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Front Matter

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PREFACE

Welcome to Volume 49, Issue 2 of the *Golden Gate University Law Review*. The *Golden Gate University Law Review* is a student-run organization that publishes two issues each academic year: the *Ninth Circuit Survey* and the *Comments Edition*. The *Ninth Circuit Survey* issue features student-written Case Notes and Case Summaries focused exclusively on decisions of the United States Court of Appeals for the Ninth Circuit. The *Comments Edition* is a general interest edition, comprised of student-written Comments and outside Articles written by practicing attorneys, judges, and academics. The *Comments Edition* provides a forum for students and legal professionals to explore deeply relevant and contemporary topics in the broader legal landscape.

Since its establishment in 1969, *Golden Gate University Law Review* has been dedicated to publishing scholarly writing on a wide range of legal topics that contributes to the broader legal discourse on a state, national, and international level. This year's *Comments Edition* continues this tradition. In the recent years leading up to the publication of this issue, America has experienced some of the most controversial legal conversations in our nation's history, and this trying period has greatly influenced the development and focus of this *Comments Edition*.

The articles within this issue touch on many of the cornerstones present in the majority of the nation's current legal debates: the scope and limitations of the powers of the legislative, executive, and judicial branches of state and federal government. This includes analysis of the legislature's power to enact law and analysis of such law, the judiciary's power of statutory interpretation, the federal judiciary selection and confirmation process, and the presidential power to declare national monuments. Each focusing on a particularized legal topic, the articles evaluate the strengths and weaknesses of existing law and practice, and propose changes to ensure the fair and just administration of the law. The topics of these articles include: the legislative and judicial roles in making a joint child custody determination; legislation enacted to silence whistleblowers; the judiciary's role in interpreting laws passed by voter initiative; the Antiquities Act and the presidential power to unilaterally designate national monuments; and the recent appointment of Brett Kavanaugh to the United States Supreme Court bench, which discusses the selection and confirmation process for a United States Supreme Court justice. In addition, this publication includes a book review that evaluates a proposal for a restored historical jurisprudence that is concerned with

understanding social relations underlying the law by examining the historical and sociological evidence for them.

We would like to begin by thanking our outside article contributors, Professor Kevin P. Lee and Caroline Fredrickson, of the American Constitutional Society. We would also like to express our gratitude to: Dean Anthony Niedwiecki who has been an advocate for the journal and has provided us with continued support; Academic Dean Mark Yates for providing his guidance and expertise to *Golden Gate University Law Review*; Heather Varanini who has our deepest gratitude for her editorial and Bluebook assistance; and Professor Jennifer Babcock for her expert guidance and continued support as *Golden Gate University Law Review's* faculty advisor. Finally, we offer our sincerest thanks to each author for their articles, as these Comments represent the culmination of each authors' time, passion, and devotion to critical issues.

As the Editor-in-Chief and Managing Editor for the 2018-2019 year, we have been inspired by the hard work, dedication, and diligence of the 2018-2019 *Golden Gate University Law Review* Staff Writers, Associate Editors, and Executive Board Members who worked tirelessly to make this edition possible. A law review issue is never an individual effort, but instead the result of much collaboration. It is our distinct privilege to present this *Comments Edition* of the *Golden Gate University Law Review*.

Stephanie Nathaniel
Editor-in-Chief

Nicholas Joy
Managing Editor

GOLDEN GATE UNIVERSITY LAW REVIEW

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April 2019

The Kavanaugh Hearings and the Search for a Just Justice

Caroline Fredrickson
American Constitution Society

ARTICLE

THE KAVANAUGH HEARINGS AND THE SEARCH FOR A JUST JUSTICE SUBMISSION

*CAROLINE FREDRICKSON**

On October 6, 2018, Brett Kavanaugh was sworn in as a United States Supreme Court justice.[1] His confirmation process had been *sui generis*, roiled by charges of sexual assault and extreme partisanship. Many of his opponents rallied to support Dr. Christine Blasey Ford who charged the future Justice with having sexually assaulted her in high school. His supporters, on the other hand, including the President who nominated him, claimed the process was "very unfair."[2] Indeed, President Trump discounted Ford's testimony entirely, saying that it was "very hard for me to imagine that anything happened."[3]

However, before we can even analyze the Kavanaugh hearing and process, we have to step back because there is a lot of history that needs to be understood before we can appreciate how little we have advanced since the early 1990s with respect to sexual assault. It had been 27 years since Anita Hill testified against Justice Clarence Thomas,[4] and felt eerily similar. Hill, like Ford, found the Republican senators uninterested and even hostile to her experience, having already decided that they

* President, American Constitution Society (AMS), 2009.

[1] *See Biography of the Justices: Justice Brett M. Kavanaugh*, SCOTUSBLOG, https://www.scotusblog.com/reference/educational-resources/biographies-of-the-justices/ (last visited Mar. 6, 2019).

[2] Peter Baker & Nicholas Fandos, *Kavanaugh's Supporters and His Accuser Are at an Impasse Over Her Testimony*, N.Y. TIMES (Sept. 19, 2018), https://www.nytimes.com/2018/09/19/us/politics/kavanaugh-accusations-trump-blasey-ford.html.

[3] *Id.*

[4] Elise Viebeck, *Here's What Happened When Anita Hill Testified Against Clarence Thomas in 1991*, CHICAGO TRIBUNE (Sept. 27, 2018), https://www.chicagotribune.com/news/nationworld/politics/ct-anita-hill-clarence-thomas-20180927-story.html.

would vote in favor of Kavanaugh.[5] The Democrats too seemed flummoxed. Senator Dianne Feinstein, the ranking Democrat on the committee, sat on Ford's information for a month before bringing it before the committee.[6] The committee's discomfort was palpable and might have seemed a replay of the Thomas hearings, despite so much time passing—it felt almost as if the #MeToo moment had passed the Senate by.

Moreover, there is other history that is also important to understand before we can evaluate the "fairness" of the process. The fact that Trump was able to fill seats on the Supreme Court depended on a strategy of all-out obstruction by Senate Republican leadership of President Obama's nominees in the last two years of his presidency. In an October 2018 piece in The New York Review of Books (TNYRB), historian Christopher R. Browning wrote:

> If the US [sic] has someone whom historians will look back on as the gravedigger of American democracy, it is Mitch McConnell. He stoked the hyperpolarization of American politics to make the Obama presidency as dysfunctional and paralyzed as he possibly could. As with parliamentary gridlock in Weimar, congressional gridlock in the US [sic] has diminished respect for democratic norms, allowing McConnell to trample them even more. Nowhere is this vicious circle clearer than in the obliteration of traditional precedents concerning judicial appointments.[7]

McConnell, the Senate Republican leader, aggressively used the filibuster[8] to block Obama's nominations. By 2013, there was such a backlog of executive nominees that the Democratic majority in the Senate, on a partisan 52-48 margin, passed the "nuclear option."[9] This allowed a

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[5] Jessica Estepa, *Brett Kavanaugh: Who are the Key Votes for Him to Get Confirmed to Supreme Court?*, USA TODAY (Oct. 4, 2019, 2:14 PM), https://www.usatoday.com/story/news/politics/onpolitics/2018/10/04/brett-kavanaugh-votes-how-many-does-he-need/1522560002/.

[6] Sean Sullivan, *'Why Didn't She Bring It Up?': Feinstein Under Scrutiny for Handling of Allegations Against Kavanaugh*, WASHINGTON POST (Sept. 18, 2018), https://www.washingtonpost.com/powerpost/why-didnt-she-bring-it-up-feinstein-under-scrutiny-for-handling-of-allegations-against-kavanaugh/2018/09/18/0ace9e24-bb78-11e8-9812-a389be6690af_story.html?utm_term=.4263889f3a14.

[7] Christopher Browning, *The Suffocation of Democracy*, N.Y. REV. OF BOOKS (Oct. 25, 2018), https://www.nybooks.com/articles/2018/10/25/suffocation-of-democracy/.

[8] The term "filibuster" is defined as an attempt to block or delay Senate action on a bill, nomination, or other matter by debating it at length by offering numerous procedural motions, or by any other delay or obstructive actions; such delay can be brought to an end by a vote of three-fifths (usually 60 or more) members of the Senate to bring debate to a close, known as a "cloture" vote. *Filibuster and Cloture*, U.S. SENATE, https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Cloture.htm (last visited Mar. 5, 2019).

[9] Paul Kane, *Reid, Democrats Trigger 'Nuclear' Option; Eliminate Most Filibusters on Nominees*, WASHINGTON POST (Nov. 21, 2013), https://www.washingtonpost.com/politics/senate-poised-

simple majority of 51 votes to confirm Obama's judicial nominations to the United States courts of appeals and the lower courts, ending the Senate's three-fifths or 60-vote cloture rule for most nominations.[10] The passing of the nuclear option effectively ended the delay of Obama's executive branch nominations, including the 17 judicial nominees pending at the time.[11] In 2014, Republicans regained control of the Senate[12] chamber allowing McConnell to prevent almost all of Obama's nominees from being confirmed with the goal of leaving a significant number of judgeships unfilled at the end of Obama's term. Most significantly, McConnell refused to consider President Obama's nominee, Judge Merrick Garland, to fill the seat on the Supreme Court that came open after Justice Antonin Scalia died in early 2016.[13] McConnell said that because it was an election year, the voters should decide—meaning the next president should decide.[14] [With Donald Trump as president, McConnell has recently reversed course, suggesting that a 2020 vacancy would be considered by the Senate.][15]

And with Donald Trump's election as president in 2016, McConnell ended the filibuster for Supreme Court nominations—which Democrats had kept in place—in order to complete the "steal" of Scalia's seat from Obama and confirm Trump's nominee, Neil Gorsuch.[16] McConnell showed his partisan colors during the Kavanaugh hearings; rushing them despite lacking a vast trove of background information on the nominee and refusing to allow a full FBI inquiry into the allegations of sexual assault by several survivors. The midterms were coming.

