowledge led to his work on the *Encyclopedie*. Its contribution may not be measured in specifics but in its breathtaking scope. In philosophy, it included works of Bacon, Descartes, Hobbs, Locke, and Spinoza; in science, Copernicus, Galileo, Descartes, and Newton.<sup>93</sup> Diderot took this world of knowledge and aimed it at the Church. The Archbishop Cristophe de Beaumont condemned it as an

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85. *Id.*

86. *Id.*

87. Eleanor Beardsley, *After Paris Attacks, Voltaire’s ‘Tolerance’ is Back in Vogue*, NAT’L PUB. RADIO (Feb. 15, 2015), <https://www.npr.org/sections/parallels/2015/02/15/385422239/after-paris-attacks-voltaires-tolerance-is-back-in-vogue>.

88. Ken Armstrong, *Broken on the Wheel*, PARIS REV. (Mar. 13, 2015) <https://www.theparisreview.org/blog/2015/03/13/broken-on-the-wheel/>.

89. *Id.*

90. Bob Desautels, *Superstition sets the whole world in flames; philosophy quenches them*, BOB DESAUTELS (May 30, 2019), <https://www.bobdesautels.com/blog/2019/5/30/superstition-sets-the-whole-world-in-flames-philosophy-quenches-them-franais-marie-arouet-voltaire>.

91. DURANT, *supra* note 68, at 786.

92. *Id.* at 623.

93. *Id.* at 633.

attack on religion, and in February of 1762 Diderot was arrested.<sup>94</sup> Voltaire tried to arrange protection for Diderot through Fredrick II (whom Voltaire called “Le Grand,” a description which stuck);<sup>95</sup> Thomas Jefferson recommended the *Encyclopedie* to his friends.<sup>96</sup> Its influence was such that forty-three editions were published in twenty-five years in numerous countries.<sup>97</sup> It was the summation of the movement, the “revolution before the Revolution.”<sup>98</sup> It should be noted today that the French Constitution of 1958 begins with the words: “France is an indivisible, *secular*, democratic and social Republic.”<sup>99</sup> The *philosophes* won.

The Enlightenment turned its sights next on the Monarchy, seeking liberty in more earthly matters. To the *philosophes*, the monarchy was as much, if not more, responsible for the pathetic condition of France’s citizens. Equally critically, justification for the Monarchy had no more basis in rational thought than did justification for the Church. The Monarchy was, of course, based on the “[m]ediaeval concept of the divine right of kings.”<sup>100</sup> Aristocratic birth indicated actual superiority.<sup>101</sup> Noble blood was thought to make one actually better, not just more fortunate.<sup>102</sup> The great historian Barbara Tuchman has noted that before the Industrial Revolution it was thought there was inherent superiority in “captains and kings,” and that afterwards the idea has formed that there is inherent wisdom in the “common man.”<sup>103</sup> Probably neither is more true or false than the other.

The Baron D’Holbach took especially fierce aim. Born to nobility and wealth, he betrayed his class with equal vigor to Franklin Roosevelt. His influence was widespread, described as the “best loved of the *philosophes*.”<sup>104</sup> He was at the center of it all; Horace Walpole,

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94. *Id.* at 639.

95. *Id.*

96. *Id.* at 649.

97. *Id.*

98. *Id.*

99. MINISTÈRE DE L’EUROPE ET DES AFFAIRES ÉTRANGÈRES, <https://www.diplomatie.gouv.fr/en/coming-to-france/france-facts/secularism-and-religious-freedom-in-france/article/secularism-and-religious-freedom-in-france> (last visited Aug. 18, 2020).

100. Steven J. Schroepel, *Foreign Influence: Thomas Jefferson and the Thinkers of the French Revolutionary Era* 31 (Mar. 15, 2015) (M.A. thesis, Georgetown University) (emphasis omitted), [https://repository.library.georgetown.edu/bitstream/handle/10822/760883/Schroepel\\_georgetown\\_0076M\\_12843.pdf](https://repository.library.georgetown.edu/bitstream/handle/10822/760883/Schroepel_georgetown_0076M_12843.pdf).

101. *Id.*

102. *Id.*

103. See generally BARBARA W. TUCHMAN, *PRACTICING HISTORY: SELECTED ESSAYS* (Random House Publishing, 2011).

104. DURANT, *supra* note 52, at 695.

son of Britain's first Prime Minister, called D'Holbach "the maître d'hotel of philosophy."<sup>105</sup>

D'Holbach viewed monarchs as inevitably exploiting the majority.<sup>106</sup>

On the face of this globe we see only unjust sovereigns, enervated by luxury, corrupted by flattery. Depraved by licentiousness, made wicked by impurity, devoid of talents, without morals . . . and incapable of exerting an energy for the benefit of the states they govern. They are consequently but little occupied with the welfare of their people, and indifferent to their duties, of which, indeed, they are often ignorant. Stimulated by the desire . . . to feed their insatiable ambition, they engage in useless, depopulating wars, and never occupy their minds with those objects which are the most important to the happiness of their nation.<sup>107</sup>

Jean Jacques Rousseau agreed. His *Du Contrat Social; ou Principes du Droit Politique* made history's most famous argument against monarchy. Rousseau argued with all of his force against the divine right of kings, maintaining that power must rest with the people. He "insisted that there were inevitable tendencies for a king either to be or to become narrow and malicious, to want to keep his people backward, for his appointees to be inferior men, and for the hereditary principle to bring to the throne infants and imbeciles."<sup>108</sup> Rousseau

looked to discredit absolute monarchy in particular, and did so successfully for many readers. They [the *philosophes*] also began to cast arguments and ideas in terms of equality of persons in general . . . Common people were beginning to insist that they mattered too, that their existences deserved some respect, that they deserved a voice in their lot and governance.<sup>109</sup>

In this way, Rousseau and D'Holbach went further than Voltaire and the earlier generation of *philosophes*. Rousseau perhaps lacked the clarity, or at least eloquence, of Voltaire. But his writings reached the middle and lower classes at astonishing levels. As with all historical movements, the *philosophes* were both causing the tide of history and being carried by it. Revolutionary ideas were sweeping through Europe; change was occurring at a breathtaking rate. In *Le Nozze de*

105. *Id.* at 695.

106. *Id.* at 708.

107. *Id.* (quoting PAUL HENRY THIRY (The Baron D'Holbach), *I SYSTÈME DE LA NATURE OU DES LOIX DU MONDE PHYSIQUE ET DU MONDE MORAL*, chap. XIV).

108. Gordon H. McNeill, *Rousseau and Monarchy*, 10 J. ARK. ACAD. OF SCI. 13, 16 (1957), <https://scholarworks.uark.edu/cgi/viewcontent.cgi?article=3234&context=jaas>.

109. Schroepfel, *supra* note 100, at 32.

*Figaro* of 1786, that greatest achievement of classical music, Mozart had to disguise his revolutionary themes behind the Opera Comique libretto of Lorenzo De Ponte to escape the censors of Vienna. By 1803, Beethoven needed to hide nothing; his title page to the great Eroica Symphony was dedicated to pre-Emperor Napoleon, then seen as the liberator of Europe. Well known to history, Beethoven tore up the dedication after December 2, 1804 when Napoleon crowned himself Emperor.

Louis XVI was the first to go in 1793. Frances II of the Holy Roman Empire abdicated in 1806 after defeat at the hands of Napoleon at the Battle of Austerlitz. Napoleon himself was deposed for the second and final time in 1815. After the Restoration, the returned Bourbon Charles X abdicated in 1830. Though the final rupture of the old houses would not be complete until World War I, it was the *philosophes* who undermined the intellectual foundations of a millennium of the rules of kings and queens and set the wheels in motion.

Thus had the *philosophes* destroyed the ancient pillars of the past. We must now turn to their relationship with the new country across the sea.

#### B. THE INFLUENCE ON THE DECLARATION

The influence of the Age of Enlightenment on the Founders was profound. Durant writes without hyperbole: “[T]he writings of Voltaire, Rousseau, Diderot, Raynal, and a hundred others had prepared the French mind to support colonial as well as intellectual liberation, and many American leaders—Washington, Franklin, Jefferson—were sons of the French Enlightenment.”<sup>110</sup> Sons of the French Enlightenment: there is no better way to describe them. In 1759, John Adams began reading works of the great Enlightenment figures, specifically admonishing himself to read more Montesquieu.<sup>111</sup> James Madison “devoured” Enlightenment writings at Princeton under the brilliant tutelage of Professor John Witherspoon.<sup>112</sup> “[T]he works of Locke and Montesquieu, Vattel and Burlamaqui, even Rousseau and Voltaire, were more or less basic equipment for anyone intellectually concerned with public questions.”<sup>113</sup>

110. WILL DURANT & ARIEL DURANT, *ROUSSEAU AND REVOLUTION* 867 (Simon & Schuster, 1967).

111. FAWN BRODIE, *THOMAS JEFFERSON: AN INTIMATE HISTORY* 98 (W.W. Norton & Co., Inc., 1974).

112. STANLEY ELKINS & ERIC MCKITRICK, *THE AGE OF FEDERALISM* (1993), reprinted in VINCENT BLASI, *FREEDOM OF SPEECH IN THE HISTORY OF IDEAS* 18, 24 (West Academic Publishing, 2015).

113. *Id.* at 23.

When the Declaration of Independence was translated into French, France rejoiced, recognizing its influence on the new country.<sup>114</sup> Jefferson was a Francophile in all ways, from the intellectual movements to food and wine to the architecture. Jefferson based Monticello itself on the design of the Louvre, its wings jutting out towards the visitor, at once intimidating and welcoming. This relationship between Jefferson and France defined the new country.

As Steven Schroepell writes:

One may, without great difficulty, trace the origins of the majority of Jefferson's political tenets and beliefs to some of the great writers of the Enlightenment who were indeed remarkable theorizers and innovators, such as Jean-Jacques Rousseau, John Locke, Francis Bacon, Montesquieu, Isaac Newton, René Descartes, Voltaire, and Thomas Hobbes – works by each may be found in Jefferson's preserved personal library.<sup>115</sup>

The sources of the principles that lie at the core of Jefferson's system of political beliefs are readily identifiable. However, it was more complex than one simply influencing the other. The ideas of French liberty flowed through the mind of Jefferson and the others, and then flowed back to France. In early August of 1784, Thomas Jefferson arrived with his daughter Patsy in Paris.<sup>116</sup> Jefferson, along with Benjamin Franklin and John Adams, had been appointed Ministers Plenipotentiary to negotiate treaties with various European nations. The elder Franklin had been in Paris for several years, earning a colorful reputation.<sup>117</sup> Franklin greeted the arrival of Jefferson with delight, as he greatly admired the shining intellect and courteous manners of the Virginian.<sup>118</sup>

John Adams arrived in Paris a week after Jefferson.<sup>119</sup> The three dined together and made the beginnings of a social circle. This circle quickly expanded to include those with whom Jefferson had great philosophical connections. Within a short while, Jefferson was appointed to succeed Benjamin Franklin as Minister to France, and Adams left for London, having just been appointed Ambassador to the Court of St. James. Jefferson quickly filled the vacuum with *philosophes*. Soon his dinner table regularly included the Duc de La

114. Durant, *supra* note 107, at 868.

115. Schroepell, *supra* note 100, at 49-50.

116. DUMAS MALONE, JEFFERSON AND THE RIGHTS OF MAN 3 (Little, Brown and Company, 1951).

117. *Id.* at 6.

118. *Id.* at 3.

119. *Id.* at 4.

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Rochefoucauld, the Marquis de Cordecet, and of special interest, the Marquis de Lafayette.<sup>120</sup>

Lafayette was the primary author of the *Déclaration des droits de l'homme et du citoyen* of 1789. Jefferson had significant influence through Lafayette on this document,<sup>121</sup> and his expansive view of the word “Liberty” may be seen in Article IV of the *Déclaration*: “Liberty consists of doing anything which does not harm others: thus, the exercise of the natural rights of each man has only those borders which assure other members of the society the fruition of these same rights.”<sup>122</sup> This was how Thomas Jefferson saw liberty.

## V. CONCLUSION

This was also how Jefferson saw a liberty interest when he wrote the Declaration of Independence. Of course, it almost did not happen. There was some thought that John Adams should draft the Declaration of Independence. Adams, however, with a modesty that served the cause and history with singular import, told Thomas Jefferson that he indeed should be the one to author the Declaration of Independence. Though historical accounts vary, when Jefferson asked why, Adams said in reply that, “Reason first, you are a Virginian, and a Virginian ought to appear at the head of this business. Reason second, I am obnoxious, suspected, and unpopular. You are very much otherwise. Reason third, you can write ten times better than I can.”<sup>123</sup>

But happen it did. We need not guess at what Jefferson meant by liberty. It was the theme of his life, in theory if not in personal practice.

Of these rights, perhaps Jefferson’s greatest focus was on that of liberty—the right to lead the life, as best one can manage, that one chooses to lead, without being fettered by unjust external control or interference. Jefferson characterized it thus: “rightful liberty is unobstructed action according to our will within limits drawn around us by the equal rights of others.”<sup>124</sup>

This is a far distance from the English concept of a liberty interest of merely not being locked in the Tower of London. This view is also not inconsistent with strands of constitutional jurisprudence that

120. *Id.*

121. Schroepfel, *supra* note 100, at iv.

122. DECLARATION OF THE RIGHTS OF MAN AND OF THE CITIZEN para. 4 (1789).

123. *Drafting the Declaration of Independence*, CONSTITUTIONFACTS.COM, <https://www.constitutionfacts.com/us-declaration-of-independence/drafting-the-declaration/> (last visited Aug. 19, 2020).

124. Schroepfel, *supra* note 100, at 43 (quoting letter from Thomas Jefferson to Isaac H. Tiffany (April 4, 1819)).

adopt a broader view of a liberty interest than did Justices Thomas, Scalia, and Alito *supra*.<sup>125</sup> Dissenting in *Poe v. Ullman*,<sup>126</sup> Justice Harlan noted this truth: “The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees . . . . This ‘liberty’ is not a series of isolated points . . . but a rational continuum . . . .”<sup>127</sup> Justice O’Connor perhaps described it best in *Planned Parenthood v. Casey*:<sup>128</sup>

These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.<sup>129</sup>

It is axiomatic that the spirit of the law should instruct the letter of the law. The import of considering the Constitution in tandem with the Declaration of Independence, as Abraham Lincoln would have us do, has never been more important. The French spirit of liberty must instruct the English letter of liberty. The future of Substantive Due Process is at stake. The future of rights, from contraception to abortion to engaging in what consensual sexual activity one wishes, is at stake.

It has been stated that the “Declaration looks backward, as the last word in the American argument with Britain, and forward, as a statement of the principles of American experiments in government.”<sup>130</sup> Yet perhaps it is not an argument; perhaps we need not choose sides. Our mutual inheritance from England and France has defined and enriched our history. Perhaps English influence limited the excesses of the French revolution from coming to America; perhaps the expansive French view of liberty allows the English Common Law to find its best voice. Though the liberty interest of the Magna Carta may have been the original intent, the liberty of the *philosophes* has and should continue to instruct that original intent. As Americans, we value the right to define our own meaning of the universe, free from the compulsion of the state, perhaps more than any other

125. See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2632-35 (2015) (Thomas, J., dissenting) (for Justice Thomas’s view on liberty); *McDonald v. City of Chicago*, 561 U.S. 742, 768-69 (2010) (for Justice Scalia’s view on liberty); *District of Columbia v. Heller*, 554 U.S. 570, 598 (2008) (for Justice Alito’s view on liberty).

126. 367 U.S. 497 (1961)

127. *Poe v. Ullman*, 367 U.S. 497, 523 (Harlan, J., dissenting).

128. 505 U.S. 833 (1992).

129. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

130. R.B. BERNSTEIN, *THOMAS JEFFERSON* 33 (Oxford University Press, 2003).



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aspect of our citizenship. Perhaps this is the true legacy; that the English Common Law as instructed by the spirit of the French Enlightenment created America. We owe our thanks to both of these proud countries. May we continue to be worthy of it.





# CASTING A BROAD NET: THE FEDERAL COMMUNICATION COMMISSION’S PREEMPTION OF STATE BROADBAND INTERNET REGULATION

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## I. INTRODUCTION

As a comparatively modern innovation, the internet has become fundamental in our personal and professional lives. With increasing frequency we are introduced to new innovations in internet-based technologies that seek to make our lives easier socially, politically, and economically; changing how we consume our news, transact business, engage in communication, social connections and interactions, relax with entertainment, and even how we shop for our weekly groceries. As just one measure for the total pervasiveness of the internet today, digital ad spending in the United States is expected to finally overtake traditional ad spending (print, television, and radio, combined) in the

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United States in 2019 with estimated expenditures of \$129.34 billion or approximately 54.2 percent of all U.S. ad spending.<sup>1</sup>

Yet for the vastness of the internet—in both its role in today’s society and in the available content provided by a countless number of content providers (from big companies like Google, Facebook, Amazon, and Netflix, to individual bloggers and today’s “social media influencers,” and everything in between)—only a relatively few companies, known as internet service providers or “ISPs,” provide access to the internet.<sup>2</sup> And, importantly, the ISPs themselves provide the critical infrastructure and the network connections necessary to link content providers to the millions of internet users or consumers.

As a small number of ISPs dominate the increasingly salient internet access services market, federal and state legislators, executives, and regulators throughout the United States have begun to take notice. Part of recognizing and accepting the role that the internet (and ISPs as providing access to the internet) plays in today’s society is—as legislators, regulators, stakeholders, and others are beginning to do—confronting the issue of whether, how, and to what extent ISPs and the internet more broadly should be regulated.

In 2015, the Federal Communications Commission (“FCC”), for the first time of such magnitude, imposed rigorous regulations and rules on broadband ISPs. In doing so, the federal government had essentially decided as a policy matter that it was necessary to regulate how ISPs were ferrying or conveying the internet to consumers, ultimately connecting them to internet content producers; a regulatory scheme known as “net neutrality.” In doing so, the FCC at least implicitly viewed broadband internet as a public (rather than private) good, subjecting it to the regulations more familiar to common carriers of television and telephone services within the modern communica-

1. *US Digital Ad Spending Will Surpass Traditional in 2019*, EMARKETER (Feb. 19, 2019), <https://www.emarketer.com/content/us-digital-ad-spending-will-surpass-traditional-in-2019>.

2. In 2017, two of the largest ISPs—Comcast and Charter—served as internet access service providers for an estimated 122 million people; by comparison, the next four telecommunications companies (AT&T, Verizon, CenturyLink, and Frontier Communications) provided internet access services for a combined 80.3 million people. HANNAH TROSTLE & CHRISTOPHER MITCHELL, PROFILES OF MONOPOLY: BIG CABLE AND TELECOM, 27 (2018), <https://ilsr.org/monopoly-networks/>. In a similar vein, another recent study found that the three largest broadband internet providers in the United States—Comcast, Charter, and AT&T—make up almost 60% of the broadband internet market just by themselves. Pete Bell, *Cable is the Main Form of Broadband Access in North America*, TELEGEOGRAPHY (Nov. 2018), <https://blog.telegeography.com/cable-is-main-form-of-broadband-access-in-north-america>. And this trend only continues. See Jon Brodtkin, *Cable Expands Broadband Domination as AT&T and Verizon Lose Customers*, ARSTECHNICA (Aug. 16, 2016), <https://arstechnica.com/information-technology/2016/08/cable-expands-broadband-domination-as-att-and-verizon-lose-customers/>.

tions technology industry.<sup>3</sup> Just three years later, however, the FCC drastically altered course. Under a new administration focused on deregulation,<sup>4</sup> the FCC promulgated an order, the “Restoring Internet Freedom Order,” (“2018 Order”) that repealed its prior set of rules and regulations concerning broadband ISPs.<sup>5</sup>

Under this order, rather than regulating broadband internet as a public good to which the federal regulatory scheme for common carriers applies (as a practical effect, resulting in net neutrality regulations) the new regulatory scheme necessarily viewed broadband internet more like a private good, which is best regulated under a more market-based or laissez-faire approach. Most importantly, although not uniquely in agency rulemaking and regulation, the FCC reinforced its new regulatory scheme by expressly preempting states from imposing any net neutrality-style rules within their own jurisdiction (the same style or type of rules the previous FCC had made federal policy in its 2015 Order and which the FCC disavowed in 2018).<sup>6</sup>

Despite the agency’s 2018 Order, state legislatures throughout the country maintained a view of the internet as necessarily a public good subject to appropriate regulation. In the 2018 legislative session, five states enacted legislation or adopted resolutions concerning net neutrality and thirty-four states introduced 120 bills or resolutions on the issue of internet regulation and net neutrality.<sup>7</sup> In 2019, twenty-nine states introduced legislation concerning net neutrality and four states enacted legislation concerning net neutrality.<sup>8</sup> In addition, in

3. See Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601 (2015). Largely, the common carrier regulations applied to cable and telephone providers and services.

4. See *President Trump’s Historic Deregulation is Benefitting All Americans*, WHITEHOUSE.GOV (Oct. 21, 2019) (emphasizing the Administration’s record of deregulation efforts generally).

5. Restoring Internet Freedom, 33 FCC Rcd. 311 (2018).

6. See *id.* at 426-28.

7. Heather Morton, *Net Neutrality Legislation in States*, NAT’L CONF. OF ST. LEGISLATURES (Jan. 23, 2019), <http://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-legislation-in-states.aspx#2018Legis>; see also OR. REV. STAT. § 276A.418 (2019) (prohibiting public contracts with broadband ISPs that violate net neutrality principles including paid prioritization, blocking lawful content, applications, or services, discriminating against or favoring content, etc.); WASH. REV. CODE § 19.385.020(2) (2018) (prohibiting broadband ISPs from blocking lawful content, impairing or degrading internet traffic on the basis of content, application, or service, or engaging in paid prioritization); VT. STAT. ANN. tit. 3, § 348(b) (LexisNexis 2018) (providing certification of ISP only if the provider does not block lawful content, applications, or services, impair or degrade lawful internet traffic based on content, application, or service, or engage in paid prioritization); CAL. CIV. CODE § 3101(a) (Deering 2019) (making it unlawful for broadband ISP to engage in anti-net neutrality principles as defined).

8. Heather Morton, *Net Neutrality Legislation in States*, NAT’L CONF. OF ST. LEGISLATURES (Jan. 21, 2019), <https://www.ncsl.org/research/telecommunications-and-information-technology/net-neutrality-2019-legislation.aspx>.

2018, governors in six states signed executive orders that only permit state contracts with ISPs who follow or support net neutrality principles.<sup>9</sup> After California passed “one of the strongest net neutrality laws in the nation,” the Department of Justice promptly filed suit seeking declaratory and injunctive relief, in large part seeking to invalidate the law under the preemption provision contained within the FCC’s 2018 Order.<sup>10</sup>

Whether net neutrality regulation—as briefly described in Part II—is appropriate as a policy matter is not the focus of this article and is better left to policymakers and other experts in the field. Rather, this article explores how the FCC’s 2018 Order with its express preemption provision fits within the context of well-established administrative law and preemption principles and what it reveals about the state of the delicate balance of federalism, particularly given the now developing federal-state divide as to whether broadband internet should be regulated as a public or private good.

In its 2018 Order, the FCC cast a broad net of preemption over state regulation of the internet, placing a heavy weight on the federal-state regulatory balance in favor of the federal government. While federalism and preemption are not mutually exclusive or contradictory, the ability to displace independent state regulation of the internet—a communications technology and industry in which the States have a vested and important interest<sup>11</sup>—should be nonetheless judiciously wielded, as should any exercise of the preemption power. And in a modern system that continues to experience the growth in the role and autonomy of administrative agencies, more opportunities will arise for agencies to be the federal actor that tips the scales in favor of the federal government under the preemption power. At the same time, congressional preemption and preemption by agencies—although both can be valid exercises of the preemption power—are two entirely different propositions.

Recently, in *Mozilla Corp. v. FCC*,<sup>12</sup> the United States Court of Appeals for the District of Columbia Circuit recognized this principle

9. Kathryn J. Kline, *State Responses to Net Neutrality*, NAT’L REG. RSCH. INST., <https://pubs.naruc.org/pub/45ACE3A2-AAEA-417D-2416-B6862C9D4435>.

10. See Dina Kesbeh, *Justice Department Sues California Over Net Neutrality Law*, NPR (Oct. 1, 2018), <https://www.npr.org/2018/10/01/653216821/u-s-justice-department-sues-california-over-net-neutrality-law>; Complaint for Declaratory and Injunctive Relief at 9-10, *United States v. California*, 2018 U.S. Dist. Ct. Pleadings LEXIS 18799 (E.D. Cal. Sept. 30, 2018) (No. 2:18-at-01539).

11. Even industry insiders recognize the modern reality that “[l]ike electricity, broadband is essential to every American.” Jonathan Spalter & Shirley Bloomfield, *Broadband Should be Reality for All*, TOPEKA CAPITAL-JOURNAL (Aug. 13, 2018), <https://www.cjonline.com/opinion/20180813/jonathan-spalter-and-shirley-bloomfield-broad-band-should-be-reality-for-all>.

12. 940 F.3d 1 (D.C. Cir. 2019) (per curiam).

when it invalidated the FCC's exercise of the preemption power in its 2018 Order. In this vein, Part III outlines the principles of federal preemption of state law and also preemption of state law by administrative agencies. Part IV analyzes the FCC's 2018 Order in this context, as well as the D.C. Circuit Court's opinion in *Mozilla Corp.*, and concludes that the FCC's exercise of administrative preemption authority in this case raises important questions as to the seemingly unconstrained power administrative agencies like the FCC assert in the modern regulatory and governmental framework.

## II. REGULATING THE INTERNET

To fully understand the implications and importance of potential federal preemption of state law here, it is important to have a basic understanding of the internet and the underlying principles of internet regulation colloquially referred to as “net neutrality.” As a relatively modern technology, what we know as the “internet” is, in the most basic sense, a connection (or “network”) of computers that are linked together to instantaneously and simultaneously send, release, and request “data packets” of information.<sup>13</sup> These packets are transmitted through the network and ultimately re-configured in the form of a webpage, document, or video on a user's computer.<sup>14</sup> Perhaps its most important and easily palpable process, the internet operates to connect a myriad of content providers to the end-of-the-line consumer: internet users.<sup>15</sup> Today, this connection is facilitated by a number of privately-owned ISPs that provide the final link in the internet chain that directs the packets of information from the network (the “internet”) to the consumer's computer.<sup>16</sup> In one sense, ISPs provide consumers with the “on-ramp” to the internet.<sup>17</sup>

Today, internet consumers primarily rely on the technology of “broadband internet” as that on-ramp to access the internet.<sup>18</sup> Broadband internet is generally described as “high-speed internet access

13. Jennifer Wong, *Net Neutrality: Preparing for the Future*, 31 J. NAT'L ASS'N AD- MIN. L. JUD. 669, 673 (2011).

14. *Id.*; see also 47 U.S.C. § 230(f)(1) (2019) (defining the internet as “the international computer network for both Federal and non-Federal interoperable packet switched data networks”).

15. Wong, *supra* note 13, at 673.

16. Daniel Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1034 (2012).

17. *Id.* at 1033 (quoting Julius Genachowski, Conversations with FCC Chairman Julius Genachowski: Thoughts on the October Commission Meeting & the Open Internet NPRM (Oct. 22, 2009)).

18. See, e.g., *Internet/Broadband Fact Sheet*, PEW RSCH. CTR. (June 12, 2019), <http://www.pewinternet.org/fact-sheet/internet-broadband/> (almost three-fourths of American adults have high-speed broadband service at home); see also *Verizon v. FCC*, 740 F.3d 623, 629 (D.C. Cir. 2014) (recognizing, “[t]oday, [internet] access is generally

that is always on and faster than the traditional dial-up access.”<sup>19</sup> ISPs provide broadband internet service<sup>20</sup> in a number of ways: copper telephone lines (known as digital subscriber lines or DSL), satellite, traditional cables and fiber optic cables, and mobile services.<sup>21</sup> Typically, consumers pay ISPs a monthly fee for the privilege of using the ISPs’ broadband access service through one of these methods. Whatever the method for internet access, ISPs alone connect first-level content producers to last-level internet consumers.

#### A. THE BASICS OF THE INTERNET AND NET NEUTRALITY

As a function of a traditional “end-to-end” design that transmits data or information packets over the network without regard to their content, the internet provides a competitive and open platform for content providers to reach internet users.<sup>22</sup> It is competitive and open in the sense that the internet operates through a chain of “best efforts networks”—wherein the network delivers the digital packets of information based on a “best guess” of how to transmit the packet to its intended location rather than as any function of the packet’s actual content; the internet does not operationally differentiate between data packets based on the content contained within them.<sup>23</sup> As a consequence of this traditional non-discriminatory model of the internet, as the United States Supreme Court has observed, “[n]o single organization controls any membership in the [internet], nor is there any single centralized point from which individual [internet] sites or services can be blocked[.]”<sup>24</sup>

But however objective the internet may be in its basic or classical functionality and design, the physical infrastructure necessary to access the network—telephone lines, cables, satellites, and mobile infrastructure—is built and maintained by the ISPs themselves.<sup>25</sup> As a

furnished through ‘broadband,’ i.e., high-speed communications technologies, such as cable modem service,” and no longer dial-up connections through phone lines).

19. *Types of Broadband Connections*, FED. COMM. COMM’N (last updated June 23, 2014), <https://www.fcc.gov/general/types-broadband-connections>.

20. See Sam Cook, *Internet and Broadband Terms and Speeds Explained*, COMPARITECH (Mar. 14, 2018), <https://www.comparitech.com/internet-providers/internet-and-broadband-terms-explained/>.

21. *Id.*; *Types of Broadband Connections*, *supra* note 19.

22. See Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 146 (2003); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 853 (1997) (“From the publishers’ [or content provider’s] point of view, [the internet] constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.”).

23. Lyons, *supra* note 16, at 1035.

24. *Reno*, 521 U.S. at 853 (citation omitted) (quotation omitted).

25. See Kristina M. Lagasse, *Shaping the Future of the Internet: Regulating the World’s Most Powerful Information Resources in U.S. Telecom. Ass’n v. FCC*, 63 LOY. L. REV. 321, 327 (2017) (discussing how, initially, Comcast and Time Warner repurposed



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function of their existence as private entities and because the ISPs must themselves first invest in this infrastructure to provide the service, ISPs are necessarily subjected to outside forces such as profit incentivization; in turn, creating inherent preferences towards (or against) certain packets of information—more broadly, the content transmitted across the network between the content providers and the internet consumer.<sup>26</sup> This incentive to view data un-objectively is even stronger given the practical and economic reality that consumers typically choose a single ISP to provide their entire access to the internet where only a small handful of ISPs exist in the first place.<sup>27</sup> As a result, ISPs are primed to “manipulate the flow of information in society” simply “[b]y regulating the terms upon which content providers use their [ISPs’] networks to reach consumers.”<sup>28</sup> This is especially true for today’s ISPs that simultaneously exist and continue to expand and compete both in terms of content *and* the content delivery market.<sup>29</sup>

The ambiguous set of regulatory principles collectively known as “net neutrality” recognize this as a systemic flaw of the internet: the profit incentives and gate-keeper-style role ISPs can play inherently conflict with the classical design and true nature of the internet. Net neutrality proponents seek to safeguard and uphold a truly neutral end-to-end network by prohibiting ISPs from discriminating against packets of information (that is, content) by selectively slowing down or blocking their transmission altogether and from engaging in other non-objective or non-neutral network practices.<sup>30</sup> In other words, proponents of net neutrality argue that regulation is required to reduce the perverse incentives that come with the modern reality that ISPs

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their cable lines to provide high-speed internet); Spalter & Bloomfield, *supra* note 11 (stating that in the last twenty years, ISPs “have invested more than \$1.6 trillion . . . building out our nation’s world-leading digital infrastructure”).

26. See Rob Frieden, *What’s New in the Network Neutrality Debate*, 2015 MICH. ST. L. REV. 739, 748-49 (2015) (recognizing that in its early development, due to plentiful government grants and subsidies, ISPs had no incentive to “favor certain types and sources of [network] traffic,” but the commercialization of the internet where ISPs bear the financial burden of network infrastructure, ISPs are incentivized to “seek higher compensation from both downstream and upstream users”).

27. *Id.* at 764-65.

28. Lyons, *supra* note 16, at 1034.

29. See Tejas N. Narechania, *Network Nepotism and the Market for Content Delivery*, 67 STAN. L. REV. ONLINE 27, 27 (2014).

30. Frieden, *supra* note 26, at 745 (characterizing the debate as addressing “whether and how ISPs have the incentive and ability to provide preferential access to some content sources while handicapping others by providing inferior service, demanding unaffordable surcharges, or blocking specific types and sources of traffic”); see Lyons, *supra* note 16, at 1038 (net neutrality is about ISP ability to regulate and make rules for the “flow of information from Internet-based content and application providers to consumers,” rather than the rates an ISP can charge the end consumer for broadband internet access).

are privately-owned profit-seeking businesses providing a service which has become an integral necessity within today's society.<sup>31</sup> Net neutrality supporters believe that the profit-incentives for ISPs (even if merely a function of the modern reality that such companies bear the cost of building and improving network infrastructure) can easily lead to "pay to play" surcharges and prioritization of traffic delivery, threatening the internet's classical end-to-end framework.<sup>32</sup>

Proponents of net neutrality as a policy matter seek regulation of ISPs and the internet in a way that protects against "paid prioritization" practices (i.e., charging content providers a fee or higher cost for priority in the ISP's allocation of the network's limited shared resources) rather than relying on the neutral and detached best efforts network system.<sup>33</sup> Additionally, net neutrality regulations are also aimed to protect against ISPs blocking certain traffic altogether,<sup>34</sup> closing off their network based on specific content or a specific content provider, or requiring a content provider or class of content providers to pay a fee to avoid being blocked from the ISP's network.<sup>35</sup> At the most fundamental level, net neutrality proponents argue that content or content provider discrimination by ISPs in whatever form, whether paid prioritization, throttling,<sup>36</sup> or blocking, has the potential to disrupt and, at a minimum, to undermine the open, nondiscriminatory nature of the internet in its classical design and function.<sup>37</sup>

31. See Lyons, *supra* note 16, at 1034 (recognizing that "the largest broadband providers are cable and telephone companies, which have incentives to prevent customers from using their broadband connections in ways that threaten their revenue streams").

32. See Frieden, *supra* note 26, at 751.

33. Narechania, *supra* note 29, at 29; see Lyons, *supra* note 16, at 1034.

34. See, e.g., Peter Svensson, *Comcast Blocks Some Internet Traffic*, ASSOCIATED PRESS (Oct. 19, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/19/AR2007101900842.html> (reporting Comcast Corp. blocked online peer-to-peer network sharing through services like BitTorrent); see also *Comcast Corp. v. FCC*, 600 F.3d 642, 644 (D.C. Cir. 2010) ("In 2007 several subscribers to Comcast's high-speed Internet service discovered that the company was interfering with their use of peer-to-peer networking applications.").

35. Lyons, *supra* note 16, at 1053.

36. See *id.* at 1056 (defining throttling as "the intentional delaying of targeted network traffic").

37. For a brief discussion net neutrality generally, see Alexis C. Madrigal & Adrienne LaFrance, *Net Neutrality: A Guide to (and History of) a Contested Idea*, THE ATLANTIC (Apr. 25, 2014), [https://www.theatlantic.com/technology/archive/2014/04/the-best-writing-on-net-neutrality/361237/?gclid=CJwKCAjwq\\_D7BRADEiwAVMDdHi-OFnqh0\\_VoaRYi\\_sWtEmfvRZgTsW\\_SH8Ae3iEqdFcTTeq460CbyxoCf34QAvD\\_BwE](https://www.theatlantic.com/technology/archive/2014/04/the-best-writing-on-net-neutrality/361237/?gclid=CJwKCAjwq_D7BRADEiwAVMDdHi-OFnqh0_VoaRYi_sWtEmfvRZgTsW_SH8Ae3iEqdFcTTeq460CbyxoCf34QAvD_BwE).

## B. FEDERAL REGULATION OF THE INTERNET

Through the Communications Act of 1934,<sup>38</sup> as amended by the Telecommunications Act of 1996,<sup>39</sup> Congress created the Federal Communications Commission (“FCC”) to “regulat[e] interstate and foreign commerce in communication by wire and radio.”<sup>40</sup> Until 1996, the Communications Act principally regulated entities that were classified as “common carriers”; those defined as “any person engaged as a common carrier for hire, in interstate . . . communication by wire or radio.”<sup>41</sup> In 1996, the Telecommunications Act, in part, amended the Communications Act by creating two new categories or classifications of regulated entities under the FCC’s domain: telecommunications service providers and information service providers.<sup>42</sup> The classification assigned to broadband internet—itsself an exercise of agency expertise and authority to which *Chevron* deference applies<sup>43</sup>—is especially important in terms of the potential regulation to which it is subject under the statutory scheme as each classification brings with it a very different regulatory framework. For instance, when classified as a telecommunications service, ISPs providing broadband internet access services are considered common carriers,<sup>44</sup> for which federal telecommunications law imposes a mandatory and onerous regulatory scheme under Title II of the Telecommunications Act.<sup>45</sup> On the other hand, if classified as an information service, these ISPs

38. Pub. L. No. 73-416, 48 Stat. 1064 (1934) (codified at 47 U.S.C. §§ 153-614 (2018)).

39. Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. §§ 151, et seq. (2018)).

40. 47 U.S.C. § 151 (2018).

41. Communications Act of 1934, ch. 652, sec. 3(h) (1934) (codified at 47 U.S.C. § 153(11) (2018)).

42. Telecommunications Act of 1996, Pub. L. 104-104, sec. 3(a)(2)(41), (51), 110 Stat. 56, 58-60 (1996) (codified at 47 U.S.C. § 153(41), (51) (2018)). Congress enacted this modern distinction grounded in the FCC’s long-standing practice of distinguishing between “basic” services (e.g., a single-telephone line) and “enhanced” services (e.g., a “computer-processing service offered over telephone lines”). *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 975-76 (2005); *see* 47 U.S.C. § 153(24), (53) (2018); *see also* S. Rep. No. 104-230, at 114-15 (1996) (Conf. Rep.) (noting that the new definition of “information service” is defined “similar to the [FCC]’s definition of “enhanced services” and that, “[t]he Senate intends that the Commission would have the continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes”).

43. *Brand X*, 545 U.S. at 981 (applying *Chevron* deference to the FCC’s “interpretation of the Communications Act” in the agency’s classification of broadband cable internet service).

44. *See* 47 U.S.C. § 153(51) (explaining telecommunications carriers means “any provider of telecommunications services” and “shall be treated as a common carrier”); Telecommunications Act of 1996, § 101(b), 110 Stat. 56 (amending Title II of the Communications Act by inserting before 47 U.S.C. § 201 the title: “Part I—Common Carrier Regulation”).

45. 47 U.S.C. § 153(51); 47 U.S.C. §§ 201-231 (2018).

would instead be wholly outside the mandatory Title II common carrier regulations and would fall under Title I—a less-defined, but by definition a lighter and more limited regulatory scheme.<sup>46</sup>

Accordingly, whether the FCC classifies broadband internet as a telecommunications or information service under the Telecommunications Act is an exercise of agency authority that, in turn, determines the statutory authority, extent, and type or style of regulations the agency can impose on the ISPs who provide those services. If the agency promulgates a Title II telecommunications classification, it must impose the common-carrier-style rules; rules that practically speaking constitute a net neutrality scheme, including rules against blocking, throttling, and paid prioritization, in addition to enhanced transparency and disclosure requirements.<sup>47</sup> When applied under this scenario, the net neutrality-style rules are squarely “grounded in . . . statutory authority”; that is, § 706 of the Telecommunications Act<sup>48</sup> and the mandatory common carrier regulations under Title II.<sup>49</sup> While the common carrier regulations under Title II are mandatory, Congress expressly delegates to the agency decision-making authority to forbear from imposing certain regulations.<sup>50</sup> More plainly, a Title II telecommunications service classification brings ISPs and the internet industry within the FCC’s “direct authority.”<sup>51</sup>

Alternatively, if the FCC classifies broadband internet service as an information service, the agency’s regulatory authority and jurisdictional framework are much different. Most importantly, ISPs are no longer subject to any of the clearly defined (and mandatory) common carrier regulations found under Title II. In fact, the FCC would have

46. 47 U.S.C. § 151; *see also* Internet Policy Statement, 20 FCC Rcd. 14986, at 14987-88 (2005); *Brand X*, 545 U.S. at 978 (indicating Title I classification means that such services and service providers are “not subject to mandatory Title II common-carrier regulation”).

47. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, at 5607-08 (2015).

48. Pub. L. No. 104-104, § 706, 110 Stat. 153 (1996) (codified at 47 U.S.C. § 1302).

49. Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5720-25; 47 U.S.C. §§ 201-276 (2018).

50. 47 U.S.C. §§ 153(51) (telecommunications carrier treated as common carrier), 160(a) (forbearance authority); *see also* U.S. Telecomm. Ass’n v. FCC, 825 F.3d 674, 701-11 (D.C. Cir. 2016) (upholding the FCC’s re-classification of broadband internet access service as a telecommunications service in an order that imposed rules against blocking, throttling, and paid prioritization).

51. Lyons, *supra* note 16, at 1041; *see also* Framework for Broadband Internet Service, 25 FCC Rcd. 7886, at 7889 (2010) (“Title II of the Communications Act provides the Commission express authority to implement, for telecommunications services, [common carrier] rules furthering universal service, privacy, access for persons with disabilities, and basic consumer protection, among other federal policies.”); Frank W. Lloyd, *Cable Television’s Emerging Two-Way Services: A Dilemma for Federal and State Regulators*, 36 VAND. L. REV. 1045, 1051-54 (1983) (recognizing that Title II gives the FCC “express authority” and “comprehensive authority” over common carriers); 47 U.S.C. §§ 201-231.

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no regulatory authority to impose any common carrier-style rules (including net neutrality-style rules) on ISPs.<sup>52</sup> Instead, its authority to regulate ISPs when broadband internet is classified under the Telecommunications Act as an information service is the agency's "Title I ancillary jurisdiction to regulate interstate and foreign communications."<sup>53</sup> Indeed, the Supreme Court of the United States has recognized that "[i]nformation-service providers, by contrast, are not subject to mandatory common-carrier regulation under Title II, though the [FCC] has jurisdiction to impose additional regulatory obligations under its Title I ancillary jurisdiction to regulate interstate and foreign communications[.]"<sup>54</sup>

Rather than relying on an express statutory authority, FCC's jurisdiction to regulate information service providers under its ancillary authority is statutorily grounded in the broad grant of agency authority under § 4(i) of the Communications Act,<sup>55</sup> authorizing the FCC to "perform any and all acts, make such rules and regulations, and issue such orders not inconsistent with this chapter, as may be necessary in the execution of its functions."<sup>56</sup> Based on Supreme Court case law,<sup>57</sup> the Court of Appeals for the D.C. Circuit<sup>58</sup> has formulated a two-part test for the exercise of so-called ancillary jurisdiction pursuant to Title I: (1) the regulated subject is covered by the "general jurisdictional grant under Title I" (i.e., it consists of an interstate communication by wire), and (2) the regulations promulgated are "reasonably ancillary to the [FCC]'s effective performance of its statutorily mandated responsibilities."<sup>59</sup> More clearly, "to assert ancillary jurisdiction, the FCC must establish a statutory mandate to which its proposed action is

52. See *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (determining the FCC could not regulate broadband providers as common carriers—specifically anti-discrimination obligation and anti-blocking rules—under authority of § 706 of Telecommunications Act when the still-binding classification of broadband internet was as an "information service" rather than "telecommunications service").

53. Internet Policy Statement, 20 FCC Rcd. 14986, at 14987-88 (2005) (quoting *Brand X*, 545 U.S. at 976).

54. *Brand X*, 545 U.S. at 976.

55. Pub. L. No. 73-416, § 4(i), 48 Stat. 1064 (1934) (codified at 47 U.S.C. § 154(i) (2018)).

56. 47 U.S.C. § 154(i); see also Christopher Terry, Scott Memmel, & Ashley Turachek, *Lost in a Novelty Mug: U.S. Telecom, the FCC, and Policy Resolution for Net Neutrality*, 41 HASTINGS COMM. & ENT. L.J. 1, 28 (2019).

57. See generally *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972); *FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

58. Under the Hobbs Act, the courts of appeals have exclusive jurisdiction in cases challenging FCC's orders. See *FCC v. ITT World Comms., Inc.*, 466 U.S. 463, 468 (1984) (citing 28 U.S.C. § 2342(1); 47 U.S.C. § 402(a)).

59. *Comcast Corp. v. FCC*, 600 F.3d 642, 647 (D.C. Cir. 2010) (citing *Am. Library Ass'n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)).

securely tethered.”<sup>60</sup> Thus, to properly exercise ancillary authority under Title I, the FCC must tie the regulation to some duty or responsibility specifically assigned or delegated by Congress. In 1980, when initially outlining its authority to regulate enhanced services—an order that was the precursor to and model for the Telecommunications Act’s “information services” classification—the FCC recognized that the “principle limitation” on its Title I authority is that the “regulation must be directed at protecting or promoting a statutory purpose.”<sup>61</sup>

In a 2010 decision, the D.C. Circuit Court further delineated the importance in the distinction between internet service as a telecommunications service or information service.<sup>62</sup> In *Comcast Corp. v. FCC*, despite FCC’s classification of cable internet as *not* a Title II telecommunications service, it issued an order asserting jurisdiction over Comcast’s network management practices and requiring the ISP to stop discriminating against peer-to-peer network applications and to adopt a new system to manage its network (“Comcast Order”).<sup>63</sup> In effect, the FCC attempted in its Comcast Order to impose regulations sounding in the Title II common-carrier realm of its jurisdiction while employing a different, non-Title II classification to cable internet service.

But as noted above, to properly exercise ancillary jurisdiction under Title I, the FCC must ground any regulation imposed under its ancillary authority in some statutory obligation (such that FCC’s regulation is “ancillary” to that statutory obligation or mandate). In promulgating its Comcast Order, the agency relied on 47 U.S.C. § 230(b), arguing that Comcast’s network management practices frustrated stated congressional policy “to promote the continued development of the internet and other interactive computer services” and “to encourage the development of technologies which maximize user control over what information is received.”<sup>64</sup> The Court of Appeals recognized, however, that by the very nature of ancillary—rather than direct—authority, the FCC cannot provide the necessary statutory link simply by relying on congressional statements of policy.<sup>65</sup> In

60. Babette E.L. Boliek, *FCC Regulation versus Antitrust: How Net Neutrality Is Defining the Boundaries*, 52 B.C. L. REV. 1627, 1636-37 (2011).

61. Second Computer Inquiry, 77 F.C.C.2d 384, ¶ 126 (1980).

62. As an initial note, while the FCC order that precipitated this case did not classify cable internet as an information service, the FCC nevertheless relied only on § 4(i) of the Communications Act (its Title I ancillary authority) where a then-binding 2002 FCC order had classified cable internet services as “neither ‘a telecommunications service’ covered by Title II . . . nor a ‘cable service’ covered by Title IV.” *Comcast Corp.*, 600 F.3d at 645.

63. *Comcast Corp.*, 600 F.3d at 644-45.

64. *Id.* at 651 (quoting 47 U.S.C. § 230(b)(1), (3)).

65. *See id.* at 651-55 (determining the FCC could not rely on policy statements contained within 47 U.S.C. § 230(b) and § 151 to justify ancillary authority or jurisdic-

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other words, the court at least implicitly confirmed that, at the core, the FCC's exercise of its ancillary authority must be tied to some express delegation of regulatory authority or other statutory responsibility. The appeals court vacated the FCC's order finding it had not properly exercised its Title I ancillary authority where it relied only on congressional policy statements and failed to tie those policy statements to any "express delegation[] of regulatory authority," rejecting the agency's attempt "to use its ancillary authority to pursue stand-alone policy objective, rather than to support its exercise of a specifically delegated power."<sup>66</sup> In *Comcast*, then, while the circuit court found that cable internet clearly falls within the scope of potential FCC regulation as a non-Title II service, FCC could not rely only on congressional policy statements setting forth federal policies and purposes regarding the internet, to properly exercise its ancillary jurisdiction.<sup>67</sup>

Prior to its 2015 Order, the FCC classified broadband internet access service as an information service.<sup>68</sup> In doing so, the FCC principally relied on its interpretation of § 706 of the Telecommunications Act and Title II. First, in accordance with the D.C. Circuit Court's earlier decision in *Verizon v. FCC*<sup>69</sup> (upholding the FCC's prior interpretation of § 706(a) as an affirmative grant of authority), the FCC expressly interpreted § 706 as its "affirmative authority."<sup>70</sup> Second, in light of its administrative determination that broadband internet access service should be classified as a telecommunications service, the FCC found statutory authority to implement net neutrality rules under Title II.<sup>71</sup>

In 2018, however, the FCC reversed course again to re-classify broadband internet access service as an information service under the Telecommunications Act.<sup>72</sup> As a function of this re-classification, the agency expressly eliminated the "conduct rules" of the prior order, in-

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tion because they are not delegations of regulatory authority and FCC "cites neither . . . to shed light on any express statutory delegation of authority found in Title II, III, VI, or for that matter, anywhere else").

66. *Id.* at 655, 659; *see also* Terry et al., *supra* note 56, at 9.

67. *Comcast Corp.*, 600 F.3d at 655, 661 (citing *Am. Library Ass'n*, 406 F.3d at 692) (vacating FCC's order because FCC "failed to tie its assertion of ancillary authority . . . to any 'statutorily mandated responsibility'"); *see* Terry et al., *supra* note 56, at 9.

68. *See* Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5743-44 n.865 (citing FCC's prior decisions classifying broadband internet access service as information services and re-classifying broadband internet access service as a "telecommunications service subject to our regulatory authority under Title II of the Communications Act").

69. 740 F.3d 623 (D.C. Cir. 2014).

70. Protecting and Promoting the Open Internet, 30 FCC Rcd. at 5722.

71. *Id.* at 5724 (citing 47 U.S.C. §§ 201, 202, 208 and "related enforcement authorities").

72. *See* Restoring Internet Freedom, 33 FCC Rcd. 311, at 320 (2018).

cluding bans on paid prioritization, blocking, and throttling.<sup>73</sup> In rationalizing its retreat and 180-degree turn from the net neutrality rules, the FCC now reasoned that the agency has no legal authority to adopt such conduct rules for all ISPs in the first instance,<sup>74</sup> reinterpreting § 706 of Telecommunications Act and § 509 of the Communications Act as “hortatory” and *not* grants of regulatory authority that would support a legal basis to impose net neutrality conduct rules.<sup>75</sup>

Notwithstanding the removal of net neutrality rules on broadband ISP’s conduct, the FCC imposed an affirmative transparency rule requiring ISPs to disclose certain network management practices, performance, and commercial terms underlying its broadband internet access service.<sup>76</sup> Consistent with the Title I ancillary jurisdiction framework set out above, to affirmatively regulate the broadband ISPs it now classified as information-service providers (effectively in the form of the new transparency rule and pulling away from net neutrality-style rules), the agency relied on § 101(a) of the Telecommunications Act<sup>77</sup>, imposing a reporting requirement on the FCC, as a substantive grant of authority to which it anchored its Title I ancillary jurisdiction.<sup>78</sup>

### III. FEDERAL PREEMPTION OF STATE LAW

As the Supreme Court has consistently recognized, “central to the constitutional design”<sup>79</sup> are the principles of federalism that guide our dual sovereignty system; promoting (and at times straining) the successful coexistence of the federal and state spheres of government. Simultaneously aware that a dual sovereignty-system of governance will result in conflicts and also (on the heels of the earlier failed attempt at organization under the Articles of Confederation that created only a weak federal government) that, at times, federal law must take precedence in the delicate balance, the Framers included Article VI in the Constitution.<sup>80</sup> The Supremacy Clause provides:

73. *Id.* at 450.

74. *Id.*

75. *Id.* at 470.

76. *Id.* at 437-44 (noting that the new rule requires ISPs to disclose, among others, practices like blocking, throttling, and paid prioritization, although it does not prohibit such practices).

77. Pub. L. 104-104, § 101(a), 110 Stat. 56, 152 (1996) (codified at 47 U.S.C. § 257(a) (2018)).

78. Restoring Internet Freedom, 33 FCC Rcd. 311, at 445 n.846 (2018) (quoting 47 U.S.C. § 257(a)) (citing 29 FCC Rcd. 1433, 1460, para. 77 & n.30 (2014)).

79. *Arizona v. United States*, 567 U.S. 387, 398 (2012).

80. See Susan Bartlett Foote, *Administrative Preemption: An Experiment In Regulatory Federalism*, 70 VA. L. Rev. 1429, 1432 (1984) (“The Framers of the Constitution understood that supreme federal power was essential to coherent national government.”).



This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.<sup>81</sup>

It preserves federal law at the top, ensuring that where state law conflicts or contradicts otherwise valid federal law, any conflict is necessarily resolved in favor of the federal law.<sup>82</sup> But only where state law contradicts federal law (or vice versa and regardless whether the state law at issue precedes, coincides, or comes after the federal law) is the Supremacy Clause activated.<sup>83</sup> Thus, the Supremacy Clause forms the foundation for the constitutional preemption doctrine—that is, when federal law preempts (displaces) state laws that “interfere with, or are contrary to, federal law.”<sup>84</sup>

#### A. CONGRESSIONAL (STATUTORY) PREEMPTION

With the Supremacy Clause the Founders conferred on Congress—as the very embodiment of the federal law-making power under the separation of powers framework established by the same Constitution—a broad and expansive authority to enact legislation that preempts state law.<sup>85</sup> Because the statutes Congress enacts are, beyond dispute, “Laws of the United States,” statutes preempt any conflicting state laws under operation of the Supremacy Clause. Although in nearly all cases it is not an active issue, the Supremacy Clause is clear that Congress may exercise this power of preemption only when acting within the confines of the authority granted it by the Constitution (it must be a valid enactment of Congress’s constitutional lawmaking power).<sup>86</sup> Writing for a plurality, Justice Gorsuch recently

81. U.S. CONST. art. VI, cl. 2.

82. *Rose v. Ark. State Police*, 479 U.S. 1, 3 (1986) (citations omitted) (recognizing, “[t]here can be no dispute that the Supremacy Clause invalidates all state laws that conflict or interfere with an Act of Congress”); Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 250-51 (2000) (quoting 2 SAMUEL JOHNSON, A DICTIONARY OF THE ENGLISH LANGUAGE (London, J.F. & C. Rivington 6th ed. 1785) (the Clause ensures that federal law is “supreme,” that is, “highest in authority”)).

83. Nelson, *supra* note 82 at 260 (stating courts must “disregard state law if, but only if, it contradicts a rule validly established by federal law”).

84. *Hillsborough Cnty., Fla. v. Automated Med. Labs, Inc.*, 471 U.S. 707, 713 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211, 6 L.Ed. 23 (1824) (Marshall, C.J.)). *But see* Stephen A. Gardbaum, *Nature of Preemption*, 79 CORNELL L. REV. 767, 769-74 (1994) (stating, “[c]ontrary to the prevailing view . . . supremacy and preemption are quite distinct legal concepts,” and arguing that the federal power to preempt state law does not emanate from the Supremacy Clause).

85. *Arizona v. United States*, 567 U.S. 387, 399 (2012) (explaining that “Congress has the power to preempt state law” under the Supremacy Clause).

86. *City of New York v. FCC*, 486 U.S. 57, 63 (1988) (“When the Federal Government acts within the authority it possesses under the Constitution, it is empowered to

noted: “to win preemption of a state law[,] a litigant must point specifically to a constitutional text or a federal statute that does the displacing or conflicts with state law.”<sup>87</sup>

In light of the dual-sovereignty system of state and federal government, the power of preemption becomes a significant tool for the federal government to exercise regulatory power and authority vis-à-vis the states; a tool that can be wielded either broadly or very precisely. Not only does it effectively give the makers of federal law (Congress and, as explored below, federal administrative agencies) the ability to unilaterally displace state law over an issue, topic, or regulatory arena, it also operates to allow federal law-makers to act offensively to foreclose any future state law on a given topic, even where no conflict yet exists.<sup>88</sup>

Because the power of preemption places a heavy weight on the delicate balance of federalism in favor of federal law and effectively removes from the states any authority to regulate a particular subject or issue, regardless of any interests the state may have, if it is to wield the power of preemption, Congress must do so intentionally. As the Supreme Court has recognized, “the ultimate touchstone in every preemption case” is “the *purpose* of Congress.”<sup>89</sup> In other words, preemption jurisprudence requires Congress to have acted with the “objective, goal, or end” of preempting state law.<sup>90</sup> Nonetheless, courts have rec-

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preempt state laws.”). The Federal Government, by ultimately deriving its authority and power from the people, is a government of limited enumerated powers. See U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people.”). Implicit in every action is the requirement that it must act within its constitutionally-delegated authority (i.e., the laws must be valid).

87. *Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (citation and internal quotation marks omitted).

88. See David S. Rubenstein, *Delegating Supremacy?*, 65 VAND. L. REV. 1125, 1136-37 (2012); *Arizona*, 567 U.S. at 399 (“There is no doubt that Congress may withdraw specified powers from the States by enacting a statute containing an express pre-emption provision.”). Although the exercise of the federal preemption power, even when used expressly and proactively, does not itself act to restrict states from passing certain laws or enacting certain regulations on a given topic, it does mean these state laws are susceptible to an easily foreseeable legal challenge on preemption grounds and, if the preemption act is within the framework detailed below, one that is likely to prevail. Thus, acting to preempt state laws in a proactive manner may chill state legislation; an outcome that is not hard to imagine could motivate the use of the federal preemption power in this manner.

89. *Wyeth v. Levine*, 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)) (emphasis added); see Gardbaum, *supra* note 84, at 767-68.

90. *Purpose*, BLACK’S LAW DICTIONARY (11th ed. 2019); see *English v. General Elec. Co.*, 496 U.S. 72, 78-79 (1990) (citation omitted) (“Preemption fundamentally is a question of congressional intent.”).

ognized that Congress may demonstrate its intent to preempt state law in an express or implicit manner.<sup>91</sup>

There are several ways, then, in which Congress wields the preemption power. First, Congress may pass a statute that simply displaces state law by its express terms with a specific provision that clearly states a congressional intent to preempt state law.<sup>92</sup> When Congress does so, congressional intent to preempt is clear. But Congress is not confined in its power to remove a given topic or subject from state regulation or jurisdiction (the practical effect of federal preemption) only when expressly stating as much.<sup>93</sup> The Supreme Court frequently finds an implied congressional intent to preempt state law where a federal regulatory scheme is “so pervasive” that “Congress has left no room for the States to supplement it” or that the “federal interest . . . [is] so dominant” that the federal law “precludes enforcement of state laws on the same subject”; a kind of preemption known as “field preemption.”<sup>94</sup>

Similarly, the Court finds implied congressional intent to preempt state law where federal and state law otherwise “actually conflict[.]”<sup>95</sup> Conflict preemption, in turn, is implied where it would be physically impossible to comply with both state and federal law (“impossibility preemption”), or the state law “stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress” (“obstacle preemption”).<sup>96</sup> Importantly, “[i]n all pre-emption cases,” and especially when Congress reaches into areas traditionally occupied and regulated by the States, the Supreme Court applies a “presumption against . . . preemption,”<sup>97</sup> in which any claimed pre-

91. See, e.g., *FMC Corp. v. Holliday*, 498 U.S. 52, 56-57 (1990) (recognizing both express and implied preemption principles).

92. Rubenstein, *supra* note 88, at 1137; see, e.g., *Coventry Health Care of Missouri, Inc. v. Nevils*, 137 S. Ct. 1190 (2017) (analyzing express preemption provision within the Federal Employees Health Benefits Act); *Arizona*, 567 U.S. at 399.

93. See Nelson, *supra* note 82, at 226; David S. Rubenstein, *The Paradox of Administrative Preemption*, 38 HARV. J.L. & PUB. POL’Y 267, 275 (2015) [hereinafter “Rubenstein, Paradox”].

94. Nelson, *supra* note 82, at 226-27 (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)); Rubenstein, Paradox, *supra* note 93, at 275; *Arizona v. United States*, 567 U.S. 387 (2012) (finding state law imposing a penalty for failing to complete or carry an alien registration document, a requirement under federal law, is preempted under the principle of field preemption); *United States v. Locke*, 529 U.S. 89 (2000) (applying this principle to find that Washington state regulations governing certain aspects of tanker vessels and crew is preempted under the Ports and Waterways Safety Act as a matter of field preemption).

95. Nelson, *supra* note 82, at 227-28 (quoting *English*, 496 U.S. at 79).

96. *Id.* at 228; see also *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982); *Wyeth*, 555 U.S. at 589 (explaining the two types of conflict preemption—physical impossibility and obstacle preemption).

97. Damien J. Marshall, *The Application of Chevron Deference in Regulatory Preemption Cases*, 87 GEO. L.J. 263, 264 (1998) (citing *Cipollone v. Liggett Group, Inc.*, 505

emption is effective only if Congress also demonstrates a “clear and manifest purpose” to preempt state law in that area.<sup>98</sup> Whatever the case, the “touchstone” is congressional intent to preempt and must, somehow, “whether express or implied . . . be sought in the text and structure of the statute at issue.”<sup>99</sup> Thus, although the Supremacy Clause and preemption doctrine function to ensure federal law prevails over state law in certain circumstances (i.e., conflict arises), the exercise of that awesome power by Congress is tempered and framed by federalism concerns, as demonstrated by the requirement of some conflict between state and federal law and, additionally, the requirement that preemption must be the intended consequence and is not a presumed “default” effect of federal law.

#### B. ADMINISTRATIVE AGENCY PREEMPTION

Under Article I of the U.S. Constitution, all legislative power (the power to make the “Laws of the United States”) expressly rests with the Legislative Branch—that is, Congress.<sup>100</sup> Narrowly construed, then, only Congress can enact or “make” the Laws of the United States that can expressly or impliedly preempt state law under operation of the Supremacy Clause and preemption doctrine. Yet as much as the Constitution does not define what exactly constitutes “Laws of the United States,” it certainly does not expressly limit it to statutes passed by Congress and neither does it provide for nor prohibit that Congress may delegate the very legislative power it holds under the Constitution.<sup>101</sup>

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U.S. 504, 518 (1992)); *see also* New York State Conference of Blue Cross & Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 654-55 (1995) (stating, “we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law”); Riegel v. Medtronic, Inc., 552 U.S. 312, 334 (2008) (Ginsburg, J., dissenting) (recognizing the principle of a presumption against preemption, especially when state police powers are implicated).

98. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Rice*, 331 U.S. at 230) (citations omitted); *see also* Howard P. Walthall, Jr., *Chevron v. Federalism: A Reassessment of Deference to Administrative Preemption*, 28 CUMB. L. REV. 715, 719, 721 (1997) (noting that Congress must demonstrate preemption is its “clear and manifest purpose” although preemption may be based on either the express or implied doctrines of preemption).

99. *Va. Uranium, Inc.*, 139 S. Ct. at 1907 (citation and internal quotation omitted).

100. U.S. CONST. art. I, § 1 (“All legislative powers herein granted shall be vested in a Congress of the United States.”).

101. Thomas W. Merrill, *Rethinking Article I, Section 1: From Nondelegation to Exclusive Delegation*, 104 COLUM. L. REV. 2097, 2127 (2004); Rubenstein, *supra* note 88, at 1143 (stating, “nothing in the constitutional text expressly forecloses congressional delegation of policymaking power to agencies”).

Although the early “non-delegation doctrine” limited the exercise of legislative or law-making authority to Congress alone,<sup>102</sup> there can be no serious question today that the non-delegation doctrine as strictly applied no longer governs.<sup>103</sup> As a result of the complex realities of today’s modern world, administrative agencies—existing under the executive branch of government—are bastions of congressionally-delegated authority, both administering the law and creating or “making” law by promulgating regulations.<sup>104</sup> Indeed, the Supreme Court has recognized that notwithstanding the non-delegation doctrine it was “established long ago that Congress must be permitted to delegate to others at least some authority that it could exercise itself.”<sup>105</sup> Under this framework and the expansive understanding of Congress’s ability to delegate its authority to administrative agencies, the Supremacy Clause applies with equal weight to a myriad of actions undertaken by federal administrative agencies as to Congress itself.<sup>106</sup>

But just like the preemption power exercised by Congress, administrative agencies can preempt state law only when acting under valid law-making authority. Here, that means the agency action must be consistent with not only the Constitution (the sole limit on congressional action) but it also must be within the authority delegated to it by Congress.<sup>107</sup> Consequently, although preemption by an adminis-

102. *Loving v. United States*, 517 U.S. 748, 758 (1996) (explaining the non-delegation doctrine: “the lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity”).

103. *See* *Whitman v. Am. Trucking Ass’n*, 531 U.S. 457, 472 (2001) (recognizing the general framework under which Congress can validly delegate authority, and although it still exists in theory, the limitations of the non-delegation doctrine as applied today).

104. *Loving*, 517 U.S. at 758 (“To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers’ design of a workable National Government.”); *see also* Lars Noah, *Interpreting Agency Enabling Acts: Misplaced Metaphors in Administrative Law*, 41 WM. & MARY L. REV. 1463, 1464 (2000) (noting that “few today question [administrative agencies’] legitimacy or centrality as legal institutions”); *see generally* PETER J. WALLISON, *JUDICIAL FORTITUDE* (2018) (recognizing the hugely prevalent role administrative agencies play in the modern system).

105. *Loving*, 517 U.S. at 758.

106. *See* Joshua Hawkes & Mark Seidenfeld, *A Positive Defense of Administrative Preemption*, 22 GEO. MASON L. REV. 63, 64, 93-94 (2014) (concluding that “as a matter of constitutional law, agencies with substantive rulemaking authority should be viewed as having the power to preempt state law”); *Fidelity Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”); *City of New York v. FCC*, 486 U.S. 57, 63 (1988) (“The phrase ‘Laws of the United States’ [of the Supremacy Clause] encompasses both federal statutes themselves and federal regulations.”).

107. *La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 369 (1986) (indicating agency must be acting “within the scope of its congressionally delegated authority”); *City of New York*, 486 U.S. at 64 (framing the issue in an administrative context as, “whether the federal agency has properly exercised its own delegated authority rather than sim-

trative agency rests in part on the same constitutional foundation as congressional preemption, administrative agency preemption requires a revised analytical framework.

This difference necessarily arises as a function of the role and authority of administrative agencies. While Congress makes legislative decisions as a first-order exercise of its constitutional authority, administrative agencies can engage in legislative decision-making only under authority delegated by Congress—a second-order exercise of such authority. In this way, administrative agencies “literally ha[ve] no power to act” in a legislative decision-making manner “unless and until Congress confers power on it.”<sup>108</sup> Moreover, administrative agencies, whether delegated authority by Congress or not, exist under the executive branch of government and not the legislative branch. Accordingly, without any natural (constitutional) legislative authority, agencies can create “Laws of the United States” only when acting under some authority delegated it by Congress. Thus, administrative agencies are fundamentally constrained in their exercise of (delegated) legislative authority or decision-making in two ways: (1) agencies are constrained by the scope of their enabling or authorizing legislation (by which Congress delegates the necessary authority to an agency), and (2) administrative agencies must engage in evidence-based decision-making and must avoid arbitrary and capricious decision-making by following certain procedures (like notice and comment, timeliness, etc.).<sup>109</sup> These are constraints, of course, that Congress need not consider in its first-order exercise of legislative decision-mak-

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ply whether Congress has properly exercised the legislative power”); see Matthew Dunne, *Let My People Go (Online): The Power of the FCC to Preempt State Laws that Prohibit Municipal Broadband*, 107 COLUM. L. REV. 1126, 1140-41 (2007) (explaining the key question in the administrative preemption context is whether (1) “Congress has delegated the power to preempt” and (2) the agency’s action falls within the scope of that power).

108. *La. Pub. Serv. Comm’n*, 476 U.S. at 374 ; see also Paul E. McGreal, *Some Rice with your Chevron?: Presumption and Deference in Regulatory Preemption*, 45 CASE W. RES. L. REV. 823, 859 (1995) (“When Congress grants an agency broad discretion within which to act, Congress presumably intends that all agency actions within such discretion have the full force and effect of federal law.”); Rubenstein, *supra* note 88, at 1141 (“Nothing in the Constitution itself vests authority in administrative agencies per se; rather, such authority is born of congressional grace.”).

109. See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513, 515 (2009) (noting that under the Administrative Procedure Act, 5 U.S.C. § 551 et seq., agency decisions can be set aside if they are arbitrary and capricious and without a “reasoned explanation”—that is, “the agency must show that there are good reasons for the new policy”); *Ridgway v. Ridgway*, 454 U.S. 46, 57 (1981) (regulations must not be “unreasonable, unauthorized, or inconsistent” with the enabling statute); see also WALLISON, *supra* note 104, at 109-10 (recognizing that as a function of its non-legislature status, agencies must act (1) on the basis of evidence [i.e., unlike legislative decision-making, agency decision-making must not be arbitrary or capricious] and (2) within the confines of the authorizing/enabling legislation).

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ing. For our purposes, this means that agency preemption authority must rest more or less on the same foundation as statutory or congressional preemption: congressional intent in conjunction with these other limitations.

When an agency preempts state law through regulatory action, it does so under one of two processes. First, in promulgating the rule, regulation, or order that is intended to have preemptive effect, an agency may simply be engaged in the practice of interpreting a statute or statutory scheme that itself preempts state law.<sup>110</sup> In other words, administrative agencies can validly preempt state law by interpreting the preemptive nature or effect of statutes they are charged with administering.<sup>111</sup> Of course, when an agency exercises its authority to interpret its statutes (and specifically, interpreting any preemptive effect or outcome), the *Chevron* doctrine of judicial review applies; courts defer to an agency's interpretation of a statute if the "statute is ambiguous and the agency's interpretation" is not unreasonable.<sup>112</sup> While the addition of the *Chevron* doctrine to the preemption power seems to give agencies a large amount of discretion in preempting state law, the reality is that any preemptive effect here wholly rests on that which must be found in the statute created and passed by Congress. In other words, any regulation that preempts state law is the result of a clear and manifest congressional design, thereby lessening any potential federalism-based concerns that could arise from an unelected bureaucratic agency (rather than an elected Congress that at least in political theory represents the people) ostensibly preempting state law in a regulation interpreting a statute. The key is that in this first context, even if the current reality of *Chevron* affords great discretion on judicial review to an agency interpretation of a given statute and its preemptory effect, any preemption at its core is ultimately an exercise of first-order legislative authority by Congress and emanates directly from Congress itself.

Second, administrative agencies may preempt state law in the course of substantively exercising its congressionally-delegated au-

110. Ernest A. Young, *Executive Preemption*, 102 Nw. U.L. REV. 869, 881-900 (2008); Walthall, *supra* note 98, at 726-27 ("Agencies can seek to effect preemption analysis in two key ways. First, they can offer their interpretation of the preemptive effect of a federal statute . . . Second, the agency may promulgate regulations which have preemptive effect.").

111. *See* Young, *supra* note 110, at 881.

112. *Id.* at 883-84 (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 842-44 (1984)). The *Chevron* doctrine only applies, as the Supreme Court clarified in *Smiley v. Citibank*, 517 U.S. 735 (1996), where the agency's interpretation has to do with the substantive meaning of a statute (that is, what a statute "means, does, or requires") even if the agency's decision has a preemptive effect. *Id.* at 884-85 (citing *Smiley*, 517 U.S. at 744-45); *see Smiley*, 517 U.S. at 744 (deferring to agency's interpretation of a statute that, by its own express terms, preempts state law).

thority.<sup>113</sup> In other words, the agency—as an independent action pursuant to its congressionally-delegated authority—promulgates a rule, regulation, or order that purports to preempt state law. Such an action may be based on an express delegation of discretion to the agency to make preemptory determinations within its realm of regulatory authority or the agency’s general authority under the statutory scheme.<sup>114</sup> Substantive preemption by an administrative agency is valid where the agency intended to preempt state law and in doing so the agency is acting within the scope of its delegated authority.<sup>115</sup>

Under this framework, the same general preemption principles apply. Agencies acting in an independent substantive capacity may preempt state law with an “express pre-emption clause” in a promulgated regulation or order or through the operation of the implied preemption principles.<sup>116</sup> Administrative agencies may preempt state law that conflicts with federal law when it is physically impossible to comply with both federal and state laws and when the state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>117</sup> Again, however, administrative preemption is (at least in theory) naturally more constrained vis-à-vis congressional preemption inasmuch as whether the agency purports to preempt state law expressly or impliedly, it must be acting pursuant to authority granted or delegated it by Congress.<sup>118</sup> Generally, congressional preemption in whatever way must be an intentional exercise of the preemption power. Thus, to preempt state law by express provision, the agency may rely on authority delegated by Congress only so much as that delegated authority includes the au-

113. See, e.g., Walthall, *supra* note 98, at 726-27.

114. *City of New York*, 486 U.S. at 64 (noting that the key inquiry is “whether the federal agency has properly exercised its own delegated authority” and on the “proper bounds of its lawful authority to undertake such action”); Young, *supra* note 110, at 881-900; Walthall, *supra* note 98, at 726-27 (“Agencies can seek to effect preemption analysis in two key ways. First, they can offer their interpretation of the preemptive effect of a federal statute . . . . Second, the agency may promulgate regulations which have preemptive effect.”); see Rubenstein, *supra* note 88, at 1148-49 (determining under this method, agencies may independently preempt state law based on (1) Congress’s delegation of the power to preempt state law and to make the decision to preempt state law, or (2) Congress’s grant of “general rulemaking authority”).

115. See *de la Cuesta*, 458 U.S. at 154; *City of New York*, 486 U.S. at 66 (the agency must be “legally authorized” to substantively preempt state law); Rubenstein, *supra* note 88, at 1150.

116. Rubenstein, *supra* note 88, at 1150 n.146 (collecting cases); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 65 (2002) (quoting *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 869 (2000) (“Congress’ inclusion of an express pre-emption clause ‘does not bar the ordinary working of conflict pre-emption principles.’”)).

117. *de la Cuesta*, 458 U.S. at 153 (citations omitted); see also *Geier*, 529 U.S. at 873-74.

118. William Funk, *Judicial Deference and Regulatory Preemption by Federal Agencies*, 84 TUL. L. REV. 1233, 1236 (2010); see *La. Pub. Serv. Comm’n*, 476 U.S. at 374.



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thority of the agency to make and to promulgate that very preemption determination.<sup>119</sup>

#### IV. CASTING A BROAD NET: FCC'S PREEMPTION OF STATE NET NEUTRALITY LAW

In 2018, the Federal Communications Commission ("FCC") promulgated its Restoring Internet Freedom Order<sup>120</sup> in which the agency, for the second time, re-classified broadband internet access service as a Title I information service. In doing so, the agency (again) altered the regulatory landscape as it relates to broadband internet ISPs by wholly removing broadband internet from the possible reach of the mandatory Title II common carrier regulations applicable to telecommunications services and, thus, from any possibility of a net neutrality-style regulatory regime. To be sure, when the courts exercise their power of judicial review over the FCC's 2018 Restoring Internet Freedom Order ("2018 Order"), the agency's classification decision is subject to the well-known deferential review under the *Chevron* framework as a question of statutory interpretation.<sup>121</sup> Indeed, in its review of the 2018 Order, the D.C. Circuit upheld the FCC's classification of broadband internet as an information service under *Chevron*, finding that the FCC's classification is a "reasonable policy choice" under Step Two of *Chevron*.<sup>122</sup> But establishing the FCC's proper jurisdiction via its reasonable classification of broadband internet does not *automatically* lead to the validity of the rest of the FCC's order, and especially its preemption of state law. The classification of broadband internet (even if, effectively, the classification means a net neutrality regulatory regime will not be applied) and preempting state net neutrality laws necessarily requires a separate analysis under judicial review, especially given the implications for the delicate balance of federalism for the latter. In other words, where, as here, the preemption of state law by an agency involves something more than statutory interpretation and, instead, is a sub-

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119. *Id.*

120. 33 FCC Rcd. 311 (2018).

121. *See generally* *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

122. *Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019). The Court of Appeals also noted that the United States Supreme Court previously upheld the FCC's classification of cable modem internet service as an information service (and not a telecommunications service) under Step Two of *Chevron*. *Id.* at 21 (citing *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 989-92 (2005)); *see also* Restoring Internet Freedom Order, 33 FCC Rcd. 311, at 320-21 (2018) (indicating FCC's classification decision was based on its interpretation of § 3 of the Telecommunications Act).

stantive exercise of agency authority, a more searching inquiry is required.

Not surprisingly, in its 2018 Order, the FCC itself renounced the notion that any statutory authority permits the agency to impose the net neutrality-style rules imposed in the agency's former 2015 Order.<sup>123</sup> Additionally, the FCC—entirely consistent with the D.C. Circuit's decision in *Verizon v. FCC*<sup>124</sup>—now argued that it has no legal authority under which to impose the net neutrality conduct rules imposed by the previous 2015 Order.<sup>125</sup> In fact, the 2018 Order expressly “eliminate[d] the conduct rules adopted in the [2015] Order—including the general conduct rules and prohibitions on paid prioritization, blocking, and throttling.”<sup>126</sup> Effectively, the agency argued it had no statutory authority to impose net neutrality rules because under the appropriate classification (as determined by the agency),

123. Restoring Internet Freedom, 33 FCC Rcd. at 470. Specifically, the agency announced its new interpretation of § 706 of the Telecommunications Act (codified at 47 U.S.C. § 1302) as “hortatory” and instead of granting the agency regulatory authority, only directed the FCC to “exercise market-based or deregulatory authority granted under other statutory provisions, particularly the Communications Act.” *Id.* at 470-71. Section 706 instructed the FCC “with regulatory jurisdiction over telecommunications services,” to:

encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

Telecommunications Act of 1996, Pub. L. 104-104, sec. 706(a), 110 Stat. 56, 152 (1996) (codified at 47 U.S.C. § 1302(a) (2018)). Under the deferential *Chevron* framework, the D.C. Circuit held that the FCC's new interpretation of § 706 of the Telecommunications Act was reasonable. *Mozilla Corp.*, 940 F.3d at 46. Similarly, the FCC refused to rely on the policy statement contained within § 509 of the Telecommunications Act (adding 47 U.S.C. § 230) as granting any substantive authority to impose net neutrality regulations for the same reason: interpreting this statute as merely “hortatory” and, additionally, recognizing that a statement of policy standing alone is not a delegation of authority to the agency from Congress. Restoring Internet Freedom, 33 FCC Rcd. at 480-81 (citing, in part, *Comcast Corp. v. FCC*, 600 F.3d 642, 652 (D.C. Cir. 2010)). Section 230(b)(2) established that “[i]t is the policy of the United States: (1) to promote the continued development of the Internet . . . ; [and] (2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230 (2018). Notably, however, although the agency argued the policy statement contained within § 230 was wholly insufficient for the agency to impose substantive net neutrality rules, at the same time it relies on the statute as demonstrating “Congress's approval of our preemptive federal policy of nonregulation for information services.” 2018 Order, 33 FCC Rcd. at 480-81, 432.

124. *Verizon v. FCC*, 740 F.3d 623, 631-33, 655-59 (D.C. Cir. 2014) (noting that the FCC could not impose anti-discrimination and anti-blocking rules (common carrier rules) on broadband internet providers where it did so while continuing to classify broadband internet as an information service—and not a Title II telecommunications service).

125. Restoring Internet Freedom, 33 FCC Rcd. at 470.

126. *Id.* at 450.

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broadband internet is not under the auspice of Title II, and therefore, no net neutrality rules can be applied. As discussed below, however, after finding it has no authority to regulate the internet in this manner, the agency asserted, at the same time, that it had authority to preempt state laws from regulating even intrastate broadband internet with net neutrality-style rules and regulations. Stated differently, the agency purported to affirmatively (and indeed prospectively) preempt state laws in a way in which the agency soundly determined it had no federal authority to regulate in the first instance.

To be sure, another way to characterize what the agency did in its 2018 Order by finding no authority to impose net neutrality regulations with a Title I classification is that the agency enacted, on the federal level, a “light-touch, market-based” regulatory framework over broadband internet.<sup>127</sup> At the same time, the agency did not leave ISPs wholly un-regulated. Rather, the agency imposed substantive regulations requiring ISPs to disclose their “network management practices, performance, and commercial terms” of the ISPs’ broadband internet access services.<sup>128</sup> The transparency rule specifically requires ISPs to, in part, disclose any blocking, throttling, and paid prioritization practices in which it engages; even if the order did not outright prohibit these practices (as it would have done under a net neutrality regulatory regime).<sup>129</sup> As explained above, to exercise its Title I ancillary authority the FCC now asserted over broadband ISPs (as a function of its “information service classification”) it must ground any regulation, including the transparency regulation, in some other existing statutory duty or responsibility. In its Order the FCC found the necessary authority for its transparency regulation in § 101(a) of the Telecommunications Act,<sup>130</sup> directing the agency to identify and

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127. *Id.* at 434.

128. *Id.* at 437-41.

129. *Id.* at 440. Interestingly, this transparency rule targets the same practices of ISPs that net neutrality targets; the difference lies in the perceived role of government—whether an active role by the government is necessary to curb such harmful practices or whether the free-market will act to dissuade these practices. At least arguably implicit in the imposition of the transparency requirement is that blocking, throttling, and paid prioritization, to some extent are harmful or at least undesirable practices from the standpoint of the internet market and as to internet consumers.

130. Pub. L. 104-104, § 101(a), 110 Stat. 56, 152 (1996) (codified at 47 U.S.C. § 257(a) (2018)). Section 257(a) commands that the FCC:

Shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers for entrepreneurs and other small businesses in the provisions and ownership of telecommunications services and information services, or in the provision of parts or services to providers of telecommunications services and information services.

47 U.S.C. § 257 (2018).

address market entry barriers into broadband internet as an information service.<sup>131</sup> The D.C. Circuit, under the deferential guiding hand of *Chevron*, ultimately upheld as reasonable the agency's interpretation of § 257 as delegating the agency direct authority "to collect evidence to prove that such barriers [to the information services market] exist."<sup>132</sup>

In addition to renouncing any statutory basis for any affirmative net neutrality regulation and promulgating the transparency rule, however, the FCC's 2018 Order also expressly preempted state laws from imposing any net neutrality-style regulations on broadband internet access services. The agency reasoned (1) broadband internet access service, as an information service, "should be governed . . . by a uniform set of federal regulations" and (2) the Order "establishes a calibrated federal regulatory regime based on the pro-competitive, deregulatory goals" of the Telecommunications Act of 1996, and therefore preemption was appropriate.<sup>133</sup> Specifically, the 2018 Order preempted state law conflicting with this federal scheme of light-touch regulation; state laws that would "impose more stringent requirements" on broadband internet access services and ISPs.<sup>134</sup> In its Order, the agency relied on conflict (impossibility) preemption,<sup>135</sup> an "independent authority" to preempt state law based upon "longstanding federal policy of no regulation of information services" and, finally, that § 401 of the Telecommunications Act embraces "regulatory flexibility" and grants the agency authority to "forbear from applying any regulation or any provision."<sup>136</sup>

#### A. FCC'S EXPRESS PREEMPTION PROVISION

Within its 2018 Order, the agency expressly preempted state law that would "effectively impose rules or requirements that we have repealed . . . or that would impose more stringent requirements for any

131. Telecommunications Act of 1996, § 101(a) (codified at 47 U.S.C. § 257(a)); Restoring Internet Freedom, 33 FCC Rcd. at 446.

132. *Mozilla*, 940 F.3d at 47 (quoting Restoring Internet Freedom Order, 33 FCC Rcd. at 446 n.847).

133. Restoring Internet Freedom, 33 FCC Rcd. at 426.

134. *Id.* at 427-28.

135. *Id.* at 429. Generally, conflict preemption analysis is case-specific. In other words, conflict preemption is piecemeal judicial inquiry as to whether a specific state law (fully and properly enacted) conflicts with the federal law. *See, e.g.*, *Arizona v. United States*, 567 U.S. 387, 399-414 (2012) (analyzing whether provisions of "Unlawfully Present Aliens," S.B. 1070 (2010) are preempted in light of federal law, particularly 8 U.S.C. § 1304(e)); *Nat'l Meat Ass'n v. Harris*, 565 U.S. 452 (2012) (deciding whether Cal. Penal Code Ann. § 599f (2010) was preempted by the Federal Meat Inspection Act, 21 U.S.C. §§ 601-695).

136. 47 U.S.C. § 160(a), (e) (2018).

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aspect of broadband service.”<sup>137</sup> In doing so, the agency did not purport to rely on some express delegation of preemptory authority because, simply, Congress did not expressly delegate such authority within the agency’s Title I information services regulatory authority. To be sure, the Supreme Court has held that administrative agencies can lawfully preempt state law without express statutory authority to do so.<sup>138</sup> But as the D.C. Circuit recognized in *Mozilla Corp. v. FCC*,<sup>139</sup> because administrative agencies, by operation of the separation of powers constitutional design, rely on Congress for *any authority* they exercise, having an authority to regulate necessarily goes hand in hand with authority to preempt state law.<sup>140</sup> Thus, even if express statutory authority to preempt state law is not the end-all of a preemption analysis, an agency action preempting state law must still itself be a valid agency action, which requires some statutory authority to regulate. In this instance, the statutory scheme, when strictly construed—as I argue is necessary in this context and consistent with the constitutional framework—supports the conclusion that the agency simply has no authority to preempt state law in the manner for which it has no authority to regulate and when the agency’s regulatory authority is only an ancillary and limited authority in itself.

Although the statutory scheme does not expressly delegate to the agency preemption authority in Title I, this is not simply indicative of the agency’s delegated authority as a whole. Rather in the realm of Title II telecommunication services, Congress explicitly delegated preemption authority to the FCC.<sup>141</sup> Especially when considering preemption of state law by an executive-branch administrative agency in light of the separation of powers and the natural federalism concerns inherent with agency preemption, Congress’s decision not to delegate the agency any preemption authority in one of its two realms of authority should be, and is, significant. As to telecommunications ser-

137. Restoring Internet Freedom, 33 FCC Rcd. 311, at 427 (2018).

138. See *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982).

139. 940 F.3d 1 (D.C. Cir. 2019).

140. *Mozilla Corp. v. FCC*, 940 F.3d 1, 75 (D.C. Cir. 2019). After laying out the basic administrative law framework—that agencies can act only under authority delegated it by Congress, including the power to preempt state law—the Court of Appeals recognized: “By the same token, in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.” *Mozilla Corp.*, 940 F.3d at 75.

141. See 47 U.S.C. § 253(a), (d) (2018) (noting express congressionally-delegated preemption authority where FCC determines a local “statute, regulation, or legal requirement” “prohibit[s] or ha[s] the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service”); 47 U.S.C. § 276(c) (2018) (noting express congressionally-delegated preemption authority for FCC’s regulations concerning payphone service).

vices under Title II, Congress, in its constitutional Article I first-order legislative decision-making authority, recognized a need for the FCC to preempt state law to effectively regulate under the Title II common carrier regulatory scheme and, accordingly, it delegated such authority to the agency in its enabling statutes. While the modern trend in administrative law jurisprudence is to broadly construe agency authority under its enabling statutes<sup>142</sup> when considering an agency's exercise of the federal preemption power, an express delegation of preemption authority in one of only two potential regulatory schemes for the subject area should be significant. Indeed, even if not determinative, in the federal administrative agency preemption framework, at a minimum, the lack of a similar express preemption provision in the regulatory realm the agency has adopted should be an indication of the agency's authority delegated by Congress within that regulatory scheme.<sup>143</sup> And even more, the Communications Act, in creating the FCC, expressly fashioned and acknowledged a dual-governing structure where the states retained authority over "intrastate communication service by wire and radio."<sup>144</sup> More succinctly, given the constitutional concerns underlying any exercise of the preemption power, an agency should be able to point to some basis of clear congressional intent for the agency to preempt state law; and of course, while not the only way, express congressional intent is the clearest indication. And the lack thereof—in contrast to the alternative regulatory regime—makes congressional intent for the agency to preempt state law that much more opaque.