So, was the process "fair?" Unfortunately, while Republicans decried Ford's testimony as unfair, they did not actually try to examine whether Kavanaugh had committed those acts, so how could they know? At the request of Senator Flake (although multiple Democrats had pushed for it as well), an FBI investigation was launched to investigate

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to-limit-filibusters-in-party-line-vote-that-would-alter-centuries-of-precedent/2013/11/21/d065cfe8-52b6-11e3-9fe0-fd2ca728e67c_story.html?noredirect=on&utm_term=.c9d8269c3cd2.

[10] *Id.*

[11] Jeremy W. Peters, *In Landmark Vote, Senate Limits Use of the Filibuster*, N.Y. TIMES (Nov. 21, 2013), https://www.nytimes.com/2013/11/22/us/politics/reid-sets-in-motion-steps-to-limit-use-of-filibuster.html.

[12] *US Mid-Term Elections: What is at Stake?*, BBC NEWS (Nov. 6, 2018), https://www.bbc.com/news/world-us-canada-29412354.

[13] *See* Russell Berman, *Republicans Abandon the Filibuster to Save Neil Gorsuch*, THE ATLANTIC (Apr. 6, 2017), https://www.theatlantic.com/politics/archive/2017/04/republicans-nuke-the-filibuster-to-save-neil-gorsuch/522156/.

[14] *Id.*

[15] William Cummings, *McConnell Appears Open to Election Year Nomination if Supreme Court Seat Vacant in 2020*, USA TODAY (Oct. 8, 2018, 7:34 AM), https://www.usatoday.com/story/news/politics/onpolitics/2018/10/08/supreme-court-mitch-mcconnell-2020/1563328002/.

[16] Berman, *supra* note 13.

only one of the three sexual assault allegations against Justice Kavanaugh. The scope of the FBI investigation was limited, and the number of persons of interest interviewed was only a portion of those named by Dr. Ford.[17] A single copy of the report was made available for senators to review the day before the vote.[18]

Senate Republicans also did not think it appropriate to probe his background as a government lawyer, preventing Democrats from reviewing the many million pages of documents relating to his role as a White House lawyer under President George W. Bush.[19] The Senate Judiciary Committee received only 10% of the documents from Justice Kavanaugh's time in the Bush White House.[20] Bill Burck, who worked under Kavanaugh in the White House, was tasked with leading a team to review documents before they were sent to the Committee.[21] Republicans alleged that the number of documents received, around 100,000, was similar to those obtained for Justice Kagan's hearing, and therefore should be sufficient.[22]

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[17] *See* Abigail Abrams, *Here Are All the People We Know the FBI Talked to for the Kavanaugh Report*, TIME (Oct. 4, 2018), http://time.com/5415845/kavanaugh-fbi-investigation-witnesses/; Jeremy Herb et al., *Sources Describe FBI's Limited Investigation on Kavanaugh*, CNN (Oct. 4, 2018, 7:36 PM), https://www.cnn.com/2018/10/04/politics/fbi-investigation-parameters-kavanaugh/index.html.

[18] Morgan Chalfant & Lydia Wheeler, *Five Things to Know About the FBI's Kavanaugh Investigation*, THE HILL (Oct. 3, 2018, 4:25 PM), https://thehill.com/homenews/senate/409759-five-things-to-know-about-the-fbis-kavanaugh-investigation?amp.

[19] *See* Erin Kelly, *Senate Digs Through Record 1 Million Pages of Documents on Supreme Court Nominee Brett Kavanaugh*, USA TODAY (July 31, 2018, 7:55 AM), https://www.usatoday.com/story/news/politics/2018/07/31/senate-digs-through-record-1-million-pages-documents-kavanaugh/864516002/.

[20] Letter from all 10 Democratic Members of the Senate Judiciary Committee (Dianne Feinstein, Patrick J. Leahy, Richard J. Durbin, Sheldon Whitehouse, Amy Klobuchar, Christopher A. Coons, Richard Blumenthal, Mazie K. Hirono, Cory A. Booker, and Kamala D. Harris) to Chairman Chuck Grassley (Aug. 28, 2018), *available at Judiciary Committee Democrats Protest Withholding of Kavanaugh Documents*, COMMITTEE ON THE JUDICIARY (Aug. 28, 2018), https://www.judiciary.senate.gov/press/dem/releases/judiciary-committee-democrats-protest-withholding-of-kavanaugh-documents.

[21] *See* Seung Min Kim, *Clearinghouse for Kavanaugh Documents is a Bush White House Lawyer, Angering Senate Democrats*, WASHINGTON POST (Aug. 15, 2018), https://www.washingtonpost.com/politics/clearinghouse-for-kavanaugh-documents-is-a-bush-white-house-lawyer-angering-senate-democrats/2018/08/15/224973dc-a082-11e8-b562-1db4209bd992_story.html?utm_term=.c7272d71646e.

[22] *See generally* Salvador Rizzo, *Fact-Checking the Bipartisan Spinfest on Brett Kavanaugh's Time at the White House*, WASHINGTON POST (Aug. 15, 2018), https://www.washingtonpost.com/politics/2018/08/15/fact-checking-bipartisan-spinfest-brett-kavanaughs-time-white-house/?utm_term=.c53b4490ae7c (discussing that Justice Kagan had 170,000 pages of White House documents reviewed for her Supreme Court nomination hearing; whereas for Kavanaugh's hearing a comparable number of pages were reviewed, however, his grand total of White House documents was significantly more than Kagan, with over 3 million pages of documents).

Among these documents are the significant policy decisions by the George W. Bush White House, including signing statements.[23] Bush's administration pushed an aggressive view of the presidency through these statements, claiming that over 1000 provisions were unconstitutional incursions on Article II powers.[24] In fact, when Kavanaugh was nominated in 2006 to the U.S. Court of Appeals, he was grilled on the statement dealing with torture of detainees, but there are many other statements that collectively lay out breathtaking claims—and "baseless, unprecedented, and sometimes bizarre assertions of presidential power" according to constitutional scholar Peter Shane.[25]

But as much as the process should concern those who think we should know the background of someone ensconced in a job for life, especially one with so much power, we should be even more concerned about our new justice's approach to constitutional and statutory interpretation. Justice Kavanaugh's approach to constitutional interpretation could be defined as "loose" originalism and textualism. That is, he resorts to the theories when they lead to the right conclusions, conservative ones. His opinions as an appellate judge and his other writings wave the flag for those theories without being strict in their application. This is the most dangerous and utilitarian approach to constitutional theory.

In his book, *The Living Constitution*, Professor David Strauss provides a thorough rebuke to originalism, pointing out the many flaws and problematic outcomes.[26] For example, Strauss explains that under an originalist approach, the Supreme Court could not have found "separate but equal" unconstitutional as it did in *Brown v. Board of Education*.[27] Few people could seriously argue that the nineteenth-century framers of the Fourteenth Amendment meant to attack segregated schools in the Amendment.[28] Even Justice Scalia had to admit that his approach did not always work, calling himself a "faint-hearted originalist." After all, he confessed, "I am an originalist. I am not a nut."[29] Other died-in-the-wool originalists confess that it is a leaky vessel. According to Georgetown Law Professor Randy Barnett, sometimes the words alone do not answer a contemporary question due to facts that would not have been thought

[23] Peter M. Shane, *The Senate Must Closely Examine These Documents from Kavanaugh's Bush Years*, SLATE (Aug. 17, 2018, 4:59 PM), https://slate.com/news-and-politics/2018/08/brett-kavanaughs-bush-documents-show-how-much-power-hed-grant-donald-trump.html.

[24] *Id.*

[25] *Id.*

[26] *See* DAVID A. STRAUSS, THE LIVING CONSTITUTION (Oxford Univ. Press 2010).

[27] *Id.*; *see also* Brown v. Board of Educ. of Topeka, 347 U.S. 483 (1954).

[28] STRAUSS, *supra* note 26, at 25.

[29] Molly McDonough, *Scalia: 'I Am Not a Nut,'* ABA JOURNAL (Apr. 8, 2008, 2:09 PM), http://www.abajournal.com/news/article/scalia_im_not_a_nut.

possible to the eighteenth-century authors.[30] The text is often vague, how are we to understand what is a reasonable search under the Fourth Amendment when customs agents grab someone's cell phone? Barnett admits that the Constitution "does not say everything one needs to know to resolve all possible cases and controversies."[31] How judges evaluate cases under these circumstances is something even originalists do not agree on among themselves.[32] However, they do tend to agree that all the results should be conservative.

Similarly, on federalism, Kavanaugh favors state power and limits on the federal government—except when he doesn't. "If we get a textualist, originalist justice, then we're likely to get a judge who thinks federalism is important, and that means someone who thinks diversity among the 50 states is a part of our constitutional structure," says Barnett.[33] Which could mean "an increased reigning in of one-size-fits-all federal policies."[34] Kavanaugh is likely to allow states and localities to use aggressive law enforcement tactics instead of supporting a protective Fourth Amendment, and he believes states can restrict reproductive rights for women.

In his first case in the Court dealing with abortion, Kavanaugh revealed his interest in cutting back on access to abortion. By a 5–4 vote, in *June Medical Services v. Gee*, the Court enjoined a Louisiana statute that would have ended almost all abortions in the state.[35] Chief Justice John Roberts and the four liberals blocked the law.[36] It should have been a unanimous decision as the Louisiana law was virtually the same as the one struck down in the Supreme Court's 2016 ruling, *Whole Woman's Health v. Hellerstedt*.[37] To express his disagreement with upholding a precedent of less than two-years-old, Kavanaugh penned a dissent arguing that the law should be allowed to stand;[38] something Mark Joseph Stern in Slate calls "an opinion that should not be taken as anything less

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[30] Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65, 71-72 (2011).

[31] *Id.* at 69.

[32] MICHAEL AVERY & DANIELLE MCLAUGHLIN, THE FEDERALIST SOCIETY: HOW CONSERVATIVES TOOK THE LAW BACK FROM LIBERALS 10 (2013).

[33] Graham Vyse, *What Brett Kavanaugh Means for States*, GOVERNING (Sept. 4, 2018, 2:45 PM), http://www.governing.com/topics/politics/gov-kavanaugh-states-confirmation-hearing-justice.html.

[34] *Id.*

[35] June Med. Servs. v. Gee, 139 S. Ct. 663 (2019).

[36] *Id.*; Mark Joseph Stern, *Brett Kavanaugh Just Declared War on* Roe v. Wade, SLATE (Feb. 7, 2019, 11:15 PM), https://slate.com/news-and-politics/2019/02/brett-kavanaugh-june-medical-services-louisiana-john-roberts.html.

[37] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[38] *June Med. Servs.*, 139 S. Ct. 663.

than a declaration of war on *Roe v. Wade*."[39] He asserted in his dissent that the Fifth Circuit was correct that Louisiana should have been allowed to enforce the law because the plaintiffs had not worked hard enough to get the surgical privileges required by the law.[40] As Stern writes,

> This is classic Kavanaugh. On the U.S. Court of Appeals for the District of Columbia Circuit, Kavanaugh had a penchant for pretending to apply *Roe* while finding arbitrary reasons to uphold abortion restrictions. Kavanaugh let the Trump administration prevent an undocumented minor from terminating her pregnancy, on the laughable theory that she could find a sponsor who would remove her from government custody, where she could reassert control over her body. It was a pseudo-moderate procedural solution that had the effect of denying the undocumented minor abortion access altogether. Here, Kavanaugh made the same play, pretending like he'd found a reasonable middle ground that, in reality, serves to rubber-stamp unconstitutional abortion laws.[41]

However, when it comes to gun regulation, Justice Kavanaugh has a different view and federalism goes out the window. Similarly, he favors business interests over localism; for example, supporting the position that the First Amendment protects the rights of internet service providers whose speech rights apparently suffer from net neutrality.[42] And employers will find a willing ally in their efforts to preempt local minimum wage and sick leave ordinances.[43]

On executive power, what we know so far of Justice Kavanaugh's record suggests he will be extremely deferential to the President. The new Justice replaces Justice Anthony M. Kennedy, who helped affirm detainee rights in landmark cases during the George W. Bush administration.[44] Kavanaugh brings a long record in this area, very different from that of Kennedy's. His 12-year tenure on the D.C. Circuit Court shows broad deference to presidential powers on national security and war.[45] He consistently embraced a limited view of the courts' ability to chal-

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[39] Stern, *supra* note 36; *see also* Roe v. Wade, 410 U.S. 113 (1973).

[40] *June Med. Servs.*, 139 S. Ct. 663.

[41] Stern, *supra* note 36.

[42] Vyse, *supra* note 33.

[43] *See id.*

[44] Stephen I. Vladeck, *One Huge Difference Between Kavanaugh and Kennedy: Their Guantanamo Records*, WASHINGTON POST (July 11, 2018), https://www.washingtonpost.com/opinions/one-huge-difference-between-kavanaugh-and-kennedy/2018/07/11/469b995e-852a-11e8-9e80-403a221946a7_story.html?utm_term=.a0ddde34da7b.

[45] *Id.*

lenge the executive branch in that area.[46] Kavanaugh could be the critical vote on questions that arise from the government's controversial use of the law known as the Authorization for Use of Military Force (AUMF), to justify military incursions against the Islamic State. Critics say the law does not provide justification for such operations.[47] Of singular importance in Kavanaugh's jurisprudence is his skepticism of the relevance of international law in establishing limits to presidential powers. In a lengthy opinion in *Al-Bihani v. Obama*, Kavanaugh wrote that international law cannot limit presidential power to fight Al-Qaeda, and other militant groups, or to hold detainees.[48] These views could spill over to other areas, including privacy and surveillance.

With respect to checks and balances—a central element of the U.S.'s constitutional structure—Kavanaugh has repeatedly questioned pivotal Supreme Court decisions that limit out-of-control presidential power (such as the Watergate tapes case) and has a history of controversial statements that suggest he believes the Constitution bars a special counsel from investigating a president.[49] When meeting with Leader Schumer prior to his confirmation, Kavanaugh not only refused to answer crucial questions about health care and women's reproductive rights, he also refused "to affirm that a President must comply with a duly issued subpoena, even in a criminal investigation that concerns national security."[50] Many believe he was chosen *because* of these ideas—with the Mueller investigation ongoing. Kavanaugh, along with the other conservative justices, is being counted on to protect the President against charges of obstruction of justice and collusion with a foreign power.

As President Trump, his allies, and legal team continue to attack and try to undermine Special Counsel Mueller's investigation, Trump's personal attorney and former Mayor of New York City, Rudy Giuliani, has said that he plans to fight a potential subpoena all the way to the Supreme Court. It is possible that the Supreme Court could soon be faced

[46] *Id.*; *see* Al-Bihani v. Obama, 619 F.3d 1, 9-53 (2010); Al Bahlul v. United States, 840 F.3d 757, 759-774 (2016); *In re* Al-Nashiri, No. 14-5229, 2014 U.S. App. LEXIS 22038, at *1 (D.C. Cir. Nov. 18, 2014), https://dccircuitbreaker.org/wp-content/uploads/2018/07/14-1203.pdf; Omar v. McHugh, 646 F.3d 13 (2011); Saleh v. Titan Corp., 580 F.3d 1 (2009).

[47] *See generally* Vladeck, *supra* note 44; *Al-Bihani*, 619 F.3d at 9.

[48] Jonathan Hafetz, *Judge Kavanaugh's Record in National-Security Cases*, SCOTUSBLOG (Aug. 29, 2018, 11:02 AM), https://www.scotusblog.com/2018/08/judge-kavanaughs-record-in-national-security-cases/; *Al-Bihani*, 619 F.3d at 9.

[49] *See* Hafetz, *supra* note 48.

[50] 164 Cong. Rec. S5873, 141 (2018), https://www.congress.gov/crec/2018/08/23/CREC-2018-08-23-senate.pdf.

with "a decision as to whether a sitting president can be subpoenaed or indicted," a question the Court has yet to answer.[51]

His views on executive power are consistent with the extreme views he takes on administrative law. The *Chevron* decision, under which courts are supposed to give deference to agency expertise, is one he firmly disagrees with.[52] In a speech at Notre Dame, he said that "[t]he *Chevron* doctrine encourages agency aggressiveness on a large scale,"[53] repeating an argument from his Harvard Law Review article from the prior year.[54] "Under the guise of ambiguity, agencies can stretch the meaning of statutes enacted by Congress to accommodate their preferred policy outcomes."[55]

On many issues, the public is becoming more liberal—such as with rights pertaining to sexual orientation, gender roles, the environment, and race for example—as well as more diverse (and younger). A Supreme Court and a federal judiciary that represents an extreme minority viewpoint and has the power to thwart the majority poses a threat to the American system of checks and balances, and potentially to our democracy.

As Christopher R. Browning wrote, "No matter how and when the Trump presidency ends, the specter of illiberalism will continue to haunt American politics. A highly politicized judiciary will remain, in which close Supreme Court decisions will be viewed by many as of dubious legitimacy, and future judicial appointments will be fiercely contested."[56]

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[51] *Schumer Floor Remarks on the Need for Republicans to Stand Up to President Trump, Delaying Judge Kavanaugh's Hearing, and the Danger of Government Funding of Guns for Teachers*, SENATE DEMOCRATS (Aug. 23, 2018), https://www.democrats.senate.gov/news/press-releases/schumer-floor-remarks-on-the-need-for-republicans-to-stand-up-to-president-trump-delaying-judge-kavanaughs-hearing-and-the-danger-of-government-funding-of-guns-for-teachers.

[52] *See generally* Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).

[53] Brett M. Kavanaugh, *Two Challenges for the Judge as Umpire: Statutory Ambiguity and Constitutional Exceptions*, 92 NOTRE DAME L. REV. 1907, 1911 (2017); *Chevron*, 467 U.S. 837.

[54] *See* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118 (2016) (reviewing ROBERT A. KATZMANN, JUDGING STATUTES (2014)).

[55] Kavanaugh, *supra* note 53.

[56] Browning, *supra* note 7.

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Realism and Jurisprudence: A Contemporary Assessment

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BOOK REVIEW

REALISM AND JURISPRUDENCE: A CONTEMPORARY ASSESSMENT

BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW, Cambridge, UK: Cambridge University Press, 2017, p. 202, $34.99

*REVIEWED BY KEVIN P. LEE**

INTRODUCTION

In *A Realistic Theory of Law* (*RTL*), Brian Z. Tamanaha develops a narrative of historical jurisprudence that is deeply textured and rich in probative insight. But despite the title, readers looking for a philosophical account of realism in legal theory should look elsewhere. The realism of *RTL* is a commonsense realism that is related to commonsense pragmatism. It is "built on observations about the past and present reality of law rather than on . . . non-empirical modes of analysis frequently utilized by analytic jurisprudents."[1] The book does not engage with current debates on philosophy or concerns about the possibility of objective historiography.[2]

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[1] BRIAN Z. TAMANAHA, A REALISTIC THEORY OF LAW 2 (2017).

[2] "Realism" means the philosophical concepts of "real" in the fields of ontology (the study of being) and epistemology (the study of knowledge). The concept is given some clarity by the famous question attributed to George Berkley: "If a tree falls in the forest and there is no one there to hear it fall, did it really happen?" Ontological realists answer this question in the affirmative—there is a tree, and it did fall; and epistemological realists add that there is some way (at least potentially) to discover the tree and determine if it did or did not fall. There are then two claims of philosophical realism: (1) that there is a real world external to the mind; and (2) that knowledge of it is possible. When the falling tree example is applied by analogy to law, the question becomes one about the nature and the status of legal rules. It might be formulated this way: "If legal rules exist, can they be known apart from the society that made them?" The philosophical realist view is that law exists in

Nonetheless, Tamanaha takes a philosophical position. He believes that "[c]ontemporary jurisprudence suffers from a profound gap. Law is rooted in the history of a society, continuously remade in relation to social factors."[3] But, he observes, despite this connection between law and history, the once-influential historical jurisprudence has been "banished." He argues that neither contemporary natural law (by which he means the natural law jurisprudence of John Finnis)[4] nor analytic jurisprudence is concerned with history. "Natural law theorists concentrate on objective principles of morality and their implications for law,"[5] he writes. And "[l]egal positivist analytical jurisprudents focus on 'those few features which all legal systems necessarily possess.'"[6] Neither of the two "schools"[7] is concerned with how historians have interpreted law's past.