This is especially so when considering the basic framework under which administrative agencies act—solely within the authority delegated to it by Congress. When Congress engages in a first-order exer-

142. Interestingly, this sometimes works against the agency itself. For example, in *Massachusetts v. EPA*, the Supreme Court broadly construed § 202(a)(1) of the Clean Air Act, in conjunction with § 7602(g) defining "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical substance or matter which is emitted into or otherwise enters the ambient air," to hold that the Environmental Protection Agency does have authority under the statutory scheme to regulate greenhouse gas emissions (carbon dioxide) and must do so. *Massachusetts v. EPA*, 549 U.S. 497, 528-32 (2007) (internal quotations omitted) (ellipses omitted). In another related context, the Supreme Court has applied *Chevron* deference directly to an agency's interpretation of its jurisdiction and the scope of its statutory authority. See *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (explaining how *Chevron* deference applies to agency construction or interpretation of its enabling statutes).

143. But see *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)) (deferring to agency's preemption regulation under a statutory "broad grant of authority to reconcile conflicting policies" so long as the preemption decision is a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute . . . [and] the accommodation is not one that Congress would have sanctioned").

144. 47 U.S.C. §§ 151, 152(b) (2018).

cise of legislative decision-making to preempt state law, it must act in a clear and intentional manner. Allowing an agency like the FCC to preempt state law (a second-order exercise of legislative authority) to then find preemption authority, whether express or even implied for that matter, under a broad and general grant of authority disregards the combination of institutional and constitutional limitations at play when considering agency preemption. Not only is the federal power of preemption limited to some clear and intentional action by *Congress*, agencies are even more constrained in that they can act in a legislative manner only to the extent and in the manner which Congress has delegated to the agency its own legislative authority.

A major tenet of today's administrative law jurisprudence is the deference agencies enjoy in terms of any judicial review of their rulemaking under the auspices of *Chevron*. Under *Chevron*, courts will defer to an agency's reasonable interpretation or "construction of the statute which it administers."<sup>145</sup> Yet even *Chevron* deference, as Justice Scalia recognized in *City of Arlington, Texas v. FCC*,<sup>146</sup> is "rooted in a background presumption of congressional intent."<sup>147</sup> It is premised on the notion that "Congress, when it left ambiguity in a statute' administered by an agency, 'understood that the ambiguity would be resolved . . . by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows."<sup>148</sup> Moreover, any application of *Chevron* deference necessarily requires and presumes, as a threshold matter, that the agency action in question is properly authorized and valid. In other words, there can be nothing to which the court can defer if the agency action at issue is not statutorily (i.e., congressionally) authorized.

Where agency preemption is concerned, courts should be loath to rely on anything less than clear congressional intent and this necessarily includes applying a strict construction of agency authority to preempt state law.<sup>149</sup> The basic foundations of our system depend on it.

145. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984); *see also City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013) (explaining how *Chevron* deference applies to agency construction or interpretation of its enabling statutes).

146. 569 U.S. 290 (2013).

147. *City of Arlington*, 569 U.S. at 296.

148. *Id.* (quoting *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-41 (1996)).

149. *See generally City of Arlington*, 569 U.S. 290 (applying *Chevron* deference directly to an agency's interpretation of its jurisdiction and the scope of its statutory authority); *see id.* at 302 (noting that the Court has "even deferred to the FCC's assertion that its broad regulatory authority extends to preempting conflicting state rules"); *Nat'l Cable and Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citations omitted) (quoting §§ 151, 201(b)) (applying *Chevron* deference to FCC regulation based upon the Communication Act's broad delegation of authority to "execute and en-

Finding sufficient delegation of preemption authority in broad grants of regulatory authority that are all too common today, a kind of deference in the same vein as *Chevron* but without any clear foundation in congressional intent of any nature, contravenes the very notion that Congress itself—much less an administrative agency—must intentionally wield the federal power of preemption.<sup>150</sup> On judicial review of an agency's express preemption of state law, courts should require that the agency action be traced to a secure foundation in congressional intent for the agency to wield the power of preemption (i.e., to engage in preemption decision-making). The ability to alter the balance of power between the federal government and the state governments requires more of Congress and should thus require more of agencies, even if only as a function of the basic principle underlying the separation of powers—that agencies can act only under the authority delegated by Congress.<sup>151</sup>

Thus, for purposes of the FCC's 2018 Order, the ultimate inquiry must be whether the agency is acting under and within the scope of federal power or authority so delegated by Congress in promulgating its order preempting states from imposing net neutrality-style regulations on broadband internet. Certainly, no real question or dispute exists that Congress itself could validly preempt state broadband internet access regulation in whatever form, but it has not done so here.

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force the Communications Act” and to “prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions” of the Communications Act); *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 238 (2004) (citing 15 U.S.C. § 1604(a)) (indicating *Chevron* deference applies based upon Congress's “express[] delegat[ion] to the [Federal Reserve] Board the authority to prescribe regulations containing ‘such classifications, differentiations, or other provisions’ as the Board deems ‘necessary or proper to effectuate the purposes of [the Truth in Lending Act]’”; cf. *Gonzales v. Oregon*, 546 U.S. 243, 258-59 (2006) (declining to apply *Chevron* deference to an interpretive rule from the Attorney General concerning the Controlled Substances Act, because the enabling statute under which the Attorney General has its rulemaking power as to controlled substances is not a grant of broad regulatory authority, but instead delegates only “limited powers, to be exercised in specific ways”). *But see City of New York*, 486 U.S. at 64 (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961)) (deferring to agency's preemption regulation under a statutory “broad grant of authority to reconcile conflicting policies”; so long as the preemption decision is a “reasonable accommodation of conflicting policies that were committed to the agency's care by the statute,” it will “not be disturbed unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned”).

150. *See Va. Uranium, Inc. v. Warren*, 139 S. Ct. 1894, 1901 (2019) (quoting *Puerto Rico Dept. of Consumer Affairs v. ISLA Petroleum Corp.*, 485 U.S. 495, 503 (1988)) (recognizing the principle that “to win preemption of a state law[,] a litigant must point specifically to ‘a constitutional text or a federal statute’ that does the displacing or conflicts with state law”). Thus, preemption of state law by federal law necessarily begins and ends with Congress.

151. *But see de la Cuesta*, 458 U.S. at 162 (recognizing a principle that broad congressional delegation of authority to regulate is not cabined by express authority to preempt state law in particular areas).



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And when it is an *agency* acting to preempt state law, the separation of powers and constitutional framework requires that it must have the power or authority to do so through a delegation by Congress to preempt state law, not just to regulate generally. This determination, on judicial review, should require more than *Chevron*-esque deference or reliance on a broad and general grant of regulatory authority to act within a particular regulatory sphere.

While Title II of the relevant FCC statutory scheme speaks directly to the agency's preemption of state law,<sup>152</sup> because the agency's classification decision brings broadband internet under its Title I jurisdiction, to validly preempt state law, then, the agency must find authority to do so under Title I. But under Title I, the agency has only a broad and general grant of regulatory authority to "perform any and all acts, make such rules and regulations, and issue such orders . . . as may be necessary in the execution of its functions."<sup>153</sup> Moreover, the nature of Title I's ancillary authority requires that any regulatory action the FCC takes must find a concrete foundation in an existing statutory duty or mandate. To allow preemption on the broad grant of regulatory authority given Title I's limited ancillary authority otherwise would, as a course of the resulting circular reasoning, allow the agency to enact virtually any regulation. This would not be consistent with the agency's ancillary authority delegated it by Congress in Title I.

Under administrative law principles, when acting in a substantive rather than interpretive capacity, the FCC may lawfully preempt state law concerning intrastate broadband internet access if: (1) the agency intends to preempt state law, and (2) its preemption action is within the confines of its congressionally-delegated authority.<sup>154</sup> The FCC's 2018 Order is clear that the FCC *intends* to preempt state law that imposes in any form common carrier net neutrality-style rules or regulations on ISPs providing broadband internet access. While it is enough in congressional preemption (as a first-order exercise of legislative decision-making) to validly preempt state law by indicating Congress's intent to do so, because agencies are constrained by the scope of power delegated by Congress, the agency's intent to preempt is not itself sufficient. Such action must be within the scope of its congressionally-delegated authority. And in the preemption context, the question is whether the agency has "properly exercised its own dele-

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152. See, e.g., 47 U.S.C. § 253(d) (2018).

153. 47 U.S.C. § 154(i) (2018).

154. *City of New York*, 486 U.S. at 65-66.



gated authority,” i.e., a “congressionally delegated authority . . . [to] pre-empt state regulation.”<sup>155</sup>

Under its Title I authority, the FCC only has ancillary authority to regulate.<sup>156</sup> In other words, it has authority to impose regulations on Title I information services that rest on some pre-existing statutory duty. While the agency ties its substantive transparency regulation to a statutory responsibility,<sup>157</sup> it does not tie its express preemption provision to any equivalent statutory authority. Instead, the FCC only purports to rely upon (1) the broad grant of authority to “perform any and all acts, make such rules and regulations, and issue orders . . . as may be necessary in the execution of its functions,”<sup>158</sup> and (2) statements of the Act’s policy: “preserve . . . unfettered by Federal or State regulation” a “vibrant and competitive free market . . . for the internet and other interactive computer services” (with the latter defined as “any information service . . . that provides or enables computer access by multiple users to a computer server”).<sup>159</sup>

In exercising its Title I regulatory authority, however, courts have held that a mere statement of policy does not provide the necessary pre-existing statutory duty to support the exercise of regulatory authority.<sup>160</sup> Neither should it be enough for an agency to promulgate a regulation that broadly preempts state law. When properly exercised,

155. *Id.* at 63-64.

156. 47 U.S.C. § 151.

157. There seems to me to be some argument concerning whether 47 U.S.C. § 257 can satisfy the independent-statutory-duty foundational requirement for the FCC to impose a transparency regulation. *See* 47 U.S.C. § 257(a) (2018) (directing the FCC to “complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than this section), market entry barriers . . . in the provision and ownership of . . . information services”); Restoring Internet Freedom, 33 FCC Rcd. 311, at 438 (2018); *Comcast Corp. v. FCC*, 600 F.3d 642, 659-60 (D.C. Cir. 2010) (“[T]he Commission’s attempt to dictate the operation of an otherwise unregulated service based on nothing more than its obligation to issue a report defies any plausible notion of ‘ancillarity.’”). Any failure to promulgate a valid affirmative regulation on broadband ISPs would certainly weaken the agency’s assertion of preemptive authority because it would in that instance be even more clearly based upon general federal policy which is not sufficient to exercise Title I ancillary authority. Notably, in reviewing the 2018 Restoring Internet Freedom Order, the D.C. Circuit held that the agency could rely on § 257 to impose the substantive requirement it did under its Title I ancillary authority, finding under standard principles of reviewing an agency’s decision making that it was a “permissible” interpretation under *Chevron* Step Two. *Mozilla*, 940 F.3d at 47. Nonetheless, the validity of the 2018 Order’s substantive transparency requirement is outside the scope of this paper because the agency’s preemption provision was not directed to preempt conflicting state law relating to this substantive requirement. Instead, the FCC sought to preempt state law after finding, in effect, that the federal agency itself did not have authority to regulate ISPs in the proscribed manner.

158. 47 U.S.C. § 151(i); *see also* 47 U.S.C. § 303(r) (2018).

159. 47 U.S.C. § 230(b)(2), (f)(2) (2018).

160. *See Comcast Corp.*, 600 F.3d at 651-58.

preemption has a very necessary function and role in our dual-sovereignty system. Here, for instance, it can ensure that any lawful exercise of the FCC's ancillary-jurisdiction to impose a "ceiling" of regulation that the agency,<sup>161</sup> within its regulatory ancillary authority, has deemed sufficient to regulate broadband internet access services, is not undermined by state-based net neutrality regulatory schemes.<sup>162</sup> It would be wholly inconsistent, though, if the agency could displace state law much less exercise its Title I jurisdictional authority by affirmatively regulating solely on the basis of a congressional policy statement of non-regulation, rather than an affirmative statutory mandate or responsibility.

By operation of the express preemption provision in its Order, the FCC sought to preempt any state regulation that would conflict with the "deregulatory approach" intended by the 2018 Order.<sup>163</sup> This approach was, in large part, the main function of the Order's classification of broadband internet access service as an information service: removing broadband internet from the realm of Title II telecommunications services for which common carrier regulations (the statutory justification of any net neutrality-style rules) would apply. Thus, the agency effectively promulgated and supported its 2018 Order on the basis that it had no congressionally delegated authority to impose net neutrality regulations. In other words, the agency effectively argued that the earlier net neutrality regulations (because the "correct" classification required by the statutory scheme was information services and *not* telecommunication services) were outside the scope of the agency's proper statutory authority. To regulate, though, it remains the agency must have the statutory authority to do so. Thus, agencies cannot preempt laws they have no (federal) authority to impose much less where Congress has not, in some manner, allowed the agency to preempt state laws in the regulatory arena in which the agency, by exercising its lawful administrative discretion, has itself entered.

Stated differently, the FCC exhibited a desire to exercise the weighty power of federal preemption in an area and under circumstances in which it expressly (first) found that Congress did not delegate to the agency its own power to affirmatively or substantively

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161. See William W. Buzbee, *Asymmetrical Regulation: Risk, Preemption, and the Floor/Ceiling Distinction*, 82 N.Y.U. L. REV. 1547, 1568-69 (2007) (defining "preemptive ceilings" as where "the federal government sets a standard of performance or regulatory requirement reflecting a choice about the degree of required protection, but prohibits any additional or more stringent regulation by states").

162. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-75 (2000) (addressing federal regulation that sets a "minimum airbag standard" that "deliberately provided the manufacturer with a range of choices among different passive restraint devices" preempted a common-law "no airbag" action under D.C. tort law);

163. Restoring Internet Freedom, 33 FCC Rcd. 311, at 428.

regulate in the manner proscribed. The agency purported to preempt states from exercising otherwise existing regulatory authority in a manner the agency found it had no authority to do either. This clear disconnect—although neither determinative nor ultimately relied on by the FCC in its justification of its preemption provision in the Order—emphasizes the need to carefully and critically analyze administrative agencies' use of preemption authority.

At the same time, however, the Supreme Court has carefully established the principle that a federal law-making body (Congress or agencies) can validly decide as a policy matter to forgo regulation in a certain area and that this decision may have as much preemptive force as a decision to affirmatively regulate a certain area.<sup>164</sup> It is equally clear that Congress intended the Telecommunications Act “[t]o promote competition and reduce regulation to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”<sup>165</sup> Yet if the separation of powers is to mean anything, and if there is to be any end to the scope of federal authority (which, by our dual-sovereignty constitutional design, is by definition required at some level), it must mean that agencies can act only under the authority they are delegated. Preempting state law that the agency itself disclaims statutory authority to regulate violates this principle.

Federalism requires maintaining a delicate balance; one that requires diligent attention to the use of the federal preemption power, especially by administrative agencies as a second-order exercise of the preemption power. Where preemption is concerned, courts should hesitate to find, no matter how appealing it may be or how easily it advances perceived congressional or federal policy, that Congress has delegated the power of preemption under a broad and general grant of authority. Here, the relevant statutory scheme applicable to broadband ISPs and under which the FCC is bound to act offers only a broad delegation of authority to “make such rules and regulations . . . as may be necessary in the execution of its functions” or “as may be necessary to carry out the provisions of this chapter.”<sup>166</sup> And this broad authority is only ancillary regulatory authority. Simply, in this context, where state net neutrality-style regulations ostensibly would interfere or conflict with the FCC's order only inasmuch as the agency has determined it has no authority to otherwise regulate ISPs in this

164. See, e.g., *Ark. Elec. Co-op. Corp., v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original) (“[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.”).

165. Telecommunications Act, Pub. L. No. 104-104, 110 Stat. 56, 56 (1996).

166. 47 U.S.C. §§ 154(i), 303(r).

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manner, a broad grant of regulatory authority should not be enough for the agency to preempt state law.

Certainly, Congress can without question clarify an intent to preempt state law (just the same as the de-regulatory intent the FCC cites in its express preemption provision) by enacting statutes containing express administrative preemption language, as it did in Title II of the Telecommunications Act. Yet it did not do so in Title I, instead relying only on a broad and general grant of regulatory authority. Admittedly, however, when an administrative agency pursuant to its delegated authority promulgates regulations that advance statutorily stated congressional policy, there is conceivably less concern that any resulting preemption of state law “is not one that Congress would have sanctioned.”<sup>167</sup> But at the same time, it is equally clear in this case the FCC cannot substantively exercise its properly delegated Title I ancillary authority by simply recognizing congressional policy, and it should accordingly be much less able to exercise preemptory authority that acts to displace state law and regulations when otherwise constrained to an ancillary regulatory authority. Even where a state regulatory scheme ostensibly conflicts with a federal scheme, it is within Congress’s wheelhouse—and not administrative agencies’ wheelhouse—to ensure the federal scheme of de-regulation is not undermined, especially when it has not expressly delegated to the administrative agency the power to preempt state law in the “unregulated” information services arena. While this would require Congress to take the necessary steps as a first-order exercise of legislative decision-making or, as seems more likely, to simply (expressly) delegate to the agency the necessary preemption authority to utilize under its Title I authority, the constitutional and institutional structure demands as much.<sup>168</sup>

167. *United States v. Shimer*, 367 U.S. 374, 383 (1961).

168. Importantly, the companion of conflict preemption, “field preemption,” is not asserted to apply in this instance. In *Arizona v. United States*, the Supreme Court explained that field preemption is an exercise of the preemption power wherein “States are precluded from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance.” *Arizona v. United States*, 567 U.S. 387, 399 (2012). There, the Court found that the federal statutes concerning alien registration was so “comprehensive,” in effect, “the Federal Government ha[d] occupied the field of alien registration,” and therefore a state law creating a state misdemeanor on the failure to abide by federal alien-registration requirements was preempted. *Arizona*, 567 U.S. at 400-02. In this case, however, Congress has both recognized and maintained, by statute, the federal-state regulatory spheres regarding wire and radio communications. See 47 U.S.C. § 152(a), (b) (1993) (stating that the statutes “apply to all interstate and foreign communication . . . [and] nothing in this Act shall be construed to apply or to give the [FCC] jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier . . .”).

## B. NARROWING THE BREADTH OF FCC'S BROAD PREEMPTION NET

In October 2019, the United States Court of Appeals for the D.C. Circuit decided *Mozilla Corp. v. FCC*,<sup>169</sup> brought as a comprehensive legal challenge to the entirety of the agency's 2018 Order.<sup>170</sup> The petitioners—consisting of online companies, business associations, and public interest organizations,<sup>171</sup> alongside twenty-two state attorneys general (in addition to the District of Columbia)<sup>172</sup>—challenged: the FCC's classification of broadband internet as an information service, its interpretation of § 706 as “hortatory,” the agency's reliance on § 257 to impose transparency requirements, and finally, the validity of the preemption provision. In its decision, a unanimous panel upheld the FCC's classification decision,<sup>173</sup> and a two to one majority affirmed the agency's interpretation of § 706 as “reasonable” under the auspice of *Chevron*<sup>174</sup> along with the agency's reliance on § 257 to issue its substantive transparency rule under its Title I ancillary authority.<sup>175</sup> And most importantly for purposes of this article, the two to one majority vacated the 2018 Order's preemption provision in whole.<sup>176</sup>

Based on the foundational principle of administrative law that administrative agencies have the authority to act *only* under that which is granted them by Congress, the D.C. Circuit recognized that the FCC can “preempt state law only when and if it is acting within the scope of its congressionally delegated authority.”<sup>177</sup> Much in the same way, the court recognized (as a matter of analytical consistency and necessity) that where the agency “lacks the authority to regulate, it equally lacks the power to preempt state law.”<sup>178</sup> Notably, the FCC did not, before the D.C. Circuit, claim either an express statutory authority to preempt state net neutrality laws or that its Title I ancillary authority to regulate ISPs provides an avenue to which it may validly preempt

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169. 940 F.3d 1 (D.C. Cir. 2019).

170. *See generally* *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

171. Joint Brief for Petitioners at i - v, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1068) (Aug. 20, 2018) 2018 WL 5282022.

172. Proof Brief for Government Petitioners, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) (No. 18-1068) (Aug. 20, 2018) 2018 WL 5282010.

173. *See Mozilla*, 940 F.3d at 18-35, 97 (Williams, J., concurring in part and dissenting in part).

174. *Id.* at 20, 46.

175. *Id.* at 47-49.

176. *See id.* at 74 (“The Governmental Petitioners challenge Preemption Directive on the ground that it exceeds the Commission's statutory authority. They are right.”).

177. *Id.* at 74-75 (quoting *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986)).

178. *Id.* at 75.

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state net neutrality laws.<sup>179</sup> Rather, in its Order and before the D.C. Circuit, the agency relied on two theories of its legal authority to preempt state law in such a broad and conclusory fashion: (1) implied preemption authority under a derivative of the conflict preemption doctrine known as the “impossibility exception,” and (2) that preemption is necessarily consistent with the “federal policy of nonregulation for information services” (or stated in the negative, that not preempting state law while altering the regulatory framework from Title II to Title I would be inconsistent with the federal policy set forth under the Title I regulatory scheme).<sup>180</sup>

Under the first theory, the FCC asserted in its Order that because “it is impossible or impracticable to regulate the intrastate aspects of a [broadband internet] service without affecting interstate communications,” state laws imposing regulations inconsistent with the regulatory approach the FCC was adopting in its 2018 Order (net neutrality regulations) would “interfere with federal regulatory objectives,” i.e., the balanced free-market, low-pressure regulatory system resulting from the FCC’s information services classification.<sup>181</sup> But as noted above, simply because state regulation would conflict with a federal regulatory objective does not give an agency authority to, as a second-order exercise of legislative decision-making, categorically preempt all such state laws. Preemption (and, in this case because of its ancillary authority under Title I) requires something more.

As an extension of implied conflict preemption doctrine,<sup>182</sup> the impossibility exception, rooted in the Supreme Court’s opinion in *Louisiana Public Service Commission v. FCC*,<sup>183</sup> essentially permits an administrative agency to act to preempt state regulation of intrastate matters “when it is ‘not possible to separate the interstate and intra-

179. *Id.* at 75-76 (citing *Am. Lib. Ass’n v. FCC*, 406 F.3d 689, 691-92 (D.C. Cir. 2005)). The panel applied the two-step ancillary jurisdiction test it previously applied in *American Library*: “ancillary jurisdiction exists only when ‘(1) the Commission’s general jurisdictional grant under Title I . . . covers the regulated subject and (2) the regulations are reasonably ancillary to the Commission’s effective performance of its statutorily mandated responsibilities.’” *Id.* at 76 (quoting *Am. Lib. Ass’n.*, 406 F.3d at 691-92).

180. Restoring Internet Freedom, 33 FCC Rcd. 311, at 429-31; see *Mozilla Corp.*, 940 F.3d at 76.

181. Restoring Internet Freedom, 33 FCC Rcd. at 429-31; see *Mozilla Corp.*, 940 F.3d at 74-76.

182. As the D.C. Circuit recognized in *Mozilla Corp.*, the doctrine of conflict preemption does not apply in this circumstance with regards to the FCC’s 2018 Order inasmuch as the agency conceded at oral argument that the preemption provision is broader than conflict preemption and, in addition, conflict preemption is a “fact-intensive inquir[y]” involving whether a specific state regulation is an “obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Mozilla Corp.*, 940 F.3d at 81-82 (citations and internal quotation marks omitted).

183. 476 U.S. 355 (1986).

state components of the asserted FCC regulation.”<sup>184</sup> In *Mozilla Corp.*, the D.C. Circuit recognized the three-part test the court of appeals had previously formulated in an earlier case for when the FCC may preempt state regulation under the impossibility exception: (1) “the matter to be regulated has both interstate and intrastate aspects,” (2) “[FCC] preemption is necessary to protect a valid federal regulatory objective,” and (3) “state regulation would *negate the exercise by the [FCC] of its own lawful authority* because regulation of the interstate aspects of the matter cannot be unbundled from regulation of the intrastate aspects.”<sup>185</sup>

In this context, because the FCC classified broadband internet access service as an information service, any application of the conflict preemption doctrine necessarily rests on the validity of FCC’s exercise of its Title I ancillary jurisdiction to regulate information services.<sup>186</sup> Stated differently, as the D.C. Circuit recognized in *Mozilla Corp.*, “the impossibility exception presupposes the existence of statutory authority to regulate; it does not serve as a substitute for that necessary delegation of power from Congress.”<sup>187</sup> Because the agency’s classification decision relegated its regulatory authority to its Title I ancillary authority and because the agency’s express preemption provision is necessarily outside the sphere of this limited authority, it cannot rely on the impossibility exception to broadly preempt state law as a matter of first-order legislative decision-making.

Indeed, the D.C. Circuit agreed, recognizing that “contrary to the Commission’s argument, the ‘impossibility exception’ does not create preemption authority out of thin air.”<sup>188</sup> In a sense, the D.C. Circuit applied a *Chevron Step Zero*-style<sup>189</sup> requirement in which the agency

184. *Public Serv. Comm’n of Md. v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990) (quoting *La. Pub. Serv. Comm’n*, 476 U.S. at 375 n.4 (1986)) (emphasis in original); *La. Pub. Serv. Comm’n*, 476 U.S. at 368 (discussing preemption when “compliance with both federal and state law is in effect physically impossible”).

185. *Mozilla Corp.*, 940 F.3d at 77 (quoting *Pub. Serv. Comm’n of Md.*, 909 F.2d at 1515) (emphasis added). Although FCC cites a two-part test, the third prong is necessarily implied within the ostensibly two-prong tests. See *Minn. Pub. Utilities Comm’n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007) (stating the impossibility exception permits FCC to preempt state regulation if (1) separation of interstate and intrastate aspects of the service is impossible and (2) “federal regulation is necessary to further a valid federal regulatory objective”); *Nat’l Ass’n of Regulatory Utility Comm’rs v. FCC*, 880 F.2d 422, 429 (D.C. Cir. 1989) (quoting *La. Pub. Serv. Comm’n*, 476 U.S. at 375-76 n.4) (alteration in original) (stating “[w]here [the] FCC acted within its authority . . . , preemption of inconsistent state regulation . . . [will be] upheld since state regulation would negate the federal tariff” (i.e., the exercise of lawful authority)).

186. *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 976 (2005).

187. *Mozilla Corp.*, 940 F.3d at 78.

188. *Id.*

189. See generally Cass R. Sunstein, *Chevron Step Zero*, 92 VA. L. REV. 187 (2006).



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must, before any inquiry can proceed, have adequate and proper statutory authority to act in the manner it purports to act.<sup>190</sup> An agency has no power to act without authority granted to it by Congress, especially concerning any second-order legislative decision-making and even more so, when exercising the federal Supremacy Clause power to preempt state law in a broad and categorical manner.<sup>191</sup>

As explained above, because the agency failed to tie its express preemption provision to any congressionally-delegated authority (other than, arguably, a broad grant of authority in § 151) to properly exercise its ancillary authority, it cannot validly regulate in this manner even under the auspice of the impossibility exception to traditional preemption law.

But the FCC also relies on an “independent authority” to displace state regulations on the basis that Congress itself adopted the deregulatory framework of non-regulation concerning information services.<sup>192</sup> To be sure, the United States Supreme Court has established the basic principle that when Congress “fail[s] . . . affirmatively to exercise their full authority,” the resulting scheme “takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute.”<sup>193</sup> Here, the stated policy of the Telecommunications Act as cited by the FCC in its 2018 Order is to “preserve the vibrant and competitive free market that presently exists for the internet and other interactive computer services, unfettered by Federal or State regulation.”<sup>194</sup> But as the D.C.

190. See *City of Arlington, Tex. v. FCC*, 569 U.S. 290, 306 (2013) (stating “for *Chevron* deference to apply, the agency must have received congressional authority to determine the particular manner at issue in the particular matter adopted”).

191. As an additional matter of note, the FCC’s preemption action here was not the quintessential exercise of conflict preemption principles where it did not identify any specific state law or regulation that actively conflicts with a valid and lawful regulation from the agency. See, e.g., *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 874-75 (2000). The agency acted instead in this instance to categorically preempt (by regulation) state net neutrality laws to foreclose the then-impending possibility that the states would enact their own net neutrality laws and regulations. Even so, because the FCC in this instance as an exercise of its ancillary Title I authority must tie any affirmative regulation to some pre-existing statutory mandate or duty, it is not clear that even if such state law existed, the FCC could bring these conflict preemption principles to bear in a rulemaking or regulatory setting, regardless. Instead, the agency would pursue litigation and judicial avenues to preclude the state law from taking effect and to “enforce” the Supremacy Clause principles. This approach avoids bringing into the mix separations-of-powers issues alongside federalism concerns and principles, as is the case here.

192. *Restoring Internet Freedom*, 33 FCC Rcd. at 431.

193. *Bethlehem Steel Co. v. N.Y. State Labor Relations Bd.*, 330 U.S. 767, 773-74 (1947); see also *Ark. Elec. Coop. Corp., v. Ark. Pub. Serv. Comm’n*, 461 U.S. 375, 384 (1983) (“[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left unregulated, and in that event would have as much pre-emptive force as a decision to regulate.”).

194. *Telecommunications Act*, Pub. L. No. 104-104, 110 Stat. 56 (1996) (codified at 47 U.S.C. § 230(b)(2) (2018)).

Circuit re-affirmed in *Mozilla Corp.*, when dealing with an action by an administrative agency, the initial question must necessarily be whether the agency is acting within the confines of its congressionally-delegated authority, especially when considering preemptive actions. At the core of administrative law is the principle that agencies are first and foremost depositories of legislative decision-making authority. As the appellate court recognized: “First, as a matter of both basic agency law and federalism, the power to preempt the States’ laws must be conferred by Congress. It cannot be a mere byproduct of self-made agency policy.”<sup>195</sup> Thus, to exercise any independent authority—preemptive or not, although as I argue especially when the result is preemption of state law or regulatory authority—the agency must be acting within or under the authority delegated it by Congress.

To mean anything, then, this standard must apply even when the agency is ostensibly pursuing (and even when expressly stating as much) what is otherwise clear congressional or federal policy. There is no exception to this basic principle of administrative law. Any positive regulations or actions with the force of law, whether in pursuit of federal regulatory objectives or policies or not, are valid agency actions only where Congress has delegated the agency the power or authority to promulgate the rule or order in question. As explained above, because the FCC’s Title I authority here is an exercise of ancillary authority, simply pursuing or promulgating a regulation that is *consistent with* such congressional or federal policy is not enough. Thus, it should not be sufficient for an agency to wield the federal power of preemption even in the face of a federal statutory scheme that suggests a de-regulation or laissez-faire approach which may be undermined by individual state regulation to the contrary, without statutory authority in which to otherwise ground such preemption.

Finally, the FCC relied on § 401 of the Telecommunications Act, adding 47 U.S.C. § 160, to support the agency’s preemption authority regarding broadband internet access services.<sup>196</sup> Specifically, § 160(e) provides: “A State commission may not continue to apply or enforce any provision of this Act . . . that the [FCC] has determined to forbear from applying” under § 160(a).<sup>197</sup> In turn § 160(a) provides FCC statutorily delegated authority to make forbearance determinations regarding “any regulation or any provision of this Act to a telecommunications carrier or telecommunications service” upon certain findings.<sup>198</sup> The agency argued:

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195. *Mozilla Corp.*, 940 F.3d at 78.

196. Restoring Internet Freedom, 33 FCC Rcd. at 432.

197. 47 U.S.C. § 160(a), (e) (2018).

198. *Id.*

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It would be incongruous if state and local regulation were preempted when the Commission decides to forbear from a provision that would otherwise apply, or if the Commission adopts a regulation and then forbears from it, but not preempted when the Commission determines that a requirement does not apply in the first place.<sup>199</sup>

The preemptive authority within § 160(e) is clear had the agency retained the telecommunications service-classification of broadband internet access service. In the realm of Title II regulation, Congress expressly sets forth (1) FCC discretionary authority to make forbearance determinations and (2) the requisite preemption of state law. But as the D.C. Circuit recognized, the agency's classification determination taking broadband internet out of the Title II realm necessarily removes such forbearance authority.<sup>200</sup> The court of appeals also noted that § 160(e) itself is not a delegation of preemptive authority to the agency but rather it only grants the agency authority to forbear from particular regulations under Title II with Congress "preemptively" determining the preemptive effect of such decision.<sup>201</sup> In other words, even under § 160(e) and the Title II sphere of regulatory authority, it is not the FCC that is necessarily making preemptive determinations but instead it is Congress itself that has made a preemptive determination as an exercise of first-order legislative decision-making.

In vacating the preemption provision on the grounds that the agency lacked any "lawful source of statutory authority" to do so,<sup>202</sup> the majority re-emphasized a foundational tenant of administrative law: that agencies are empowered to act only under such authority as granted by Congress and no more, including in preempting state law. But as the reasoning in the 2018 Order illustrates, in practice (as is more often than not the case) this is not a simple black and white matter. Indeed, as the dissent in *Mozilla* argues, in part, the Supreme Court has made clear that express grants of agency authority to preempt state law is not always a necessary requirement.<sup>203</sup> Something less is allowed. For example, the Supreme Court has recognized that when Congress "fail[s] . . . affirmatively to exercise their full authority," the resulting scheme "takes on the character of a ruling that no

199. Restoring Internet Freedom, 33 FCC Rcd. at 432.

200. *Mozilla Corp.*, 940 F.3d at 80 (discussing that the Commission "just cannot completely disavow Title II with one hand while still clinging to Title II forbearance authority with the other").

201. *Id.* at 79; see also *Am. Lib. Ass'n*, 406 F.3d at 708 (rejecting the argument that the FCC "possesses plenary authority to act within a given area simply because Congress has endowed it with some authority to act in that area").

202. *Mozilla Corp.*, 940 F.3d at 74.

203. *Id.* at 96 (Williams, J., concurring in part, dissenting in part). In addition, the dissent argues as an initial matter that the three-part impossibility test formulated by the D.C. Circuit itself was satisfied in this instance. *Id.* at 95.

such regulation is appropriate or approved pursuant to the policy of the statute.”<sup>204</sup> Additionally, in an earlier case concerning the FCC’s assertion of preemption authority in its regulation of cable television, the Court also recognized that while the key inquiry is whether the agency “has properly exercised its own delegated authority,” at the same time “a pre-emptive regulation’s force does not depend on express congressional authorization to displace state law.”<sup>205</sup>

In *City of New York v. FCC*,<sup>206</sup> the Supreme Court found that Congress had delegated the FCC statutory authority to preempt state law in regulating cable television signals based on the broad power to “make such rules and regulations and prescribe such restrictions and conditions . . . as may be necessary to carry out the provisions of this chapter” and, importantly, where the FCC had preempted such state and local regulation for the ten years leading up to Congress’s enacting the Communications Act.<sup>207</sup> Additionally, just five years prior to *City of New York*, the Supreme Court stated the broad principle that decisions *not to regulate* are just as effective as a decision *to regulate*: “because a federal decision to forgo regulation in a given area may imply an authoritative factual determination that the area is best left *unregulated*, . . . that event would have as much pre-emptive force as a decision *to regulate*.”<sup>208</sup>

Similar to the Eighth Circuit’s 2007 opinion in *Minnesota Public Utilities Commission v. FCC*,<sup>209</sup> the *Mozilla Corp.* dissent argued for a deferential review of the FCC’s action to preempt state law.<sup>210</sup> Remarkably, in *Minnesota Public Utilities Commission*, the Eighth Circuit—in reviewing an FCC-promulgated order preempting state regulation of telecommunication services using Voice over Internet Protocol (“VoIP”)—engaged in a simple arbitrary-and-capricious standard of review of the agency’s preemption promulgation.<sup>211</sup> In review-

204. *Bethlehem Steel Co.*, 330 U.S. at 773-74 (1947); see also *Ark. Elec. Coop. Corp.*, 461 U.S. at 384 (“[A] federal decision to forgo regulation in a given area may imply an authoritative federal determination that the area is best left *unregulated*, and in that event would have as much pre-emptive force as a decision *to regulate*.”).

205. *City of New York v. FCC*, 486 U.S. 57, 64 (1988) (quoting *Fidelity Fed. Savings & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 154 (1982)).

206. 486 U.S. 57 (1988).

207. *City of New York*, 486 U.S. at 66-67.

208. *Ark. Elec. Coop. Corp.*, 461 U.S. at 384 (noting the statutory scheme at issue, the Federal Power Act, did not determine as a matter of policy that the rural power cooperatives at the heart of the agency’s preemptive act should be left unregulated as a matter of federal policy); see also *Minn. Pub. Utilities Comm’n*, 483 F.3d at 580 (noting, generally, “[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation”).

209. 483 F.3d 570 (8th Cir. 2007).

210. *Mozilla Corp.*, 940 F.3d at 97 (Williams, J., concurring in part, dissenting in part).

211. *Minn. Pub. Utilities Comm’n*, 483 F.3d at 577-82.

ing the agency's assertion of the impossibility exception under 47 U.S.C. § 152(b), the Eighth Circuit deferred to the agency's "informed decision[-making]" in both its determination that the intrastate and interstate aspects of the service cannot be separated *and* that state regulation would interfere with federal rules or policies.<sup>212</sup> There, the FCC argued that if classified as an information service, state regulation of the VoIP service would conflict with the "long-standing national policy of nonregulation of information services" and the agency's "market-oriented policy" for information service providers.<sup>213</sup> The Eighth Circuit concluded the agency did not arbitrarily or capriciously preempt state regulation of VoIP service on the basis that it would "interfere with valid federal rules or policies," largely deferring to the agency's "conclusions regarding the conflicts between state regulation and federal policy."<sup>214</sup> On this basis, the *Mozilla* dissent argues that the 2018 Order's adoption of a federal regulatory regime characterized by deregulation for Title I information services does not render preemption impossible (or, more accurately, statutorily unauthorized as an exercise of agency authority).<sup>215</sup>

The Eighth Circuit recently re-affirmed its reasoning in *Charter Advanced Services (MN) LLC v. Lange*,<sup>216</sup> holding that because the VoIP service in issue (Spectrum Voice) is an "information service" under the Telecommunications Act, state regulation of the service is preempted:

How a service is classified affects a state's ability to regulate the service. Telecommunications services are generally subject to "dual state and federal regulation." By contrast, "any state regulation of an information service conflicts with the federal policy of nonregulation [of information services under the Telecommunications Act]," so that such regulation is preempted by federal law.<sup>217</sup>

212. *Id.* at 579-80.

213. *Id.* at 580 (quoting Communications Reg., 19 FCC Rcd. 22404 (2004)).

214. *Id.* at 580-81 (quoting, in part, *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 883 (2000)).

215. *Mozilla Corp.*, 940 F.3d at 104 (Williams, J., concurring in part, dissenting in part) (asserting the Eighth Circuit's *Minnesota Public Service Commission* decision upholding FCC preemption of VoIP regardless of the service's classification as an information service or telecommunications service "seems wholly incompatible with the majority's idea that there is no Commission preemptive authority vis-à-vis a service located under Title I").

216. 903 F.3d 715 (8th Cir. 2018).

217. *Charter Advanced Servs. (MN), LLC v. Lange*, 903 F.3d 715, 718 (8th Cir. 2018) (quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986); then quoting *Minn. Pub. Util. Comm.*, 483 F.3d at 580). In *Charter Advanced Services*, the Eighth Circuit relied on its earlier decision in *Minnesota Public Utilities Commission* for the preemptive effect of state regulation of information services. *Charter Advanced Servs.*, 903 F.3d at 719.

When dealing with preemption by an administrative agency—rather, and especially so, than Congress itself—the principles of federalism and the separation of powers require a close and careful examination of the validity of the preemption action, as the majority in *Mozilla* re-affirmed. When acting as an independent or substantive matter (not merely interpreting federal preemption statutes), agencies like the FCC are limited to exercising delegated authority; as required by the separation of powers framework of the Constitution. Because of the implications of preemption under the Supremacy Clause and the delicate federalism balance, courts should be hesitant to accept an agency’s asserted authority to preempt under only a broad delegated authority to act in a certain realm or on a certain topic especially when Congress itself (entitled without question to make first-level preemption decisions under the Constitution as a function of its vested lawmaking authority and legislative decision-making powers) must, to preempt state law, indicate a clear and manifest purpose to displace state law.

The United States Supreme Court should emphasize that judicial review of agency preemption decision-making must—as with judicial review of any agency action—begin with a “step-zero” inquiry: whether the agency is acting under some authority delegated by Congress. And where preemption of state law is concerned, for the sake of federalism and the basic institutional framework under the separation of powers, such power and authority to do so must be clear from Congress; much as Congress is itself required to make such determinations clear in statutory preemption. The Court should also clarify that even if the agency was not acting under Title I authority—under which congressional policy is simply not enough for regulatory action but requires a regulation tied to an existing statutorily mandated duty—as a general matter it should not be enough for agencies to independently undertake to pursue federal policy in preempting state laws, either. Unless Congress has delegated to the agency the authority to regulate and to preempt state law, it cannot so act with the force of law. Under this statutory scheme applicable to the FCC, pursuing congressional policy is not enough to exercise Title I authority as the FCC has undertaken to do here.<sup>218</sup> Neither should it be sufficient to

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218. In *City of New York v. FCC*, the Supreme Court held the FCC had authority under the broad delegation of authority under § 4(i) of the Communications Act to preempt state law on an issue for which Congress enacted the enabling statute “against a background of federal [agency] pre-emption on this particular issue”; the FCC had “[f]or the preceding 10 years . . . pre-empted such state and local . . . standards under its broad delegation of authority . . .” *City of New York*, 486 U.S. at 66-67. As mentioned above, the distinction between the less regulated “information services” and the more regulated “telecommunications services” is grounded in historic FCC practice.

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exercise the power of preemption, even if the general federal scheme of regulation would indicate or arguably provide support for, as a policy matter, a laissez-faire or market-based approach to regulating the internet as an information service.

In sum, the courts in judicial review should ensure that when agencies like the FCC invoke the foundational principles of federalism and act to influence the balance of regulatory authority between the dual sovereigns under the Supremacy Clause by the federal power of preemption, agencies must act under and within the inherently limited power delegated to it by Congress. Administrative agencies like the FCC should not be able to derive regulatory authority to preempt state law and foreclose any and all state laws regulating broadband internet—in which the States certainly have an intimate and important interest—in a net neutrality-style by simply reasoning that since it has no jurisdiction to regulate interstate broadband internet providers in this manner, states do not have jurisdiction to regulate intra-state broadband internet providers in that same way.<sup>219</sup> This would, simply, be inconsistent with the administrative law framework that exists within the broader institutional and constitutional design.