To address this situation, he proposes the restoration of a historical jurisprudence as a third way. There are two types of claims made here: (1) a claim about the history of law; and (2) a claim about philosophical realism. With respect to the first claim, there is a rich tradition of historical jurisprudence that includes Henry Maine (1822-1888), Friedrich Karl von Savigny (1779-1861), Rudolf von Jherling (1818-1892), and Oliver Wendell Holmes Jr. (1841-1935),[8] which lost influence early in the 20th century. The restored historical jurisprudence that he proposes is concerned with understanding social relations underlying the law by examining the historical and sociological evidence for them.[9] The underlying basic social relations are held to exist apart from mental and cultural instantiation and to be knowable. The theory rests on the claim that it is an instance of (or at least substantially similar to) classical American pragmatism, the philosophy initiated by C.S. Pierce and William James in the late 19th century and developed by John Dewey.[10] In *RTL*, Tamanaha introduces a historical method that he calls "genealogical"[11] that he hopes will result in a "portrayal of law developing over time in connection with natural human tendencies and surrounding social cir-

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some way apart from the minds of those who create it, and that knowledge of at least some aspect of the law is possible apart from its cultural expression in authoritative texts.

[3] TAMANAHA, *supra* note 1, at 1.

[4] Following Anthony Lisska, the natural law theory of John Finnis is referred to herein as the "Finnis Reconstruction." *See* ANTHONY J. LISSKA, AQUINAS'S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION 82-115 (1998).

[5] TAMANAHA, *supra* note 1, at 1.

[6] *Id.*

[7] Tamanaha terms these styles of jurisprudential reasoning as "schools." He suggests that the other "theoretical approaches" such as law and economics and critical studies, "considers law in its social totality." *Id.*

[8] *Id.* at 17-21.

[9] *Id.* at 24.

[10] *Id.* at 2-3.

[11] *Id.* at 10.

cumstances."[12] In the realistic theory presented in *RTL*, law mediates (in particular historically manifested cultural moments) between social forces and emergent social norms.

For all of *RTL*'s many strong points, a historical theory needs to be strongly self-aware of its own location in the history. With *RTL*, that means having a sense of the location of both types of claims in Tamanaha's theory (i.e., legal history and philosophical realism). Where *RTL* is weakest is in locating itself in relation to historical debates on philosophical realism. Concepts of reality (and relatedly, the concepts of Being and existence) have storied pasts. The claims about the real that Tamanaha makes in *RTL* are not entirely new, and the anti-realist jurisprudents have sophisticated and intellectually respectable theories. They cannot be simply ignored and dismissed. Moreover, in the 20th century, new realist concepts of information, computation, and complexity are giving rise to radically new understandings of the world and of human nature. These new concepts are so radical that they are leading to a new informational worldview that has been likened to a Copernican revolution.[13] Although the information revolution is having practical and philosophical consequences, it has so far had little influence on American legal theory. Nonetheless, it holds insights for questions about ontological and epistemological realism in law and could perhaps support the type of realistic theory of law that Tamanaha seeks.

I. SUMMARY OF THE BOOK

RTL contains six chapters. Chapter 1 is the Introduction. It describes the historical-sociological theory he calls "social legal theory" as an alternative to both legal positivism and natural law jurisprudence. Tamanaha argues that social legal theories are in some ways similar and complementary to natural law and legal positivism. He views this approach as similar to (or derived from) Montesquieu, Adam Smith, and others who viewed law as interacting with other social systems. He explains that historical jurisprudence seeks to understand law through universal principles, but it is also distinct in that it seeks to derive the principles from empirical observations. The belief that law is related to relations among various functional social structures is central to Tamanaha's theory.

Chapter 2 considers theories that have sought to define law in terms of a stable essential nature. Tamanaha argues that all such attempts have

[12] *Id.* at 9.

[13] *See* LUCIANO FLORIDI, THE FOURTH REVOLUTION: HOW THE INFOSPHERE IS RESHAPING HUMAN REALITY (2014).

been either over– or underinclusive. He is particularly concerned to point out the error of conflating a legal system with a system of rules. Citing to John Searle's theory of social ontology,[14] he argues that law is a distinct type of rule-based system backed by the authority and power of the state. There is a multitude of kinds of rule systems, but law is unique in having this formal aspect. Theories that are overly abstract do not recognize the "conventionalism" that he develops.[15]

Chapter 3 begins by distinguishing between natural kinds and social artifacts. It makes note of a common analogy used by both Joseph Raz and Scott Shapiro: "If being made of H_2O is of the nature of water,"[16] Raz writes, "[t]hen this is so whether or not people believe that it is so, and whether or not they believe water has essential properties."[17] These ontological claims are distinguished by drawing attention to the physicalism of these understandings of the ontology of water and asserting that law is social, not physical.[18] Tamanaha does not develop a philosophical concept of realism here, and perhaps that is because the real for him is not a singular concept. While this may appear to allow for a subjective interpretation of what is significant in history, Tamanaha nonetheless asserts what he calls a "genealogical" approach that he apparently believes avoids this conclusion.

Chapter 4 presents the genealogical method of historical jurisprudence in more detail. The chapter develops a narrative of increasing complexity in society, moving from basic social relations to clans and tribes. Although analytic jurisprudents do not typically view tribal people as having law because they do not have legal systems, he argues that they go wrong when they unthinkingly conflate "law" and "legal sys-

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[14] TAMANAHA, *supra* note 1, at 50-53.

[15] *Id.* at 51-53.

[16] *Id.* at 58-59.

[17] Tamanaha notes that Shapiro makes a similar claim: "Being H_2O is what makes water, water. With respect to law, accordingly, to answer the question 'What is law?' on this interpretation is to discover what makes all and only instances of law instances of law and not something else." *Id.* at 58 (quoting JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 23 n.7 (2009)).

[18] To some extent, this claim appears at least superficially, to call into question the realism of the theory presented in *RTL*, since the passage continues,

> Philosophers generally agree the essential properties of water are mind-independent internal properties: "we are accustomed to thinking of essentialness as fixed by the laws of nature." Law is neither mind independent nor fixed by the laws of nature, but rather is a folk concept with multiple versions and variations. As psychologists who study concepts have found, "it may indeed be the case that for any one type of artifact, there exist an almost infinite number of variations in ontogeny, form, and function."

TAMANAHA, *supra* note 1, at 59.

tem."[19] What he means by law is a commonplace understanding among modern Anglophones: "Law is our concept, not theirs," he writes.[20] His point is that, among tribal people, there was present what we now call "law" even in the absence of a legal system, and even if the tribal persons do not use the concept.

The chapter describes an evolution of law from early states to empires to contemporary legal systems. The argument is eclectic, moving from topic to topic. Beginning from what is essentially Hart's concept of the minimum content of the natural law[21] to medieval law (which did not fit well with Hart's concept),[22] the chapter suggests a secularized progressive view of law, separating from "religion and superstition" along essentially Weberian lines.[23] It defines empires as "inoperative states that exercise control over other societies through military force."[24] After describing British colonial practices, he concludes that colonial laws are indifferent to the societies in which they are imposed.[25] And "[a] realistic clear-eyed view tells us that law can be constructed to advance all sorts of aims, from moral, to immoral, to having nothing to do with morality."[26] The chapter is generally progressive, viewing law as growing in volume and complexity over time, with the 20th century witnessing explosive growth. This growth in sheer volume and complication of the law mirrors similar growth in society in general.[27]

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[19] Tamanaha explains:

> This is an artificial puzzle created by a poorly posed question that presupposes current circumstances. We have little trouble making these distinctions in our own societies using commonsense conventional criteria. Sharp distinctions cannot be drawn between law, custom, morality, etiquette, and religion in early social groups because low levels of social differentiation did not have the normative variations present at higher levels of social complexity. It was a primordial normative soup. If one points at the lack of differentiation to conclude that law did not exist, then it would also follow that customs and morality did not exist because they too cannot be clearly distinguished—which reinforces the point that these distinctions are inappropriate. A genealogical approach need not make these distinctions clear, for it can identify law in early social groups by locating recognizably familiar legal proscriptions.

Id. at 91-92.

[20] *Id.* at 92.

[21] *Id.* at 99.

[22] *Id.*

[23] *Id.* at 100.

[24] *Id.* at 101.

[25] Tamanaha writes: "Legal systems, as colonial law shows, are complexes of coercive power that do things in the name of law with no necessary or inherent connections to the society they purport to rule and no inherent moral purpose." Legal systems, as colonial law shows, are complexes of coercive power that do things in the name of law with no necessary or inherent connections to the society they purport to rule and no inherent moral purpose. *Id.* at 103-04.

[26] *Id.* at 105.

[27] *Id.* at 116-17.

Chapter 5 adds some clarity by focusing on law as it exists today (which is described as the Age of Organizations) and suggesting some aspects influencing its continued development. Critically, Tamanaha argues that "[n]o existing theory of law adequately accounts for government entities that utilize legal mechanisms in myriad ways in their activities."[28] Legal theories tend to view law only from the perspective of the government as law-giver, not law-user. But this is inadequate today. He then describes law in terms of social use and three forms of government use. Social use refers to the ways in which law coordinates social activities, whether consciously and intentionally or not.[29] Governmental use takes several forms: (a) self-protecting of its own institutions;[30] (b) structuring the internal operations of the government;[31] and (c) achieving governmental objectives.[32] This schema of private and governmental use, he believes, is more complete than the abstract analytic theories that reduce these dimensions to one account. He argues against Hayek that the common law is a spontaneous order reflecting society because societies will inevitably have diverse views of fundamental values, such as justice, and these differences create diverse background rules that are not purposefully part of the common law.[33] The chapter lists several features of law in the Age of the Organization that he believes are overlooked by analytic philosophy. He argues that due to over abstraction, it misses these features of law.

Chapter 6 considers international law as a distinct socio-historical legal tradition that emerged from European customs and practices between states, and evolved with the changing nature of state sovereignty. Focusing on the global financial and trade regime that was developed after the Second World War, Tamanaha suggests that an equivalent to the legal fabric of society had developed in the international community, which has allowed for more stability and concern for lawful behavior among state actors.