## V. CONCLUSION

Because of its excessive pervasiveness, how the internet is regulated (or not) will continue to become a mobilizing and pressing political issue across the federal and state levels of government. While the worthwhile regulatory policy debate centered around broadband ISPs' gatekeeper role and influence continues, it is important to remember the role the states can play as "laborator[ies] . . . [to] try novel social and economic experiments without risk to the rest of the country."<sup>220</sup> But this notion must necessarily exist under the framework established by the Supremacy Clause which dictates that in conflict, state law must cede to federal law.<sup>221</sup> While a necessary federal power, the power of preemption under the Supremacy Clause must be wielded

219. Ultimately, the D.C. Circuit agreed and vacated FCC's preemption provision on much the same grounds. *See generally Mozilla Corp.*, 940 F.3d 1. Importantly, however, the preemption issue is far from settled, as the dissent makes clear. *See id.* at 69-79 (Williams, J., concurring in part and dissenting in part). If nothing else, the FCC's 2018 Order itself illustrates the need to clarify the limits to federal agency power in an era of increasing administrative agency reach at the outer limits of its realm of authority.

220. *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting); *see also FERC v. Mississippi*, 456 U.S. 742, 788 (1982) (O'Connor, J., concurring in part and dissenting in part) (stating, "[c]ourts . . . frequently have recognized that the 50 states serve as laboratories for the development of new social, economic, and political ideas").

221. U.S. CONST. art. VI, cl. 2.

with at least intentionality, and even more so when wielded by an administrative agency rather than Congress.

Under the current administration, the FCC has wielded this authority to impose a market-based framework on broadband internet access regulation on the whole of the United States and to foreclose States from an alternative net neutrality scheme. While in this instance the regulatory action failed after the D.C. Circuit vacated the Order's preemption provision, it remains instructive. With the hyper-partisanship and hyper-politicization of net neutrality and the regulation of the internet today, it is not hard to imagine how the FCC under a different administration may yet again change course and *re-re-re-classify* broadband internet as a telecommunications service in order to pave the way to impose affirmative net neutrality requirements. And it is not unlikely that the agency will again wield the power of preemption. When this occurs, to establish some sense of consistency within this regulatory arena, we must ensure that the agency is properly exercising a preemptive authority delegated to it, in some way, by Congress. Where this authority is unclear given the statutory scheme, agencies like the FCC continue to demonstrate a willingness and desire to expand their reach and preempt state law based only on general or broad grants of authority and in the interest of congressional policy. When asked, the courts should carefully review such agency action, rein in this trend, and re-affirm the most basic constitutional principles at the intersection with administrative law. If policy statements and broad grants of general and undefined regulatory authority is enough for an administrative agency to preempt state laws, there is no effective limit to both the affirmative regulations administrative agencies can promulgate, let alone the administrative preemption of state law.



# CON OR CONSTITUTIONAL: AN ANALYSIS OF THE “NET WORTH” WEALTH TAX

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## ABSTRACT

*This Article is an in-depth analysis of the wealth tax proposals presented by former presidential candidates Bernie Sanders and Elizabeth Warren to determine if their proposals could be considered constitutional. As both plans propose a wealth tax based on “net worth,” this Article attempts to determine how a court or the tax code would most likely define this essential term for tax purposes. The proposals are then compared, in the context of United States legal history, to historically constitutional and unconstitutional federal taxes. Although the tax code is free to define any term as it sees fit, a court would most likely find that a “net worth” wealth tax is more comparable to a “property tax,” i.e., a direct tax, and is, therefore, unconstitutional as proposed by the former presidential candidates.*

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## I. INTRODUCTION

During the 2020 election season, there were quite a few proposals on how to narrow the gap between the ultra-rich and middle- to lower-class citizens. One such proposal focuses not on changing the tax to income, but on taxing wealth. The “Ultra-Millionaire Tax” proposed by former Democratic presidential candidate Senator Elizabeth War-



ren is one such plan where she proposes to tax “the wealth of the richest Americans.”<sup>1</sup> Former Democratic presidential candidate Senator Bernie Sanders has a similar plan for taxing “extreme wealth,” which he has creatively named his “Tax on Extreme Wealth” proposal.<sup>2</sup> The idea of taxing wealth has become a popular one, but would a tax on wealth based on a household’s or person’s net worth pass constitutional requirements? Perhaps. The constitutionality of a wealth tax would depend on how a court construes the term “net worth.” But in general, a wealth tax would probably not be constitutional.

## II. THE PROPOSALS

The “Ultra-Millionaire Tax,” proposed by former Democratic presidential candidate Elizabeth Warren, is one of the more popular wealth tax proposals. On her website she urges a tax on “the wealth of the richest Americans.”<sup>3</sup> The website indicates this would apply “only to households with a net worth of \$50 million or more—roughly the wealthiest 75,000 households, or the top 0.1%.”<sup>4</sup> Under Warren’s plan, these “[h]ouseholds would pay an annual 2% tax on every dollar of net worth above \$50 million and a 6% tax on every dollar of net worth above \$1 billion.”<sup>5</sup>

Former Democratic presidential candidate Bernie Sanders’s plan for taxing “extreme wealth” is similar. His plan, titled the “Tax on Extreme Wealth,” proposes:

a 1% tax on net worth above \$32 million for a married couple. That means a married couple with \$32.5 million would pay a wealth tax of just \$5,000. The tax rate would increase to 2 percent on net worth from \$50 to \$250 million, 3 percent from \$250 to \$500 million, 4 percent from \$500 million to \$1 billion, 5 percent from \$1 to \$2.5 billion, 6 percent from \$2.5 to \$5 billion, 7 percent from \$5 to \$10 billion, and 8 percent on wealth over \$10 billion. These brackets are halved for singles.<sup>6</sup>

Obviously, both former presidential candidates believe a wealth tax would be constitutional. On Senator Warren’s website, she states that “[l]egal experts have submitted two separate letters in support of

1. *Ultra-Millionaire Tax*, WARREN DEMOCRATS, <https://elizabethwarren.com/plans/ultra-millionaire-tax> (last visited Oct. 15, 2020) (noting that the “plan was originally released during Senator Elizabeth Warren’s presidential campaign”).

2. *Tax on Extreme Wealth*, BERNIE, <https://berniesanders.com/issues/tax-extreme-wealth> (last visited Oct. 15, 2020).

3. *Ultra-Millionaire Tax*, *supra* note 1.

4. *Id.*

5. *Id.*

6. *Tax on Extreme Wealth*, *supra* note 2.

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the constitutionality of this proposal.”<sup>7</sup> However, it does not seem that these letters have been published as no trace of them could be found. Senator Sanders, on the other hand, has released an analysis of why he thinks a wealth tax would be constitutional. Senator Sanders states:

Since 1916, we have taxed the inherited wealth of the richest people in this country through the estate tax. For more than 100 years, we have taxed investment income from capital gains and dividends. In order to reduce extreme inequality, we must also establish a tax on the net worth on the top 0.1 percent.

“ . . . [Article I, Section 9, Clause 4 of the Constitution] was part of a compromise with the slave-holding South, and its intention was to prevent the North from imposing a “head tax” on slaves because this could not be apportioned equally among the population of all the states.

“Given its origins, this provision has consistently been construed very narrowly by the Supreme Court, which has found only head taxes and real estate levies to be within its scope[.] Given this history, it is extremely unlikely that the justices will cite the founders’ original compromise with slavery to bar a tax that would serve the cause of economic equality and democratic legitimacy. The Roberts court may be conservative, but it is not quite as reactionary as all that.”<sup>8</sup>

Senator Sanders is correct in some aspects. An estate tax and an income tax have both been upheld as constitutional taxes.<sup>9</sup> He is also correct that real estate taxes have been construed as direct taxes.<sup>10</sup> However, his analysis is only partially correct.

A “head tax”—also known as a capitation, “per capita tax, or polltax[—]is ‘[a] fixed tax levied on each person within a jurisdiction,’ regardless of income or worth.”<sup>11</sup> Historically it did have ties to slavery.<sup>12</sup> But, as will be explained further, a wealth tax is not a head tax and therefore has no historical ties to slavery. A wealth tax is more

7. *Ultra-Millionaire Tax*, *supra* note 1.

8. *Tax on Extreme Wealth*, *supra* note 2 (quoting Bruce Ackerman & Anne Alstott, *Why (and how) to tax the super-rich*, L.A. TIMES (Sept. 20, 2011), <https://www.latimes.com/archives/la-xpm-2011-sep-20-la-oe-ackerman-wealth-tax-20110920-story.html>).

9. See *Chase Nat’l Bank v. United States*, 278 U.S. 327, 339 (1929) (upholding an estate tax); *New York Trust Co. v. Eisner*, 256 U.S. 345 (1921) (same); *Springer v. United States*, 102 U.S. 586 (1881) (upholding a federal income tax); see also U.S. CONST. amend. XVI.

10. See generally *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895).

11. *Head Tax*, BLACK’S LAW DICTIONARY (9th ed. 2009).

12. *Veazie Bank v. Fenno*, 75 U.S. 533 (8 Wall.) 543 (1869).

similar to a property tax which “[the Founders] thought . . . dangerous, and . . . wanted to constrain Congress’s power to use such taxes in ordinary circumstances.”<sup>13</sup> Also further discussed, estate taxes and income taxes are not wealth taxes. The term direct tax has been construed narrowly, as stated by Senator Sanders, but a direct tax encompasses more than simply head taxes and real estate taxes.

### III. WHAT IS A WEALTH TAX?

As already stated, the two most popular wealth tax proposals come from former presidential candidates Bernie Sanders and Elizabeth Warren. Both of these plans evaluate a person’s or household’s net worth and gauge it against a certain threshold. If the net worth is above that threshold, it is taxed at a certain set percentage.<sup>14</sup> A wealth tax, as has been proposed, is a taxation of net worth. Therefore, the characterization of a wealth tax as constitutional or unconstitutional hangs on the definition or interpretation of this essential term. Unfortunately, neither candidate has come forth with a definition for “net worth,” nor does the tax code provide a definition for this term. There are, however, definitions from other sources that could be applied to a tax on net worth.

When determining the amount of a wealth tax, the most probable definition of “net worth” probably uses assets and liabilities. The United States Supreme Court defined net worth in a tax case involving the Division of Tax Appeals.<sup>15</sup> In *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*,<sup>16</sup> the Court had to use the plaintiff’s net worth to determine a state tax levied on the plaintiff’s personal property. Here the Court explained that net worth is found by “subtracting liabilities from the value of assets.”<sup>17</sup> The Court seems to imply that the value of the assets used was the fair market value of the assets. However, this is not always the case.

The “net worth method” from tax law is a principle applied by the courts that uses a taxpayer’s net worth to find his actual income.<sup>18</sup> This is only used when a taxpayer has been accused of tax evasion to

13. Erik M. Jensen, *Is a Tax on Wealth Constitutional?*, 36 J. TAX’N INV. 79, 3 (2019).

14. See, e.g., *Tax on Extreme Wealth*, *supra* note 2 (providing a graduated tax rate of one percent “on net worth above \$32 million for a married couple” up to eight percent “on wealth over \$10 billion”); *Ultra-Millionaire Tax*, *supra* note 1 (providing a two percent “annual tax on household net worth between \$50 million and \$1 billion” and a four percent “annual Billionaire Surtax . . . on household net worth above \$1 billion”).

15. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 673-74 (1950).

16. 338 U.S. 665 (1950).

17. *N.J. Realty*, 338 U.S. at 678 n.1 (Black, J., dissenting).

18. *Holland v. United States*, 348 U.S. 121, 126 (1954).

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find discrepancies in his tax return.<sup>19</sup> When applying the net worth method, a court will look at a taxpayer's net worth at the beginning of the taxable year and again at the end of the taxable year to determine if his wealth increased more than was reported on his tax return.<sup>20</sup> In the net worth method, net worth is defined as the cost paid for all the assets minus the individual's liabilities.<sup>21</sup> This is because "the net worth method is a means of reconstructing income, [therefore] assets are generally listed at their cost rather than at their current market value."<sup>22</sup>

For purposes of this analysis, whether the first method, using the fair market value, or the second method, using the purchase price of the asset, is used to find a person's net worth, is not all that important. The generally accepted definition of net worth in law and accounting is the value of the assets, however that value is determined, minus liabilities.<sup>23</sup> Additionally, even though the presidential candidates themselves have not explicitly stated that net worth is found by subtracting liabilities from assets, many of their proponents do define net worth this way.<sup>24</sup> Why does this matter? Because net worth is found by a valuation of assets. Assets are property,<sup>25</sup> and a wealth tax levies a tax on these assets solely because of a household's possession of those assets. If a wealth tax is a tax on the valuation or the mere possession of property, then it stands to reason that a wealth tax is a tax levied on property.

It bears mentioning that if Congress were to pass a statute authorizing a wealth tax, Congress is free to define the term "net worth" however it pleases for tax purposes and it does not need to conform to the commonly understood definition of that term. For example, Merriam-Webster defines the word person as "human, individual—sometimes used in combination especially by those who prefer to avoid *man*

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19. *Holland*, 348 U.S. at 126.

20. *Id.* at 125.

21. *See* *Camien v. Comm'r*, 420 F.2d 283, 285 (8th Cir. 1970) (considering cost, not market value, to determine net worth).

22. *Camien*, 420 F.2d at 285.

23. *See* Akhilesh Ganti, *Net Worth*, INVESTOPEDIA (Mar. 31, 2019), <https://www.investopedia.com/terms/n/networth.asp> ("Net worth is the value of the assets a person or corporation owns, minus the liabilities they owe."); *Net Worth*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/legal/net%20worth> (last visited Oct. 16, 2020) (defining "net worth" as "the excess of the value of assets over liabilities").

24. *See, e.g.*, Greg Leiserson, *Wealth Taxation: An Introduction to Net Worth Taxes and How One Might Work In The United States*, WASHINGTON CTR. FOR EQUITABLE GROWTH (Jan. 23, 2019), <https://equitablegrowth.org/wealth-taxation-an-introduction-to-net-worth-taxes-and-how-one-might-work-in-the-u-s> (providing an example of an article that uses the terms "net worth" and wealth synonymously to say that a family's wealth is the total value of its assets less its debts).

25. *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 675 (1999).

in compounds applicable to both sexes.”<sup>26</sup> But this is not the definition of person found in the Internal Revenue Code (“IRC”). The IRC states that “[t]he term “person” shall be construed to mean and include an individual, a trust, estate, partnership, association, company or corporation.”<sup>27</sup> Therefore, if Congress were to use a definition of net worth that did not involve the valuation or ownership of assets, i.e., property, it would not be considered a tax on property.

#### IV. CONSTITUTIONAL COMPLIANCE

Although neither candidate has advocated for non-constitutional compliance, it would be prudent to include why all branches of the United States government would and should be constrained by the U.S. Constitution. The question is an obvious one: *does* the Constitution have the power to constrain the government? If the power to govern is derived from “We the People of the United States,”<sup>28</sup> then should not the power to govern come from those who are currently being governed? If the people want a wealth tax, should not the people simply be able to pass a wealth tax? It is true that the Constitution’s framers are long gone, but this does not mean the Constitution should no longer constrain governmental powers. Robert H. Bork, in his book *The Tempting of America*, states:

The dead, and unrepresentative, men who enacted our Bill of Rights and the . . . amendments did not thereby forbid us, the living, to add new freedoms. We remain entirely free to create all the additional freedoms we want by constitutional amendment or by simple legislation, and the nation has done so frequently.<sup>29</sup>

Just because the rules were written by men that are no longer with us or may not have represented the population at large, does not mean the rules do not still apply. By preserving the Constitution as it has been for hundreds of years, the people implicitly ratify it through their inaction. If a provision of the Constitution is no longer applicable, the people have the power to supersede or discard that provision through the amendment process.<sup>30</sup> The U.S. has a long history of this implicit ratification. “We did not adopt the Constitution, and those who did are dead and gone . . . . [I]t is only through a history of continuing assent or acquiescence that the [Constitution] could become

26. *Person*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/person> (last visited Oct. 15, 2020).

27. I.R.C. § 7701(a)(1) (2020).

28. U.S. CONST. pmb1.

29. ROBERT H. BORK, *THE TEMPTING OF AMERICA* 251-52 (1990).

30. U.S. CONST. art. V.

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law.”<sup>31</sup> Through the history of the U.S. the people have consistently turned to the Constitution as the “supreme law of the land [because it was] ordained and established by the people.”<sup>32</sup> As the people continue to implicitly ratify the Constitution as the codification of the people’s will, it therefore constrains and will continue to constrain the government.

## V. THE CONSTITUTIONAL TAX

Article I, Section 8 of the Constitution gives the federal government the power to collect taxes for the general welfare of the United States.<sup>33</sup> However, this provision only allows “Duties, Imposts, and Excises.”<sup>34</sup> Additionally, Section 2 and Section 9 of the same article prohibit direct taxes without being apportioned among the several states.<sup>35</sup> Therefore, without apportionment, a direct tax is not allowed by the Constitution.<sup>36</sup> But what is a direct tax? The most generally understood definition of a direct tax is a “tax paid directly by an individual or organization to the imposing entity.”<sup>37</sup> Under this construction, a federal direct tax is a tax paid directly from a taxpayer to the federal government. But this is not the *legal* definition of “direct tax” as interpreted in the Constitution. The United States Supreme Court has held more than once that a direct tax is simply a property tax or an income tax.<sup>38</sup>

Today, the Sixteenth Amendment allows an income tax to be levied by the federal government free from the apportionment requirement despite the fact that it is still considered a direct tax.<sup>39</sup> Apportionment among the states is understood to mean that each state pays the same percentage of the tax due to the federal government as the percentage of the U.S. population that lives inside its state lines.<sup>40</sup>

[E]nacting a workable direct tax is difficult. That was the founders’ intention. They thought direct taxes were dangerous, and they wanted to constrain Congress’s power to use

31. Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204 (1980).

32. *United States v. Butler*, 297 U.S. 1, 53 (1936).

33. U.S. CONST. art. I, § 8, cl. 1.

34. *Id.*

35. U.S. CONST. art. I, § 2, cl. 3; *Id.* § 9, cl. 4.

36. Jensen, *supra* note 13, at 5.

37. Julia Kagan, *Direct Tax*, INVESTOPEDIA (Mar. 27, 2019), <https://www.investopedia.com/terms/d/directtax.asp>.

38. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429 (1895); Nat’l Fed’n of Indep. Bus. v. *Sebelius*, 567 U.S. 519 (2012).

39. U.S. CONST. amend. XVI.

40. Jensen, *supra* note 13, at 3.

such taxes in ordinary circumstances. As a result, the Constitution requires apportioning a direct tax among the states on the basis of population. The taxpayers in a state having one-tenth of the national population must pay one-tenth of the total collected under a direct tax, a state with one-twentieth of the national population must pay one-twentieth of the total, and so on—regardless of how the tax base is distributed across the country. The apportionment requirement makes imposition of a direct tax often technically—and politically—impossible. That was the point.<sup>41</sup>

Therefore, a federal wealth tax must be a duty or impost, an income tax, or an excise and cannot be a property tax if it is to comply with the requirements of the Constitution.

Unfortunately for those who are campaigning for a federal wealth tax, this type of tax most likely does not fall under any of the constitutionally approved categories for a federal tax and would most likely be characterized as a direct tax on property. As will be discussed in more detail below, a wealth tax would, almost certainly, not be characterized as a duty or impost because it has nothing to do with interstate or international trade.<sup>42</sup> It probably would not be upheld as an income tax because it does not tax the accession to wealth but merely the ownership or valuation of wealth.<sup>43</sup> Nor is it likely that a court would find a federal wealth tax to be an excise, such as an estate or gift tax, because a wealth tax does not tax the use or transfer of property but simply its possession.<sup>44</sup> A federal wealth tax based on the net worth of a person or household is most likely a tax on the ownership of property and is, therefore, a direct property tax.<sup>45</sup>

## VI. THE UNCONSTITUTIONAL DIRECT TAX

Over the past 230 years since the Constitution was ratified, the meaning of “direct tax” has undergone some drastic changes. As stated before, the common layman understands a “direct tax” to be a tax levied directly on a person.<sup>46</sup> While this would make sense, this is not the definition that has ever been accepted by the United States Supreme Court. In 1796, just seven years after the Constitution was ratified, the Court found itself interpreting the meaning of the term

41. *Id.* (emphasis omitted) (citations omitted).

42. See *infra* Section VII(C); *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 637-38 (1997).

43. *United States v. Burke*, 504 U.S. 229, 233 (1992).

44. *Chase Nat'l Bank v. United States*, 278 U.S. 327, 339 (1929); *Bromley v. McCaughn*, 280 U.S. 124, 138 (1929); *Fernandez v. Wiener*, 326 U.S. 340, 352 (1945).

45. *Pollock*, 157 U.S. at 579-81.

46. *Kagan*, *supra* note 37.



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“direct tax” as used in the context of Sections 2 and 9 from Article I of the Constitution.<sup>47</sup>

In *Hylton v. United States*,<sup>48</sup> the Court was asked to determine whether taxes on carriages would be considered a “direct tax,” which would require the tax “to be laid according to the census, [as] directed by the constitution . . . .”<sup>49</sup> The *Hylton* Court found that a tax on carriages was an indirect tax. The Court reasoned that “a tax on expence is an indirect tax; and . . . an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumeable commodity; and such annual tax on it, is on the expence of the owner.”<sup>50</sup> Because a carriage is a consumable commodity, the Court found that a tax on such a commodity was considered similar to a tax on an expense and was, therefore, an indirect tax. Furthermore, the Court stated that “the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstances; and a tax on LAND.”<sup>51</sup> In other words, besides the capitation or poll tax, the Court only considered a tax on land as a direct tax.

The Court did not change this definition until 1895, nearly one hundred years later. In *Pollock v. Farmer’s Loan & Trust Company*,<sup>52</sup> the plaintiff brought a suit seeking an injunction and alleging that taxes on rents and incomes of real estate and municipal bonds was an unconstitutional direct tax.<sup>53</sup> The Court found for Pollock stating that “under the state systems of taxation all taxes on real estate or personal property or the rents or income thereof [are] regarded as direct taxes. In support of the Court’s finding, Chief Justice Fuller argued in the majority opinion, “that the distinction between direct and indirect taxation was well understood by the framers of the Constitution and those who adopted it,” and they understood a direct tax to mean a tax on real estate, personal property, rents, or income from such property.<sup>54</sup>

This definition of a direct tax has not changed much since the *Pollock* holding. A direct tax still means a tax on property or income. However, nearly fifteen years after the *Pollock* Court construed “direct tax” to include taxes on property or income, Congress partially superseded the *Pollock* holding through the Sixteenth Amendment to the

47. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796).

48. 3 U.S. (3 Dall.) 171 (1796).

49. *Hylton*, 3 U.S. at 172-73.

50. *Id.* at 175.

51. *Id.*

52. 157 U.S. 429 (1895).

53. *Pollock v. Farmers’ Loan & Trust Co.*, 157 U.S. 429, 555 (1895).

54. *Pollock*, 157 U.S. at 573-74.



Constitution.<sup>55</sup> The Sixteenth Amendment, which was passed in 1909 and ratified in 1913,<sup>56</sup> states that “Congress shall have power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration.”<sup>57</sup> Although an income tax is still considered a direct tax, the Sixteenth Amendment gives Congress the power to bypass the apportionment requirement and collect taxes on incomes from whatever source derived.<sup>58</sup> This is a topic the Court discussed more recently in 2012.<sup>59</sup>

The Court in *National Federation of Independent Business v. Sebelius*,<sup>60</sup> following precedent, stated that now a direct tax is a tax on income and a property tax whether it be real or personal.<sup>61</sup> The court recounted the history stating that:

In 1880, for example, [the United States Supreme Court] explained that “*direct taxes*, within the meaning of the Constitution, are only capitation taxes, as expressed in that instrument, and taxes on real estate.” In 1895, [the Court] expanded [its] interpretation to include taxes on personal property and income from personal property, in the course of striking down aspects of the federal income tax. That result was overturned by the Sixteenth Amendment, although [the Court] continued to consider taxes on personal property to be direct taxes.<sup>62</sup>

The Court noted that between the *Pollock* holding and the Sixteenth Amendment’s supersession of that holding, the only direct taxes that require apportionment under the Constitution are taxes on the ownership of land or personal property. Without apportionment, such a tax is still an unconstitutional exercise of the federal taxing power.<sup>63</sup> Therefore, a direct tax is a tax on the ownership of property<sup>64</sup> or a tax based on the valuation of property.<sup>65</sup>

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55. See U.S. CONST. amend. XVI.

56. Joseph R. Fishkin, et al., *Common Interpretation: The Sixteenth Amendment*, INTERACTIVE CONSTITUTION, <https://constitutioncenter.org/interactive-constitution/interpretation/amendment-xvi/interps/139> (last visited Oct. 22, 2020).

57. U.S. CONST. amend. XVI.

58. *Id.*

59. See Nat’l Fed’n of Indep. Bus. v. Sebelius, 567 U.S. 519 (2012).

60. 567 U.S. 519 (2012).

61. *Sebelius*, 567 U.S. at 571.

62. *Id.* (citations omitted).

63. *Id.* at 570.

64. *Id.* at 571.

65. *Pollock*, 157 U.S. at 573.

## VII. THE CONSTITUTIONAL INDIRECT TAXES

The United States Supreme Court undeniably established that the definition of a direct tax is a tax on the ownership or valuation of property. However, there are many things that seem to be taxes on the valuation or ownership of property but do not fall under the Court's narrow construction of Article I, Section 9 of the Constitution. The Court has upheld seemingly direct taxes in the past, such as gift taxes and estate taxes, characterizing them as excises and not property taxes.<sup>66</sup> A wealth tax, however, is probably not an excise and can be distinguished from these cases. A wealth tax may also be hard to distinguish from an income tax because *income* is essentially an evaluation of a household's *annual* wealth.<sup>67</sup> But a wealth tax and an income tax are different, as will be discussed. Finally, duties and imposts are simple to distinguish from a wealth tax, but it still bears consideration if nothing else than to cover all the bases, that a wealth tax is not a duty or an impost.

## A. EXCISE TAX

There are two types of excises. The first is technically a tax on property but it is a tax on the specific *use* or *exercise* of ownership over property. The second is tax on a corporation for the *privilege* of doing business in the United States. If a tax is levied on these two circumstances, then it is considered an excise.

1. *The Tax on Use*

As mentioned before, an excise and a property tax can be hard to distinguish. In actuality an excise is a tax on property but it is not a "property tax" as this is a term of art used in tax law. "Excise" originally meant a levy on tangible property or on the owners based on activity. This was levied on activities such as movement, manufacture, sale in commerce, or sale for consumption.<sup>68</sup> Therefore, the "direct tax" and the "excise" were originally property taxes differentiated by activity. The "direct tax" was levied regardless of its activity or inactivity, and the "excise" was levied because of its activity.

66. Chase Nat'l Bank v. United States, 278 U.S. 327, 339 (1929); New York Trust Co. v. Eisner, 256 U.S. 345, 348-49 (1921); Bromley v. McCaughn, 280 U.S. 124, 138 (1929).

67. United States v. Burke, 504 U.S. 229, 233 (1992).

68. Flint v. Stone Tracy Co., 220 U.S. 107, 151 (1911) (quoting THOMAS M. COOLEY, CONST. LIM. 680 (7th ed.)) ("Excises are 'taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.'").

From its inception, constitutional interpretation has based the distinction between a direct tax and an “excise” on the *use* of the property. In *Hylton v. United States*,<sup>69</sup> the United States Supreme Court made this distinction when it stated that an annual tax on a carriage would be an indirect tax because a carriage is a consumable commodity and, most importantly, because a carriage is for the conveyance of persons.<sup>70</sup> The Court reasoned that Congress was taxing the actions of the carriages and not the possession or valuation of the carriages.

In 1928, the Court used this distinction between property taxes and excises in regards to the estate tax and applied the same reasoning to the gift tax.<sup>71</sup> In *Chase National Bank v. United States*,<sup>72</sup> the Court was asked to rule on whether a tax on the proceeds from life insurance policies would be considered a property tax on the insurance policies themselves, and therefore an unconstitutional direct tax.<sup>73</sup> The *Chase* Court applied the same reasoning to the policy proceeds as it had eight years earlier to the estate tax. The Court found that the tax on the proceeds of the insurance policies was a tax on the transfer of property, not on the life insurance policies themselves.<sup>74</sup> The Court reasoned that because the policy holder still had control and could direct the policy up to the point of his death, the beneficiary was not entitled to the proceeds until the decedent’s death. The proceeds were not transferred until the death of the decedent, therefore, the tax on the proceeds was a tax on transfer of property and not a direct tax on the ownership of the property.<sup>75</sup> The court further stated that:

[T]he power to tax the privilege of transfer at death cannot be controlled by the mere choice of the formalities which may attend the donor’s bestowal of benefits on another at death, or of the particular methods by which his purpose is effected, so long as he retains control over those benefits with power to direct their future enjoyment until his death. Termination of the power of control at the time of death inures to the benefit of him who owns the property subject to the power and thus brings about, at death, the completion of that *shifting of the*

69. 3 U.S. (3 Dall.) 171 (1796).

70. *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 175 (1796).

71. *Chase Nat’l Bank v. United States*, 278 U.S. 327, 334 (1929); *Bromley v. McCaughn*, 280 U.S. 124, 136 (1929).

72. 278 U.S. 327 (1929).

73. *Chase Nat’l Bank*, 278 U.S. at 333-34.

74. *Id.* at 338.

75. *Id.* at 334-35. The plaintiff argued that the decedent had not transferred the proceeds to him upon death but that he was a beneficiary of the life insurance proceeds before death and the proceeds were more like a distribution from a trust. *Id.*

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*economic benefits of property which is the real subject of the tax, just as effectively as would its exercise.*<sup>76</sup>

As the tax was applied, the tax was on the redemption of the insurance policies, i.e., the *transfer* of the property, and therefore not a direct tax requiring apportionment.<sup>77</sup>

The Court has used this same reasoning in regards to the gift tax.<sup>78</sup> The Court in *Bromley v. McCaughn*<sup>79</sup> was asked to decide whether a tax on a gift made by the plaintiff was an unconstitutional exercise of Congress's taxing power when the tax was collected without taking into account the apportionment requirement.<sup>80</sup> Again, the Court held that this was not a property tax levied on the ownership or value of the gift and, therefore, it was not a direct tax.<sup>81</sup> The Court found that:

While taxes levied upon or collected from persons because of their general ownership of property may be taken to be direct, . . . [the United States Supreme Court] has consistently held, almost from the foundation of the government, that a tax imposed upon a particular use of property or the exercise of a single power over property incidental to ownership, is an excise which need not be apportioned.<sup>82</sup>

Just like an estate tax, where a tax is levied on the value of the property at transfer, a tax on the presentment of a gift is a tax on the activity concerning the property, not on the actual property itself. Although an excise and a direct tax are technically a tax on property, only a direct tax is considered a "property tax," and is, therefore, unconstitutional if levied without the apportionment requirement.

## 2. *The Corporate Privilege*

One particular type of excise has to do with corporations. In 1910 the United States Supreme Court was asked to rule on a statute passed by Congress which required corporations to pay a one percent tax on income above five thousand dollars.<sup>83</sup> The Sixteenth Amendment, which allows Congress to tax incomes without apportionment, was not ratified until 1913, and as such, Congress did not yet have a

76. *Id.* at 338 (emphasis added).

77. *Id.* at 334.

78. *Bromley*, 280 U.S. at 139.

79. 280 U.S. 124 (1929).

80. *Id.* at 134-35.

81. *Id.* at 139.

82. *Id.* at 136.

83. *Flint v. Stone Tracy Co.*, 220 U.S. 107, 144 (1911).

blanket authority to tax income.<sup>84</sup> However, the Court upheld this income tax on corporations as an excise.<sup>85</sup>

In *Flint v. Stone Tracy Co.*,<sup>86</sup> the Court stated that “[e]xcises are ‘taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licenses to pursue certain occupations, and upon corporate privileges.’”<sup>87</sup> The Court reasoned that an income tax on corporations is simply an “excise . . . imposed on importation, consumption, manufacture and sale of certain commodities, privileges, particular business transactions, vocations, occupations and the like.”<sup>88</sup> Furthermore, the tax on a corporation’s income “may be described as an excise upon the particular privilege of doing business in a corporate capacity, i.e., with the advantages which arise from . . . corporate organization.”<sup>89</sup> In other words, Congress can levy a tax on corporations for the privilege of doing business in the United States without apportionment because this is an excise and not a direct tax.

### 3. *The Wealth Tax Is Not an Excise*

As stated before, an excise is technically a tax on property, but it is not a “property tax.” A wealth tax on a household’s net worth, however, appears to be a classic example of a “property tax.” The current proposals for the wealth tax are based on a percentage of a taxpayer’s net worth.<sup>90</sup> A net worth, if the legal or accounting definition is used, is found by valuing a taxpayer’s assets and subtracting the liabilities. The wealth tax is calculated by valuing those assets and levying a tax based on the value of those assets merely because the taxpayer possesses them.<sup>91</sup> It does not tax the transfer of the assets, nor does it tax a specific use of the assets which is the basic function of an excise.

Furthermore, a wealth tax as proposed, probably does not fall under the corporate exception for a direct tax. The proposals from both presidential candidates do not tax corporations but households. Bernie Sanders even goes farther describing the consequences for married couples and singles.<sup>92</sup> Additionally, “household” is a term of art unique to tax law that means a home which constitutes the princi-

84. U.S. CONST. amend. XVI.

85. *Flint*, 220 U.S. at 177.

86. 220 U.S. 107 (1911).

87. *Flint*, 220 U.S. at 151 (quoting THOMAS M. COOLEY, CONST. LIM. 680 (7th ed.)).

88. *Id.* at 151 (quoting *Thomas v. United States*, 192 U.S. 363 (1904)).

89. *Id.*

90. *Tax on Extreme Wealth*, *supra* note 2; *Ultra-Millionaire Tax*, *supra* note 1.

91. *New Jersey Realty Title Ins. Co. v. Division of Tax Appeals*, 338 U.S. 665, 678 n.1 (1950) (Black, J., dissenting); *Holland v. United States*, 348 U.S. 121, 132 (1954).

92. *Tax on Extreme Wealth*, *supra* note 2.

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pal place of abode for the taxpayer during the taxable year.<sup>93</sup> The proposals seem pretty clear that the wealth tax would tax humans and not corporations. The wealth tax would not fall under the corporate exception for an excise because it is not a tax on a corporation for the privilege of doing business in the United States. Therefore, a wealth tax based on a human's net worth is most likely a "property tax," not an excise on activity or the privilege of doing business in the United States.

#### B. INCOME TAX

Like distinguishing a wealth tax from an excise, distinguishing a wealth tax from an income tax can also be difficult. As mentioned above, an income tax is essentially a measurement of wealth. However, the distinguishment comes by the means used to measure the wealth. As explained previously, the current proposals would implement a wealth tax based on a taxpayer's net worth.<sup>94</sup> In contrast, an income tax technically levies a wealth tax on a taxpayer based on income.<sup>95</sup>

In *Pollock v. Farmers' Loan & Trust Co.*,<sup>96</sup> the United States Supreme Court ruled that a tax levied on the income from rents and other property is a direct tax that requires apportionment between the states.<sup>97</sup> However, in 1909, Congress passed the Sixteenth Amendment to the Constitution and the amendment was ratified later in 1913. The Sixteenth Amendment gives Congress, i.e., the federal government, the power to "collect taxes on incomes, from whatever source derived, without apportionment among the several States, and without regard to any census or enumeration."<sup>98</sup> In other words, the Sixteenth Amendment superseded the *Pollock* decision by allowing Congress to bypass the apportionment requirement and collect taxes on incomes regardless of whether the income was from rents or other income from personal or real property. Therefore, even though this type of tax is still considered a direct tax, it is now constitutional for Congress to collect taxes on incomes.<sup>99</sup>

Like many legal terms, "income" is a term of art with a specific meaning unique to tax law. An income tax begins with a taxpayer's

93. See I.R.C. § 2(a)(1)(B) (2020) (defining "surviving spouse" as a taxpayer "who maintains as his home a household which constitutes for the taxable year the principal place of abode . . . of a dependent").

94. *Ultra-Millionaire Tax*, *supra* note 1; *Tax on Extreme Wealth*, *supra* note 2.

95. I.R.C. § 1 (2020).

96. 157 U.S. 429 (1895).

97. *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, 580 (1895).

98. U.S. CONST. amend. XVI.

99. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 571 (2012).

“gross income,” which is defined in the Internal Revenue Code (“IRC”) as “income from whatever source derived . . . .”<sup>100</sup> Unfortunately, this is not a very helpful definition, but the Court in 1992 expounded on the IRC definition stating:

The definition of gross income . . . sweeps broadly. [It] provides that “gross income means all income from whatever source derived,” subject only to the exclusions specifically enumerated elsewhere in the Code. . . . Congress intended through [the IRC] . . . to exert “the full measure of its taxing power,” and to bring within the definition of income “*any accessio[n] to wealth.*”<sup>101</sup>

Therefore, income is any accession to wealth. Furthermore, the *United States v. Burke*<sup>102</sup> Court’s definition of accession to wealth was recently clarified by the U.S. Tax Court in 2018. The tax court stated that an accession to wealth is a transaction that accords the taxpayer an economic benefit equivalent to income.<sup>103</sup> This seems very circular, but simply stated if a taxpayer receives an economic benefit that leaves him with more wealth than he previously possessed, then this is income. If a tax is levied on this *economic benefit* or *accession to wealth*, then it is an income tax which, thanks to the Sixteenth Amendment, does not require apportionment between the states though technically still a direct tax as defined in *Pollock*.

Technically, an income tax is a type of wealth tax.<sup>104</sup> In fact, the income tax was originally introduced as a way to make the wealthy pay their fair share of taxes and lessen the gap between poor and wealthy American citizens.<sup>105</sup> The real difference between an income tax and a wealth tax, as described in the presidential candidate proposals, is the mode of gauging the wealth. An income tax values the “gross income” of an individual and calculates a tax owed based on that valuation.<sup>106</sup> In contrast, the wealth tax values a household’s net

100. I.R.C. § 61 (2020).

101. *United States v. Burke*, 504 U.S. 229, 233 (1992) (alteration in original) (emphasis added) (first quoting I.R.C. § 61(a); then quoting *Helvering v. Clifford*, 309 U.S. 331, 334 (1940); and then quoting *Comm’r v. Glenshaw Glass Co.*, 348 U.S. 426, 431 (1955)).

102. 504 U.S. 229 (1992).

103. *French v. Comm’r*, No. 14777-15S, 2018 Tax Ct. Summary LEXIS 38, at \*1, \*20 (T.C. July 12, 2018).

104. Jensen, *supra* note 13, at 2.

105. See Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of “Incomes”*, 33 ARIZ. ST. L.J. 1057, 1091 (2001) (“From the beginning, supporters of the modern income tax stressed that it was necessary to tie taxation to ability to pay—to ensure the wealthy who had benefitted from the American system would pay their fair share of the nation’s tax liability. Ability to pay was also offered as a justification for graduating an income tax, of course—for taxing higher levels of income at higher rates.”).

106. I.R.C. §§ 1, 61 (2020).



worth based on the value of assets.<sup>107</sup> In order to be an income tax, Congress would have to define net worth to include some sort of *accession to wealth* or some increased *economic benefit*.<sup>108</sup> The Constitution does not bar a wealth tax without apportionment, but it must tax some change in that wealth, not just the mere possession of it. Because the wealth tax as introduced would not tax any variations or changes in the wealth but merely the existence of wealth, this could not be considered an income tax immune from the apportionment requirements of the Constitution.

### C. DUTY OR IMPOST

As mentioned above, the distinction between a wealth tax and duty or impost is a simple one to make. However, for the sake of thoroughness, it bears mentioning because it is the final constitutionally acceptable tax that bears discussion. Congress's power to lay duties and imposts comes from Article I, Section 8, the same constitutional provision that grants Congress the power to collect taxes.<sup>109</sup> The provision simply says that, "Congress shall have the Power To lay and collect . . . Duties, [and] Imposts . . . to pay the Debts and provide for the common Defence and general Welfare of the United States[.]"<sup>110</sup> As many other constitutional terms, "Duty or Impost" is not defined in the Constitution. The definition of "Duty or Impost" comes from case law. The United States Supreme Court was first asked to discuss the definition of a "duty" or "impost" in 1827 when a state congress passed an act laying duties on licenses to retailers of dry goods and for other purposes.<sup>111</sup> The question before the Court was whether a state could constitutionally require an importer to take out a license before permitting him to sell a bale or package that was imported.<sup>112</sup> The holding of the case is irrelevant to this paper but the definition of "duty" found by the court *is* relevant. The Court simply stated that "[a]n impost, or duty . . . is a custom or a tax levied on articles brought into a country[.]"<sup>113</sup> This definition was discussed more at length much later in 1976 when the Court was asked to rule on this question again.<sup>114</sup>

107. *Camien v. Comm'r*, 420 F.2d 283, 285 (1970); *Ganti*, *supra* note 23; *Net Worth*, *supra* note 23; *Leiserson*, *supra* note 24.

108. *United States v. Burke*, 504 U.S. 229, 233 (1992); *French v. Comm'r*, No. 14777-15S, 2018 Tax Ct. Summary LEXIS 38, at \*20 (T.C. July 12, 2018).

109. U.S. CONST. art. I, § 8, cl. 1.

110. *Id.*

111. *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 437-40 (1827).

112. *Brown*, 25 U.S. at 437-40.

113. *Id.* at 437.

114. *See generally* *Michelin Tire Corp. v. Wages*, 423 U.S. 276 (1976).

In *Michelin Tire Corp. v. Wages*,<sup>115</sup> the plaintiff challenged a tax on goods imported from France and Nova Scotia as unconstitutionally prohibited by Article I, Section 10 of the Constitution because the tax was a “duty or impost” and it was not absolutely necessary for executing the state’s, in this case Georgia’s, inspection laws.<sup>116</sup> The Court stated that the tax was a duty or impost because:

[T]he words “imposts” and “duties” as used in 1787 had meanings well understood to be exactions upon imported goods as imports. “Imposts” were like customs duties, that is, charges levied on imports at the time and place of importation. “Duties” was a broader term embracing excises as well as customs duties, and probably only capitation, land, and general property exactions were known by the term “tax” rather than the term “duty.” The characteristic common to both “imposts” and “duties” was that they were exactions directed at imports or commercial activity as such and, as imposed by the seaboard States under the Articles of Confederation, were purposefully employed to regulate interstate and foreign commerce and tax States situated less favorably geographically.<sup>117</sup>

The last time this subject was discussed was in 1997 where the Court simply stated that duty, impost, and import refer to interstate and international trade.<sup>118</sup> Therefore, a “duty or impost” as listed in the Constitution is a tax on imports or exports and if a wealth tax does not tax goods leaving or coming into the country, it cannot be a “duty or impost.”

An analysis of a wealth tax as a duty or impost is not difficult. A wealth tax, as stated previously, is a tax based on a household’s net worth.<sup>119</sup> Net worth would most likely be defined as a valuation of assets merely because of that household’s possession of them. A duty or impost, like an excise, involves movement or action of property before it can be taxed. Unlike an excise, a duty or impost involves a specific movement of property, movement inside or outside of a state or the United States. In contrast, a wealth tax does not take movement into consideration when levying the tax, but taxes the mere possession of the property and not the movement. A wealth tax cannot be a duty or impost because net worth, as most likely defined, does not refer to imports or exports and therefore cannot be a duty or impost.

115. 423 U.S. 276 (1976).

116. U.S. CONST. art. I, § 10, cl. 2; *Michelin*, 423 U.S. at 278-81.

117. *Michelin*, 423 U.S. at 291-93 (citations omitted).

118. *Camps Newfound/Owatonna v. Town of Harrison*, 520 U.S. 564, 637-38 (1997).

119. *Tax on Extreme Wealth*, *supra* note 2; *Ultra-Millionaire Tax*, *supra* note 1.