In sum, it appears that Tamanaha's claim is that law, which is admittedly a Western concept with a modern meaning, has nonetheless a general applicability. It refers to a phenomenon that must be studied in the particular details of its actual manifestation. Therefore, rigid a priori concepts should be eschewed in favor of flexible commonsense understandings developed through historical and cross-cultural observation and analysis. This sort of analysis, which Tamanaha calls "genealogy," sug-

[28] *Id.* at 126.
[29] *Id.* at 127.
[30] *Id.* at 129.
[31] *Id.*
[32] *Id.*
[33] *Id.* at 134-35.

gests that law has referred to something that exists formally from simple tribal societies to complex modern states but is always culturally contingent in the details of its existence. Law has a formal structure and an organic vitality. It is independent of moral norms and other social influences, but also coupled to them, shaping and being shaped by them. It has grown in volume and complexity as society has grown more complex.[34]

II. ANALYSIS: "REALISM" IN A HISTORICAL CONTEXT

A significant weakness of *RTL* is that it develops a "genealogy" without reference to the substantial history of philosophical usage of the concept of genealogy—a history that is marked by complex issues in epistemology. Two moments in the development of the philosophical meaning of the term are particularly relevant in the contemporary literature. Genealogy was first used with philosophical meaning by Friedrich Nietzsche and developed substantially by Michel Foucault.[35] By choosing this term, Tamanaha has associated his work with these historiographies, but since he does not engage with them, it is not precisely clear how he views the relation to them. To get a better understanding of the method of *RTL*, it is useful to make a close examination of the genealogy described in *RTL* compared to both of the main methodological perspectives on genealogy.[36] A brief review of some of the history of the genealogical methods might clarify the nature and role of the historiography he calls "genealogy" in his "realistic theory" of law.

To begin, Nietzsche claimed the term genealogy for philosophers in his 1887 book, *On the Genealogy of Morals*.[37] In that book, he uses genealogy to refer only to a line of causal relations of descent. The biological concept of "gene" at the time referred to the presumed agent or unit of heredity, but that DNA is the mechanism of the gene was not discovered until 1953. Nonetheless, the Darwinian conception of evolution was well known in social science mainly through the work of Herbert Spencer in the United States and the United Kingdom, and Ernst Haeckel in Germany. Nietzsche used the term "genealogy" with preci-

[34] *Id.* at 148.

[35] FRIEDRICH NIETZSCHE, ON THE GENEALOGY OF MORALS 2 (Horace B. Samuel trans., Barnes & Noble 2006) (1887); *see also* BRIAN LEITER, NIETZSCHE ON MORALITY 133-54 (2015) (discussing the meaning of genealogy).

[36] That is to say at least this: by calling his method "genealogical," Tamanaha signals that he is engaging in the discourse of legal theory from within an existing genealogical method, but his conclusions are not precisely located in relation to those of the genealogists who form the tradition in philosophy and political theory.

[37] NIETZSCHE, *supra* note 35.

sion. *On the Genealogy of Morals* is a study and critical analysis of the development of morality. This was a landmark in moral philosophy in part because Nietzsche suggested that moral norms have a history at all since the then dominant Christian moral philosophy viewed moral principles to be "absolutes," in the sense that they are timeless truths willed by God or reflecting God's moral nature.[38] Where Christians viewed moral norms as timeless, transcendent principles or universal essences, Nietzsche's *Genealogy* showed that moral norms change over time through the interaction of concealed natural social forces. This was itself a revolutionary claim. Moreover, this conclusion suggested that the organizing principles of society might be revisable. In an age where hereditary monarchy was still widely recognized, the suggestion that the entire structure might be arbitrary and revisable was transformative. Nietzsche sought to expose the hidden history in order to challenge the power distributions within society.

Tamanaha's concept of "genealogy" has prima facie similarly to Nietzsche's in as much as it appears to endorse a naturalized historical account. Early in *RTL*, for example, Tamanaha invokes Adam Smith as exemplifying the method of genealogy. For him, Smith illustrates how social forces can be operative in history, even if they are not obvious. This is a form of naturalized genealogy. Leiter explains naturalism in this context:

> The genealogy is not only a *history* of morality that rejects the evidential value of morality's present meaning for discovery of its origin, but it is also a distinctively *naturalistic* history, an account of the origins of morality without appeal to supernatural causes. Nietzsche reiterates this methodological point in both the Preface of the *Genealogy* and his summary of the *Genealogy*'s argument two years later in *Ecce Homo*.[39]

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[38] Leiter explains:

> So a genealogy of morality shows "morality" (qua AEP [Anthropocentric Evaluative Practice]) to have several different origins and multiple meanings. In particular the genealogist resists the mistaken inference from the present purpose of morality to any conclusions about its history or origin. But, this, so far is only part of what is distinctive of genealogy qua method. For equally central to genealogical practice, in Nietzsche's view, is a commitment to *naturalism.* The genealogy is not only a *history* of morality that reject the evidentiary value of morality's present meaning for discovering its origin, but it is also a distinctively naturalistic history, an account of the origins of morality without appeal to supernatural causes. Nietzsche reiterates this methodological point in both the Preface of the *Genealogy*, and his summary of the *Genealogy*'s points two years later in *Ecce Homo*.

LEITER, *supra* note 35, at 138 (footnote omitted) (emphasis in original).

[39] *Id.* at 138 (emphasis in original).

Naturalism here refers to a claim that is influential in many areas of philosophy, that the epistemological foundations can be explained through the interactions of material forces and entities, and are thus open to scientific investigation.[40] (Leiter views naturalized jurisprudence as a philosophically informed version of the central claims of Legal Realism.)[41]

Tamanaha expresses similar ambitions for *RTL*. He equates "social scientific realism" with "naturalism,"[42] and sets this as a goal for his theory.[43] This commitment appears to be confirmed by his reliance on early sociology; which appears to rest on the work of sociologists like Eugene Ehrlich and Bronislaw Malinowski who draw from traditional intellectual history and the assumptions of functional-structuralism,[44] (a theoretical perspective that presumes that the natural social forces that guide the development of law work through causal relations that are rationally predictable).

A second issue has to do with the epistemological value of history. Leiter observes that for Nietzsche, genealogy is a critique of moral values:

> In the genealogy of morality, his aim is critical not positive. And he is concerned *precisely* to break the chain of value transmission by showing that the value or meaning of the genealogical object is discontinuous over time: first because there is no unitary value or meaning transferred from point of origin to contemporary object; and, second, because there is more than one point of origin.[45]

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[40] Owing to Leiter's influence, the form of naturalized epistemology that has been most important for legal philosophy is the replacement naturalism associated with Willard Van Orman Quine. Alvin Goldman has also developed a normative epistemological naturalism that some legal theorists have associated with Ronald Dworkin's legal theory. And, there is a form of substance naturalism (which seeks harmony by looking to avoid conflicts of legal theory with the conclusions of the natural sciences), which is associated with Scandinavian Legal Realism. *See* Brian Leiter, *Naturalism in Legal Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (July 31, 2012), https://plato.stanford.edu/archives/fall2014/entries/lawphil-naturalism/.

[41] Leiter has developed his understanding beyond the naïve realism of Nietzsche. He makes his case in two ways that mirror Quine's two ways to naturalize epistemology: first by asserting epistemic holism, and second, by rejecting foundationalism. Leiter argues that Legal Realists made arguments similar to both of Willard Quine's approaches. He illustrates the impact of Quine's holism argument, which undercuts the distinction between apriori and a posteriori, by turning to a central claim of 20th century Anglophone jurisprudence: legal positivism. *See* Kevin Lee, *Jurisprudence and Structural Realism*, 5 LEGAL ISSUES J. 2, 81-82 (2017).

[42] TAMANAHA, *supra* note 1, at 2.

[43] *Id.*

[44] For a discussion of the development of socio-legal theories, *see* John M. Conley & William M. O'Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41 (1993).

[45] LEITER, *supra* note 35, at 135.

For Nietzsche, then, the value of tracing the threads of relation through historical texts lies in drawing causal inferences that suggest the adaptive value of moral sentiments and their cultural expressions as rules and valued habits for the survival of individuals. The genealogy is naturalistic in this respect, in as much as it seeks no transcendent source or purpose for morals.

Tamanaha is silent on this aspect of his genealogy. The precise epistemic value the historical moments that he identifies are unclear, but he appears to have a similar agenda as Nietzsche. In describing the perspective on law that *RTL* develops, he writes:

> Law is a social historical growth—or, more precisely, a complex variety of growths—tied to social intercourse and complexity. Certain of these legal manifestations develop and evolve, while others whither or are absorbed or supplanted. Law has roots in the history of a society, develops in social soil alongside other social and legal growths, tied to and interacting with surrounding conditions. The realistic theory of law I elaborate conveys law in these terms.[46]

And later he adds:

> [A] realistic theory of law can consider social influences on and consequences of natural law and analytical theories of law in ways the theories themselves are not capable of addressing. A realistic theory folds all theories of law, including itself, into the broader environment of beliefs and actions about law within society.[47]

Taken together, these passages suggest that Tamanaha may view his project as similar to Nietzsche's genealogy. His genealogy seeks to illustrate the hidden socio-legal forces that evolve, the culturally specific belief and actions (rituals) that instantiate these natural forces.

All of this is well enough, but Nietzsche was writing before the critiques of modern social science that were put forward by the likes of Heidegger, Derrida, and Rorty. A critical objective for his genealogy to be self-reflexive in the way he suggests it is would be to engage with Michel Foucault, who wrote the *Order of Things.*[48] At that time, the gene recently had been identified, and this brought a new meaning to the historiographic method of genealogy. Foucault intended the term genealogy to refer to Nietzsche's study of morals, but he substantially departs

[46] TAMANAHA, *supra* note 1, at 3.

[47] *Id.* at 35.

[48] MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (Vintage 1994) (1966).

from it.[49] The shift in meaning is indicated by the distinction he makes between an *archeological* and a *genealogical* method. Archeology is the term he uses to refer to his early works on the history of psychology, which culminate with *Folie et Déraison: Historie de la Folie à L'Âge Classique* (*Madness and Insanity: History of Madness in the Classical Age)*.[50] Beginning in *The Order of Things*,[51] Foucault alters Nietzsche's conception of genealogy by rejecting what he takes to be Nietzsche's naïve commitment to naturalism. This allows an anti-realism to develop in Foucault's concept of genealogy.[52]

Before adopting the term genealogy, Foucault used the metaphor of archeology to describe his method. His premise was that to understand an idea such as evolution, one needs to "understand the underlying structures of thought that formed the context" for Darwin to develop it.[53] The term "archaeology" was already in use in France after World War II as a metaphor for a historiography that emphasized discontinuity, the rejection of narrative histories, and "the critical awareness that historical research is always partly creating its subject matter."[54] Social Darwinism, associated with Herbert Spencer, which had been influential in the early twentieth century, was held deeply suspect by many following the war.[55] The metaphor of archeology refers to a historiographical approach that looks through the procrustean layers of intellectual deposit over generations for the grand themes that form the context for the creative insights of individuals. "It distinguishes between different levels of analysis in the history of science and penetrates the strata beneath individual observations, experiments and theories."[56]

Foucault developed this concept of archeology, which he used in earlier works, to a derivative expression of Nietzsche's genealogy. In an essay, *"Nietzsche, Genealogy, History*," he argues for an opposition between naïve metaphysical systems of philosophy (such as characterized medieval Scholasticism) and genealogy, "which is self-effacing and unpretentious, but effective, precise, and cutting."[57] It too makes philosoph-

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[49] Leiter suggests that Foucault did not adopt Nietzsche's naturalism. *See* LEITER, *supra* note 35, at 133-34. *See also* JOHANNA OKSALA, HOW TO READ FOUCAULT 45-46 (2008).

[50] MICHEL FOUCAULT, HISTORY OF MADNESS IN THE CLASSICAL AGE (Routledge 2006) (1961).

[51] FOUCAULT, *supra* note 48.

[52] LEITER, *supra* note 35, at 138 n.5.

[53] OKSALA, *supra* note 49, at 27.

[54] *Id.* at 28.

[55] For a general account of Spencer's philosophy and the eugenics movement in the United States, see ADAM COHEN, IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK (2016).

[56] OKSALA, *supra* note 49, at 29.

[57] *Id.* at 47.

ical claims, but ones that "historicize in order to radically question the timelessness and inevitable character of practices and forms of thinking."[58] For Foucault, the genealogical method places emphasis on showing that what is presumed to be knowledge might be otherwise—that knowledge is contingent on historical accident. Archeology placed emphasis on discontinuity and disruption against the notion of steady linear progress, which Foucault took to be an overly simplified conceptualization of historical change that is commonly found in intellectual history. Foucault's genealogy sought to show the connections between power relations and the claim to scientific knowledge. He argues that power and scientific knowledge co-evolve, and that genealogy's task is to show that intertwining.[59]

Tamanaha's relation to Foucault's conception of genealogy is complex. He does not specifically fail to mention Foucault, but the argument of *RTL* implicates questions that Foucault's genealogy presupposes. The project of *RTL* questions the norms of the academic study of legal theory more than the law itself: it has as a primary goal to advocate for historical jurisprudence over the more dominant forms of analytic and natural law jurisprudence.[60] The social power conferred by the dominance of the analytic conceptualization of legal theory itself appears to be a concern for Tamanaha, but it is not clear from the text. Surely, it is an elitist field, but Tamanaha does not focus on this as Foucault might. But, to call into question the power structures that have made analytic philosophy and natural law jurisprudence the dominant forms (and to question why historical jurisprudence has been forgotten), is to question also the judgment that Nietzsche's genealogy has not escaped naïve realism. That is to say, Foucault's conception of genealogy challenges Nietzsche's genealogy to be self-referential—to question what evolutionary forces support the recognition of the "will to power," and by whom. To be self-referential in this way is necessary if genealogical approaches are to exemplify those virtues that they advocate. For Tamanaha's theory to be self-referential, it must make a genealogy of legal theory that includes the idea of genealogy itself; that calls into question the historical constructed-ness of historical deconstruction. None of this is on the agenda of *RTL*, however. And so, the reader is left to wonder how Tamanaha views the genealogy of legal theory: is it driven by evolutionary forces that are disclosed by the genealogy of genealogy, based on the survival of the fittest jurisprudent, like Nietzsche? Or is it a historically constructed power play carried out through the intertwining of power structures and claims to scientific

[58] *Id.* at 48.
[59] *Id.* at 49-50.
[60] TAMANAHA, *supra* note 1, at 12-13.

knowledge as with Foucault's genealogy? Lack of clarity on this issue goes to the core claims of the book since the methods of analytic jurisprudence[61] and the anti-realisms that it rejects are responses to the epistemological claims that are illustrated by the contrasting methods of Nietzsche and Foucault.

[61] The methodology of the Finnis reconstruction of natural law is bifurcated. Finnis intends to separate theoretical and practical reason as Aquinas did. Whether he succeeds in this has been a matter of debate, *see* LISSKA, *supra* note 4. In many respects, he does adopt a form of conceptual analysis, particularly with theoretical reason. He accepts the positivists dichotomy between fact and norm, but seeks to ground practical reason separately from theoretical reason. Perhaps the historical method that Tamanaha seeks does not lie between analytic jurisprudence and Finnis, but is an alternative that is at odds with both.

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Gagged by Big Ag: Whistleblower Silencing Bill Threatens the Employee's Right to Uncover Workplace Wrongdoing

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COMMENT

GAGGED BY BIG AG: WHISTLEBLOWER SILENCING BILL THREATENS THE EMPLOYEE'S RIGHT TO UNCOVER WORKPLACE WRONGDOING

*TARA COOLEY**

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INTRODUCTION

> Of the butchers and floorsmen, the beef-boners and trimmers, and all those who used knives, you could scarcely find a person who had the use of his thumb; time and time again the base of it had been slashed, till it was a mere lump of flesh against which the man pressed the knife to hold it. The hands of these men would be crisscrossed with cuts, until you could no longer pretend to count them or to trace them. They would have no nails, – they had worn them off pulling hides; their knuckles were swollen so that their fingers spread out like a fan.[1]

In 1906, Upton Sinclair published the results of his undercover investigations in *The Jungle*, which exposed horrendous conditions faced by employees in the meat-packing industry.[2] This led to social outcry and major reform.[3] Undercover investigations provide an avenue to inform the public when businesses conduct unethical, hazardous, or unlaw-

[1] UPTON SINCLAIR, THE JUNGLE 82 (Paul Negri & Joslyn T. Pine eds., Dover Thrift Editions 12th ed. 2001) (1906). The story is based on Sinclair's undercover investigations within the Chicago meatpacking industry in the 1900s, despite being a work of fiction.

[2] SINCLAIR, *supra* note 1.

[3] Following the release of *The Jungle*, the Meat and Inspection Act of 1906 and the Pure Food and Drug Act of 1906 were enacted. *Upton Sinclair's The Jungle: Muckraking the Meat-Packing Industry*, CONST. RTS. FOUND., http://www.crf-usa.org/bill-of-rights-in-action/bria-24-1-b-upton-sinclairs-the-jungle-muckraking-the-meat-packing-industry.html (last visited Feb. 23, 2019).

ful activities.[4] The investigator's right to access workplace settings is indispensable to safeguard the public's health and safety.[5] Vulnerable individuals, such as children and the elderly, are left unprotected without the investigator's access to the workplace.[6] Today, eight states have enacted whistleblower[7] silencing bills that criminalize and/or impose severe civil penalties against individuals who, like Sinclair, conduct undercover investigations to expose illegal and unethical practices.[8] Two of the state laws expand beyond food-processing facilities to target investigations within any work place, including childcare facilities and nursing homes.[9]

These whistleblower silencing bills, also known as 'ag-gag bills,'[10] began to emerge after undercover investigations severely damaged the image of factory farms.[11] For example, undercover investigators yielded footage of animal abuse: employees skinning alive day-old calves, grinding-up male chicks, and forcing injured animals to their kill spot by use of electric prods, fork lifts, and jabs to the eye.[12] After learning about these undercover investigations, 28 states attempted to enact ag-gag legislation between 1990 and 2017.[13]

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[4] *See* Brief for Amici Curiae in Support of Plaintiffs-Appellants Urging Reversal at 4, PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *vacated*, 737 F. App'x 122 (4th Cir. 2018), https://www.rcfp.org/wp-content/uploads/imported/2017-08-11-peta-nc.pdf.

[5] *See id.* at 5-9 (providing examples of disturbing practices that were exposed by undercover journalists, for example, the whistleblower who uncovered a history of careless inspections prior to the explosion of the oil rig Deepwater Horizon).

[6] *See id.* at 11-12 (presenting the example of the 1991 three-month investigation of a private nursing homes in Texas that uncovered disturbing recordings of the troubling treatment of the facility's elderly residents).

[7] A whistleblower is "an employee who turns against their superiors to bring [a] problem out in the open." *Whistleblower*, BLACK'S LAW DICTIONARY (9th ed. 2009).

[8] Current ag-gag laws exist in Alabama, Arkansas, Kansas, North Carolina, North Dakota, Missouri, Montana and Texas. Public Policy, *What Is Ag-Gag Legislation?,* ASPCA, https://www.aspca.org/animal-protection/public-policy/what-ag-gag-legislation (last visited Feb. 23, 2019) (stating that ag-gag bills are designed to silence whistleblowers who reveal to the public the animal abuse that is occurring on factory farms).

[9] The Arkansas and North Carolina statutes broaden the application to any workplace setting. *Id.*

[10] Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES, https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/ (last visited Feb. 23, 2019) (coining the term "ag-gag" to refer to legislation intended to silence investigators from exposing illegal and unethical practices within farm factories). The author uses the term "whistleblower silencing bill" to reflect the modern expansion of this legislation to hinder not only the investigations of farm factories, but of any business or organization.

[11] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1195-97 (D. Utah 2017). A farm factory is a large industrial facility that raises animals for food. Factory Farms, *Farm Animals Need Our Help*, ASPCA, https://www.aspca.org/animal-cruelty/farm-animal-welfare (last visited Feb. 23, 2019).

[12] *Herbert*, 263 F. Supp. 3d at 1197.

[13] ASPCA, *supra* note 8.