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## VIII. CONCLUSION

Recently there has been a push for Congress to pass a wealth tax. The wealth tax, as proposed by two leading former Democratic presidential candidates, would tax wealthy or ultra-rich households based on their net worth. Whether a wealth tax is constitutional or not would depend on how Congress, when passing the statute, or the United States Supreme Court, when ruling on a case, would define the term “net worth.” The current definition by the tax courts is the value of a household’s assets, whether by fair market value or purchase price, minus that household’s liabilities. Other legal and accounting definitions use a similar, if not the same, definition of net worth as a value of the household’s assets minus the liabilities. The courts would likely be bound by precedent as to how to define net worth, but Congress is not bound by precedent and can define net worth however it would like.

If Congress were to pass a wealth tax, they would have to define “net worth” in a way that would not be a direct tax because the Constitution specifically states that a “direct tax” must be apportioned between the states by population; something that is virtually impossible in our modern political system. The definition of a direct tax, as has been decided by various Court holdings, is simply a property tax or a tax on income from property. However, the Court’s decision that income taxes are direct taxes subject to the apportionment requirement was superseded by the Sixteenth Amendment of the Constitution. Therefore, the direct tax referred to in the Constitution is simply a property tax.

A property tax, simply stated, is a tax on the value of property merely because a person owns that property. To understand this, an analysis of the various “indirect taxes” is helpful. A wealth tax is not an excise. An excise is levied on the specific use of or the exercise of ownership over property. A wealth tax is a tax on the ownership of assets. For no other reason other than ownership, a wealth tax values those assets and calculates taxes owed. Because the wealth tax is a tax on property ownership, not the use of property, then it is not an excise. An excise can also be levied on corporations for the privilege of doing business in the United States. A wealth tax does not meet this requirement either. A wealth tax is placed on households or humans, not corporations. Therefore, a wealth tax cannot be an excise through use of property or through corporate privilege.

Neither is a wealth tax based on net worth likely classified as an income tax. An income tax is levied on an accession to wealth, i.e., an individual’s change in wealth over the taxable year. In contrast, a wealth tax based on net worth, as commonly defined, does not tax the

change in wealth but its possession. Therefore, the wealth tax proposed by the former presidential candidates, depending on how Congress defines “net worth,” most likely could not be characterized as an income tax.

Finally, a wealth tax is not a duty or impost. Duties and imposts are taxes levied specifically on imports or exports, i.e., the movement of property across state or national borders. A wealth tax, regardless of how any vital terms would likely be defined, could not be a tax on imports or exports. Therefore, a wealth tax cannot be a duty or impost and would still be classified as a “property tax.”

A wealth tax is not an excise, an income tax, or a duty or impost but a “property tax.” As property tax is the only definition of “direct tax” still subject to the apportionment requirement, a wealth tax would likely require apportionment to be in conformity with constitutional constraints.

# ENSURING PROPER NOTICE: CLEARING THE FOG SURROUNDING VIRTUAL PATENT MARKING

DANE D. SOWERS†

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## I. INTRODUCTION

Consider an everyday product many consumers use with little, if any, thought regarding the packaging: a ketchup packet.<sup>1</sup> On the lid of the packet, in small print, Heinz has printed the words “U.S. Pat. Nos. D623,072; other Pats. Pending.”<sup>2</sup> Use of this language is typically referred to as “marking” a patented product.<sup>3</sup> While often overlooked, this marking language serves an important function: if Hunt’s Ketchup, for example, infringes on Heinz’s patent, Heinz will be able to collect damages without having to prove that Hunt’s had actual notice of the alleged infringement.<sup>4</sup> However, when the pending patents covering the product are granted, rejected, or abandoned, the marking language on the product will be inaccurate because there are no longer any patents pending. This creates a serious problem for Heinz.

If Heinz were to continue to use the lids as they read today, it could be liable for false marking, which carries a statutory penalty of up to \$500 per offense (or in other words, per falsely marked ketchup packet).<sup>5</sup> Additionally, for any later-issued patents that were not marked on the product, Heinz would be unable to accrue damages in an infringement action until it provided actual notice to the infringer.<sup>6</sup>

1. Specifically, the Heinz Dip & Squeeze ketchup packet. For an example of the product design, see AMAZON, *Heinz Ketchup Dip & Squeeze Packets (0.95 oz Packets, Pack of 500)*, <https://www.amazon.com/dp/B00SW257AG> (last visited Aug. 22, 2020).

2. *Id.* (displaying this language in the picture of the ketchup packet).

3. See 7 DONALD S. CHISUM, CHISUM ON PATENTS § 20.03[7][c][iii] (2020) (discussing the general mechanics of patent marking).

4. See 35 U.S.C. § 287(a) (2013) (requiring that if a patent is not marked, “no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice”).

5. See 35 U.S.C. § 292(a) (2011) (“Whoever marks upon, or affixes to, or uses in advertising in connection with any article, the words . . . ‘patent pending,’ or any word importing that an application for patent has been made, when no application for patent has been made, or if made, is not pending, for the purpose of deceiving the public—Shall be fined not more than \$500 for every such offense.”). False marking is not a strict liability offense, so some evidence of an intent to deceive would be required. See *Clontech Laboratories, Inc. v. Invitrogen Corp.*, 406 F.3d 1347, 1352-53 (Fed. Cir. 2005) (“[I]n order to establish knowledge of falsity the plaintiff must show by a preponderance of the evidence that the party accused of false marking did not have a reasonable belief that the articles were properly marked (i.e., covered by a patent). Absent such proof of lack of reasonable belief, no liability under the statute ensues.”). Nonetheless, the specter of liability could still exist. See Corey McCaffrey, Note, *The Virtues of Virtual Marking in Patent Reform*, 105 NW. U. L. REV. 367, 369 (2011) (noting a recent increase in focus on false marking, exemplified by a sharp increase in the number of false marking claims in the year 2010).

6. See *Stryker Corp. v. Zimmer, Inc.*, 782 F.3d 649, 660 n.5 (Fed. Cir. 2015), *vacated on other grounds*, 136 S. Ct. 1923 (2016) (“[T]he statute is not so broad as to allow marking with a different patent—with different claims—to provide sufficient notice to the public. Rather, the plain language of the marking statute provides that the patented article be marked with the ‘number of *the* patent.’”); 35 U.S.C. § 287(a) (providing that

To avoid these issues, Heinz could redesign its lids to list all of the active patents and no longer include the “patent pending” language. However, this would almost certainly result in the additional cost of creating new lids, and would also not happen immediately;<sup>7</sup> presumably, Heinz would want to exhaust its existing inventory of lids before using the new, accurate lids. The doctrine of virtual marking seeks to solve this conundrum.

With virtual marking, instead of marking all of its products with a patent number as it does currently, Heinz could mark the packet with “Pat.” followed by a web address,<sup>8</sup> for example, “Pat. <http://kraftheinz.com/patents>.”<sup>9</sup> Using this webpage to provide the patent numbers for the ketchup packets would serve two benefits: first, it would allow Heinz to immediately update the page with a new patent number if a pending patent became allowed; and second, it would allow Heinz to quickly remove any expired patents or “patent pending” language so as to avoid liability for false marking.<sup>10</sup> Furthermore, use of a virtual marking website would eliminate the potential costs associated with changing the lids, assuming the web address of the page did not change.<sup>11</sup>

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for unmarked products, damages do not accrue until “the infringer [is] notified of the infringement and continue[s] to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice”).

7. See McCaffrey, *supra* note 5, at 375 (“Patents are dynamic: new patents are granted, existing patents expire, and a patent’s scope may change during its lifetime. Manufacturing, on the other hand, is typically static: manufacturing equipment is expensive to change, and individual products are not modified after production.”).

8. See § 287(a) (permitting patentees to mark products with “the abbreviation ‘pat.’ together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent”).

9. Notably, KraftHeinz has earmarked this exact page for “virtual patent marking,” but no patent information is actually available on the page at the time of this piece. See KRAFTHEINZ, *The Kraft Heinz Company Virtual Patent Marking*, <https://www.kraftheinzcompany.com/patents.html> (last visited Aug. 20, 2020). Perhaps KraftHeinz is reluctant to deploy this page in any meaningful sense due to the lack of clarity regarding the virtual marking requirements. See *infra* Part III.

10. See McCaffrey, *supra* note 5, at 387-89 (“[I]f [a patentee] abandoned an application or the USPTO denied patent protection, then [the patentee] could immediately remove the application from the product page to avoid potential liability for false marking. With virtual marking, [the patentee] could make any necessary changes in real time without changing the manufacturing process of the physical device. . . . If the product page continued to list the patents and clearly noted that they had expired, then virtual marking would achieve the same public benefit that the court identified without raising any concern as to whether it constituted a false mark.”).

11. See *id.* at 389 (“If [the patentee] had created molds that read, ‘Patents: [virtual marking URL],’ it could have updated the site at virtually no cost, and no physical change to the lids or the manufacturing process would have been necessary.”).

Despite these seemingly clear benefits, patentees seem reluctant to employ virtual marking in place of traditional marking methods.<sup>12</sup> This could be due to lack of education and awareness, either of the availability of virtual marking altogether or of the specific requirements needed to conform with the marking statute.<sup>13</sup> Specifically, the marking statute requires that patentees who virtually mark their products include “the abbreviation ‘pat.’ together with an address of a posting on the Internet, accessible to the public without charge for accessing the address, that associates the patented article with the number of the patent.”<sup>14</sup> There is some ambiguity in this language. Two particular points of ambiguity are the terms “posting” and “associates.” Is a “posting” a single webpage or a website with multiple pages? What does it mean to “associate” a patented article with the number of the patent? Patentees may be more willing to mark their products virtually if these questions can be answered, and they can be more certain they are meeting the statutory requirements as a result.<sup>15</sup>

This article proposes interpretations for “posting” and “associates” that are consistent with the text and purpose of the statute, as well as notice requirements in other areas of the law. It also proposes an additional statutory requirement for patentees employing virtual marking. Part II argues that the history of the patent system, and patent marking specifically, should inform the interpretation of the ambiguous statutory terms. Part III outlines the particular issues caused by the ambiguity in the virtual marking requirements; specifically, that it is unclear what the boundary for a “posting” is, the extent to which downtime and modifications are permissible, and what it means to “associate” a product with a patent number. Part IV examines how

12. See Gaetan de Rassenfosse, *Notice Failure Revisited: Evidence on the Use of Virtual Patent Marking* 16-17 (Nat'l Bureau of Econ. Research, Working Paper No. 24288, 2018), <https://www.nber.org/papers/w24288.pdf> (finding that approximately 12% of patent holders use virtual marking, and estimating that up to 25% of commercially active patentees use virtual marking); MICHELLE K. LEE, UNITED STATES PATENT AND TRADEMARK OFFICE, REPORT ON VIRTUAL MARKING 23 (2014), [https://www.uspto.gov/sites/default/files/aia\\_implementation/VMreport.pdf](https://www.uspto.gov/sites/default/files/aia_implementation/VMreport.pdf) (highlighting a comment that “virtual marking is not widely used”).

13. See LEE, *supra* note 12, at 23 (“The commenter proposed that the USPTO undertake an initiative to educate the public on how to use virtual marking and on the advantages of using this alternative. The commenter further suggested that increased knowledge and awareness of virtual marking may lead to more usage of virtual marking, thereby benefiting both patent owners and the public.”).

14. 35 U.S.C. § 287(a).

15. See *Mayo Collaborative Servs. v. Prometheus Laboratories, Inc.*, 566 U.S. 66, 90 (2012) (expressing concern about “legal uncertainty” in the patent context); see also Anna S. Rominger, *Rethinking the Paradigm: Can the Wagner Act and Labor-Management Cooperation Coexist?*, 8 DEPAUL BUS. L.J. 159, 192 (1996) (“Companies need legal certainty in order to pursue their business goals in an efficient manner.”).



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other areas of the law treat questions of digital notice and registration notice, and develops the common thread that notice is adequate when an observer could be reasonably expected to recognize the existence of a certain fact. Part V proposes that “posting” should be limited to a single webpage, that “associate” should mean to directly connect each patented product with each relevant patent number, and that the title of each patent be included along with the patent number. Part V further urges courts to adopt these interpretations, urges the United States Patent and Trademark Office (“USPTO”) to promulgate these interpretations in its guidance, and urges Congress to include the new language in the marking statute when it next revisits the patent system.

## II. THE HISTORY OF PATENT MARKING

This Part explains the basic history of the patent system and the patent marking requirements, as well as the background for the introduction of the virtual marking requirements. A clear definition should be consistent with the ultimate goals of the patent system, the marking requirements generally, and virtual marking specifically.<sup>16</sup> As a result, this history will illuminate the analysis of how to interpret the ambiguous statutory terms.

### A. ORIGINS OF PATENT MARKING

In the early years of the patent system, patentees were not required to mark their products; rather, patents were considered public records and the public was considered to be on notice of all patents.<sup>17</sup> However, Congress quickly became aware of the difficulties of such a requirement.<sup>18</sup> In the early nineteenth century, someone looking to learn which patents covered a certain product would have to travel by horseback to Washington, D.C., where the patents were stored in “shoebox form.”<sup>19</sup> This was further complicated by the fact that the singular patent office (and all of the patents) were destroyed in a fire

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16. See *Dolan v. U.S. Postal Serv.*, 546 U.S. 481, 486 (2006) (“Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis.”).

17. *Boyden v. Burke*, 55 U.S. 575, 582 (1852) (“Patents are public records. All persons are bound to take notice of their contents, and consequently should have a right to obtain copies of them.”).

18. See Tim Hsieh, *The Adequacy of the Mark: Raising the Standard Under 35 U.S.C. § 287(a) for Patented Online Software Methods*, 48 IDEA: INTEL. PROP. L. REV. 69, 78 (2007) (discussing the “sheer inconvenience” of obtaining information about patents before the introduction of the marking requirement).

19. *Id.* (internal quotation marks omitted).



in 1836.<sup>20</sup> Understandably, Congress sought to introduce another way for the public to take notice of issued patents.<sup>21</sup>

The requirement that patented products be marked first originated with the Patent Act of 1842, which required that patentees mark their products with only the dates of their patents.<sup>22</sup> Under this Act, there was a statutory penalty of “not less than one hundred dollars” for failing to mark a product that was covered by a patent.<sup>23</sup> The Patent Act of 1861 replaced the statutory penalty with the requirement that exists today: that patentees may not recover damages unless the product employing the patent was marked.<sup>24</sup> In 1927, Congress altered the requirements so that patentees needed to mark the patent number on the product instead of the date of the patent.<sup>25</sup> In 1952, Congress allowed patentees to abbreviate “Patent” to “Pat.” on marked products.<sup>26</sup> This was the final revision prior to the enactment of the America Invents Act of 2011.<sup>27</sup>

At this point in the doctrine’s development, the Federal Circuit articulated the three main purposes of the marking requirements: “1) helping to avoid innocent infringement . . . 2) encouraging patentees to give notice to the public that the article is patented . . . and 3) aiding the public to identify whether an article is patented.”<sup>28</sup>

#### B. THE AMERICA INVENTS ACT AND THE ADDITION OF VIRTUAL MARKING

In 2011, Congress passed the America Invents Act, which introduced a number of revisions to the patent system, including the introduction of virtual marking.<sup>29</sup> “Virtual marking” was introduced primarily to lower costs for patentees, as well as to permit easier marking on smaller products.<sup>30</sup> The House Report for the Act also noted that “[c]onstrucive notice is possible by ‘marking’ any patented

20. *Id.*

21. *See id.* (“Realizing these problems, Congress imposed a duty to mark in the Patent Act of 1842 . . .”).

22. Eugene Goryunov & Mark Polyakov, *To Mark or Not to Mark: Application of the Patent Marking Statute to Websites and the Internet*, 14 RICH. J.L. & TECH. 2, 3 (2007).

23. *Id.* (quoting *Nike v. Walmart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998)).

24. *See id.*; 35 U.S.C. § 287(a) (2013).

25. *See Goryunov & Polyakov, supra* note 22, at 3.

26. *Id.*

27. *See id.* (noting that “[t]he Patent Act of 1952 codified the Marking Statute as it exists today”; the piece was published in 2007).

28. *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998).

29. *See generally* Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011).

30. *See H.R. REP. NO. 112-98*, at 52-53 (2011) (“This amendment will save costs for producers of products that include technology on which a patent issues after the product

article that the patent holder (or its licensee) makes, uses, sells or imports.”<sup>31</sup> Based on this language, we can understand virtual marking as a means for providing constructive notice. Noting that virtual marking appears to primarily benefit the patentee,<sup>32</sup> the primary focus should be the first two purposes of patent marking articulated in *Nike, Inc. v. Wal-Mart Stores, Inc.*<sup>33</sup> by the Federal Circuit: the constructive notice must be both sufficiently adequate to help members of the public avoid being innocent infringers and simple enough that patentees are encouraged to provide this notice.<sup>34</sup>

### III. AMBIGUITIES IN THE VIRTUAL MARKING STATUTE

Armed with the background and general framework within which the virtual marking requirements operate, we can begin to examine the issues with the specific ambiguous terms in the marking statute: “posting” and “associates.” As this Part illustrates, the term “posting” is unclear as to what exactly constitutes a posting, as well as to what extent downtime and modifications are permissible. The term “associates” is unclear as to what is required to connect a patented product with the patent number, as well as what, if any, limit should be placed on products covered by large numbers of patents. Later, Part V argues for interpretations that seek to resolve these issues.<sup>35</sup>

#### A. “POSTING”

The virtual marking statute provides that patentees may mark their products by “fixing thereon the word ‘patent’ or the abbreviation ‘pat.’ together with an address of a *posting* on the Internet . . . that associates the patented article with the number of the patent.”<sup>36</sup> Many patentees appear to believe “posting” means a single webpage,<sup>37</sup>

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is on the market, and will facilitate effective marking on smaller products.”); *see also* S. REP. NO. 111-18, at 14 (2009).

31. H.R. REP. NO. 112-98, at 52.

32. The primary benefits of patent virtual marking are to reduce costs and allow for easier marking of small products. *See id.* at 52-53. These benefits primarily work for patentees; members of the public are not substantially affected by this change—without virtual marking, they would still be able to see patent numbers on products.

33. 138 F.3d 1437 (Fed. Cir. 1998).

34. *See Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998).

35. *See infra* Part V.

36. 35 U.S.C. § 287(a) (2013) (emphasis added).

37. Many companies that use virtual marking seem to have reserved a specific webpage for their patented products, and this page is marked on their products. *See, e.g.*, Trvo, *Tivo Corp. Legal Center*, <https://business.tivo.com/about-us/licensing> (last visited Aug. 22, 2020); YETI, *Patents*, [https://www.yeti.com/en\\_US/patents.html](https://www.yeti.com/en_US/patents.html); LG, *Patent*, <https://www.lg.com/us/patent> (last visited Aug. 22, 2020); GENERAL MILLS, *Virtual Patent Marking*, <https://www.generalmills.com/pat> (last visited Aug. 22, 2020); LBP, *Patents*, <https://www.lbpmfg.com/patents/> (last visited Aug. 22, 2020).

and the United States Patent and Trademark Office (“USPTO”) seems to share this belief.<sup>38</sup> However, this view is not completely unchallenged.<sup>39</sup> In *National Products, Inc. v. Arkon Resources, Inc.*,<sup>40</sup> the parties disputed whether using the patentee’s primary website address, rather than a specific address for patents, was adequate notice to comply with the marking statute.<sup>41</sup> While the court declined to rule on the adequacy of notice in this case, the court did go out of its way to point out the difficulty of locating the patents page on the patentee’s website.<sup>42</sup>

One can understand why a company may want to direct visitors to its homepage rather than a page specifically for patents. Directing visitors to a homepage allows the patentee to advertise its product offerings, sales, and promotions, which the patentee may not be able to do on a specific page dedicated to patents. Additionally, the URL for the homepage would necessarily contain fewer characters than a longer URL for patents, so it could be easier to fit the homepage address on a smaller product. Finally, using the homepage could allow for more flexibility if, for example, the web developer changed its routing scheme for the website; the patentee would then not need to redesign its products with a different URL for patents. Further, as *National Products* illustrates, this is a real point of confusion for at least one patentee.<sup>43</sup> Given the variety of reasons why a patentee might wish to direct users to its homepage, the plaintiff in *National Products* is likely not alone either.

An additional issue raised by the term “posting” is the transience of webpages: specifically, that websites can be changed very easily,

38. See LEE, *supra* note 12, at 14 (“Section 287(a) requires only that virtual marking Web pages be ‘accessible to the public without charge.’”); cf. 35 U.S.C. § 287(a) (requiring “a posting on the Internet, accessible to the public without charge”). While this interpretation was provided fairly informally in a report on virtual marking, a court might nevertheless offer it some deference when interpreting the statute. See *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (noting that “an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency”).

39. See *Nat’l Prods., Inc. v. Arkon Res., Inc.*, No. CV 18-02936 AG, 2019 WL 1034321, at \*16 (C.D. Cal. Jan. 9, 2019) (discussing a product which is marked with the patentee’s primary website URL as opposed to a specific page for patents).

40. No. CV 18-02936 AG, 2019 WL 1034321 (C.D. Cal. Jan. 9, 2019).

41. See *Nat’l Prods., Inc.*, 2019 WL 1034321, at \*16 (“The parties do not appear to dispute that . . . [the patentee] marks at least some of [its] products with the word ‘PATENTED’ and the URL of [the patentee’s homepage] . . . [and that] any person can access the website, but has to additionally navigate to a ‘Patents and Trademarks’ page of the website to see a listing of [the patentee]’s patents.”).

42. See *id.* (“Out of curiosity, the Court attempted to access the ‘Patents and Trademarks’ page from [the patentee]’s website’s home page, but did not find any links on the homepage that directly linked to such a webpage, which is apparently nested under the link ‘Legal.’”).

43. See *id.*

and are also prone to downtime (e.g., due to maintenance, errors, or attacks).<sup>44</sup> Traditional patent marking is governed by a “consistent and continuous” standard, meaning that a patentee must mark its products consistently and continuously to be in compliance with the marking requirements.<sup>45</sup> The inference is that this same standard would apply to virtually marked products as well,<sup>46</sup> but the statute does not fully define the requirements for patentees wishing to virtually mark.<sup>47</sup> Without someone litigating the issue, patentees may not know how much downtime is considered acceptable,<sup>48</sup> or what the permissible extent and frequency of modifications is.<sup>49</sup> Another way of framing these questions is to consider them through the lens of notice: is there a certain point where too much downtime or improper modifications cause notice to be inadequate?

In light of these issues, a clear definition of “posting” should indicate whether patentees must use a single webpage, or if a website with multiple pages is permissible. Additionally, it should provide some benchmark for enabling patentees to ensure they are not operating with too much downtime or making impermissible modifications. Part V provides an analysis and proposes a definition consistent with these goals.<sup>50</sup>

#### B. “ASSOCIATES”

The virtual marking statute provides that patentees may mark their products by “fixing thereon the word ‘patent’ or the abbreviation ‘pat.’ together with an address of a posting on the Internet . . . that

44. See McCaffrey, *supra* note 5, at 395-96 (flagging potential issues with downtime and modifications of virtual marking sites).

45. Nike, Inc. v. Wal-Mart Stores, Inc., 138 F.3d 1437, 1446 (Fed. Cir. 1998) (“In order to satisfy the constructive notice provision of the marking statute, [the patentee] must . . . show[ ] that substantially all of the [products] being distributed were marked, and that once marking was begun, the marking was substantially consistent and continuous.”); see also McCaffrey, *supra* note 5, at 373-74 (“To recover under the marking statute, patentees must satisfy the requirement that marking be ‘consistent and continuous.’ Courts have developed this standard because § 287 does not expressly define what is required to comply with the marking statute.”).

46. See McCaffrey, *supra* note 5, at 374 (“If Congress amends § 287 to permit virtual marking, courts will have the challenge of determining what form of virtual marking complies with the consistent-and-continuous standard under the statute.”).

47. See 35 U.S.C. § 287(a) (2013) (listing no requirements for handling downtime on virtual marking sites or managing changes to a site’s marking information); McCaffrey, *supra* note 5, at 374 (noting that § 287 does not fully define the marking requirements for patentees).

48. See McCaffrey, *supra* note 5, at 396 (noting that downtime “could be a violation of the ‘continuous’ element of the compliance standard,” but also that “[a] certain amount of downtime may be acceptable”).

49. See *id.* (“One issue is how much modification, in form or content, is permissible under the ‘consistent’ element of the compliance standard.”).

50. See *infra* Part V.

*associates* the patented article with the number of the patent.”<sup>51</sup> Unlike physical products, there are no space constraints on a virtual marking webpage.<sup>52</sup> Theoretically, a user could list hundreds of patents and be in compliance with the marking requirements.<sup>53</sup> According to one commentator, this is not adequate notice.<sup>54</sup> For example, LG’s virtual marking page lists 626 patents for a single product, the “Optim G E970,” with large numbers of patents for other products as well.<sup>55</sup> One can imagine that it may be difficult for a potential infringer to effectively evaluate its product against a list of that size.

Additionally, some patentees who virtually mark their products do not distinguish among their product offerings, but instead list all patents they own.<sup>56</sup> The one district court to face this issue held this method of marking to be inadequate notice,<sup>57</sup> but without an appellate determination, other patentees may continue to organize their sites in this manner. In fact, many patent owners who are using virtual marking are “associating” their products with patent numbers in different ways.<sup>58</sup> Wherever the line is drawn, it seems unlikely that every implementation of a virtual marking site will sufficiently associate a product with its patent numbers. As a result, the law should seek to clarify what it means to “associate” a product with a patent number.

The issues presented by the ambiguity in the terms “posting” and “associates” for virtual marking are not like those presented by traditional patent marking, which requires only the word “Patent” (or an

51. 35 U.S.C. § 287(a) (2013) (emphasis added).

52. See McCaffrey, *supra* note 5, at 395 (noting that “[p]atentees currently face practical limits dictated by the space available on physical products, whereas a website has theoretically limitless length.”).

53. See *id.* (“[T]here is no official limit on the number of patents that patentees can list under traditional marking law, but there is a de facto limit due to space constraints on the physical product. . . . Courts have not yet considered how many patent listings on a product can reasonably convey notice under either traditional or virtual marking . . .”).

54. See *id.* at 394-95 (“Allowing patentees to list thousands of patent numbers with no guidance for the public does not provide adequate notice.”).

55. See LG, *Patent*, <https://www.lg.com/us/patent> (last visited Aug. 20, 2020).

56. See, e.g., *Mfg. Res. Int’l, Inc. v. Civiq Smartscales, LLC*, 397 F. Supp. 3d 560, 576 (D. Del. 2019) (noting that the patentee’s site “labels the listed patents as ‘LCD display patents’ and states, ‘one or more of the above listed . . . patents may be used by [the patentee’s] products’ without identifying any specific products”).

57. See *Civiq Smartscales*, 397 F. Supp. at 578 (“[T]he website does nothing to ‘associate’ any of 112 patents with any of the 46 identified covered products . . . . This is insufficient as a matter of law to meet the requirements of virtual marking under § 287.”).

58. See LEE, *supra* note 12, at 22 (listing a number of ways in which virtual marking is employed, ranging from providing only a list of patent numbers to pairing patent numbers with specific products and including links to the patents themselves).

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abbreviation of it) and the patent number.<sup>59</sup> Constructive notice is not unique to patent law, however, and courts have grappled with notice questions for centuries in other areas of the law.<sup>60</sup> Lessons from these other areas of the law can provide some key touchstones regarding what constitutes adequate notice, and these touchstones will inform the analysis of how to define the ambiguous statutory terms.<sup>61</sup>

#### IV. PRINCIPLES OF DIGITAL NOTICE AND REGISTRATION NOTICE

To evaluate the adequacy of the constructive notice provided under virtual marking, we can look to other areas of the law that require notice in various contexts. The issues surrounding the term “posting” raise questions of digital notice, or in other words, notice questions that arise from the shift in context from a physical product to a digital environment.<sup>62</sup> By contrast, the issues surrounding the term “associates” raise questions of registration notice, or in other words, notice questions about whether the specific information provided in the notice is sufficient to put the public on notice of the patent.<sup>63</sup> While each notice category has some specific contours that are relevant to the analysis of virtual marking, the general theme is that notice is adequate when someone looking for the information in question could reasonably be expected to find it.

##### A. DIGITAL NOTICE

Questions of digital notice have previously appeared in the contract and real property law contexts, and the way these areas of the law answer these questions can illuminate how notice can be achieved

59. See 35 U.S.C. § 287(a) (requiring that patentees include on the product “the word ‘patent’ or the abbreviation ‘pat.’, together with the number of the patent”).

60. See, e.g., *Burkart v. Bucher*, 2 Binn. 455, 460 (Pa. 1810) (holding that in the real property context, “[w]here a purchaser cannot make out a title, but by a deed which leads him to another fact,” the purchaser is on constructive notice of the fact); *Livingston v. Roosevelt*, 4 Johns. 251, 251 (N.Y. Sup. Ct. 1816) (suggesting that newspaper notice regarding the dissolution of a partnership is sufficient constructive notice of the dissolution). Many other areas of the law employ constructive notice standards, including trademark law, copyright law, real property law, and contract law. See *infra* Part IV (discussing how these areas of the law treat constructive notice questions—specifically those of digital notice and registration notice).

61. See *infra* Part IV.

62. See Caroline Desmond, Note, *The Transformative Potential of Digital Media & Technology on Class Actions*, 23 LEWIS & CLARK L. REV. 747, 754-55 (2019) (discussing challenges in the class-action context with “digital notice,” or the notice provided by “digital methods currently proposed as supplemental or constructive forms of notice”). For a discussion of the issues surrounding the term “posting,” see *supra* Part III.A.

63. See *Gaston v. Dashiell*, 55 Tex. 508, 510 (1881) (“Registration notice is only of the existence and contents of the instrument recorded.”). For a discussion of the issues surrounding the term “associates,” see *supra* Part III.B.

through virtual marking. Specifically, contract law teaches that the adequacy of digital notice often hinges on context and appearance, and that information contained within a single page often more clearly provides notice. Real property law also teaches that even prolonged unavailability of the data does not preclude a finding of notice in certain circumstances.

### 1. *Contract Law*

Generally, contract law concerns private agreements between two or more parties.<sup>64</sup> For a contract to form, there must be a “meeting of the minds,” or in other words, mutual assent to the terms of the offer.<sup>65</sup> A party’s assent can be implied by conduct, but only if the party has reasonable notice of the offer and its terms.<sup>66</sup> The question of whether a party has digital notice comes up with some regularity in the context of “terms of service” and other clickwrap agreements, and these questions typically involve whether a user has notice of specific terms or information on webpages.<sup>67</sup> Virtual marking tends to focus on the same type of inquiry, but with the information in question being a patent number instead of contract terms.<sup>68</sup>

In the internet context, users typically indicate assent to terms by checking a box or clicking a button that says, “I agree,” “I accept,” or some other similar phrase indicating agreement.<sup>69</sup> When the terms of

64. See RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981) (“A contract may consist of a single promise by one person to another, or of mutual promises by two persons to one another; or there may be, indeed, any number of persons or any number of promises.”).

65. 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 3:4 (4th ed. 2019) (“Whether there is mutual assent to the terms of a contract is determined by an objective test, rather than the subjective intentions of the parties.”).

66. See *Berkson v. Gogo LLC*, 97 F.Supp.3d 359, 385 (E.D.N.Y. 2015) (“Reasonable notice must be given prior to the acts constituting acceptance. The conduct of a party is not effective as a manifestation of consent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.”).

67. See, e.g., *Berkson*, 97 F. Supp. at 397 (evaluating users’ notice of the terms of an in-flight wi-fi service); *Cullinane v. Uber Technologies*, 893 F.3d 53, 62 (1st Cir. 2018) (evaluating whether a user of a ride-sharing app had reasonable notice of the app’s terms of service); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) (same); *Hines v. Overstock.com, Inc.*, 668 F. Supp. 2d 362, 367 (E.D.N.Y. 2009) (evaluating whether a user had notice of the terms of use for an online retailer’s website).

68. See *Mfg. Res. Int’l, Inc. v. Civiq Smartscares, LLC*, 397 F. Supp. 3d 560, 577 (D. Del. 2019) (framing the virtual marking inquiry as whether a user has notice that “the product is associated with the patent, even where a patentee may use a single website to mark multiple products.”)

69. See Matt Meinel, *Requiring Mutual Assent in the 21st Century: How to Modify Wrap Contracts to Reflect Consumer’s Reality*, 18 N.C. J.L. & TECH. ON. 180, 184 (2016) (“In clickwrap agreements, users are presented with the actual terms of the agreement and are required to click ‘I agree’ in order to proceed with the transaction. Because the consumer makes a purposeful action to assent after clear notice of terms, clickwraps



the offer are listed on the same page as this assent mechanism, courts often hold that notice is adequate.<sup>70</sup> For example, in one case, a court held that users had notice of the license terms when those terms were provided in a scrollable window on the same page as the acceptance button.<sup>71</sup> In so holding, the court rejected the argument that the disputed clause, which was three hundred lines into the terms, would be difficult to find because the window of terms showed only ten lines at one time.<sup>72</sup> The court emphasized that the user “had a full and fair opportunity to read the entire document,” and that “no time limitation limited [the user]’s opportunity to scroll through the terms and conditions.”<sup>73</sup>

This inquiry becomes more complicated when users are presented with a link directing them to another page containing the terms, although the link alone does not preclude a finding of adequate notice.<sup>74</sup> In *Cullinane v. Uber Technologies*,<sup>75</sup> the Uber app provided a hyperlink to the company’s terms of service during the user registration process.<sup>76</sup> In holding that users did not have notice of the contract’s terms, the First Circuit considered a number of facts specific to that app, including the number of words, color contrasts, and placement of other elements on the page.<sup>77</sup> The court strongly emphasized that the

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‘expressly and unambiguously manifest’ assent and are therefore enforceable contracts.”).

70. *See, e.g., Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 838 (S.D.N.Y. 2012) (quoting *Grosvenor v. Qwest Commc’ns Int’l, Inc.*, No. 09-cv-2848, 2010 WL 3906253, at \*2 (D. Colo. Sept. 30, 2010)) (describing cases consistent with the rule that “a click-wrap is valid where the terms of the agreement appear on the same screen with the button the user must click to accept the terms and proceed with the installation of the product”).

71. *See Novak v. Overture Servs., Inc.*, 309 F. Supp. 2d 446, 451 (E.D.N.Y. 2004) (internal citations omitted) (“Prior to registration for access to the [service], Plaintiff must accept the [service’s terms and conditions]. On this page is a window for viewing the “terms and conditions” contract and a button to indicate acceptance of the terms contained therein.”).

72. *Novak*, 309 F. Supp. 2d at 451 (“Plaintiff claims that, because so little of the contract was viewable at a time, the . . . clause must be unenforceable. The Court disagrees.”).

73. *Id.*

74. *See Fteja*, 841 F. Supp. 2d at 835 (“[C]licking [a] hyperlinked phrase is the twenty-first century equivalent of turning over the cruise ticket. In both cases, the consumer is prompted to examine terms of sale that are located somewhere else.”); *see also, e.g., Cullinane*, 893 F.3d at 62 (holding that a user of a ride-sharing app did not have reasonable notice of the app’s terms of service when the terms were hyperlinked on the screen); *In re Holl*, 925 F.3d 1076, 1083-84 (9th Cir. 2019) (holding that user was bound to terms despite the need to click multiple links and exercise “web-browsing intuition”); *Berkson*, 97 F. Supp. 3d at 404 (holding that users of in-flight wi-fi service were not bound to terms despite a textual statement in small font above the “next” button during registration).

75. 893 F.3d 53 (1st Cir. 2018).

76. *Cullinane*, 893 F.3d at 59.

77. *Id.* at 62-63.

hyperlink was not blue and underlined, as most hyperlinks are, but rather was displayed “in a gray rectangular box in white bold text.”<sup>78</sup> It also pointed out the existence of several other items on the page that were in “large capital letters and dark colored font.”<sup>79</sup> Had the hyperlinks been more conspicuous, it is likely the court may have held users to be on notice of the license terms.<sup>80</sup> However, the Second Circuit conducted a similar factual inquiry a year earlier and held that Uber’s app did provide sufficient notice of the terms.<sup>81</sup> In this case, though, the hyperlinks were blue and underlined, and the screen was “uncluttered” and required no scrolling.<sup>82</sup>

In another case, the Ninth Circuit considered the terms of UPS’s “My Choice” tracking service, which required the user to click through one (and sometimes two) hyperlinks to reach the terms, and the terms incorporated another agreement which were not hyperlinked at all and only available on UPS’s primary website.<sup>83</sup> Despite the fact that multiple steps and “web-browsing intuition” were required to locate the clause at issue, the district court held that users were on notice of those terms, and the Ninth Circuit affirmed.<sup>84</sup>

78. *Id.* at 63. Notably, several other courts have also emphasized the “common appearance of a hyperlink” as well. *Id.*; see also *Meyer*, 868 F.3d at 78 (“[T]he hyperlinks are in blue and underlined.”); *Adelson v. Harris*, 774 F.3d 803, 808 (2d Cir. 2014) (“[T]he hyperlinks were not hidden but visible in the customary manner, that is, by being embedded in blue, underlined text.”); *Fteja*, 841 F. Supp. 2d at 835 (quoting *United States v. Hair*, 178 Fed. Appx. 879, 882 n.3 (11th Cir. 2006)) (“The phrase ‘Terms of Service’ is underlined, an indication that the phrase is a hyperlink, a phrase that is ‘usually highlighted or underlined’ and ‘sends users who click on it directly to a new location—usually an internet address or a program of some sort.’”).

79. *Cullinane*, 893 F.3d at 63.

80. *See id.* at 63-64 (“Though not dispositive, the characteristics of the hyperlink raise concerns as to whether a reasonable user would have been aware that the gray rectangular box was actually a hyperlink. . . . Even though the hyperlink did possess some of the characteristics that make a term conspicuous, the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink’s capability to grab the user’s attention. If everything on the screen is written with conspicuous features, then nothing is conspicuous.”).

81. *See Meyer*, 868 F.3d at 78 (considering a number of factors including the placement of elements on the page, lack of need for scrolling, and the color of the hyperlink).

82. *See id.* (“Although the sentence is in a small font, the dark print contrasts with the bright white background, and the hyperlinks are in blue and underlined.”).

83. *In re Holl*, 925 F.3d at 1083 (“The user must access the UPS My Choice Service Terms via the enrollment page’s hyperlink, potentially after following the first hyperlink to the 96-page Technology Agreement. The user must then read the UPS My Choice Service Terms and understand that they incorporate the UPS Tariff/Terms and Conditions of Service. Because the My Choice Service Terms do not include hyperlinks to the incorporated documents, the user must visit the full ups.com website, intuitively find the Service Terms and Conditions link at the bottom of the webpage, select it, and locate yet another link to the UPS Tariff/Terms and Conditions of Service.”).

84. *Id.* (“We cannot say, with ‘definite and firm conviction,’ that the district court erred by finding the incorporation valid.”).

The key inquiry in these types of cases appears to be whether the existence of the terms was reasonably conspicuous to the user.<sup>85</sup> But as these cases illustrate, what is reasonably conspicuous can depend on the specific facts and court in a particular case.<sup>86</sup> However, there seem to be some relatively safe principles for providing adequate notice if a hyperlink is used; specifically, using blue and underlined hyperlinks<sup>87</sup> and keeping the screen relatively uncluttered<sup>88</sup> seem to be fairly accepted ways to ensure adequate digital notice.

## 2. Real Property – Equitable Servitudes

Real property law generally concerns itself with “[l]and and anything growing on, attached to, or erected on it.”<sup>89</sup> This can include corporeal property (e.g., land and buildings) and incorporeal property (e.g., easements).<sup>90</sup> While real property law is a broad area of the law, constructive notice typically appears in the context of equitable servitudes, or private agreements that govern the use or occupancy of real property.<sup>91</sup> When a property owner records a servitude, the recordation generally serves as constructive notice to potential purchasers of the servitude’s existence.<sup>92</sup>

85. See *Meyer*, 868 F.3d at 79 (“As long as the hyperlinked text was itself reasonably conspicuous—and we conclude that it was—a reasonably prudent smartphone user would have constructive notice of the terms.”).

86. Compare *Cullinane*, 893 F.3d at 62 (finding notice inadequate because the hyperlink was not conspicuous enough), with *In re Holl*, 925 F.3d at 1083 (finding notice adequate even though some terms were not hyperlinked at all).

87. See *Cullinane*, 893 F.3d at 63-64 (discussing how deviating from the typical blue and underlined format for hyperlinks “raise[d] concerns as to whether a reasonable user would have been aware” it was a hyperlink).

88. See *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) (noting the “blue and underlined” hyperlinks and “uncluttered” nature of the screen); cf. *Cullinane*, 893 F.3d at 63 (“The inclusion of the additional payment option and the placement of a large blue PayPal button in the middle of the screen were more attention-grabbing and displaced the hyperlink to the bottom of the screen.”).

89. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

90. *Id.*

91. *Covenant*, BLACK’S LAW DICTIONARY (11th ed. 2019). These agreements typically appear in a deed or lease. *Id.*

92. See, e.g., *Citizens for Covenant Compliance v. Anderson*, 906 P.2d 1314, 1320 (Cal. 1995) (quoting CAL. CIV. CODE §§ 1213, 1215 (West 1989)) (“[E]very ‘conveyance’ of real property recorded as prescribed by law provides ‘constructive notice’ of its contents to subsequent purchasers. The term ‘conveyance’ is broadly defined to include ‘every instrument in writing . . . by which the title to any real property may be affected’”); *Genovese Drug Stores, Inc. v. Connecticut Packing Co.*, 732 F.2d 286, 290 (2d Cir. 1984) (“The traditional rule is that a purchaser or lessee of property is charged with constructive notice only of those encumbrances that appear in his direct chain of title.”); *Emrick v. Multicon Builders, Inc.*, 566 N.E.2d 1189, 1193 (Ohio 1991) (“In determining whether the purchaser had constructive notice, we held that since the encumbrance was never recited in any deed in the chain of title, the purchaser could not be charged with constructive notice.”); *Cole v. Seamonds*, 104 S.E. 747, 750 (W. Va. 1920) (“[T]he authorities are uniform in holding that actual notice of the restriction is not essential, but that

The concept of digital notice often appears in the real property context when a servitude is recorded correctly, but an error by the clerk prevents it from appearing in the chain of title during a title search.<sup>93</sup> In *Mayfield v. First City Bank of Florida*,<sup>94</sup> the deed in question was properly recorded, but disappeared from the county's electronic records after only seventy-three minutes due to a clerk's error.<sup>95</sup> While "recogniz[ing] the harshness of the result," the court held that the recordation provided constructive notice because "constructive notice attaches upon compliance with the recording statute," and no requirement existed that the "documents had to remain in the official record."<sup>96</sup> This rule is not unique to Florida law; Georgia and many other jurisdictions have produced similar holdings as in *Mayfield*.<sup>97</sup> As a result, it appears that even long gaps in the availability of digital records may not necessarily preclude a finding of adequate digital notice, so long as the person providing the notice acted in accordance with the relevant requirements. This principle could be of par-

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constructive notice is sufficient."); *Earl v. Pavex, Corp.*, 313 P.3d 154, 166 (Mont. 2013) ("[W]e hold that a prospective purchaser is on constructive notice of recorded servitudes and encumbrances granted by the existing and prior owners of the parcel in question during the respective periods when each owner held title to the parcel."); *Federoff v. Pioneer Title & Tr. Co. of Ariz.*, 803 P.2d 104, 108 (Ariz. 1990) ("Under the rules of constructive notice, a successor in interest is charged with notice of any equitable covenant that is properly recorded in a prior instrument and for which the successor is required to search. The successor takes the property bound by the covenant and must comply with it.");

93. *See, e.g.*, *Mayfield v. First City Bank of Fla.*, 95 So.3d 398, 400 (Fla. Dist. Ct. App. 2012) (evaluating whether purchaser had constructive notice of a deed that appeared in the official record briefly before disappearing).

94. 95 So.3d 398 (Fla. Dist. Ct. App. 2012).

95. *Mayfield*, 95 So.3d at 400 ("[I]n the . . . electronic official records, the corresponding book and page numbers showed that the documents were voided . . . Thus, except for a brief period of approximately 73 minutes on July 6, 2006, the . . . deed and . . . mortgage did not appear in the official records of [the county].").

96. *Id.* at 402-03.

97. *See, e.g.*, *Leeds Bldg. Prods., Inc. v. Sears Mortg. Corp.*, 477 S.E.2d 565, 568 (Ga. 1996) ("A majority of jurisdictions have recognized that a defect in the acknowledgment of an instrument required for recordation, which is not apparent on the face of the instrument, does not prevent the recordation from providing constructive notice to subsequent bona fide purchasers."); *Kendall v. J.I. Porter Lumber Co.*, 64 S.W. 220, 222 (Ark. 1901) (holding that constructive notice attached to covenants despite a clerk's error because "the recorder was required to record them, and when filed for record they were constructive notice of their contents to all persons."); *Columbia Gas Transmission Corp. v. Bennett*, 594 N.E.2d 1, 6 (Ohio 1990) ("Failure to discover an instrument within the chain of title, even though improperly recorded by a county recorder, will not negate constructive notice."); *Miller v. Simonson*, 92 P.3d 537, 541 (Idaho 2004) ("The Idaho recording statute clearly establishes that once an instrument has been acknowledged, certified, and presented for recording it provides constructive notice to all subsequent purchasers regardless of whether the instrument is thereafter properly recorded by county officials or not.").

ticular relevance to virtual patent marking, where information may occasionally be unavailable despite the best efforts of the patentee.<sup>98</sup>

## B. REGISTRATION NOTICE

In addition to the questions of digital notice, questions of registration notice have previously appeared in the trademark, copyright, and real property law contexts. While the case law in each of these areas is nuanced, the general theme is that the notice must be provided in such a way that someone seeking the information would reasonably be able to recognize the facts located in the notice. Furthermore, real property law teaches that registration notice does not extend when the searcher would need to undertake an unreasonable effort to identify the information contained in the notice.

### 1. Trademark

Generally speaking, trademark law prevents others from copying or using a “mark” that indicates the source of another’s goods or services.<sup>99</sup> A “mark” typically refers to words and logos, but can refer to any word, name, symbol, or device that indicates source.<sup>100</sup> Under the Lanham Act, Congress has authorized mark owners to register their marks with the United States Patent and Trademark Office.<sup>101</sup> Registration carries numerous benefits, including demonstrating prima facie validity of the mark and granting to the registrant the exclusive right to use the mark in commerce.<sup>102</sup> Registration also provides nationwide constructive notice to the public of the registrant’s claim of

98. See *infra* Part V.A.2.

99. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163 (1995) (noting that “[i]n principle, trademark law . . . prevent[s] others from copying a source-identifying mark”); see also 15 U.S.C. § 1114 (2005) (providing a cause of action for mark owners against any person who “use[s] in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods or services on or in connection with which such use is likely to cause confusion, or to cause mistake, or to deceive”).

100. 15 U.S.C. § 1127 (2005) (“The term “trademark” includes any word, name, symbol, or device, or any combination thereof . . .”). This language has been interpreted to include shapes, sounds, fragrances, and colors. *Qualitex Co.*, 514 U.S. at 162, 174.

101. 15 U.S.C. § 1051(a)(1) (2002) (“The owner of a trademark used in commerce may request registration of its trademark on the principal register hereby established by paying the prescribed fee and filing in the Patent and Trademark Office an application and a verified statement, in such form as may be prescribed by the Director, and such number of specimens or facsimiles of the mark as used as may be required by the Director.”).

102. 15 U.S.C. § 1115 (2002) (providing that registration serves as “prima facie evidence of the validity of the registered mark . . . and of the registrant’s exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the registration”).

ownership.<sup>103</sup> However, registrants are still required to provide additional notice to the public of their registration to recover damages for actions occurring after the mark is registered.<sup>104</sup>

The trademark notice requirement is very similar to the patent marking requirement.<sup>105</sup> In order to recover post-registration damages in an infringement suit for a registered trademark, the mark owner must display the mark with “the words ‘Registered in U.S. Patent and Trademark Office’ or ‘Reg. U.S. Pat. & Tm. Off.’ or the letter R enclosed within a circle, thus ®.”<sup>106</sup> In other words, instead of marking the product with a patent number, a mark owner is marking the product with the ® symbol to place the public on notice of the mark’s registration.

While there is “surprisingly little case law” on the adequacy of trademark notice,<sup>107</sup> a few examples illustrate what seems to be the common thread: registration notice is adequate if a member of the public, upon examining the product, could reasonably be expected to recognize that the mark on the product was registered.<sup>108</sup> One illustrative example relates to marks used on clothing items.<sup>109</sup> In cases where a registered mark appears on clothing or other accessories, courts have held that providing notice of the registration on the neck label or price tag is sufficient notice, even though it may not accom-

103. 15 U.S.C. § 1072 (1946) (“Registration of a mark on the principal register . . . shall be constructive notice of the registrant’s claim of ownership thereof.”).

104. See 15 U.S.C. § 1111 (1988) (“[I]n any suit for infringement under this chapter by such a registrant failing to give such notice of registration, no profits and no damages shall be recovered under the provisions of this chapter unless the defendant had actual notice of the registration.”).

105. See *Nat’l Prods., Inc. v. Arkon Res., Inc.*, No. C15-1553RSL, 2017 WL 497678, at \*1 (W.D. Wash. Feb. 7, 2017) (noting that “the trademark notice provision is similar to that found in patent law”). Note that this case is distinct from the case with the same name discussed in *supra* note 39 and accompanying text.

106. 15 U.S.C. § 1111. This statutory notice is required to recover any profits or damages for acts that occur post-registration as part of a Lanham Act § 32 claim for infringement of a registered mark. 3 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 19:144 (5th ed. 2019). Any damages for acts that occur pre-registration do not require this registration notice and can be brought under a Lanham Act § 43(a) action for infringement of an unregistered mark. *Id.* (“This means that a trademark owner can sue under Lanham Act § 43(a) for damages from infringing acts occurring prior to registration unaffected by the notice requirement and under Lanham Act § 32(1) for damages for acts post-registration so long as the notice requirement is met.”).

107. *Nat’l Prods., Inc.*, 2017 WL 497678, at \*1.

108. See, e.g., *AGSouth Genetics, LLC v. Georgia Farm Servs., LLC*, No. 1:09-CV-186 (WLS), 2013 WL 5774698, at \*9 (M.D. Ga. Oct. 24, 2013) (placing emphasis on whether “any observer would be placed on sufficient notice of the protected status of the mark”).

109. See, e.g., *Reebok Int’l Ltd. v. Su Youn Pak*, No. 87 CIV. 2727 (TPG), 1989 WL 76225, at \*3 (S.D.N.Y. June 30, 1989) (discussing Reebok’s use of registration symbols on the neck label and hang tags of garments, but only sometimes in the designs of the garments).

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pany the mark on the product itself.<sup>110</sup> Additionally, one court has held that the registration notice need not appear “directly adjacent to the mark.”<sup>111</sup> Instead, the emphasis should be on whether “any observer would be placed on sufficient notice of the protected status of the mark.”<sup>112</sup> In a third example, however, notice was held to be insufficient when a mark owner included the ® symbol on “a subset of marketing materials and on a subset of the product representations within those materials.”<sup>113</sup> In that case, the court noted that the mark owner did not “consistently mark[] substantially all of its [trademarked] products, and . . . no longer distribut[ed] unmarked products,”<sup>114</sup> but rather, “did so in an inconsistent and wholly insufficient manner.”<sup>115</sup>

As these cases illustrate, the main theme in these inquiries appears to be whether it would be reasonable for a member of the public to see, when encountering a given product, that the mark on the product was registered. It is probably reasonable to expect someone to see a registration symbol on a price tag even if it is not marked on the good itself. Similarly, it is probably reasonable to expect someone to see the registration symbol even if not located directly adjacent to the mark itself. Conversely, it is probably unreasonable to expect someone to see a registration symbol if it only appears in some marketing materials, and only on some of the products within those materials.

## 2. Copyright

At a high level, copyright law seeks to protect “original works of authorship.”<sup>116</sup> Typical examples are literary, musical, and dramatic works, but any work “fixed in [a] tangible medium of expression” can be protected.<sup>117</sup> When a protectible work is created, the author of the work gains several exclusive rights, including the rights to reproduce the work, distribute the work, perform the work publicly, and create

110. See *Reebok*, 1989 WL 76225, at \*3 (“Affixing the notice of registration to plaintiffs’ trademarks, whether on the garment itself or on a tag, is adequate notice of such registration.”); *Coach, Inc. v. Citi Trends, Inc.*, No. CV 17-4775-DMG (KSx), 2019 WL 1940622, at \*6 (C.D. Cal. Apr. 5, 2019) (“[The mark owner] provides the constructive registration language on its goods’ price tags . . . . That is adequate under section 1111 to put [a defendant] on notice.”).

111. *AGSouth Genetics*, 2013 WL 5774698, at \*9.

112. *Id.*

113. *Nat’l Prods., Inc.*, 2017 WL 497678, at \*1.

114. *Id.* at \*3 (quoting *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1538 (Fed. Cir. 1993)).

115. *Id.*

116. 17 U.S.C. § 102(a) (1990).

117. *Id.*; see *Fourth Est. Pub. Benefit Corp. v. Wall-Street.com, LLC*, 139 S. Ct. 881, 887 (2019) (noting that prominent types of original works of authorship include “literary, musical, and dramatic works”).

derivative works.<sup>118</sup> When another person or entity attempts to exercise one of these rights, the author may bring suit for copyright infringement.<sup>119</sup> However, in some cases, authors are required to put potential infringers on notice in order to bring a suit.<sup>120</sup>

Currently, for works published before March 1, 1989, copyright owners must provide notice of their copyright in order to bring an infringement suit.<sup>121</sup> Notice is optional for works published on or after March 1, 1989, but the requirements are nevertheless illustrative.<sup>122</sup> Effective copyright notice consists of three elements: the copyright symbol ©, the year of first publication of the work, and the name of the copyright owner.<sup>123</sup> In addition, the notice must be placed “on copies or phonorecords in a way that [is] permanently legible to an ordinary user of the work and could not be concealed from view upon reasonable examination.”<sup>124</sup> While courts have interpreted this requirement in various ways, the general trend is clear: like with trademark law, the determination of whether notice is adequate focuses on whether a potential infringer could reasonably be expected to know that a work is copyrighted.<sup>125</sup>

118. 17 U.S.C. § 106 (2002) (providing copyright holders with the exclusive rights to reproduce the copyrighted work, prepare derivative works, distribute copies of the work, perform the copyrighted work publicly, and display the copyrighted work publicly); *see also Fourth Est.*, 139 S. Ct. at 887.

119. 17 U.S.C. § 501 (2019) (“Anyone who violates any of the exclusive rights of the copyright owner . . . is an infringer of the copyright or right of the author, as the case may be. . . . The legal or beneficial owner of an exclusive right under a copyright is entitled . . . to institute an action for any infringement of that particular right committed while he or she is the owner of it.”); *see also Fourth Est.*, 139 S. Ct. at 887 (“Upon registration of the copyright . . . a copyright owner can recover for infringement that occurred both before and after registration.”).

120. *See generally* UNITED STATES COPYRIGHT OFFICE, COPYRIGHT NOTICE (2017), <https://www.copyright.gov/circs/circ03.pdf>.

121. *See id.* at 1.

122. *See id.* In most cases, the duration of a copyright is the life of the author plus seventy years. *See* 17 U.S.C. §§ 302-303 (1998). As a result, many works protected by copyright are still governed by the notice requirement; as of 2020, this would include any work published before March 1, 1989 by an author who is still living or who died after the year 1950.

123. UNITED STATES COPYRIGHT OFFICE, *supra* note 120, at 1.

124. *Id.* at 2.

125. *See, e.g.,* *Uneeda Doll Co. v. Goldfarb Novelty Co.*, 373 F.2d 851, 852-53 (2d Cir. 1967) (quoting *Shapiro, Bernstein & Co. v. Jerry Vogel Music Co.*, 161 F.2d 402, 409 (2d Cir. 1946)) (“The purpose of a copyright notice is to prevent innocent persons who are unaware of the existence of the copyright from incurring the penalties of infringers by making use of the copyrighted work.’ In keeping with this purpose, courts generally, and particularly those of this circuit, have afforded protection to one who has substantially complied with [the statutory notice requirements].”)



Several key cases illustrate this common thread.<sup>126</sup> In one case, a court held that notice was adequate when a copyright holder provided the letter “C” inside of a hexagon in place of the copyright symbol.<sup>127</sup> While the Copyright Office has suggested that a “C” inside parentheses may be insufficient,<sup>128</sup> the United States Court of Appeals for the Sixth Circuit has offered that it may indeed be sufficient while affirming a district court holding that the copyright holder “substantially complied with the [notice] statute.”<sup>129</sup> Similarly, for author names, the United States Court of Appeals for the Second Circuit has held that notice can still be adequate “even when the stated party on a copyright notice is not precisely correct.”<sup>130</sup> The purpose of copyright notice is to “prevent innocent persons who are unaware of the existence of the copyright” from infringing, and courts seem to focus on whether this purpose is substantially met.<sup>131</sup>

In addition to including the three elements of notice, copyright holders are required to include the notice “in such manner and location as to give reasonable notice of the claim of copyright.”<sup>132</sup> In one case, a copyright owner included the notice on the bottom of a computer chip, and the notice was not visible when the chip was attached to the circuit board employing the chip.<sup>133</sup> However, the court held that this location was acceptable because the chip would need to be removed from the board in order for the copyrighted program to be copied.<sup>134</sup> The Second Circuit has also held that any location is sufficient so long as it notifies anyone seeking to copy the work of the copyright’s existence.<sup>135</sup>

126. See, e.g., *Videotronics, Inc. v. Bend Elecs.*, 586 F. Supp. 478, 481 (D. Nev. 1984) (holding that the letter “C” enclosed inside of a hexagon, instead of the required circle, was sufficient to satisfy the copyright symbol element).

127. *Id.*

128. See *id.*

129. *Forry, Inc. v. Neundorfer, Inc.*, 837 F.2d 259, 266 (6th Cir. 1988) (“[I]f a ‘C’ in a hexagon is sufficient, an argument exists that a ‘C’ in parentheses is sufficient.”).

130. *Martha Graham Sch. & Dance Found., Inc. v. Martha Graham Ctr. of Contemp. Dance, Inc.*, 380 F.3d 624, 645 (2d Cir. 2004) (holding that a copyright notice listing a dance center as the copyright owner was sufficient regardless of whether the copyright was formally assigned to the dance center).

131. See *Uneeda Doll Co.*, 373 F.2d at 852-53 (“In keeping with this purpose, courts generally, and particularly those of this circuit, have afforded protection to one who has substantially complied with [the statutory notice requirements].”).

132. 17 U.S.C. § 401(c) (1988).

133. *Forry*, 837 F.2d at 266.

134. *Id.* (“Once [the chip is] removed, the copyright notice would be clearly visible, and so . . . the location of the notice sufficiently complied with [the notice requirements].”).

135. See *Coventry Ware, Inc. v. Reliance Picture Frame Co.*, 288 F.2d 193, 195 (2d Cir. 1961) (“[The notice statute] should not be read to impose a restriction on placement which, had it been intended by Congress, would certainly have been expressly stated.”).

As with trademark law, it appears the common theme here is whether it is reasonable for a potential infringer to know that a work is copyrighted. This theme seems to dovetail with the common thread that underpins the trademark notice cases.<sup>136</sup> Even outside of the intellectual property regimes, this common thread still seems to hold true, particularly in the real property context.<sup>137</sup>

### 3. Real Property – Equitable Servitudes

While relevant to questions about digital notice,<sup>138</sup> real property law also addresses questions relating to registration notice for equitable servitudes. While an equitable servitude typically binds the original parties to the agreement, it can also bind a successor in interest if the successor has actual or constructive notice of the servitude.<sup>139</sup> The nuances of various state laws can differ, but the general rule is that a duly recorded servitude provides constructive notice to subsequent purchasers.<sup>140</sup> This rule does have restrictions, however; in particular, purchasers are often not deemed to have constructive notice in the case of a “wild deed,” or a deed that does not appear in the chain of title.<sup>141</sup> In applying this general rule, courts tend to focus on a common thread quite like that of the trademark and copyright notice requirements:<sup>142</sup> specifically, whether a potential purchaser would reasonably be expected to know of a servitude’s existence in the property’s chain of title.<sup>143</sup>

This common thread is illustrated in cases that hold even when a servitude appears indirectly in the property’s chain of title, purchasers may still not be held on notice of the servitude.<sup>144</sup> For instance, if

136. See *supra* Part IV.A.

137. See *infra* Part IV.B.3.

138. See *supra* Part IV.A.2.

139. See, e.g., *Excel Willowbrook, L.L.C. v. JP Morgan Chase Bank, Nat. Ass’n*, 758 F.3d 592, 601 n.26 (5th Cir. 2014) (“Equitable servitudes run against a successor in interest even where there is no privity of estate, if the successor has actual or constructive notice.”).

140. See *supra* note 92.

141. See, e.g., *Sabo v. Horvath*, 559 P.2d 1038, 1039 (Alaska 1976) (holding that “a deed recorded outside the chain of title is a ‘wild deed’ and does not give constructive notice”).

142. See *supra* Parts IV.A.1-2.

143. See, e.g., *Beach v. Faust*, 40 P.2d 822, 823 (Cal. 1935) (noting that the purpose of recording laws “is to protect those who honestly believe they are acquiring a good title, and who invest some substantial sum in reliance on that belief”).

144. See, e.g., *Spring Lakes, Ltd. v. O.F.M. Co.*, 467 N.E.2d 537, 540 (Ohio 1984) (holding that a purchaser does not take notice of a covenant occurring in another conveyance by the same grantor). Notably, this is not a uniform rule in all jurisdictions. See 14 MICHAEL ALLEN WOLF, POWELL ON REAL PROPERTY § 82.01[4] (2020) (“Whether the purchaser, in the process of [a title] search, has the burden of locating all documents that have been deposited for record, even if not properly recorded, will vary from state to state. . . . [I]n many states a subsequent purchaser is considered to have constructive

grantor *A* conveys half of Blackacre to *B* with a covenant, and the other half of Blackacre to *C* with no covenant, *C* is not held to have constructive notice of *B*'s covenant, even though the parcel was shared originally.<sup>145</sup> The rationale behind this rule seems to be protecting purchasers who have made a good faith effort to ensure they are obtaining good title by not requiring them to engage in an unreasonable or burdensome inquiry.<sup>146</sup>

As with trademark and copyright law, it appears that the adequacy of notice in the real property context centers on whether it would be reasonable for a purchaser to encounter the equitable servitude in the chain of title. In particular, the limits on what a purchaser must search are notable. While in cases like *Hancock v. Gumm*,<sup>147</sup> a purchaser could theoretically search through all subsequent titles from the original grantor, she is not required to do so for notice purposes.<sup>148</sup> Thus, there is a line at which a search that, while possible, becomes unreasonable.

Overall, understanding digital notice and registration notice through the lenses of contract law, real property law, trademark law, and copyright law informs the analysis of what constitutes adequate notice in the virtual marking context. The common thread across all areas of the law is reasonableness; if it would be reasonable to expect someone to take notice of a certain fact upon observing the website or product, notice is likely adequate. In the patent context, this likely means that if it would be reasonable for a potential infringer, upon going to the URL marked on a product, to recognize which patents cover the product, then the notice is adequate. The interpretations of the ambiguous statutory terms will therefore embody this theme.

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notice of only those interests that are recorded within the grantor's chain of title. . . . In other jurisdictions the search is not so limited, but may include all transactions regardless of the date on which they are recorded."'). However, the cases are still illustrative of a common view of what constitutes adequate notice.

145. See WOLF, *supra* note 144, at § 82.01; *Hancock v. Gumm*, 107 S.E. 872, 877 (Ga. 1921) ("[W]here a recorded deed to a lot forming part of a larger tract contains restrictive covenants, which by the terms of the deed are not only to apply to the lot conveyed, but, as in this case, to other lands of the grantor, a purchaser of one of the lots is not charged with notice of the covenant contained in a prior deed from the common grantor to another lot or parcel of the general tract.").

146. See *Beach*, 40 P.2d at 823 (noting that the purpose of recording laws "is to protect those who honestly believe they are acquiring a good title, and who invest some substantial sum in reliance on that belief"); *Glorieux v. Lighthipe*, 96 A. 94, 96 (N.J. 1915) ("A purchaser may well be held bound to examine or neglect at his peril, the record of the conveyances under which he claims; but it would impose an intolerable burden to compel him to examine all conveyances made by every one in is [sic] chain of title.").

147. 107 S.E. 872 (Ga. 1921).

148. See *Hancock*, 107 S.E. at 877.

## V. PROPOSING DEFINITIONS FOR THE STATUTORY TERMS

In light of the issues presented by the statutory ambiguities discussed in Part III, this Part argues that the law should seek to provide clearer interpretations for the terms “posting” and “associates.”<sup>149</sup> This Part proposes interpretations for those two terms; specifically, it proposes that “posting” should mean a single webpage, and that “associates” should mean to explicitly connect the specific patented product with the number of the patents used in the product. Further, it argues for an addition to the statutory language, which would require patentees to include both the number and title of each patent on the virtual marking webpage.

## A. DEFINING “POSTING”

1. *Setting the Boundary for “Posting”*

The first challenge presented by the term “posting” is whether it should be confined to a single webpage, or if it can be a website with multiple pages.<sup>150</sup> This Part argues that the appropriate boundary for posting is a single dedicated webpage that is not the homepage.<sup>151</sup> The relevant dictionary definition of posting is “a message, link, image, etc., posted to an online location such as a blog, social media website, or forum.”<sup>152</sup> This definition implies that a posting is a webpage; a website with many pages is analogous to a blog or forum, which contains multiple posts and pages (these would then qualify as “postings” under the dictionary definition). In addition to the dictionary definition, the United States Patent and Trademark Office (“USPTO”) has seemed to equate “posting” with “webpage.”<sup>153</sup> While this interpretation is informal and not binding, a court may accord it some persuasive weight as an administrative interpretation.<sup>154</sup>

The question is, then, whether one of the relevant purposes of patent marking, either adequacy of notice or incentives for the paten-

149. See *supra* Part III.

150. See *supra* Part III.A.

151. Under this standard, one page for all patent products would be sufficient to meet the requirements, and this appears to be what many patentees are doing currently. See sources cited in *supra* note 37. However, if some patentees choose to create individual pages for each product, they could certainly do so under this standard, as long as the URL marked on the product matched the page specific to that product.

152. OXFORD UNIV. PRESS, *Posting*, LEXICO, <https://www.lexico.com/en/definition/posting> (last visited Aug. 20, 2020).

153. See LEE, *supra* note 12, at 14 (“Section 287(a) requires only that virtual marking Web pages be ‘accessible to the public without charge.’”); cf. 35 U.S.C. § 287(a) (requiring “a posting on the Internet, accessible to the public without charge”).

154. See *United States v. Mead Corp.*, 533 U.S. 218, 220 (2001) (noting that “an agency’s interpretation may merit some deference whatever its form, given the ‘specialized experience and broader investigations and information’ available to the agency”).

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tee,<sup>155</sup> should outweigh the definition and agency interpretation of “posting.” Taking lessons from trademark and copyright law, adequacy of notice should be judged by whether it would be reasonable to expect someone to take notice of a certain fact.<sup>156</sup> Here, the question is whether a potential infringer would take notice that a specific product is covered by not just any patent but the specific patent that it utilizes.<sup>157</sup>

It is likely that allowing patentees to mark products with the address of their website homepages could create a situation where notice is not always adequate. In *National Products, Inc. v. Arkon Resources, Inc.*,<sup>158</sup> for example, the patentee directed users to its website homepage.<sup>159</sup> In discussing the patentee’s marking strategy, the court noted that it could not find the specific page containing patents from the homepage; it later discovered that the patent information was nested under “Legal.”<sup>160</sup> While the court in this case declined to decide this issue,<sup>161</sup> it is fair to conclude that this notice was not adequate. If a court could not locate the patent information at all, it certainly could not take notice that a specific product was covered by a specific patent. A similarly situated potential infringer would likely experience the same issue, and it does not seem appropriate to treat them as being on notice of patents they would normally not be able to locate.

On the other hand, there may be circumstances in which a website homepage does clearly direct the user to a page for patents. In these cases, however, the placement of the link could create a difficult line-drawing exercise for courts. Must the patentee place the link to patent information in the main navigation bar at the top of the page?

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155. See *supra* Part II.

156. See *supra* Part IV.

157. See *Stryker Corp. v. Zimmer, Inc.*, 782 F.3d 649, 660 n.5 (Fed. Cir. 2015), *vacated on other grounds*, 136 S. Ct. 1923 (2016) (“[T]he plain language of the marking statute provides that the patented article be marked with the ‘number of the patent.’”).

158. No. CV 18-02936 AG, 2019 WL 1034321 (C.D. Cal. Jan. 9, 2019).

159. See *Nat’l Prods., Inc. v. Arkon Res., Inc.*, No. CV 18-02936 AG, 2019 WL 1034321, at \*16 (C.D. Cal. Jan. 9, 2019) (discussing product which is marked with the patentee’s primary website URL as opposed to a specific page for patents).

160. *Nat’l Prods. Inc.*, 2019 WL 1034321, at \*16 (“Out of curiosity, the Court attempted to access the ‘Patents and Trademarks’ page from [the patentee]’s website’s home page, but did not find any links on the homepage that directly linked to such a webpage, which is apparently nested under the link ‘Legal.’”).

161. See *id.* (citing U.S. PATENT & TRADEMARK OFFICE, REPORT ON VIRTUAL MARKING (Sept. 2014), [https://www.uspto.gov/sites/default/files/aia\\_implementation/VMreport.pdf](https://www.uspto.gov/sites/default/files/aia_implementation/VMreport.pdf) (“The Court finds this to be an intriguing issue. But the Court finds that on the current record, [the alleged infringers] have failed to meet their burden of adequately raising the issue for summary adjudication. Particularly if the issue truly is one of first impression, placing legal limits on what constitutes marking would be inappropriate on such a significantly limited record.”)).

Is it sufficient to include the link in the site's footer? What about other locations on the page? Given the number of different ways that patentees choose to virtually mark their products,<sup>162</sup> courts would likely have to engage in a number of facts-and-circumstances analyses to determine whether notice was adequate for a given page. These factual inquiries could look a lot like the inquiries in clickwrap contract cases, where courts seek to determine whether the existence of terms is reasonably conspicuous.<sup>163</sup> Given the variety of outcomes in those cases, this could be a barrier to creating clarity for patentees.<sup>164</sup> It seems, then, that the adequacy-of-notice factor also cuts toward setting the boundary at a single webpage, given the risk for inadequate notice and the potential for difficult line-drawing exercises if a different interpretation is used.

When considering the patentee's interests, a broader interpretation of "posting" may provide additional benefits to the patentee, such as marketing opportunities, fewer characters in the address, and flexibility in website design.<sup>165</sup> However, these interests likely do not outweigh the dictionary definition, agency interpretation, and adequacy-of-notice considerations previously discussed because the availability of virtual marking is already designed primarily to create benefits for the patentee, such as cost savings and easier marking on small products.<sup>166</sup> As a result, it already tends to favor one of the main purposes of patent marking: "encouraging patentees to give notice to the public that the article is patented."<sup>167</sup> It is difficult to justify, then, a broad interpretation that marginally advances that same goal, but perhaps at the expense of another primary purpose of patent marking: "helping to avoid innocent infringement."<sup>168</sup> It is quite possible that someone who is unable to ascertain whether a patent covers a certain product might later innocently infringe on that patent.

Without Congress, the USPTO, or the Federal Circuit adopting this boundary, however, patentees will still be required to provide adequate notice and could potentially do so under a broader interpretation. In contract law, a hyperlink to additional contract terms does

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162. See LEE, *supra* note 12, at 22 (listing a number of ways in which virtual marking is employed, ranging from providing only a list of patent numbers to pairing patent numbers with specific products and including links to the patents themselves).

163. See *supra* Part IV.D (discussing courts' interpretations of notice requirements in the context of clickwrap "terms of service agreements").

164. See *id.* (concluding that, while there are some guiding principles available, questions of this type can be difficult for courts to answer); see also *State v. Zuanich*, 593 P.2d 1314, 1324 (Wash. 1979) (en banc) (Stafford, J., dissenting) (noting the contrast between "[s]pecificity and clarity" and "future case by case definition by the judiciary").

165. See *supra* Part IV.B.

166. See *supra* Part II.C.

167. *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998).

168. *Nike, Inc.*, 138 F.3d. at 1443.

not necessarily preclude digital notice of the terms, so long as the existence of the terms is reasonably conspicuous to the user.<sup>169</sup> A similar standard could be used to evaluate virtual marking sites; if the existence of a page with patent information would be reasonably conspicuous to a potential infringer, then perhaps that infringer could be treated as being on notice of the patents, even if the product is marked with the patentee's homepage URL. If such a standard were to be adopted, patentees would be well-served to keep their homepages uncluttered and use blue and underlined hyperlinks to point to the patent information, as courts seemed to look for these factors in particular when evaluating notice in the contract law context.<sup>170</sup> But even in contract law, a single webpage containing both the terms and the assent mechanism seem to be treated much more favorably by the courts, and the same would likely occur in the patent context.<sup>171</sup> Thus, patentees seeking certainty should consider limiting their "postings" to a single page, even in the absence of a formal interpretation by Congress, the USPTO, or the Federal Circuit.

## 2. Website Transience

The second challenge posed by the term "posting" is the transience of webpages.<sup>172</sup> Specifically, how much downtime, if any, is permissible, and what types of modifications are allowed to be made to the site?<sup>173</sup> Real property law teaches that there are instances when a search may not be practically possible, for example, when the clerk errs in recording a deed or covenant.<sup>174</sup> This situation is analogous to website downtime; in both cases, an error makes it practically impossible for a member of the public to take notice of a certain fact. The primary difference is that in the property cases, a government official (the clerk) is responsible for the error, but in virtual marking cases, the patentee could be responsible for the error. This distinction should not be dispositive, however, because patentees are often not directly responsible for downtime on their sites.

The reality is that most websites experience some level of downtime, often caused by outages at the website owner's hosting provider.<sup>175</sup> According to one study, even the most reliable hosting

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169. See *supra* Part IV.A.1.

170. See *id.*

171. See *id.*

172. See *supra* Part III.A.

173. See *id.*

174. See *supra* Part IV.D.

175. See Michael Guta, *Websites Average 3 Hours of Host Downtime a Month, How Does Your Business Site Fare?*, SMALL BUS. TRENDS (Feb. 15, 2019), <https://smallbiz-trends.com/2019/02/web-hosting-uptime-statistics.html> ("The latest research from Host-

provider still experienced forty-five minutes of downtime over the course of the year 2018, with the average coming in at approximately three hours of downtime.<sup>176</sup> Given this fact, websites often measure their uptime (i.e., lack of downtime) as a function of “nines.”<sup>177</sup> While the industry standard uptime is somewhere below two nines,<sup>178</sup> some services advertise the availability of five or six nines for certain critical systems.<sup>179</sup> Unsurprisingly, this increased availability comes at a cost.<sup>180</sup>

Determining what balance of cost and uptime is most appropriate for virtual marking sites is beyond the scope of this article. It would not be appropriate to require that a virtual marking site be available without interruption.<sup>181</sup> However, it would be appropriate to use the “nines” metric to set a standard for virtual marking website availability. After some additional study, Congress, the USPTO, courts, or other scholars could offer a baseline number of “nines” that would allow for constructive notice to attach in virtual marking cases. Courts might also consider adding an exception for bad faith on the part of the patentee; if there is evidence indicating that a patentee willfully took down its virtual marking page for a significant period of time, courts may be understandably less inclined to say that a patentee provided adequate notice of its patents to the public.<sup>182</sup>

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ing Facts has revealed the average website is down three hours a month due to the downtime of web host providers.”).

176. *Id.*

177. See Dan Kusnetzky, *How Many Nines of Uptime Do You Need?*, VIRTUALIZATION & CLOUD REV. (June 1, 2015), <https://virtualizationreview.com/articles/2015/06/01/how-many-nines-of-uptime-do-you-need.aspx> (providing an assessment of the implications of the “nines” concept on system uptime). The concept of “nines” refers to the percentage of time during which a website is available; for example, two “nines” would mean an uptime of 99% and three “nines” would mean an uptime of 99.9%. *Id.*

178. See *id.* (“If we step back for a moment to consider the uptime seen with typical industry standard (x86-based) physical systems, 95 percent to 99 percent uptime is a pretty common range.”).

179. See *id.* (“Continuous processing system suppliers like Stratus Technologies state that their hardware-based systems offer 99.9999 percent (6 nines) of uptime and their software-based solutions offer 99.999 percent (5 nines) of uptime.”).

180. See *id.* (“The extra cost will probably be reasonable, considering the criticality of certain workloads.”).

181. Systems with five or six nines are often deemed appropriate or desirable for even the most critical applications. See *id.* (suggesting that applications with “critical[] . . . workloads” should consider incurring the extra cost for high availability). Even a system with six nines would incur approximately 30 seconds of downtime per year. Especially given the principle from real property cases that consistent availability is not unequivocally necessary, see *supra* Part IV.D, a requirement that a system be up without interruption would completely swallow the virtual marking option.

182. The patent system contains other provisions that tend to work against parties who act in bad faith, so such an exception would not be wholly unprecedented. See, e.g., *Bd. of Educ. ex rel. Bd. of Trs. of Fla. State Univ. v. Am. Bioscience, Inc.*, 333 F.3d 1330, 1344 (Fed. Cir. 2003) (“[P]atents have in the past been held unenforceable for failure to correctly name inventors in cases where the named inventors acted in bad faith or with



For modifications, it is important to note that one of the key benefits of virtual marking is that it permits patentees to quickly modify their sites upon the issuance of a new patent, or the expiration of an old patent.<sup>183</sup> Preventing changes to virtual marking sites, or imposing heavy restrictions on those changes, would severely undercut that purpose.<sup>184</sup> On the other hand, if changes occur too frequently and it is not clear when the patent information became available on the virtual marking site, notice might nevertheless be inadequate. But patentees bear the burden of establishing compliance with the marking statute,<sup>185</sup> so a failure to appropriately track when and what modifications are made to the site would ultimately impact a patentee's ability to obtain damages.

While this article generally argues for interpretations that promote certainty for patentees, this is an area where flexibility is likely needed because what patentees must do to meet this burden likely depends on their specific situations. If a patentee owns very few patents, it may not need to change its virtual marking website for many years, perhaps even up to twenty years.<sup>186</sup> In these cases, proving that the website did not change could be very easy; including the date that the site was last updated on the page could very well be sufficient. However, if a patentee owns thousands of patents, it may find itself changing its site much more often.<sup>187</sup> These patentees would

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deceptive intent."); *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 572 U.S. 545, 555 (2014) ("[A] district court may award fees in the rare case in which a party's unreasonable conduct—while not necessarily independently sanctionable—is nonetheless so 'exceptional' as to justify an award of fees.").

183. See McCaffrey, *supra* note 5, at 369 ("Patentees must change their marks when their patents expire or become invalid in the course of litigation. But high manufacturing costs prevent patentees from changing their marks cheaply and efficiently. Virtual marking would enable patentees to change their marks as quickly and easily as posting to a blog or sending an e-mail message.").

184. See *id.* at 396 ("To get the maximum benefit from virtual marking, patentees should be permitted to modify their sites liberally.").

185. *Nike, Inc.*, 138 F.3d at 1447 (citing *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996)) (noting that "compliance with the marking statute is a question of fact, and the burden of proving compliance with the marking statute is upon the patentee").

186. Under current law, the term of a patent is twenty years. See 35 U.S.C. § 154(a)(2) (2015) (providing that the "grant [of a patent] shall be for a term beginning on the date on which the patent issues and ending 20 years from the date on which the application for the patent was filed in the United States or, if the application contains a specific reference to an earlier filed application . . . from the date on which the earliest such application was filed."). Theoretically, then, a patentee with a single patent could leave its website untouched for twenty years, until the patent expires.

187. One scholar has suggested that patentees are "significantly more likely to use virtual marking if they have a large patent portfolio," so this may be the most likely scenario. See de Rassenfosse, *supra* note 12, at 17.

likely need to do more to provide notice of potential changes. One possibility is keeping a detailed changelog of the virtual marking site.<sup>188</sup>

Some scholars have suggested different solutions to this problem, such as providing a public registry, creating a notification system for users who subscribe to a given marking site, or using blockchain to maintain a distributed ledger of changes.<sup>189</sup> While these solutions are interesting and may each work for some patentees, none are perfect as a blanket solution. A public registry could raise additional questions about the mechanics of virtual marking.<sup>190</sup> Additionally, a close comparison to a potential public registry, the online database for trademarks,<sup>191</sup> does not provide the notice required to collect post-registration damages despite providing nationwide constructive notice of the registration.<sup>192</sup> Given the close similarity between the trademark and patent marking requirements,<sup>193</sup> it should give courts pause to diverge the two requirements with respect to the impact of a public registry on constructive notice.

Further, requiring a notification system could create additional costs for patentees, if such a feature could not easily be built into their existing websites.<sup>194</sup> A major goal of virtual marking is to reduce costs for patentees, so increased development costs could undercut

188. See McCaffrey, *supra* note 5, at 396 (suggesting that “patentees should also be required to keep records of all past revisions as evidence of the contents on a particular date or range of dates.”).

189. See *id.* (“Any virtual marking website should include a notification system that alerts members of the public who subscribe to it that a particular page has been updated. A public registry would ensure consistency in the structure and appearance of product pages and also guarantee that records of past revisions were available as required by law.”); de Rassenfosse, *supra* note 12, at 18 (“[V]irtual patent marks are scattered across the Internet, hosted on assignees’ web sites that may be temporarily unavailable. Defendants could use such elements in court to argue against proper marking. Recent advances in distributed computing (i.e., blockchain technology) could be exploited to address these deficiencies. In particular, a distributed ledger, which contains information that is available to all—and verifiable by all—at any time, could be implemented.”).

190. It might be difficult to determine, for instance, how individual products are mapped to patents on a public registry site. One can imagine a system that requires the public to search for specific products, which might be burdensome in cases when the actual patentee’s name is unclear. Similarly, the routing scheme for such a wide-ranging system could produce fairly long URLs, which might cut against the goal of marking on small products. See *supra* Part II.C.

191. See U.S. PATENT & TRADEMARK OFFICE, *Search Trademark Database*, <https://www.uspto.gov/trademarks-application-process/search-trademark-database> (last visited Aug. 24, 2020) (explaining how to use the USPTO’s trademark database to search for specific marks).

192. See *supra* notes 105-108 and accompanying text.

193. See *Nat’l Prods., Inc. v. Arkon Res., Inc.*, No. C15-1553RSL, 2017 WL 497678, at \*1 (W.D. Wash. Feb. 7, 2017) (noting that “the trademark notice provision is similar to that found in patent law”).

194. See, e.g., Ilya Pozin, *How Much Does a Website Cost?*, FORBES (Aug. 7, 2013), <https://www.forbes.com/sites/ilyapozin/2013/08/07/how-much-does-a-website-cost/#378a>

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that potential benefit.<sup>195</sup> The additional effort and cost to implement such a system could further undercut another goal of patent marking more generally: “encouraging patentees to give notice to the public.”<sup>196</sup> While virtual marking is optional, the fact that it is designed to decrease costs for patentees should discourage the imposition of additional costs on those who wish to take advantage of virtual marking.

Notably, the USPTO currently offers an alert system for when certain specified keywords appear in a patent application that is published.<sup>197</sup> One can use this tool to search on a particular patentee’s name to receive future notifications of that patentee’s applications.<sup>198</sup> This feature works only for published applications; the USPTO would need to expand the system to alert when patents are eventually issued.<sup>199</sup> It is likely that if Congress desires such a notification system for patent marking purposes, however, the cost to the USPTO to expand its existing notification system is much lower in aggregate than requiring individual patentees to each craft their own notification systems.

Using blockchain, while perhaps the most interesting option, could also be the most challenging for patentees. Many companies are still working to develop blockchain capability,<sup>200</sup> and it does not seem likely that patent marking is the use that will motivate further development in this area.<sup>201</sup> Additionally, the average investment required

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51bc416d (noting that specific features, and details about those features, can significantly impact development time and pricing for a website).

195. See H.R. REP. NO. 112-98, at 52-53 (2011) (“This amendment will save costs for producers of products that include technology on which a patent issues after the product is on the market, and will facilitate effective marking on smaller products.”).

196. See *Nike, Inc.*, 138 F.3d at 1443.

197. *Patent Application Alerts – Frequently Asked Questions*, PATENT APPLICATION ALERT SERVICE (2020), <https://www.uspatentappalerts.com/faq.php> (informing users that this system provides alerts “when an application matching [the user’s] search criteria is published”).

198. After creating an account, one can create a new alert, which includes a field for “Assignee” (i.e., the patentee). *New Alert*, PATENT APPLICATION ALERT SERVICE (2020), <https://go.uspatentappalerts.com/alert.php>. For example, a test search conducted by the author on August 31, 2020 yielded four recently published patent applications for assignee “Apple, Inc.”

199. *Patent Application Alerts*, *supra* note 197 (noting that the tool “only searches the group of applications published the prior week”).

200. See Brant Carson et al., *Blockchain Beyond the Hype: What Is the Strategic Business Value?*, MCKINSEY (June 2018), <https://www.mckinsey.com/business-functions/mckinsey-digital/our-insights/blockchain-beyond-the-hype-what-is-the-strategic-business-value> (“Despite the hype, blockchain is still an immature technology, with a market that is still nascent and a clear recipe for success that has not yet emerged. Unstructured experimentation of blockchain solutions without strategic evaluation of the value at stake or the feasibility of capturing it means that many companies will not see a return on their investments.”).

201. See generally IBM, *Blockchain Use Cases*, <https://www.ibm.com/blockchain/use-cases/> (last visited Aug. 27, 2020) (identifying a number of compelling uses for



to implement blockchain for many companies is quite high,<sup>202</sup> which could cut against virtual marking's goal of reducing costs to patentees. If a company already had a significant blockchain infrastructure, however, it could potentially leverage that to manage any changes to its virtual marking site.

Because patentees should be allowed to modify their sites as necessary,<sup>203</sup> and they bear the burden of proof in establishing constructive notice,<sup>204</sup> the steps that patentees take to establish notice when their sites are modified should largely be left up to them. A patentee who hardly ever updates its site should not be required to implement a potentially costly notification system, but a patentee with thousands of patents probably needs to do more than include only a date at the bottom of the page. Some of the solutions offered by commentators could work for certain patentees with complex sites or well-developed blockchain capabilities, and perhaps the USPTO could consider expanding its notification system for patent applications to cover issued patents, if patentees so desire. In any case, the marking statute provides that damages begin accruing when the infringer was on constructive notice of the patent.<sup>205</sup> So long as each patentee can determine and demonstrate when the infringer would have been on notice of the patent, the exact manner by which they make that determination can vary.

Overall, the dictionary definition of "posting," the USPTO's apparent interpretation of the word, and the risk of inadequate notice all cut toward a posting being a single webpage. While a broader definition may provide some limited benefits for patentees, those benefits simply do not outweigh the other considerations, and may indeed come into conflict with providing adequate notice to the public. Further, due to the transience of websites, patentees should make extra

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blockchain technology, including healthcare, customs declarations, and regulatory compliance).