The purpose of ag-gag legislation is to prevent the investigation of questionable operational practices within factory farms.[14] In the past, these investigations resulted in boycotts, bankruptcy, and criminal charges for farm factories and their owners.[15] For example, former federal contractors for the National School Lunch Program,[16] Hallmark Meat Packing Company and Westland Meat Company Inc., settled for a combined $652 million after an undercover investigation revealed a video of the companies violating federal law by forcing cows, who were too sick to stand, to their feet in order to pass inspection.[17] The video[18] went public in 2008 and led to the largest recall of beef in United States ("U.S.") history: 143 million pounds.[19]

Ag-gag laws vary from state-to-state.[20] For example, an ag-gag provision might prohibit access of agriculture facilities under false pretenses, misrepresentations on job applications, or video/audio recording at the facility.[21] Typically, these statutes criminalize the actions of undercover investigators who document and expose unethical practices within agricultural facilities.[22] The legislatures in 12 states have successfully enacted ag-gag bills, though the courts have subsequently struck down four of the laws as unconstitutional because they impermissibly restricted First Amendment rights.[23] Six of the active ag-gag laws impose criminal

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[14] *See Our Opinion: Time's Running Out for North Carolina's Atrocious Ag-Gag Law*, WILSON TIMES (Jan. 11, 2019 9:01 PM), http://wilsontimes.com/stories/our-opinion-time-running-out-for-nc-ag-gag,156820.

[15] *Herbert*, 263 F. Supp. 3d at 1197-98.

[16] Press Release, U.S. Dep't of Justice, *U.S. Intervenes in Suit Against Former Beef Suppliers to National School Lunch Program: Inhumane Treatment and Slaughter of Disabled, Non-Ambulatory Cattle at Issue* (May 1, 2009), https://www.justice.gov/opa/pr/us-intervenes-suit-against-former-beef-suppliers-national-school-lunch-program.

[17] Helena Bottemiller, *Landmark Settlement Reached in Westland-Hallmark Meat Case*, FOOD SAFETY NEWS (Nov. 18, 2012), https://www.foodsafetynews.com/2012/11/landmark-settlement-reached-in-westlandhallmark-meat-case/ (stating "Westland/Hallmark went out of business after the abuse footage–which showed "downer" cows (animals unable to walk) being dragged, violently prodded, and forklifted–caused national outrage"). ASPCA, *supra* note 8. At the time of this incident the USDA prohibited the processing of meat from downer cows and a California law required that cows too sick to stand be humanely euthanized. 9 C.F.R. § 309.2(b) (2007).

[18] Videotape: *Crimes of Hallmark Westland Meat Company (Downer Cows Abuse)* (Vegan Century Oct. 29, 2011), https://www.youtube.com/watch?v=y95vIdwM0Vs (showing the images that sparked the controversy).

[19] Bottemiller, *supra* note 17. Prior to this incident, only four states introduced ag-gag legislation from 1990 to 2011: Alabama, Kansas, Montana, and North Dakota.

[20] ASPCA, *supra* note 8.

[21] *See Herbert*, 263 F. Supp. 3d at 1198. The terms agriculture facility, agriculture business, farms, and businesses are a few of the terms used within proposed state legislation to describe the businesses targeted by undercover investigations, and thus protected by the whistleblower silencing bills. ASPCA, *supra* note 8.

[22] ASPCA, *supra* note 8.

[23] Ag-gag laws imposing criminal penalties in Idaho, Iowa, Utah, and Wyoming were all struck down as unconstitutional. ASPCA, *supra* note 8; Animal Legal Def. Fund v. Reynolds, 2019

penalties; however, two laws—in the states of North Carolina and Arkansas—utilize a new strategy that imposes severe civil penalties on employees who conduct undercover investigations at their workplace.[24]

North Carolina unsuccessfully attempted to pass ag-gag legislation with criminal penalties in 2013 and 2014.[25] In 2015, North Carolina enacted the Property Protection Act ("PPA"), which permits employers to recover damages from an employee who captures video or data from nonpublic areas of the workplace.[26] There are two major differences between PPA and the traditional ag-gag statute.[27] First, PPA does not criminalize the act, but allows employers to recover severe civil penalties from an employee who violated the statute.[28] North Carolina was the first state to impose civil penalties in an ag-gag statute.[29] Consequently, there is no judicial guidance on how standing[30]—a justiciability requirement—applies in a First Amendment pre-enforcement challenge of an ag-gag law that imposes severe civil penalties.[31] Second, PPA is an ag-gag law and a piece of general anti-whistleblower legislation that applies to all employees in North Carolina regardless of the industry.[32] This broad drafting lessens the agricultural focus and impedes the ability of an employee in any industry to confront unethical treatment encountered on the job.[33]

U.S. Dist. WL 140069 at *1 (S.D. Iowa Jan. 9, 2019) (stating that the Iowa ag-gag law was unconstitutional because the false statements implicated by the statute were protected under the First Amendment and the statute did not survive strict or intermediate scrutiny).

[24] N.C. GEN. STAT. § 99A-2 (2016) (imposing severe civil penalties of $5,000 a day for each day the defendant acted in violation of the statute); ARK. CODE ANN. § 16-118-113 (2017) (imposing severe civil penalties of $5,000 a day for each day the defendant acted in violation of the statute). A $5,000 a day penalty is severe for an undercover investigator whose work will last weeks, months or even years. CARMEN CUSACK, ANIMALS AND CRIMINAL JUSTICE 139 (Routledge 2017) (2015) ("Long term [investigations] typically last around six weeks, but could . . . last for many years.").

[25] ASPCA, *supra* note 8.

[26] N.C. GEN. STAT. § 99A-2.

[27] *See* ASPCA, *supra* note 8.

[28] N.C. GEN. STAT. § 99A-2.

[29] *See* ASPCA, *supra* note 8; N.C. GEN. STAT. § 99A-2.

[30] Standing requires the plaintiff to establish an injury-in-fact, causation, and redressability to bring a claim. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992).

[31] In *PETA v. Stein*, the court held that the plaintiffs did not have standing because the relaxed standing requirement for First Amendment claims applied to criminal statutes, but not civil statutes. However, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded, holding that the plaintiffs possessed Article III standing to challenge PPA on First Amendment free-speech grounds. PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 378 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 129-31 (4th Cir. 2018).

[32] N.C. GEN. STAT. § 99A-2.

[33] *See* Dan Flynn, *Activists Challenge NC's New Ag-Gag Law in Federal Court*, FOOD SAFETY NEWS (Jan. 14, 2016), https://www.foodsafetynews.com/2016/01/north-carolinas-new-ag-gag-law-challenged-in-federal-court/.

In May 2017, the People for the Ethical Treatment of Animals, Inc. ("PETA") brought a pre-enforcement First Amendment challenge of PPA, which the U.S. District Court for the Middle District of North Carolina dismissed because the plaintiffs did not meet the standing requirement.[34] While the U.S. Court of Appeals for the Fourth Circuit reversed and remanded the decision holding that the plaintiffs proved an actual injury,[35] the court did not address how the standing requirement would apply to a challenge of PPA if the plaintiffs, lacking an actual injury, claimed a certainly impending injury.[36] Additionally, the decision remains unpublished and therefore lacks precedent.[37] The uncertainty surrounding the application of the standing requirement for statutes like PPA might encourage other states to draft similar bills,[38] further jeopardizing the rights of workplace whistleblowers.

Arkansas passed Act 606 in March 2017.[39] The legislation permits employers to seek severe civil penalties—up to $5,000 a day—against employees who intentionally uncover wrongdoing in the workplace.[40] The Arkansas law, like North Carolina's PPA, does not solely pertain to employees of agricultural businesses, but also applies to employees within any Arkansas business.[41] Additionally, Arkansas broadened the scope of the act so that it applies to any non-employee who "knowingly gains access to a nonpublic area . . . and engages in an act that exceeds the person's authority."[42]

The North Carolina and Arkansas laws are both examples of whistleblower silencing bills that have been disguised as property-protec-

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[34] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 386 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[35] The U.S. Court of Appeals for the Fourth Circuit held that "Plaintiffs alleged injury for standing purposes is that they have refrained from carrying out their planned investigations based on their reasonable and well-founded fear that they will be subjected to significant exemplary damages under the Act if they move forward at all." PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 130 (4th Cir. 2018).

[36] *Id.* at 131.

[37] When a court determines that a decision is without precedent, the court has expressed concern that it might be acting outside the law or inconsistently with established law. Michael Kagan et al., *Invisible Adjudication in the U.S. Courts of Appeals*, 106 GEO L.J. 683, 684 (2018), https://georgetownlawjournal.org/articles/264/invisible-adjudication-u-s-courts/pdf. The Federal Rules of Appellate Procedure 32.1 mandates the permissibility of the citation of unpublished, nonprecedential opinions of the U.S. Court of Appeals, thus, *PETA v. Stein*, an unpublished decision, is available in the Federal Appendix. FED. R. APP. P. 32.1; PETA, Inc. v. Stein, 737 F. App'x 122 (4th Cir. 2018).

[38] *See* ARK. CODE ANN. § 16-118-113. Arkansas Act 606 has provisions like PPA and it was enacted less than two years after PPA.

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] *Id.*

tion legislation.[43] PPA permits "recovery of damages for exceeding the scope of authorized access to property."[44] Act 606 is a civil cause of action for unauthorized access to property.[45] Laws that restrict actions based on their communicative power raise considerable constitutional issues,[46] despite the importance of property protection.[47] With the enactment of whistleblower silencing bills, like PPA and Act 606, the constitutional First Amendment concerns extend beyond farm factories and jeopardize every employee's right to uncover workplace wrongdoing.[48] When there is a risk that statutory provisions may chill free speech, judicial review is essential to ensure First Amendment rights are protected.[49] This Comment analyzes the court's application of the standing doctrine in *PETA v. Stein*[50] to demonstrate that the dismissal of a challenge to a whistleblower silencing statute because the plaintiff lacked standing is detrimental to First Amendment rights. This Comment argues that a relaxed standing requirement must be applied to future pre-enforcement challenges of legislation that aims to silence whistleblowers, and therefore chills First Amendment rights.