202. ERNST & YOUNG LLP, TOTAL COST OF OWNERSHIP FOR BLOCKCHAIN SOLUTIONS 13 (Apr. 2019), [https://www.ey.com/Publication/vwLUAssets/ey-total-cost-of-ownership-for-blockchain-solutions/\\$File/ey-total-cost-of-ownership-for-blockchain-solutions.pdf](https://www.ey.com/Publication/vwLUAssets/ey-total-cost-of-ownership-for-blockchain-solutions/$File/ey-total-cost-of-ownership-for-blockchain-solutions.pdf) (estimating that for the average client situation, the cost to implement blockchain over five years exceeds \$300,000).

203. See McCaffrey, *supra* note 5, at 396 ("To get the maximum benefit from virtual marking, patentees should be permitted to modify their sites liberally.").

204. *Nike, Inc.*, 138 F.3d at 1447 (citing *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1111 (Fed. Cir. 1996)) (noting that "compliance with the marking statute is a question of fact, and the burden of proving compliance with the marking statute is upon the patentee").

205. See 35 U.S.C. § 287(a) (2013) ("In the event of failure so to mark, no damages shall be recovered by the patentee in any action for infringement, except on proof that the infringer was notified of the infringement and continued to infringe thereafter, in which event damages may be recovered only for infringement occurring after such notice.").

effort to ensure they are providing adequate notice and maintaining records of what changes they make to their sites, which will depend on their specific facts. As a result, “posting” should be interpreted to mean a single webpage that is not the homepage wherein modifications are appropriately tracked by the patentee. Congress, the USPTO, or the courts should also consider establishing a standard using the “nines” metric to determine what level of uptime is needed for adequate notice to be achieved. In the absence of these standards, patentees should look to ensure that their virtual marking sites reasonably convey to potential infringers that their products are covered by specific patents, ideally by using a single page with some system for tracking changes to the virtual marking site.

#### B. DEFINING “ASSOCIATES”

The primary challenge raised by the term “associates” is that it is unclear what exactly is required to “associate” a specific product with a patent number on a virtual marking website. The relevant dictionary definition of “associate” is to “connect (something) with something else because they occur together or one produces another.”<sup>206</sup> One reading of this definition suggests a requirement to create a clear link between products and patents. However, an argument could be made that if the word “connect” is interpreted broadly, that simply providing a list of patent numbers, and nothing else, is sufficient notice. After all, the person searching for the patent already knows that the patentee makes a certain product; thus, the inclusion of patent numbers alone might be enough to “connect” the product to the patent in some cases, especially if the patentee does not sell many products.

While it does not appear that the USPTO has made an interpretation of this term, one district court has addressed the issue in some detail.<sup>207</sup> In *Manufacturing Resources International v. Civiq Smartscales*,<sup>208</sup> the court noted that the association requirement is designed to “provide[] a level of notice commensurate with that of physical marking.”<sup>209</sup> By contrast, it added, “[m]ere direction to a general website listing patents for all the patentee’s products does not create this same association.”<sup>210</sup> In holding that the patentee did not provide adequate notice to potential infringers, the court highlighted

206. OXFORD UNIV. PRESS, *Associate*, LEXICO, <https://www.lexico.com/en/definition/associate> (last visited Aug. 24, 2020).

207. *See* Mfg. Res. Int’l, Inc. v. Civiq Smartscales, LLC, 397 F. Supp. 3d 560, 577 (D. Del. 2019).

208. 397 F. Supp. 3d 560 (D. Del. 2019).

209. *Civiq Smartscales*, 397 F. Supp. at 577.

210. *Id.*

that a list of patents, without a more explicit connection to specific products, “merely creates a research project for the public.”<sup>211</sup>

This is analogous to the real property context in particular. In one case, a court held that a purchaser was not on notice of a covenant that applied to his land but was included only in the conveyance from the same grantor to another purchaser.<sup>212</sup> This and other similar holdings seem underpinned by the fact that while doing so is possible, forcing purchasers to check every conveyance by every person in the chain of title would “impose an intolerable burden.”<sup>213</sup> In other words, such a scheme would “create[] a research project for the public.”<sup>214</sup>

Considered broadly, lessons from other areas of the law teach that notice is adequate when the relevant public could be reasonably expected to take notice of a given fact.<sup>215</sup> Given that the relevant inquiry is whether a potential infringer is on notice that a specific product is covered by a specific patent,<sup>216</sup> it does not seem that we could reasonably expect someone to take that notice if given only a list of patents without reference to specific products.

From the dictionary definition, we know that to associate a patented product with a patent number, it must connect the two items. Given the lessons from other areas of the law, as well as the District Court holding in *Civiq Smartscales*, it seems clear that simply listing patent numbers with no further information does not sufficiently connect a product with the patent number. As a result, the interpretation of the word “associates” should reflect a higher standard. The author proposes that “associates” be interpreted to mean to specifically connect the patented product with the number of the patents used in the product.

211. *Id.* (“[I]t is clear from the plain language of the statute itself and related statutes that the website itself must do more than simply list the patentee’s patents. Simply listing all patents that could possibly apply to a product or all patents owned by the patentee on the patentee’s marking website does not give the public notice. It merely creates a research project for the public.”).

212. *See Hancock v. Gumm*, 107 S.E. 872, 877 (Ga. 1921) (“[W]here a recorded deed to a lot forming part of a larger tract contains restrictive covenants, which by the terms of the deed are not only to apply to the lot conveyed, but, as in this case, to other lands of the grantor, a purchaser of one of the lots is not charged with notice of the covenant contained in a prior deed from the common grantor to another lot or parcel of the general tract.”).

213. *Glorieux v. Lighthipe*, 96 A. 94, 96 (N.J. 1915).

214. *Civiq Smartscales*, 397 F. Supp. 3d at 577.

215. *See supra* Part IV.

216. *See Stryker Corp. v. Zimmer, Inc.*, 782 F.3d 649, 660 n.5 (Fed. Cir. 2015), *vacated on other grounds*, 136 S. Ct. 1923 (2016) (“[T]he plain language of the marking statute provides that the patented article be marked with the ‘number of the patent.’”).

## C. INSERTION OF TITLE REQUIREMENT

These interpretations still leave one key problem unaddressed: the possibility that even if the requirements are otherwise met, patentees may provide so many patent numbers that it becomes untenable to understand all patents covering a specific product.<sup>217</sup> An example of this issue, as illustrated previously, is LG's virtual marking site, which lists 626 patents for one individual product, the "Optim G E970."<sup>218</sup> One scholar has posited that this is not adequate notice,<sup>219</sup> and this seems to be a reasonable conclusion. At a minimum, it is inconsistent with the patent marking goal of "helping to avoid innocent infringement."<sup>220</sup> It is possible, perhaps even likely, that a potential infringer, even when conducting a good faith effort to avoid infringement, might overlook a claim that potentially reads on its product when given such a large number of patents to examine.

To address this problem, one potential solution is to limit the number of patents a patentee can list for a given product.<sup>221</sup> However, "any limit that Congress impose[s] would be arbitrary."<sup>222</sup> An arbitrary limit on the number of patents would not be fair to patentees. Patents represent a *quid pro quo* between the inventor and the public; the inventor discloses how to make and use the invention to the public in exchange for a temporary monopoly on the invention.<sup>223</sup> Because patents must be useful, novel, and nonobvious, each patent presumably "represents a unique . . . invention."<sup>224</sup> If we ask patentees to limit their marking sites to list only a certain number of patents, we are effectively asking them to surrender their benefit in the *quid pro quo* for some inventions; the public already has the invention,

217. See *supra* Part III.B.

218. See LG, *Patent*, <https://www.lg.com/us/patent> (last visited Aug. 24, 2020).

219. See McCaffrey, *supra* note 5, at 394-95 ("Allowing patentees to list thousands of patent numbers with no guidance for the public does not provide adequate notice.")

220. See *Nike, Inc. v. Wal-Mart Stores, Inc.*, 138 F.3d 1437, 1443 (Fed. Cir. 1998).

221. McCaffrey, *supra* note 5, at 395 (suggesting that Congress could "provide a limit to the number of valid patents that can be listed for a single product" or "enforce a reasonable limit by preventing patentees from adding more than a predetermined number of marks to a product page").

222. *Id.*

223. Ben McEniery, *Patent Eligibility and Physicality in the Early History of Patent Law and Practice*, 38 U. ARK. LITTLE ROCK L. REV. 175, 175 (2016) ("It is uncontroversial that the patent system exists to provide an incentive to encourage the invention and commercialization of new products and processes and the disclosure by the patent applicant of information sufficient to enable a person skilled in the relevant field of technology to reproduce the claimed invention. This disclosure is the *quid pro quo* of the patent system; it is the benefit the public receives in exchange for the State bestowing monopoly rights on a private individual.")

224. Dmitry Karshedt, *Damages for Indirect Patent Infringement*, 91 WASH. U. L. REV. 911, 929 n.91 (2014); see also 35 U.S.C. §§ 101-103 (2012) (providing requirements for utility, novelty, and non-obviousness).

but now the patentee is limited in its ability to enforce its monopoly on the patents that it is unable to list. While it would help avoid especially large lists of patents, simply placing an arbitrary cap on the number of patents a patentee can list is not the best solution to this problem.

Alternatively, there is no requirement that patent marking language contain *only* the patent number. In fact, for eighty-five years, patentees were required to mark the dates of their patents on products instead of the patent number.<sup>225</sup> In addition, copyright law requires that works be marked with three elements for proper notice: the copyright symbol, the copyright owner's name, and the year of first publication.<sup>226</sup> With that in mind, it is fair to believe that more information about the patent can be included, particularly on a virtual marking website, where space is "theoretically limitless."<sup>227</sup>

There is one component of a patent that is fairly succinct and can convey significant meaning about the focus of the patent: the title. According to the USPTO, the title of the invention should be less than 500 characters "but technically accurate and descriptive" of the invention.<sup>228</sup> Further, if a patent applicant does not provide a descriptive title, the examiner may suggest a new title to the applicant or simply amend the title.<sup>229</sup> With this in mind, the title may be an appropriate component to add to the virtual marking requirements.

At least one patentee has already begun including this information on its virtual marking site: General Mills.<sup>230</sup> While this site does not organize by specific product,<sup>231</sup> the benefit of the title's presence can clearly be seen. Assume for example, that a competitor wants to create a new line of frozen pizzas. By looking through the list of patents on General Mills' site, this competitor can quickly distinguish patents that may be relevant (e.g., "Pizza Product," "Cheese Composi-

225. See Goryunov & Polyakov, *supra* note 22, at 3 (noting that beginning in 1927, patentees were required to include the patent number rather than the date, which was originally required in 1842).

226. See UNITED STATES COPYRIGHT OFFICE, *supra* note 120, at 1.

227. See McCaffrey, *supra* note 5, at 395.

228. U.S. PATENT & TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 601 (Nov. 2015), <https://www.uspto.gov/web/offices/pac/mpep/mpep-0600.pdf>.

229. See *id.* at § 606.01 ("Where the title is not descriptive of the invention claimed, the examiner should require the substitution of a new title that is clearly indicative of the invention to which the claims are directed. . . . This may result in slightly longer titles, but the loss in brevity of title will be more than offset by the gain in its informative value in indexing, classifying, searching, etc. If a satisfactory title is not supplied by the applicant, the examiner may, at the time of allowance, change the title by an examiner's amendment.")

230. GENERAL MILLS, *supra* note 37 (including not only patent numbers but also patent titles).

231. See *id.* (containing broad categories such as "Baking" and "Meals" instead of specific product offerings).



tions and Related Methods”) from those that may not be relevant (e.g., “Dumpling Producing Method and Device,” “Square Bottom Taco Shell”).<sup>232</sup> While this is not an airtight solution—some patents are still titled vaguely<sup>233</sup>—it seems much more reasonable to hold someone on notice that a product is covered by a patent when the title is provided along with the patent number.

Including the titles of patents is not a heavy burden for patentees; after all, the space available on virtual marking sites is essentially limitless.<sup>234</sup> For patentees with large numbers of patents, adding the title will significantly aid the public in avoiding innocent infringement. While it may require some marginal additional effort on the part of the patentee’s website developer, this seems a small price to pay for the additional notice afforded by the presence of patent titles.

If patentees wish to further enhance the notice provided by their virtual marking websites, they could include even more information beyond just the title and the product number. For example, patentees could also include images of specific products<sup>235</sup> or links to the patent documents themselves.<sup>236</sup> While these additions, and perhaps even others not listed here, could help the public avoid innocently infringing, each additional requirement could also result in higher costs for patentees<sup>237</sup> and could risk creating information overload or fatigue to the public.<sup>238</sup> Simply requiring a title strikes a good balance here, as

232. *See id.*

233. *See id.* (listing patent titles such as “Food Product” and “Label”).

234. *See* McCaffrey, *supra* note 5, at 395.

235. LBP, a manufacturer of various food and beverage containers, has included images of its products on its virtual marking site. *See* LBP, *Patents* (Nov. 4, 2019), <https://www.lbpmsg.com/patents/> [<https://web.archive.org/web/20191104175922/https://www.lbpmsg.com/patents/>]. This addition could be particularly useful for patentees whose products do not have immediately clear names, such as the coffee containers and beverage sleeves patented by LBP. *See id.*

236. While the author was not able to locate a specific virtual marking webpage that does this in practice, the mechanics would be relatively simple. Many public registries exist for obtaining patent documents. *See, e.g.,* GOOGLE, *Google Patents*, <https://patents.google.com/> (last visited Aug. 24, 2020); U.S. PATENT & TRADEMARK OFFICE, *USPTO Patent Database*, <http://patft.uspto.gov/netahtml/PTO/index.html> (last visited Sept. 5, 2020); EUROPEAN PATENT OFFICE, *Espacenet*, <https://worldwide.espacenet.com/> (last visited Aug. 24, 2020). Patentees could either link to the entries stored on one of these sites or maintain the patent documents on their own servers and link to those documents. Either way, this would eliminate the additional step for the public of looking up the patent once obtaining the patent number from the virtual marking website.

237. Depending on the products, it may not be easy or desirable for some patentees to provide images of each product on their virtual marking sites. Similarly, storage considerations may make it difficult for certain patentees to store and link to patent documents for all patents they own, especially if they own hundreds or thousands of patents. Locating and storing all patent documents could be a much more costly task than including only the title along with the patent number.

238. *See* Oren Perez, *Complexity, Information Overload, and Online Deliberation*, 5 I/S: J.L. & POL’Y INFO. SOC’Y 43, 56 (2009) (discussing the concept of information over-

it is short and should be relatively simple to add to the page as it consists of only additional text.

As a result of this analysis, the author recommends requiring that all patentees include the title of the patent along with the patent number on their virtual marking websites. This would be a simple amendment; Congress could simply insert the words “and title” into the marking statute where appropriate. In context, 35 U.S.C. § 287(a) would then read, in relevant part, “a posting on the Internet . . . that associates the patented article with the number *and title* of the patent.” Even in the absence of such an amendment, however, patentees are not prohibited from including additional information on their virtual marking sites, and could enhance the notice effected by their sites by including the title and perhaps even other additional information about the patents.

## VI. CONCLUSION

Virtual marking was implemented to reduce costs for patentees and facilitate easier marking on small products, but it has not been widely adopted. It is quite likely that greater certainty surrounding the requirements for virtual marking could lead to increased adoption. As a result, this article proposes that for purposes of the virtual marking statute, “posting” be interpreted as a single webpage that is not the homepage and has some system for managing changes, and “associates” be interpreted to mean specifically connecting the patented product with the number of the patents used in the product. Further, the article proposes that Congress insert the words “and title” into the statute, such that patentees are required to include the title of the patent along with the patent number on virtual marking webpages.

To implement these interpretations, the author recommends that courts begin applying the interpretations of “posting” and “associates” as marking issues come up, and the author also urges the United States Patent and Trademark Office (“USPTO”) to promulgate these interpretations as appropriate in its guidance. Further, Congress appears poised to provide new rules for patent eligibility in the near future;<sup>239</sup> the author proposes including the new statutory language in this bill, should it be further considered.

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load and noting that “[t]here are numerous studies that demonstrate that the capacity of the human mind to deal with extensive amounts of information-in terms of attention resources, memory, and processing (computation)-is highly limited”).

239. Christopher P. King, *Patent Eligibility Reform in Congress: Updates on the Tilis-Coons Proposal*, MONDAQ (Aug. 21, 2019), <https://www.mondaq.com/unitedstates/Intellectual-Property/838446/Patent-Eligibility-Reform-In-Congress-Updates-On-The-Tilis-Coons-Proposal>.

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Of course, there is nothing stopping a patentee from abiding by these recommendations immediately. Given the discussion in this article, it seems highly unlikely that any court would find a single webpage that associates patent numbers with specific products, and includes titles, as providing inadequate notice under the marking statute, particularly given courts' "long-standing focus on the notice effected by the method of marking the patented article rather than on the precise mechanistic compliance with the statute."<sup>240</sup> Patentees who are looking to employ virtual marking, but have concerns about the requirements, should feel comfortable that a marking strategy as described herein should be sufficient to provide adequate notice.

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240. Rutherford v. Trim-Tex, Inc., 803 F. Supp. 158, 161 (N.D. Ill. 1992).

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# BUT WHAT IF BIG BROTHER’S SURVEILLANCE SAVES LIVES?— COMPARATIVE DIGITAL PRIVACY IN THE TIME OF CORONAVIRUS\*

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“Big Brother Is Watching You.”  
- George Orwell, 1984<sup>1</sup>

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\* This Essay was written in mid-April 2020. Due to the rapidly-evolving situation surrounding the novel coronavirus, new data and studies, digital privacy policies, and laws in each jurisdiction may have emerged or altered post-completion of this Essay.

† J.D. Candidate, Harvard Law School (2021); B.A., *summa cum laude*, Pomona College (2018). I would like to thank my family, friends, and professors for their support during this trying period in life. Special thanks go to my parents Amy and Frank, and my grandparents, for always being there for me despite the geographical distance between us, Professor Urs Gasser for all his guidance and expertise that inspired this Essay in invaluable ways, Professor Jeannie Suk Gersen for her mentorship and encouragement, Zahra Takhshid for suggestions for this Essay, Andrew B. Liu (Ph.D. candidate at Harvard Medical School) for his insights on bioinformatics and epidemiology, Kent A. Shikama for kindling my interest in exploring intersections between law and technology, and my classmates for enlightening discussions on comparative digital privacy. I also wish to thank the *Creighton Law Review* editors for their diligence and professionalism throughout the editing process.

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I. INTRODUCTION AND CONTEXT: CURTAILING DIGITAL PRIVACY RIGHTS AS A NECESSARY EVIL TO END THE DYSTOPIAN NEW NORMAL UNDER THE COVID-19 REGIME

By April 2020, a significant portion of students from across the globe were taking classes online instead of learning with their friends at school.<sup>2</sup> Most working-age adults found themselves at home, many unemployed.<sup>3</sup> Everyone worried every day about the safety and health—the most fundamental needs—of loved ones. Across public spaces, “no entry” signs and posters reminded individuals to stay six feet away from each other to strictly enforce social distancing at all times.<sup>4</sup> Bustling restaurants and bars were ordered to shut down, save for a few diligent takeout and delivery locations.<sup>5</sup> Streets were virtually empty.<sup>6</sup> Travel was effectively out of question, as were wed-

2. See, e.g., *Map: Coronavirus and School Closures*, EDWEEK (Mar. 6, 2020), <https://www.edweek.org/ew/section/multimedia/map-coronavirus-and-school-closures.html>; Benjamin Herold, *The Scramble to Move America’s Schools Online*, EDWEEK (Mar. 27, 2020), <https://www.edweek.org/ew/articles/2020/03/26/the-scramble-to-move-america-schools-online.html>.

3. See, e.g., Patricia Cohen & Tiffany Hsu, ‘Sudden Black Hole’ for the Economy With Millions More Unemployed, N.Y. TIMES (Apr. 9, 2020), <https://www.nytimes.com/2020/04/09/business/economy/unemployment-claim-numbers-coronavirus.html>.

4. See, e.g., *COVID-19 Social Distancing Poster*, VT. DEP’T. OF HEALTH, <https://www.healthvermont.gov/sites/default/files/documents/pdf/COVID-social-distancing-poster-ltr.pdf> (last visited Aug. 30, 2020).

5. See, e.g., *From Pandemic to Protests: How Food Businesses Nationwide Are Responding*, BON APPETIT, <https://www.bonappetit.com/story/food-businesses-covid-19> (last visited Aug. 30, 2020).

6. See, e.g., Jessica Snouwaert, *13 photos of New York City looking deserted as the city tries to limit the spread of the coronavirus*, BUS. INSIDER (Apr. 1, 2020), <https://www.businessinsider.com/coronavirus-pictures-of-new-york-city-empty-streets-2020-3>.



dings, honeymoons, Easter get-togethers, and graduation ceremonies.<sup>7</sup>

As dystopian as these portraits of society may sound, they were, in one way or the other, the new normal as the world confronted a new common enemy in 2020: the novel coronavirus, "COVID-19."<sup>8</sup> Although these curtailments to one's civil liberties appeared extreme and the social changes were drastic,<sup>9</sup> especially in liberal democracies such as the United States, new policies and laws imposed by governments worldwide in response to COVID-19 became the necessary evil to mitigate the consequences of the pandemic and to rid the world of this highly contagious and fatal virus as promptly as possible.<sup>10</sup>

Disease models from epidemiologists including Marc Lipsitch, professor of epidemiology and director of the Center for Communicable Disease Dynamics at Harvard Medical School, demonstrate that intermittent periods of social distancing may be the best option to control the COVID-19 pandemic, for this "on-again, off-again approach" would "protect hospitals from being overwhelmed with sick patients, buy them time to gather adequate medical supplies, and allow the population to slowly gain immunity."<sup>11</sup> In the absence of an effective vaccine

7. See, e.g., *Coronavirus disease (COVID-19) travel advice*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019/travel-advice> (last visited Aug. 14, 2020).

8. See generally *Coronavirus disease (COVID-19) pandemic*, WORLD HEALTH ORG., <https://www.who.int/emergencies/diseases/novel-coronavirus-2019> (last visited Aug. 14, 2020).

9. See Danielle Allen et al., *Securing Justice, Health, and Democracy Against the COVID-19 Threat*, EDMOND J. SAFRA CTR. FOR ETHICS AT HARV. UNIV. WHITE PAPERS 11-20 (2020) (discussing how measures to suppress the spread of COVID-19 can impact civil liberties); Brett Milano, *Restricting Civil Liberties Amid the COVID-19 Pandemic*, HARV. LAW TODAY (Mar. 21, 2020), [https://today.law.harvard.edu/restricting-civil-liberties-amid-the-covid-19-pandemic/?utm\\_source=hltnewsletter&utm\\_campaign=Mar2520](https://today.law.harvard.edu/restricting-civil-liberties-amid-the-covid-19-pandemic/?utm_source=hltnewsletter&utm_campaign=Mar2520) (providing examples of government-mandated restrictions to civil liberties).

10. See, e.g., GPA Executive Committee, *Statement by the GPA Executive Committee on the Coronavirus (COVID-19) Pandemic*, GLOB. PRIVACY ASSEMBLY (Mar. 17, 2020), <https://globalprivacyassembly.org/gpaexco-covid19/> (indicating that members of the Executive Committee of the Global Privacy Assembly ("GPA") support the sharing of personal data by organizations and governments for the purposes of fighting the spread of the COVID-19 pandemic). The GPA brings together data protection regulations from over 80 countries. *Id.*

11. *Coronavirus news – April 2020*, HARV. T. H. CHAN SCH. OF PUB. HEALTH (Apr. 11, 2020), <https://www.hsph.harvard.edu/news/hsph-in-the-news/coronavirus-news-april-2020/>; see also Joel Hellewell et al., *Feasibility of Controlling COVID-19 Outbreaks by Isolation of Cases and Contacts*, 8 LANCET GLOB. HEALTH 488, 489-96 (2020) (containing a mathematical study using a stochastic transmission model that is parameterized to the COVID-19 outbreak). Accord Gypsyamber D'Souza & David Dowdy, *What is Herd Immunity and How Can We Achieve It With COVID-19?*, JOHNS HOPKINS BLOOMBERG SCH. OF PUB. HEALTH (Apr. 10, 2020), <https://www.jhsph.edu/covid-19/articles/achieving-herd-immunity-with-covid19.html> (stating that herd immunity requires "at least 70% of the population" to either get infected or get a protective vaccine to be immune and have herd protection; clearly, the former approach is unrealistic, as getting

and antiviral drugs, governments need to modulate the trajectory of the epidemic “so that the impact on global health is minimized and each epidemic wave does not exceed [ ]healthcare system capabilities.”<sup>12</sup>

On a macro level, to slow and contain the spread of COVID-19, governments should have at least three policy and legal objectives in regulating social behaviors while supporting scientific experts with relevant research to the extent possible. Firstly, authorities need to ensure that as many people as possible stay self-isolated at home and practice social distancing if they absolutely need to exit their homes for essential goods or other urgent needs.<sup>13</sup> The less contact there is among the population, the easier and faster it is for the virus to die down.<sup>14</sup> Secondly, for those who have tested positive for coronavirus, governments need to speedily identify individuals who could have gotten COVID-19 from the diagnosed coronavirus carriers due to recent close contact, and begin testing and quarantining those individuals accordingly.<sup>15</sup> Thirdly and equally importantly, leaders around the world need to prioritize protecting the most vulnerable members of society: the elderly, the homeless, the poor, and those with serious existing medical conditions; in countries with one or multiple epicenter(s) of coronavirus, those locations also merit particular attention.<sup>16</sup>

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70% of the population infected would overwhelm hospitals and medical staff, and subsequently result in a dauntingly high number of deaths).

12. Didier Raoult et al., *Coronavirus Infections: Epidemiological, Clinical and Immunological Features and Hypotheses*, CELL STRESS 1, 5 (2020).

13. See Joseph A. Lewnard & Nathan C. Lo, *Scientific and Ethical Basis for Social-Distancing Interventions Against COVID-19*, 20 THE LANCET: INFECTIOUS DISEASES 631, 632 (2020) (noting evidence supporting the implementation of social distancing measures).

14. See, e.g., RAMESH RASKAR ET AL., APPS GONE ROGUE: MAINTAINING PERSONAL PRIVACY IN AN EPIDEMIC, MIT WHITEPAPERS 4 (2020) (“[The] ultimate effect of R0 with a 10% use and appropriate response to data will hopefully disrupt ongoing chains of transmission, thus effecting the mortality rate and eventually impacting the contact rate and infection curve. However, high enough utilization could reduce contact rate to such a degree as to make the overall R0 < 1[,] which would ideally lead to dying off of the infection entirely.”).

15. See Lewnard & Lo, *supra* note 13, at 631 (“In the absence of any pharmaceutical intervention, the only strategy against COVID-19 is to reduce mixing of susceptible and infectious people through early ascertainment of cases or reduction of contact.”).

16. *Id.* There has also been a movement to include incarcerated populations among the most vulnerable, because prisons and jails tend to have great difficulty enforcing social distancing. See, e.g., *ACLU Letter to DOJ and BOP on Coronavirus and the Criminal Justice System*, ACLU (Mar. 18, 2020), <https://www.aclu.org/letter/aclu-letter-doj-and-bop-coronavirus-and-criminal-justice-system> (on file with American Civil Liberties Union); *Coronavirus: Iran temporarily frees 54,000 prisoners to combat spread*, BBC (Mar. 3, 2020), <https://www.bbc.com/news/world-middle-east-51723398>; John Cheves, *Chief justice pleads for Kentucky inmate releases ahead of COVID-19, but progress slow*, LEXINGTON HERALD LEADER (Mar. 23, 2020), [https://amp.kentucky.com/news/coronavirus/article241428266.html?\\_\\_twitter\\_impression=true](https://amp.kentucky.com/news/coronavirus/article241428266.html?__twitter_impression=true).



Among the sacrifices individuals have had to make in order for governments to accomplish these goals, a central tradeoff that citizens in various jurisdictions have experienced is one between individuals' digital privacy and public safety. At least theoretically, one may readily see ways in which taking advantage of technological advances to monitor individuals' compliance with the newly-launched Orwellian laws and policies can make the process more seamless and efficient. Significantly, while big data has proven to be "immensely useful in fields such as marketing and earth sciences," the public health space has yet to see the fruits of a big data revolution.<sup>17</sup> Instead of relying on recent technological advances, public health—at least up until the outbreak of the COVID-19 global pandemic—had been relying principally on traditional surveillance systems.<sup>18</sup> Based on various nations' digital technologies and data sharing strategies to resolve the COVID-19 crisis so far, one may find it likely that COVID-19 is driving major social change in an area that is integral to a healthy society worldwide.

As of early-April 2020, there have been three main ways of collecting and using digital data in order to accomplish the aforementioned goals.<sup>19</sup> First, mobile location data can provide governments with advanced tracking capabilities to help authorities enforce quarantines.<sup>20</sup> Second, facial recognition technology linked with biometric databases is being integrated with digital thermometers to help capture the identity of individuals with coronavirus symptoms, including, notably, a fever.<sup>21</sup> Third, open-source applications such as Nextstrain are using Gisaid, a platform for sharing genomic data, to help researchers

17. Lone Simonsen et al., *Infectious Disease Surveillance in the Big Data Era: Towards Faster and Locally Relevant Systems*, 214 J. INFECTIOUS DISEASES 380, 380 (2016). This paper includes an overview of the history of infectious disease surveillance, a discussion of electronic health records in the context of the big data revolution, a case study on influenza surveillance, an analysis of Google Flu Trends and other social media, and a conclusion advocating for increased use of hybrid systems combining information from traditional surveillance and big data sources, which the authors deem the most promising option moving forward. *See id.*

18. *Id.*; see also Alfred Ng, *Coronavirus Pandemic Changes How Your Privacy is Protected*, CNET (2020), <https://www.cnet.com/news/coronavirus-pandemic-changes-how-your-privacy-is-protected/> ("At a media briefing on March 16, the WHO's director-general, Tedros Adhanom Ghebreyesus, said there needed to be more technological measures for tracking the coronavirus outbreak.").

19. See, e.g., Samantha Stein, *How to Restore Data Privacy After the Coronavirus Pandemic*, WORLD ECON. FORUM (Mar. 13, 2020), <https://www.weforum.org/agenda/2020/03/restore-data-privacy-after-coronavirus-pandemic/>.

20. *Coronavirus: Surge in apps tracking spread and symptoms*, SKY NEWS (Mar. 3, 2020), <https://news.sky.com/story/coronavirus-surge-in-apps-tracking-spread-and-symptoms-11948411>.

21. Martin Pollard, *Even mask-wearers can be ID'd*, REUTERS (Mar. 9, 2020), <https://www.reuters.com/article/us-health-coronavirus-facial-recognition/even-mask-wearers-can-be-idd-china-facial-recognition-firm-says-idUSKBN20W0WL>.

track and study the evolution of coronavirus.<sup>22</sup> This Essay focuses primarily on the first of these methods.<sup>23</sup> Section II of this Essay surveys the main ways in which governments have applied digital technologies and data sharing models to combat COVID-19, with case studies and a closer examination of the key stakeholders involved throughout the process. Section III of this Essay zooms in on the legal questions involved in this pandemic from a comparative digital privacy law angle. Section IV concludes this Essay on a forward-looking note, extending an open invitation for further research on this fast-evolving situation.

## II. HOW BIG BROTHER USES DIGITAL DATA TO COMBAT COVID-19: A TYPOLOGY

### A. INTRODUCING THREE MAIN MODELS . . . AND BEYOND

As of early-April 2020, there have generally been three main ways in which governments have applied digital technologies and data sharing models to achieve the aforementioned goals in putting an end to the novel coronavirus: self-quarantine enforcement, contact tracing, and flow modeling using aggregated, anonymized data.<sup>24</sup> Some countries use a combination of these approaches. For instance, Singapore, which has widely been considered one of the most successful nations in managing the COVID-19 crisis, uses digital data both for quarantine enforcement and contact tracing.<sup>25</sup>

First, multiple jurisdictions have used cellphone location data of specific users to ensure that self-quarantine rules have been properly respected by individual members of society.<sup>26</sup> This approach serves to enforce the aforementioned social distancing and quarantine policies.<sup>27</sup> The Hong Kong government, for example, used location data to track residents' movement during its lockdown period to ensure that

22. Klint Finley, *Data Sharing and Open Source Software Help Combat COVID-19*, WIRED (Mar. 13, 2020), <https://www.wired.com/story/data-sharing-open-source-software-combat-covid-19/>.

23. I made this decision because the first way of using digital data to combat COVID-19 above has the most direct implications on individuals' digital privacy rights. Accordingly, by understanding the main models that different jurisdictions have adopted, we will be in a better position to analyze digital privacy laws and policies during the coronavirus pandemic.

24. See Michael Geist, *Canada Should Ensure Cellphone Tracking to Counter the Spread of Coronavirus Does Not Become the New Normal*, GLOBE & MAIL (Mar. 22, 2020), <https://www.theglobeandmail.com/business/commentary/article-canada-should-ensure-cellphone-tracking-to-counter-the-spread-of/>.

25. Philip J. Heijmans, *Singapore contained Coronavirus. Could other countries learn from its approach?*, WORLD ECON. FORUM (Mar. 5, 2020), <https://www.weforum.org/agenda/2020/03/singapore-response-contained-coronavirus-covid19-outbreak/>.

26. See Geist, *supra* note 24.

27. See *supra* Section I.

everyone stayed in his or her quarantine locations if asked to be quarantined.<sup>28</sup> Starting on March 19, when Hong Kong ordered all arriving passengers to be quarantined for two weeks in order to prevent further spread of COVID-19, the government began mandating the use of an electronic wristband, accompanied by a smartphone app, in an effort to enforce the self-quarantine measures.<sup>29</sup>

In Taiwan and India, there have been similar measures where cellphone tracking is used “to warn those self-quarantining that they have travelled too far from home.”<sup>30</sup> In Poland, the government launched “Home quarantine,” a smartphone application for citizens returning from abroad who have been required to self-isolate for two weeks.<sup>31</sup> The app uses geolocation and facial recognition technologies: users first upload a selfie to the app, then are “randomly prompted throughout the day to submit more selfies”; the authorities will be alerted if a user does not comply with the app’s selfie prompt within twenty minutes.<sup>32</sup> To register for the app, users need to upload personal details and a photograph, and the selfies are verified by facial recognition “and its location stamp is checked against the registered address.”<sup>33</sup> Some Latin American countries, which were hit by the coronavirus pandemic later than many other countries, started to follow similar strategies.<sup>34</sup> For instance, as of April 2020, “[t]he city of Recife in northeast Brazil ha[d] been tracking 700,000 cellphones to monitor compliance with social isolation measures.”<sup>35</sup>

Second, various countries and regions have used cellphone location data of specific users “to identify other people who may have unknowingly been placed at increased risk by coming into close

28. Ng, *supra* note 18.

29. Uptin Saiidi, *Hong Kong is putting electronic wristbands on arriving passengers to enforce coronavirus quarantine*, CNBC (Mar. 18, 2020), <https://www.cnn.com/2020/03/18/hong-kong-uses-electronic-wristbands-to-enforce-coronavirus-quarantine.html>. Whether there was consent from individuals is debatable. *Id.* The next section of this Essay, Section III, will discuss this matter in greater depth in considering some of the legal questions involved. We will return to this Hong Kong example as a brief case study in Section III(B)(2) of this Essay.

30. Geist, *supra* note 24.

31. Kenneth Garger, *Polish Residents Can Send Government Selfies to Prove Quarantine Compliance*, N.Y. POST (Mar. 24, 2020), <https://nypost.com/2020/03/24/polish-residents-can-send-government-selfies-to-prove-quarantine-compliance/>.

32. *Id.*

33. Anna Koper & Douglas Busvine, *In Europe, Tech Battle Against Coronavirus Clashes with Privacy Culture*, REUTERS (Mar. 26, 2020), <https://www.reuters.com/article/us-health-coronavirus-europe-tech-poland/in-europe-tech-battle-against-coronavirus-clashes-with-privacy-culture-idUSKBN21D1CC>.

34. See, e.g., Yasodara Cordova & Beatriz Botero Arcila, *Latin America Hopes Big Data Can Beat the Virus. But There Are Risks*, AM. QUARTERLY (Apr. 22, 2020), <https://www.americasquarterly.org/content/latin-america-hopes-big-data-can-beat-virus-there-are-risks>.

35. *Id.*

proximity with someone known to have” tested positive for COVID-19.<sup>36</sup> This contact tracing approach helps ensure that authorities can isolate possible victims of COVID-19 transmission as quickly as possible, based on their recent close contact with confirmed COVID-19 carriers.<sup>37</sup>

The World Health Organization states that contact tracing occurs in three steps: contact identification, contact listing, and contact follow-up.<sup>38</sup> Under a traditional medical surveillance regime, this process takes a significant amount of time; however, digital contact tracing makes this process much faster and more efficient.<sup>39</sup>

At its simplest, digital contact tracing might work like this: Phones log their own locations; when the owner of a phone tests positive for COVID-19, a record of his/her recent movements is shared with health officials; owners of any other phones that recently came close to that phone are notified of their risk of infection and advised to self-isolate. But designers of a tracking system will have to work out key details: how to determine the proximity among phones and the health status of users, where that information is stored, who sees it, and in what format.<sup>40</sup>

“Israel has implemented a system that involves the collection and use of cellphone location data to identify at-risk individuals, who may receive text messages warning that they need to self-quarantine.”<sup>41</sup> Similarly, Singapore, a country famous for its “efficiency and no-nonsense government,” is well known for its “TraceTogether” app, which “exchanges Bluetooth signals between mobile phones in close proximity.”<sup>42</sup> TraceTogether stores records of such encounters on the user’s

36. Geist, *supra* note 24.

37. See *supra* Section I.

38. *Contact Tracing*, WORLD HEALTH ORG. (May 9, 2017), <https://www.who.int/news-room/q-a-detail/contact-tracing>.

39. See Sharon Begley, *Covid-19 spreads too fast for traditional contact tracing. New digital tools could help*, STAT (2020), <https://www.statnews.com/2020/04/02/coronavirus-spreads-too-fast-for-contact-tracing-digital-tools-could-help/>. One may be concerned about traditional contact tracing, not only because it typically takes three days to complete the interview process, a period during which more people could be infected, but also because many interviewees find it challenging to remember all the people with whom they may have been in physical contact within the span of 14 days—the incubation period of COVID-19. This concern was raised by Satchit Balsari during a virtual roundtable privacy and COVID-19 lecture at Harvard Law School on April 21, 2020.

40. Kelly Servick, *Cellphone tracking could help stem the spread of coronavirus. Is privacy the price?*, SCIENCE (Mar. 22, 2020), <https://www.sciencemag.org/news/2020/03/cellphone-tracking-could-help-stem-spread-coronavirus-privacy-price>.

41. *Episode 44: Michael Birnhack on Israeli Use of Cellphone Tracking to Combat the Spread of Coronavirus*, MICHAEL GEIST (Mar. 23, 2020), <http://www.michaelgeist.ca/podcast/episode-44-michael-birnhack-on-israels-use-of-cellphone-tracking-to-combat-the-spread-of-coronavirus/>.

42. Yasheng Huang et al., *How Digital Contact Tracing Slowed Covid-19 in East Asia*, HARV. BUS. REV. (Apr. 15, 2020), <https://hbr.org/2020/04/how-digital-contact-trac>

phone, so that when the Ministry of Health interviews a user as part of the Singaporean government's contact tracing efforts, he/she can consent to send his/her TraceTogether data to government authorities.<sup>43</sup> This would facilitate the contact tracing procedure by speeding up the process—the sooner users take necessary actions, the earlier the detection of COVID-19 cases, and the greater reduction in the risks of the spread of coronavirus for the community at large.<sup>44</sup> Meanwhile, South Koreans downloaded the “Corona 100m” app over one million times within a few weeks; the app “collects data from public government sources that alert users of any diagnosed [COVID-19] patient within a 100-meter radius along with the patient's diagnosis date, nationality, age, gender, and prior locations.”<sup>45</sup>

Third, some countries and regions have aggregated and anonymized data “to identify trends such as community outbreaks.”<sup>46</sup> A slightly more sophisticated version of this method is termed “flow-modeling,” which uses mobile phone tower data to calculate how many people pass through places, as well as how quickly.<sup>47</sup> For example, in Italy, one of the countries that has suffered most severely from COVID-19, there is “an aggregated and anonymous heat map for the Lombardy region . . . to better understand population movements in order to help thwart the spread of COVID-19.”<sup>48</sup>

This approach not only serves to provide valuable information to scientific researchers, but also informs officials about the most vulnerable geographic locations and populations so that they can dedicate

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ing-slowed-covid-19-in-east-asia; see also TRACE TOGETHER: A SINGAPORE GOV'T AGENCY WEBSITE, *TraceTogether, Safer Together* (last visited Aug. 14, 2020), <https://www.tracetogogether.gov.sg> (providing access to the “TraceTogether” app).

43. *TraceTogether*, MINISTRY OF HEALTH SING. (last visited Aug. 14, 2020), <https://www.healthhub.sg/apps/38/tracetogogether-app>.

44. *Id.*

45. Huang et al., *supra* note 42.

46. See Geist, *supra* note 24.

47. *Countries are using apps and data networks to keep tabs on the pandemic*, ECONOMIST (Mar. 26, 2020), [https://www.economist.com/briefing/2020/03/26/countries-are-using-apps-and-data-networks-to-keep-tabs-on-the-pandemic?fbclid=IWAR3RVEv3t1XraqHzT17xBi11peT38m-TN-LsamAz\\_lsmKk0HhXwYwZiSg1A](https://www.economist.com/briefing/2020/03/26/countries-are-using-apps-and-data-networks-to-keep-tabs-on-the-pandemic?fbclid=IWAR3RVEv3t1XraqHzT17xBi11peT38m-TN-LsamAz_lsmKk0HhXwYwZiSg1A). This approach should be differentiated from “spying law” regimes such as those in Slovakia and South Korea involving “temporary legislation that would allow individual movements to be tracked for the duration of the pandemic.” Koper & Busvine, *supra* note 33. By contrast, “a proposal by German Health Minister Jens Spahn to allow individual smartphone tracking without a judicial order was blocked by the Social Democrats (SPD).” *Id.*

48. Press Release, Vodafone launches five-point plan to help counter the impacts of the COVID-19 outbreak (Mar. 18, 2020), <https://www.vodafone.com/news-and-media/vodafone-group-releases/news/vodafone-launches-five-point-plan-to-help-counter-the-impacts-of-the-covid-19-outbreak>. Vodafone played an important role in this project. See *id.* The role of private sector actors is discussed in greater detail in the subsection below.

additional resources and adjust their priorities accordingly.<sup>49</sup> As a team of leading scholars in fields as diverse as communicable diseases, quantitative social science, and privacy law opined, “the estimates of aggregate flows of people are incredibly valuable.”<sup>50</sup> In their article titled “Aggregated Mobility Data Could Help Fight COVID-19,” Professor Caroline O. Buckee and her co-authors shared that a map that examines the impact of social distancing messaging or policies on population mobility patterns “will help county officials understand what kinds of messaging or policies are most effective.”<sup>51</sup> According to this research team:

[c]omparing the public response to interventions, in terms of the rate of movement over an entire county from one day to the next, measured against a baseline from normal times, can provide insight into the degree to which recommendations on social distancing are being followed. We will need these estimates, not only now but also when we need to resume life again without risking a major resurgence.<sup>52</sup>

In addition to these three predominant models, researchers and journalists have identified a few other approaches to using digital data and technologies to combat COVID-19 that they have observed or are predicting to emerge in the coming weeks or months. For instance, *The Economist* identified “social-graph making” as an additional possible application of data tools for the COVID-19 pandemic, but states that nowhere is known to have already implemented this tool.<sup>53</sup> By mapping out which data subjects tend to meet repeatedly based on mobile phone tower data and machine learning, this approach could be an effective tool that unfortunately poses high risk of civil liberties infringements.<sup>54</sup>

Although these three strategies appear to be structurally straightforward in that all three methods are ways for governments to regulate individual citizens, in reality, there are often other stakeholders involved as intermediaries in this process.

49. See *supra* Section I.

50. Caroline O. Buckee et al., *Aggregated mobility data could help fight COVID-19*, SCIENCE (Apr. 10, 2020), <https://science.sciencemag.org/content/368/6487/145.2>. But see Scott Berinato, *There’s No Such Thing as Anonymous Data*, HARV. BUS. REV. (Feb. 9, 2015), <https://hbr.org/2015/02/theres-no-such-thing-as-anonymous-data> (arguing that there is no such thing as “anonymous data”).

51. Buckee, *supra* note 50.

52. *Id.*

53. *Countries are Using Apps and Data Networks to Keep Tabs on the Pandemic*, *supra* note 47.

54. See *id.* (explaining the breadth of information contact tracing apps can collect).

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## B. THE PICTURE AT LARGE: BIG BROTHER'S HELPERS AND THOSE VOLUNTARILY SUCCUMBING TO HIS WATCH

Because government administrations are not always the most technology-savvy and resource-abundant institutions, technology and telecommunications companies such as Apple, Google, and Vodafone,<sup>55</sup> which possess the relevant experience, expertise, and manpower to quickly invent new public health products, are naturally suitable candidates for transforming ambitious ideas and grandiose theories into reality.

Granted, one may question the incentives for those corporate powerhouses to cooperate with governments, such as prioritizing reputation-building from corporate social responsibility and profit maximization; however, if one were to take a more skeptical lens, one can note further complexities in the privacy-public health tradeoff, because each of the stakeholders has a unique incentive. Governments, especially authoritarian ones, value legitimacy. One way a government shows its legitimacy is through its performance maintaining the welfare and stability of society.<sup>56</sup> The speed at which a country extinguishes the threat of COVID-19 for its constituents can showcase to other states the effectiveness of its leadership and the country's overall strength. On the bright side, the race to kill COVID-19, if only partially driven by this incentive, is beneficial to the world at large, as one country's public health crisis can easily become another country's nightmare due to mobility under the backdrop of globalization. On the other hand, these incentives have also led to attempts to, and accusations of, fabricating data, which creates a vicious cycle of more accusations and hindrances of correctly analyzing the science behind COVID-19.<sup>57</sup>

Meanwhile, individual members of society, who are perhaps the largest group of stakeholders in this global pandemic, most value freedom, coupled with the safety and health of themselves and their loved

55. See, e.g., Ina Fried, *Apple, Google team up on coronavirus contact tracing*, AXIOS (Apr. 10, 2020), <https://www.axios.com/apple-google-team-up-on-coronavirus-contact-tracing-6579b80f-f348-4c8e-ac87-d823b9abb4fb.html>; see also Press Release, *supra* note 48; see generally Chris Nuttall, *Tracking Covid-19 Through Your Phone*, FIN. TIMES (2020), <https://www.ft.com/content/5f49f7c4-9b1e-49bc-99d1-8a0d176a9bce>.

56. See Christian von Soest & Julia Grauvogel, *Identity, Procedures and Performance: How Authoritarian Regimes Legitimize Their Rule*, 3 J. CONTEMP. POL. 287, 291 (2017) (discussing six claims to legitimacy, one of which is "performance").

57. See, e.g., Dion Rabouin, *China's V-shaped coronavirus recovery looks too good to be true*, AXIOS (Mar. 31, 2020), <https://www.axios.com/china-coronavirus-economic-recovery-doubts-0e32c3c1-3759-495f-a757-ef8ced031254.html>; Kunal Purohit, *Misinformation, Fake News Spark India Coronavirus Fears*, ALJAZEERA (Mar. 10, 2020), <https://www.aljazeera.com/news/2020/03/misinformation-fake-news-spark-india-coronavirus-fears-200309051731540.html>.

ones over that of strangers. This explains why many young people chose to continue partying at Florida beaches over spring break despite nationwide social distancing policies that had already been in place in early-to-mid March: they believed themselves to be safe from the fatality of coronavirus due to their youth.<sup>58</sup> Such actions have ironically resulted in further worsening of the spread of the virus: an attempt at gaining freedom in turn resulted in tighter restrictions in one's digital privacy and overall civil liberties.

Despite all these cynicisms that one may have about each stakeholder's incentives and motivations, there have been at least some *positive* mechanisms in which private individuals and technology corporations alike have contributed to governments' realization of their public health and safety goals. Although the three aforementioned methods in which governments use digital technologies and data to combat COVID-19 in this Section may appear to be top-down, there have been concurrent bottom-up efforts, including grassroots movements from individuals, academia,<sup>59</sup> and corporate entities alike.

We can observe a number of cases in which grassroots movements have helped governments monitor the population and ensure that individuals are self-quarantining and social-distancing properly. For instance, there have been a number of Hackathons that specifically focused on tackling issues related to the COVID-19 pandemic.<sup>60</sup> Pre-coronavirus, Hackathons had been "made popular decades ago by the software community as communal, all-night sessions, often powered by pizza and various caffeinated beverages";<sup>61</sup> under the coronavirus backdrop, nothing quite stops the enthusiasm of coders from directing their energy and talent to collectively brainstorm constructive solutions to the pandemic. True to the technology theme, everything is accomplished via online platforms such as Zoom.<sup>62</sup> Among the ideas that emerged in those Hackathons and similar grassroots movements

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58. Christopher Brito, *Spring Breakers Say Coronavirus Pandemic Won't Stop Them From Partying*, CBS NEWS (Mar. 25, 2020), <https://www.cbsnews.com/news/spring-break-party-coronavirus-pandemic-miami-beaches/>.

59. For example, the COVID-19 Mobility Data Network is "a network of infectious disease epidemiologists at universities around the world working with technology companies to use aggregated mobility data to support the COVID-19 response." COVID-19 MOBILITY DATA NETWORK, <https://www.covid19mobility.org> (last visited Aug. 14, 2020). Its "goal is to provide daily updates to decision-makers at the state and local levels on how well social distancing interventions are working, using anonymized, aggregated data sets from mobile devices, along with analytic support for interpretation." *Id.*

60. See, e.g., Agam Shah, *Hackathons Target Coronavirus*, WALL ST. J. (Apr. 9, 2020), <https://www.wsj.com/articles/hackathons-target-coronavirus-11586424603>; *Our Story*, CORONAVIRUS HACKATHON, <https://hackathon.common.vc/ourstory> (last visited Aug. 14, 2020).

61. Shah, *supra* note 60.

62. *Id.*



was “a location-based mobile application to track traffic in grocery stores for effective social-distancing practices.”<sup>63</sup>

The actions and behaviors of individual members of society are critical to a speedy return to pre-COVID-19 normalcy because their cooperation is essential to the implementation of government social distancing and quarantine policies. For consent-based approaches such as the German GeoHealth app<sup>64</sup> and Massachusetts Institute of Technology's Private Kit: Safe Paths app,<sup>65</sup> individuals have effectively become Big Brother's willing subjects by providing consent and volunteering to donate data to the apps, although the extent of voluntariness and consent is contentious.<sup>66</sup> After all, “paradoxically, privacy is a public value” that “begins with personal choices about what individuals share, and with whom.”<sup>67</sup> As Harvard Law School profes-

63. *Id.*; see also Koper & Busvine, *supra* note 33.

64. Servick, *supra* note 40. For GeoHealth, “that data would then be anonymized and stored on a central server.” *Id.* “A data analytics platform designed by the software company Ubilabs would compare users' movement history to that of infected people, and the GeoHealth app would show them color-coded alerts based on how recently they may have encountered the virus.” *Id.* Through “a combination of GPS tracking, wireless network data, and connections between phones via Bluetooth,” the GeoHealth app can “detect when a phone comes within 1 meter of another phone.” *Id.*

65. *Id.* (describing how a person who tests positive for COVID-19 could use the app to “donate” or share his or her location history). With regards to MIT's Private Kit: Safe Paths, the app was developed as a team project among MIT, Facebook, Mayo Clinic, and other organizations. Casey Ross, *After 9/11, we gave up privacy for security. Will we make the same trade-off after Covid-19?*, STAT (Apr. 8, 2020), <https://www.statnews.com/2020/04/08/coronavirus-will-we-give-up-privacy-for-security/>. MIT's app “collects information using a technique known as differential privacy, a way of publicly sharing information gleaned from a data set without identifying the individuals whose activities are represented.” *Id.* The MIT app constitutes an example of “human-centered tech,” as well as perhaps an illustration of “privacy by design.” Margaret Bourdeaux et al., *How human-centered tech can beat COVID-19 through contact tracing*, THE HILL (Apr. 21, 2020), <https://thehill.com/opinion/technology/493648-how-human-centered-technology-can-beat-covid-19-through-contact-tracing>; Lee A. Bygrave, *Data Protection by Design and by Default: Deciphering the EU's Legislative Requirements*, 4 OSLO L. REV. 106 (2017).

66. See, e.g., Saïdi, *supra* note 29. One reason why one may argue that some of the perceived voluntariness is not purely voluntary may be attributed to the immense level of shame that some COVID-19 carriers have experienced. According to Lee Su-young, a psychiatrist at Myongji Hospital in South Korea, some coronavirus “[patients] were more afraid of being blamed than dying of the virus.” RASKAR ET AL., *supra* note 14, at 2 (alteration in original). Under such circumstances, it is natural that those who test positive for COVID-19 may “volunteer” to report this information as soon as possible, so that by acting as responsible citizens, they may be blamed to a lesser extent if they infect others in the community. *But see* Doug Fraser, *Experts: Coronavirus Pandemic Tests Limits of Privacy Laws*, GOV'T. TECH. (Mar. 24, 2020), <https://www.govtech.com/health/Experts-Coronavirus-Pandemic-Tests-Limits-of-Privacy-Laws.html> (“Part of the privacy concern is that people could face discrimination, isolation, even retribution if their identity were revealed. . . . [I]t makes it less likely that those who are infected or suspect they are will come forward for testing.”).

67. Laurence H. Tribe, *Digital coronavirus data tracing would barter away American liberties: Laurence Tribe*, USA TODAY (Apr. 21, 2020), <https://www.usatoday.com/>

sor Laurence H. Tribe stated, “the cumulative impact of those judgments far exceeds the sum of their parts.”<sup>68</sup>

### III. ZOOMING IN ON DIGITAL PRIVACY LAW IN THE TIME OF CORONAVIRUS

Digital privacy law is a constantly-evolving field. The different ways in which Big Brother surveils the masses in an effort to guard them against COVID-19 raises a myriad of legal questions. While current laws generally allow for a public health crisis/emergency exception to otherwise-stricter digital privacy laws, there are still multiple valid legal concerns, including consent, expiration,<sup>69</sup> transparency, and Due Process.<sup>70</sup> Additionally, “[p]rivacy intrusions should be necessary and proportionate,” while data collection should be based on science instead of bias.<sup>71</sup> This Section starts with a brief overview of some key laws that govern digital privacy in the public health context in Europe and the United States that have substantial ramifications in other regions, and then analyzes each of the dominant digital surveillance methods identified in Section II of this Essay: (1) modeling using aggregated data and (2) location tracking using cellphone location data, which includes quarantine enforcement and contact tracing.<sup>72</sup>

#### A. AN OVERVIEW OF THE LEGAL LANDSCAPE RELEVANT TO THE COVID-19 CONTEXT

##### 1. *The European Approach to Digital Privacy Governance*

The global governance of digital privacy has, until quite recently, been a “near anarchy.”<sup>73</sup> However, Europe’s General Data Protection

[story/opinion/todaysdebate/2020/04/21/coronavirus-data-tracing-barter-away-liberties-laurence-tribe-editorials-debates/3000576001/](https://www.creighton.edu/story/opinion/todaysdebate/2020/04/21/coronavirus-data-tracing-barter-away-liberties-laurence-tribe-editorials-debates/3000576001/).

68. *Id.*

69. Under the General Data Protection Regulation (“GDPR”), consent to processing sensitive personal data should be freely given, and there are far-ranging constraints on its use; i.e., data collected over the course of COVID-19 should not be stored indefinitely or used for another purpose. *See* Council Regulation 2016/679, 2016 O.J. (L 119) 1.

70. *Accord* Effy Vayena, *Comparative Digital Privacy and COVID-19*, Presentation at Harvard Law School (Mar. 24, 2020).

71. *Id.*

72. As the field of digital privacy law is greatly complex and involves significant differences across nations, this Essay does not attempt to be comprehensive in its analysis, but instead focuses on the dominant models in Europe and the United States. Due to the two regions’ prominent role and leadership in the global economy, I believe this approach is justified. *See, e.g.,* Cordova & Botero Arcila, *supra* note 34 (Latin American countries, such as Mexico, Colombia, and Brazil, have followed European countries’ models in terms of digital privacy laws to a great extent).

73. Brian Yost, Note, *Enforcing Digital Privacy*, 33 HARV. J. LAW TECH. 311, 311 (2019).

Regulation (“GDPR”), which took effect in May 2018, terminated the previous piecemeal approach, extending European Union jurisdiction far beyond European Union countries.<sup>74</sup>

As a general matter, under Articles 7 (“[r]espect for private and family life”) and 8 (“[p]rotection of personal data”) of the Charter of Fundamental Rights of the European Union (“CFR”), “personal data must be processed on the basis of ‘consent.’”<sup>75</sup> The GDPR offers further specificity, requiring explicit and informed consent to the processing of personal health data.<sup>76</sup>

More specifically, in the fight against the coronavirus pandemic, Andrea Jelinek, who serves as Chair of the European Data Protection Board (“EDPB”), opined that whilst data protection rules such as the GDPR “do not hinder measures taken,” “even in these exceptional times, the data controller must ensure the protection of the personal data of the data subjects.”<sup>77</sup> The EDPB elaborated in a press release that:

*The GDPR is a broad legislation and also provides for the rules to apply to the processing of personal data in a context such as the one relating to COVID-19. Indeed, the GDPR provides for the legal grounds to enable the employers and the competent public health authorities to process personal data in the context of epidemics, without the need to obtain the consent of the data subject. This applies[,] for instance[,] when the processing of personal data is necessary for the employers for reasons of public interest in the area of public health or to protect vital interests ([Articles] 6 and 9 of the GDPR) or to comply with another legal obligation.*

*For the processing of electronic communication data, such as mobile location data, additional rules apply. The national laws implementing the ePrivacy Directive provide for the principle that the location data can only be used by the*

74. Pam Greenberg, *A Higher Profile for Data Privacy*, 27 LEGISBRIEF 1, 1 (2019) (“Any global business that sells to or has European Union customers is subject to the GDPR, regardless of where that business is based. The GDPR sets forth rules about how companies treat the personal data of EU citizens, even those purchasing U.S. products or services or living in the U.S.”).

75. The European Parliament Council and the Commission, *Charter of Fundamental Rights of the European Union*, 2000 O.J. (C 364) 1 (EC), [https://www.europarl.europa.eu/charter/pdf/text\\_en.pdf](https://www.europarl.europa.eu/charter/pdf/text_en.pdf); Hannah van Kolschooten, *EU Coordination of Serious Cross-Border Threats to Health: The Implications for Protection of Informed Consent in National Pandemic Policies*, 10 EUROPEAN J. RISK REG. 635, 639-40 (2019).

76. Council Regulation 2016/679, 2016 O.J. (L 119) 1.

77. European Data Protection Board Press Release, Statement of the EDPB Chair on the processing of personal data in the context of the COVID-19 outbreak (Mar. 16, 2020), [https://edpb.europa.eu/sites/edpb/files/files/news/edpb\\_covid-19\\_20200316\\_press\\_statement\\_en.pdf](https://edpb.europa.eu/sites/edpb/files/files/news/edpb_covid-19_20200316_press_statement_en.pdf).

operator when they are made *anonymous*, or with the *consent* of the individuals.<sup>78</sup>

During the 2013-2016 outbreak of Ebola, the European Union had introduced several countermeasures against the epidemic, including recommendations on “contact listing, contact tracing, and monitoring of possibly exposed persons.”<sup>79</sup> However, at the E.U. level, law and policy do not contain specific safeguards on ways “to properly balance the protection of individual fundamental rights[,] such as the right to informed consent with the protection of public health.”<sup>80</sup>

## 2. *The United States Approach to Digital Privacy Governance*

In the United States, there is an absence of a federal privacy law, which, according to Omer Tene, who serves as vice president of the International Association of Privacy Professionals, creates “great uncertainty and disarray around the scope of and guardrails around legitimate uses of personal information.”<sup>81</sup>

A notable law that was recently passed is California’s Consumer Privacy Act (“CCPA”), which “would constitute one of the broadest on-line privacy regulations in the U.S., affecting businesses across the country.”<sup>82</sup> Similar to that of “the GDPR, the CCPA’s impact is expected to be global, given California’s status as the fifth largest global economy.”<sup>83</sup> As an overview, the CCPA:

[i.] Allows consumers the right to request a business to disclose the categories and specific pieces of personal informa-

78. *Id.* (emphases added). More specifically, data processing in the context of adopting necessary measures to combat COVID-19 and limit its speed has different legal bases under the GDPR. These include Article 6(1)(c), (d) and (e), pursuant to which the processing is necessary i) “for compliance with a legal obligation to which the controller is subject”; ii) “to protect the vital interests of the data subject or of another natural person”; or iii) “for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.” Further, public authorities may process sensitive personal data based on Article 9(2)(b), (e), (h) and (i), where the data processing is either necessary i) for the purposes of carrying out obligations derived from “employment and social security and social protection law”; ii) “for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee”; iii) “for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health”; or iv) where the processing relates to personal data which is “manifestly made public by the data subject.” Council Regulation 2016/679, 2016 O.J. (L 119) 1.

79. van Kolschooten, *supra* note 75, at 642; see also *The EU’s response to the Ebola outbreak in West Africa*, EUROPEAN COMM’N (Oct. 27, 2014), [https://ec.europa.eu/commission/presscorner/detail/en/MEMO\\_14\\_599](https://ec.europa.eu/commission/presscorner/detail/en/MEMO_14_599).

80. van Kolschooten, *supra* note 75, at 643.

81. Ng, *supra* note 18.

82. Greenberg, *supra* note 74.

83. Alice Marini et al., *Comparing Privacy Laws: GDPR v. CCPA*, DATA GUIDANCE & FUTURE OF PRIVACY FORUM, Dec. 2019, at 1, 5.

tion that have been collected about them, as well as the source of that information and the purpose for collecting it.

[ii.] Gives consumers the right to request a business' sale<sup>84</sup> of their personal information without being discriminated against for opting out.

[iii.] Allows consumers to ask businesses to delete personal information that has been collected from them.

[iv.] Provides for enforcement by the state attorney general and for a private right of action in certain cases of unauthorized access, theft[,] or disclosure of a consumer's personal information.<sup>85</sup>

The CCPA, like the GDPR, defines "personal information" and "personal data" broadly.<sup>86</sup> Under the CCPA, any information that is "reasonably capable of being associated with, or could reasonably be linked with" an individual device or household constitutes "personal information," and this definition specifically includes "geolocation data."<sup>87</sup>

Unlike the GDPR, which "does not exclude specific categories of personal data from its scope of application," "[t]he CCPA specifically excludes from its scope of application collecting and sharing of [certain] categories of personal information," including, notably for our

84. The CCPA imposes notice and opt-out requirements on entities that "sell" personal information, where the word "sell" is defined to include disseminating, disclosing, or otherwise "making available" personal information to for-profit third parties in exchange for "monetary or other valuable consideration." Aaron Burstein & Alysa Zeltzer Hutnik, *Data Privacy Considerations for Coronavirus Data Tools*, AD LAW ACCESS (Mar. 28, 2020), <https://www.adlawaccess.com/2020/03/articles/data-privacy-considerations-for-coronavirus-data-tools/>. While not a "sale," sharing personal information with a government authority "would qualify as a disclosure under CCPA and would need to be accurately disclosed in the privacy policy." *Id.*

85. *Id.* (internal citation added); see also California Consumer Privacy Act of 2018, CAL. CIV. CODE §§ 1798.100-1798.198 (West 2018). But see George P. Slefo, *Coronavirus may delay enforcement of California's consumer privacy law*, ADAGE (Mar. 19, 2020), <https://adage.com/article/digital/coronavirus-may-delay-enforcement-californias-consumer-privacy-law/2245291> ("Multiple trade bodies sent the California attorney general a letter on Thursday asking the Golden State to push back its enforcement of the Consumer Privacy Protection Act from July of this year to January 2021.").

86. Burstein & Zeltzer Hutnik, *supra* note 84.

87. California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.140(b)(o) (2018). This is similar to the GDPR, where:

personal data is defined as "any information relating to an identified or identifiable natural person ("data subject"); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person."

Marini et al., *supra* note 83, at 13 (quoting GDPR Articles 4(1), 9, Recitals 26-30). "The GDPR also explains in its recitals that in order to determine whether a person is identifiable, 'account should be taken of all the means reasonably likely to be used, such as singling out, either by the controller or by another person' to identify the individual directly or indirectly." *Id.*

purposes, “medical information and protected health information.”<sup>88</sup> Instead, one’s “medical information and protected health information [ ] are covered by the Confidentiality of Medical Information Act and the Health Insurance Portability and Accountability Act” (“HIPAA”).<sup>89</sup>

The HIPAA—the United States’ primary health privacy law—punishes any covered entity that knowingly discloses another person’s “individually identifiable health information.”<sup>90</sup> The language of the HIPAA is sufficiently broad to permit disclosures if one acts “reasonably and in good faith that the disclosure is necessary and to someone who could reasonably lessen the threat.”<sup>91</sup> Specific to the public health crisis context, the HIPAA includes language that allows “federal officials to waive privacy rules”; “officials have already exercised those provisions to allow for greater sharing of patient medical records for public health purposes and to support increased access to telemedicine services.”<sup>92</sup> However, as this law was passed in 1996, “when health data were primarily in the hands of hospitals, physician offices, and insurance companies—before Apple, Facebook, Amazon, and Google became so pervasive in American life,” it is arguably outdated to a certain degree.<sup>93</sup> This may pose “threats to privacy and individual freedoms that lawmakers could not have contemplated at the time.”<sup>94</sup>

## B. APPLYING PRIVACY-RELATED LEGAL CONCERNS TO BIG BROTHER’S DIGITAL SURVEILLANCE STRATEGIES

### 1. *Flow Modeling Using Aggregated, Anonymized Data*

Among the predominant ways in which Big Brother has used digital technologies and data to surveil his subjects, the use of aggregated and anonymized data is the least controversial vis-à-vis concerns raised by digital privacy law. As the EDPB shared in its press release statement, “public authorities should first aim for the processing of location data in an anonymous way (i.e., processing data aggregated in a way that it cannot be reversed to personal data)” “to generate

88. Marini et al., *supra* note 83, at 11.

89. *Id.*

90. Ross, *supra* note 65; *see also* 42 U.S.C. § 1320d-6 (2012).

91. Fraser, *supra* note 66.

92. Ross, *supra* note 65.

93. *Id.*; *supra* Section I (discussing possible social changes in the COVID-19 outbreak context, where we are seeing a shift from traditional medical surveillance regimes to one that is driven by the big data revolution).

94. Ross, *supra* note 65.

reports on the concentration of mobile devices at a certain location ('cartography')."<sup>95</sup>

Buckee and her co-authors have advocated against the use of individual data and instead recommend the use of aggregated and anonymized data, believing that there have already been successful precedents in Asia and Europe where governments have managed to juggle the privacy-public health trade-off in aggregating COVID-19 data.<sup>96</sup> Deutsche Telekom, for example, "has shared aggregated data with Germany to help measure social distancing, in compliance with EU laws."<sup>97</sup> According to Buckee and her co-authors, "[t]he more such analyses are initiated and concluded openly, and in accordance with the law, the greater will be the public trust and our ability to produce reliable analytic insights."<sup>98</sup>

However, one still has reasons to remain cautious. As the Electronic Frontier Foundation ("EFF") has warned, "there's a difference between 'aggregated' location data and 'anonymized' or 'deidentified' location data."<sup>99</sup> Information about a person's location is often sufficient by itself to re-identify individual location data, for "[s]omeone who travels frequently between a given office building and a single family home is probably unique in those habits and therefore identifiable from other readily identifiable sources."<sup>100</sup> Indeed, study shows that researchers could uniquely characterize fifty percent of the population using only two randomly selected time and location data points.<sup>101</sup> Despite this, the EFF has also found aggregation to preserve individual privacy to be potentially useful, while it still considers consent to play an important role despite the anonymous and aggregated form of data collection method.<sup>102</sup>

95. European Data Protection Board Press Release, *supra* note 77.

96. Buckee et al., *supra* note 50; see, e.g., Shengjie Lai et al., *Assessing spread risk of Wuhan novel coronavirus within and beyond China, January-April 2020: a travel network-based modelling study*, MEDRxIV: THE PREPRINT SERVER FOR HEALTH SCIENCES (Mar. 9, 2020), <https://www.medrxiv.org/content/10.1101/2020.02.04.20020479v2.full.pdfhtml>; Elvira Pollina & Douglas Busvine, *European mobile operators share data for coronavirus fight*, REUTERS (Mar. 18, 2020), <https://www.reuters.com/article/us-health-coronavirus-europe-telecoms/european-mobile-operators-share-data-for-coronavirus-fight-idUSKBN2152C2>.

97. Buckee et al., *supra* note 50.

98. *Id.*

99. Jacob Hoffman-Andrews & Andrew Crocker, *How to Protect Privacy When Aggregating Location Data to Fight COVID-19*, ELECTRONIC FRONTIER FOUND. (Apr. 6, 2020), <https://www.eff.org/deeplinks/2020/04/how-protect-privacy-when-aggregating-location-data-fight-covid-19>.

100. *Id.*

101. Yves-Alexandre de Montjoye et al., *Unique in the Crowd: The privacy bounds of human mobility*, SCI. REPORTS (Mar. 25, 2013), <https://www.nature.com/articles/srep01376>.

102. See Hoffman-Andrews & Crocker, *supra* note 99.

Overall, this data aggregation method, based on our analysis of the GDPR in Section III(A)(1), is generally compliant with European privacy laws. Meanwhile, in the U.S., the CCPA, HIPAA, and other privacy laws also offer “examples of what safeguards are expected to reasonably treat data as anonymized, and employing such standards can help avoid unnecessary privacy mishaps despite well-intentioned efforts.”<sup>103</sup> These specificities will hopefully alleviate some of the EFF’s concerns. In any case, moving forward, different authorities should, as best practice, keep in mind the relevant consent-based considerations even in the context of aggregated data.

## 2. *The Cellphone Tracking Methods: Quarantine Enforcement and Contact Tracing*<sup>104</sup>

Cellphone tracking methods, including quarantine enforcement and contact tracing, are more worrying with regards to privacy concerns. If flow modeling using aggregated data poses low civil liberties risk, quarantine enforcement would rate as “medium” and contact tracing would rate as “high” in terms of the level of risk these methods pose to cellphone users’ civil liberties and privacy rights.<sup>105</sup> Although at a glance, the unprecedented crisis caused by the COVID-19 outbreak around the world appears to easily qualify under the exemptions of both the GDPR and HIPAA, as well as similar laws from other regions,<sup>106</sup> in the absence of anonymity,<sup>107</sup> many legal challenges remain, including issues of consent, expiration/deletion, transparency, proportionality, and necessity.<sup>108</sup>

Per Article 15 of Europe’s ePrivacy Directive, when it is not plausible to solely process anonymous data, member states may introduce “legislative measures pursuing national security and public secur-

103. Burstein & Zeltzer Hutnik, *supra* note 84.

104. Because of the nature of my legal analysis, I find it easier to group quarantine enforcement and contact tracing in the same sub-sub-section because laws tend to focus on the similarities between them as both are based on cellphone location data tracking.

105. *Countries are Using Apps and Data Networks to Keep Tabs on the Pandemic*, *supra* note 47.

106. *See, e.g.*, Cordova & Botero Arcila, *supra* note 34.

107. Granted, some contact tracing apps under the category of “human-centered tech” arguably does preserve anonymity through putting to practice “privacy by design” principles. *See* Ross, *supra* note 66; Bourdeaux et al., *supra* note 65. However, as much of that type of technology is still a work in progress, this Essay focuses more on the already-widely adopted methods that governments have used.

108. *See supra* Section III(A). This Essay will not address expiration/deletion issues in detail, because as we are still very much in the middle of the pandemic, there has been relatively scarce focus on this longer-term issue, although some apps, including TraceTogether and MIT’s app, pride themselves in forward-looking considerations such as the erasure of data after the end of COVID-19. *See, e.g.*, *TraceTogether Privacy Safeguards*, GOV’T OF SING. (last updated June 1, 2020), <https://www.tracetgether.gov.sg/common/privacystatement>; RASKAR ET AL., *supra* note 14, at 12.



ity.”<sup>109</sup> This emergency legislation, however, comes with the caveat that those measures must constitute “a necessary, appropriate, and proportionate measure within a democratic society.”<sup>110</sup> Germany, which has some of Europe’s most stringent data privacy protections, allows the government to “compel a technology company to share location data on an individual in the interest of national security.”<sup>111</sup> However, according to Sebastian Golla, a data protection law scholar at the Johannes Gutenberg University of Mainz, “indiscriminate mass tracking of individuals lacks a legal basis” under German laws: to track cell-phone users who have or might carry “coronavirus, Germany and other European countries would need to pass laws specifying how data collection would be restricted to a certain population, for a certain time, and for a certain purpose.”<sup>112</sup>

Further reflecting on the general legal principles of proportionality, necessity, and appropriateness in the COVID-19 context, a number of experts have voiced skepticism regarding the effectiveness of location tracking altogether. Some advise policymakers to exercise caution with these tools, partially because “locational data is not very accurate,” as “it can convey that two people a few meters apart crossed paths, but it won’t distinguish if they were on the same bus or in two separate cars at a stoplight.”<sup>113</sup> Ross Anderson, a professor of security engineering at the computer laboratory at the University of Cambridge, has also raised at least seven concerns about contact tracing, calling into question the extent to which it is as privacy-complying as others may consider it to be.<sup>114</sup> These critiques include this technique’s lack of anonymity, the authorities’ access to other types of data such as public transport ticketing and credit-card records,<sup>115</sup> the vulnerability of such smartphone apps to trolling or other bad-inten-

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109. European Data Protection Board Press Release, *supra* note 77.

110. *Id.*

111. Servick, *supra* note 40.

112. *Id.* In reality, some laws satisfying these criteria are in the making: for instance, in late March, the German Health Ministry had drafted changes to the Infection Protection Act to allow the tracking of individuals who were in contact with those infected with the novel coronavirus. *Id.*; see also *COVID-19: The German Infectious Diseases Protection Act – What Makes You Stay at Home*, GIBSON DUNN (Mar. 20, 2020), <https://www.gibsondunn.com/covid-19-german-infectious-diseases-protection-act-what-makes-you-stay-at-home/>.

113. Cordova & Botero Arcila, *supra* note 34.

114. Ross Anderson, *Contact Tracing in the Real World*, LIGHT BLUE TOUCHPAPER: SECURITY RSCH., COMPUTER LAB., UNIV. OF CAMBRIDGE (Apr. 12, 2020), <https://www.lightbluetouchpaper.org/2020/04/12/contact-tracing-in-the-real-world/>.

115. According to Anderson, this accounts for how “a contact tracer in Singapore is able to phone you and tell you that the taxi driver who took you yesterday from Orchard Road to Raffles has reported sick, so please put on a mask right now and go straight home.” *Id.*

tioned acts from hackers,<sup>116</sup> and the outdated nature of some of the technologies involved due to the fact that some of the Internet infrastructure from thirty years ago are difficult to update.<sup>117</sup> Given the relative ease at which such technologies can be exploited to “expand mass surveillance, limit individual freedoms and expose the most private details about individuals,”<sup>118</sup> skepticisms and criticisms such as these are valid in casting doubt on the proportionality, necessity, and appropriateness of quarantine enforcement and contact tracing using cellphone tracking technologies.

Partially, the answer would depend on the type of data that is collected from these approaches. Under the GDPR, data can be either related to the health of the data subject or not; the former would be a special category of personal data subject to stricter regulation.<sup>119</sup> While personal data such as one’s travel history to a country with a high rate of COVID-19 cases or data that one’s relatives or colleagues have been infected by COVID-19 would not constitute this special category of data, whether the data subject has recently received health-care services does fall within this special category of personal data.<sup>120</sup>

In terms of legal concerns about consent and transparency, we may return to the Hong Kong quarantine enforcement example.<sup>121</sup> Despite that authorities claimed to have obtained consent from individuals under quarantine before tracing them,<sup>122</sup> in practice, it is “un-

116. See RASKAR ET AL., *supra* note 14, at 9 (“In South Korea, fraudsters quickly began blackmailing local merchants and demanding ransoms to not (falsely) report themselves as sick and having visited the business. Additionally, bad actors may force individuals to provide their location data for purposes other than disease containment, such as for immigration or police purposes.”). Indeed, there are many forms of fraud involved with these digital technologies that skilled fraudsters can exploit. Unfortunately, bad actors can be quite creative.

117. Anderson, *supra* note 114.

118. RASKAR ET AL., *supra* note 14, at 2.

119. See Council Regulation 2016/679, 2016 O.J. (L 119) 1.

120. Dan Cooper & Spyridon Goulielmos, *Greek Data Protection Authority Issues Guidelines on Data Protection and Coronavirus*, INSIDE PRIVACY (Mar. 30, 2020), <https://www.insideprivacy.com/covid-19/greek-data-protection-authority-issues-guidelines-on-data-protection-and-coronavirus/>. Cooper and Goulielmos’s article uses Greece as an illustration:

Pursuant to Article 2(1) of the GDPR and Article 2 of Law 4624/2019” of Greece (which implemented the GDPR), “the legal framework for the processing of personal data applies solely in cases where personal data is processed wholly or partly by automated means or where it otherwise forms part of a filing system or is intended to form part of a filing system. As a result, although information provided orally concerning – for example – whether a data subject has been infected by COVID-19 or whether one’s body temperature is higher than normal does not fall within the scope of the GDPR, where [sic] it not recorded.

*Id.*

121. *Supra* Section II(A).

122. See, e.g., *Privacy Commissioner Responds to Privacy Issues Arising from Mandatory Quarantine Measures*, PRIVACY COMM’R FOR PERSONAL DATA, HONG KONG,

clear *how* that consent was obtained.”<sup>123</sup> For instance, passenger Declan Chan, whom Saiidi interviewed, “filled out a form which suggested passengers had the option of sharing their location with the government via messaging platforms, like WeChat and WhatsApp, or by agreeing to wearing an electronic wristband.”<sup>124</sup> However, Chan “soon learned the messaging apps were not an option and all passengers must wear the wristbands.”<sup>125</sup> In other apps, it is also difficult to obtain “real” consent, because signing up to these apps often involves reading and consenting to “incomprehensible” language that a non-lawyer can find daunting, and consider to be a “lack of real choice.”<sup>126</sup>

Even if consent was truly obtained to everyone’s satisfaction, still, others question the sufficiency of consent. Cordova and Botero Arcila, for instance, commented that “consent is an insufficient protection mechanism” because “[o]nce a citizen gives consent,” it would be challenging “for individuals to exercise control about how their information is being used.”<sup>127</sup>

All in all, despite the surface-level legal compliance of cellphone location tracking techniques in quarantine enforcement and contact tracing, a more nuanced legal analysis finds that existing strategies may not hold up to closer examinations. The hope would be that “citizen-centric, privacy-first solutions” that are “open source, secure, and decentralized,” such as MIT’s Private Kit: Safe Paths, will truly “represent the next generation of tools for disease containment in an epidemic or a pandemic,” as they claim themselves to be.<sup>128</sup>

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(Feb. 12, 2020), [https://www.pcpd.org.hk/english/media/media\\_statements/press\\_20200211.html](https://www.pcpd.org.hk/english/media/media_statements/press_20200211.html). Among other key points, the Commissioner highlights that the collection of location data of persons under quarantine is “for a lawful purpose . . . for the interest of the persons under quarantine and the general public” alike. *Id.* Regarding consent, the Commissioner underscores that:

[b]efore the quarantine measures were implemented, the authority has obtained *consent* from the persons under quarantine *in accordance with the law* for access to their relevant personal data, including the situation of the quarantine premises, and for the usage of commonly-used mobile applications and imaging equipment. *These functions can only be activated by the persons under quarantine, who have a free choice* as to [under] what circumstances these functions would be activated, and whether the requisite information would be provided via other means.

*Id.* (emphases added). However, the government did not specify *how* consent was obtained.

123. Ng, *supra* note 18 (emphasis added).

124. Saiidi, *supra* note 29.

125. *Id.*

126. RASKAR ET AL., *supra* note 14, at 8.

127. Cordova & Botero Arcila, *supra* note 34.

128. RASKAR ET AL., *supra* note 14, at 3. It is at least reassuring that designers of these newer apps have had the legal principles in mind from the very get-go—a good illustration of “privacy by design.” See Ross, *supra* note 65.

#### IV. COUNTERING THE NOVEL CORONAVIRUS, AND BEYOND: SYNTHESIS AND LOOKING AHEAD

As Winston Churchill once said, “never waste a good crisis.”<sup>129</sup> The novel coronavirus appears to have forcefully put an originally vibrant, inter-connected world on halt. It is hardly imaginable that merely months ago, one could easily fly anywhere for business or leisure, and now, countries around the world are beginning to see lockdowns as a new normal of sorts. As we unwillingly confront ourselves with what promises to be an unprecedented global economic crisis that would likely rival the Great Depression,<sup>130</sup> times of crises and uncertainty such as the one we live in at the moment calls for optimism and introspection. This includes thoughtful research and reform on current laws and policies, including the ever-evolving field of digital privacy law. Only through such reflections can society move forward and prepare for any future crises that pose new challenges to the human race, especially as technology becomes an ever-more-omnipotent force that we could harness to counter new challenges.

As of April 2020, in response to the outbreak of COVID-19, twenty-three countries have used contact tracing apps and twenty-two countries have actively used alternative digital tracking measures.<sup>131</sup> As Section II shows, Big Brothers from different jurisdictions have used digital technology and data at an unprecedented scale. This demonstrates the way society has moved past traditional medical surveillance to digital-based surveillance featuring public and private sector players alike.<sup>132</sup> While different digital privacy laws have been overall generous in terms of their public health crisis exceptions, such

129. Andrew Low, *Telling the truth about SME life today*, REAL BUS. (Feb. 25, 2016), <https://realbusiness.co.uk/as-said-by-winston-churchill-never-waste-a-good-crisis/>. But see Jerry Bellune, *NEVER LET A CRISIS GO TO WASTE*, LEXINGTON CTY. CHRONICLE (Mar. 26, 2020), <https://www.lexingtonchronicle.com/business/never-let-crisis-go-waste> (attributing a similar version of the quote to Rahm Emanuel); Fred Shapiro, *Quotes Uncovered: Who Said No Crisis Should Go to Waste?*, FREAKONOMICS (2009), <https://freakonomics.com/2009/08/13/quotes-uncovered-who-said-no-crisis-should-go-to-waste/> (noting the expression has been used in the context of medical emergencies by M.F. Weiner).

130. See, e.g., Natalie Huet & Sasha Vakulina, *IMF: Coronavirus pandemic will cause worst economic slump since Great Depression*, EURONEWS (Apr. 3, 2020), <https://www.euronews.com/2020/04/09/imf-coronavirus-pandemic-will-cause-worst-economic-slump-since-great-depression>; Peter S. Goodman, *Why the Global Recession Could Last a Long Time*, N.Y. TIMES (Apr. 1, 2020), <https://www.nytimes.com/2020/04/01/business/economy/coronavirus-recession.html>.

131. Samuel Woodhams, *COVID-19 Digital Rights Tracker*, TOP10VPN (Mar. 20, 2020), <https://www.top10vpn.com/news/surveillance/covid-19-digital-rights-tracker/> (last updated July 3, 2020). By September 2020, the number of countries using contact tracing apps increased to 50, and the number of countries using alternative digital tracking measures rose to 35. *Id.*

132. See *supra* Sections I and II.

exceptions should constitute no legal loophole for any unnecessary or disproportional intrusion into residents' private lives and personal data.

Many open questions remain: how can governments and private sector cooperators further encourage individuals to download consent-based digital tools at a higher rate?<sup>133</sup> What actions should nations take to assist particularly vulnerable and marginalized groups—such as the homeless, the poor, the elderly, and rural populations, who often lack the technological means of participating in digital governance during COVID-19 that ultimately serves to benefit individuals through information transparency?<sup>134</sup> How can different jurisdictions collaborate together, putting aside non-altruistic political incentives, for the greater good? In what ways can authorities keep private sector actors and themselves accountable for the deletion of private data after this public health crisis ceases?<sup>135</sup> How can authorities further reform privacy laws and policies beyond the immediate duration of the novel coronavirus pandemic?<sup>136</sup>

These call for further studies and discussion much beyond the end of the COVID-19 pandemic. While it is heartening to note many cross-disciplinary collaborations are already underway with an intense fo-

133. See, e.g., Kai-Fu Lee (@kaifulee), TWITTER (Apr. 10, 2020, 7:46 PM), <https://twitter.com/kaifulee/status/1248774479309766656?s=20> (“Opt-in contact tracing won’t work. If 10% people opt-in, 50% always-on bluetooth, 40% people infected voluntarily report, then only  $10\% \times 10\% \times 50\% \times 40\% = 0.2\%$  pairwise contacts get reported.”). Lee is an AI entrepreneur and the former president of Google China. According to experts advising the United Kingdom National Health Service (“NHS”), for a contact-tracing app to help stop the coronavirus pandemic, 80% of current smartphone owners would need to use it; however, as of mid-April, only 12% of the Singaporean population downloaded TraceTogther. See Leo Kelion, *Coronavirus: NHS contact tracing app to target 80% of smartphone users*, BBC (Apr. 16, 2020), <https://www.bbc.com/news/technology-52294896>.

134. For instance, according to the Pew Research Center, in India—the second most populous country in the world comprising approximately 17.7% of the global population—only 24% of all adults report owning a smartphone. *India Population 2020 (Live)*, WORLD POPULATION REV., <https://worldpopulationreview.com/countries/india-population/> (last viewed Aug. 14, 2020); Laura Silver, *Smartphone Ownership Is Growing Rapidly Around the World, but Not Always Equally*, PEW RSCH. CTR. (Feb. 5, 2019), <https://www.pewresearch.org/global/2019/02/05/smartphone-ownership-is-growing-rapidly-around-the-world-but-not-always-equally/>. Meanwhile, in Latin America, “approximately 66% of the population has a smartphone and about 52% has access to mobile Internet.” Cordova & Botero Arcila, *supra* note 34.

135. See generally Cordova & Botero Arcila, *supra* note 34 (raising five suggestions for lawmakers and policymakers, including: a data minimization policy, limitation of the amount of time the data can be stored to only cover the duration of the COVID-19 pandemic, as well as transparency with the “public and open access to the rules[] to allow monitoring and evaluation by the courts and civil society”).

136. Some legal scholars have already been working on this matter. See, e.g., Bill Proposal, Lilian Edwards et al., *The Coronavirus (Safeguards) Bill 2020: Proposed Protections for Digital Interventions and in Relation to Immunity Certificates* (May 6, 2020).

cus on unresolved questions posed by COVID-19,<sup>137</sup> it is a critical goal of this Essay to further encourage such explorations, which will affect global societies and individuals at large, as well as generations to come.

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137. See, e.g., Allen et al., *supra* note 9; Buckee et al., *supra* note 50.

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