Part I examines the court's relaxed application of the standing requirement to criminal statutes that chill First Amendment rights. Part II argues for a relaxed application of the standing requirement to whistleblower silencing statutes, both criminal and civil, that chill First Amendment rights. Finally, Part III discusses the implication of the un-

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[43] ASPCA, *supra* note 8.

[44] N.C. GEN. STAT. § 99A-2.

[45] ARK. CODE ANN. § 16-118-113.

[46] *See Herbert*, 263 F. Supp. 3d at 1213 ("Utah undoubtedly has an interest in addressing perceived threats to the state agricultural industry, and as history shows, it has a variety of constitutionally permissible tools at its disposal to do so. Suppressing broad swaths of protected speech without justification, however, is not one of them.").

[47] "The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights." Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419, 435 (1982).

[48] Press Release: ALDF, *Coalition Sues North Carolina over Constitutionality of 'Anti-Sunshine' Law* (Jan. 13, 2016), https://aldf.org/article/coalition-sues-north-carolina-over-constitutionality-of-anti-sunshine-law/ ("North Carolina's version is written so broadly that it would also ban undercover investigations of all private entities, including nursing homes and daycare centers. The North Carolina law threatens to silence conscientious employees who witness and wish to report wrongdoing.").

[49] "When contesting the constitutionality of a criminal statute, 'it is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.'" Babbitt v. Farm Workers, 442 U. S. 289, 298 (1979) (quoting Steffel v. Thompson, 415 U.S. 452, 459 (1974)).

[50] PETA brought the first pre-enforcement challenge of North Carolina's Property Protection Act. PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 371 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 129-30 (4th Cir. 2018).

published *PETA v. Stein* decision and the likelihood of an increase in civil statutes silencing workplace whistleblowers.

I. BACKGROUND

To appreciate the significance of PPA and Act 606, it is first necessary to understand whistleblowers' rights to access and expose workplace wrongdoing. Moreover, it is valuable to recognize the purpose of special interest groups and their potential influence on the design of new legislation. A comparison of PPA and Act 606 to traditional ag-gag laws highlights the potential impact on all workplace whistleblowers. Furthermore, PPA and Act 606 call attention to the uncertainty of the standing application in challenges to civil statutes threatening First Amendment rights.

A. THE EMPLOYEE'S RIGHT TO UNCOVER WRONGDOING IN THE WORKPLACE

In November 2018, mother Kindsie watched a video that showed her four-year-old son's childcare teacher straddling her son on the floor, repeatedly slapping and pinching him.[51] Kindsie's son came home with welts and bruises.[52] After a teacher at the center quietly hinted to the concerned mother that there was trouble, Kindsie demanded to see the security cameras which uncovered the documented abuse of her son.[53] Kindsie believed that the center attempted to cover up the abuse and, if not for an employee at the center speaking up, the abuse would remain undiscovered.[54] The state charged the teacher with felony child abuse.[55]

The vulnerable individuals in society, such as young children and the elderly, depend on employees who witness abuse, wrongdoing, or illegal conduct to speak out.[56] Fortunately, employees have constitutional protections to ensure their ability to blow the whistle on wrongdoing in the workplace.[57] In addition, there are currently 22 federal laws that contain provisions protecting employees from retaliation for reporting the

[51] J.D. Miles, *North Texas Daycare Worker Charged with Child Abuse*, CBS DFN (Nov. 19, 2018, 5:10 PM), https://dfw.cbslocal.com/2018/11/19/north-texas-daycare-worker-charged-child-abuse/.

[52] Miles, *supra* note 51.

[53] *Id.*

[54] *Id.*

[55] *Id.*

[56] *See id.*

[57] The First Amendment of the United States Constitution prohibits Congress from passing laws that abridge an individual's freedom of speech. U.S. CONST. amend. I.

misconduct of their employer.[58] For example, the Affordable Care Act, the Clean Air Act, and the Consumer Product Safety Improvement Act all include provisions protecting whistleblowers from "adverse action," such as firing, intimidation, harassment, or reduction in pay or hours.[59] However, each whistleblower provision has specific requirements, depending on the federal law.[60] Thus, it may be complicated to determine which federal law provides the whistleblower with protection. Each federal whistleblower provision covers a specific category of employee, has specific actions that violate the provision, and has short and varying deadlines for filing an action.[61]

In addition, all states have some form of statutory safeguard for whistleblowers, and like federal protections, the application and the extent to which these statutes shield whistleblowers varies by state.[62] For example, in *Garcetti v. Ceballos*, the U.S. Supreme Court held that when public employees make a statement within the duties of their job they are not speaking as a citizen for First Amendment purposes.[63] The Court found that a district attorney's memorandum was a work-related task and

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[58] U.S. Dep't of Labor, *The Whistleblower Protection Program*, *Statutes,* OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.whistleblowers.gov/statutes (last visited Feb. 23, 2019). For example, the Occupational Safety and Health Administration Act includes a provision, section 11(c), that "provides in general that no person shall discharge or in any manner discriminate against any employee because the employee has: (a) Filed any complaint under or related to the Act; (b) Instituted or caused to be instituted any proceeding under or related to the Act; (c) Testified or is about to testify in any proceeding under the Act or related to the Act; or (d) Exercised on his own behalf or on behalf of others any right afforded by the Act." 29 U.S.C. § 660(c).

[59] U.S. Dep't of Labor, *supra* note 58; U.S. Dep't of Labor, *The Whistleblower Protection Program*, *Protection from Workplace Retaliations,* OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.whistleblowers.gov/know_your_rights (last visited Feb. 23, 2019).

[60] U.S. Dep't of Labor, *Occupational Safety and Health Admin. Directorate of Whistleblower Protection Programs (DWPP) Whistleblower Statutes Desk Aid*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.whistleblowers.gov/whistleblower_acts-desk_reference (last visited Feb. 23, 2019).

[61] *Id.* For example, the Toxic Substances Control Act applies only to the private sector, permits thirty days to file and thirty days to complete, and protects employees from retaliation for reporting possible violations relating to industrial chemicals. 15 U.S.C. § 2622.

[62] *Whistleblower Protection Laws, Deputizing Workers to Identify and Report Hazards,* CPR, http://www.progressivereform.org/WorkerWhistleblower.cfm (last visited Feb. 11, 2019). For example, a North Carolina whistleblower statute states that "[i]t is the policy of this State that State employees shall have a duty to report verbally or in writing to their supervisor, department head, or other appropriate authority, evidence of activity by a State agency or State employee constituting any of the following: (1) A violation of State or federal law, rule or regulation; (2) Fraud; (3) Misappropriation of State resources; (4) Substantial and specific danger to the public health and safety; (5) Gross mismanagement, a gross waste of monies, or gross abuse of authority; (b) Further, it is the policy of this State that State employees be free of intimidation or harassment when reporting to public bodies about matters of public concern, including offering testimony to or testifying before appropriate legislative panels." The statute does not provide protections to non-state employees. N.C. GEN. STAT. § 126-84(a) (2018).

[63] Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

was not protected speech.[64] *Garcetti* assumed that state whistleblower laws provide protection to employees who uncover wrongdoing.[65] In *Trusz v. UBS Realty Investors, LLC*, the Connecticut Supreme Court determined the amount of protection that Connecticut workers receive,[66] but in most states it is unclear.[67] Employees depend on legislatures to enact statutes that protect their right to uncover wrongdoing because employees remain vulnerable to retaliation for whistleblower conduct.

B. THE ROLE AND INFLUENCE OF SPECIAL INTEREST GROUPS

State legislators, as part of their oath, are responsible for upholding their state's constitution and the U.S. Constitution.[68] There is an inherent conflict between their duty to uphold the law and the influence of special interest groups, which might be contrary to the legislatures' duty to their constituents.[69] An inherent danger in legislative drafting is that the law may be influenced by special interest groups,[70] such as agricultural and food special interest groups.[71] For example, a legislator may help serve a special interest group by drafting a bill to avoid litigation that would

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[64] *Id.* at 410, 426.

[65] "The dictates of sound judgment are reinforced by the powerful network of legislative enactments-such as whistle-blower protection laws and labor codes-available to those who seek to expose wrongdoing." *Id.* at 425.

[66] Trusz v. UBS Realty Investors, LLC, 319 Conn. 175, 215-17 (2015) (holding that the state constitution protects employee speech related to official duties in a public workplace from employer discipline only if it involves a "comment on official dishonesty, deliberately unconstitutional action, other serious wrongdoing, or threats to health and safety," and that the protections extend to private employees).

[67] Robert Joyce, *Understanding the Limitations of North Carolina's Whistleblower Protection Act*, UNC SCH. OF GOV'T: COATES' CANONS: NC LOC. GOV'T LAW (July 8, 2010), https://canons.sog.unc.edu/understanding-the-limitations-of-north-carolinas-whistleblower-protection-act/ (providing an example of state whistleblower limitations for government employees).

[68] "I, (name), do solemnly swear that I will support the Constitution of the United States and the Constitution of Ohio, will administer justice without respect to persons, and will faithfully and impartially discharge and perform all of the duties incumbent upon me as (name of office) according to the best of my ability and understanding. [This I do as I shall answer unto God.]" OHIO REV. CODE ANN. § 3.23 (West 2007).

[69] *See* Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (demonstrating the conflict regarding the protection of the constitutional freedom of association and addressing concerns of legislative capture by special interest groups).

[70] *See* Chris Micheli, *How Interest Groups Influence Policymaking*, CAL. LAWMAKING (March 12, 2018), https://www.capimpactca.com/2018/03/interest-groups-influence-policymaking/. A special interest group is a group of individuals with shared interests working together to advance their cause. *Id.*

[71] Some of the powerful meat-lobbying organizations are the American Meat Institute, the National Meat Association, and the National Cattlemen's Beef Association. Steve Johnson, *The Politics of Meat*, FRONTLINE, https://www.pbs.org/wgbh/pages/frontline/shows/meat/politics/ (last visited Feb. 23, 2019).

threaten the objectives of the group.[72] One way to reduce the likelihood of a lawsuit is to complicate the path to judicial review for potential challengers.[73] If a court cannot hear a case, there can be no challenge to the statute's validity. The justiciability doctrines, namely standing, serve to limit the role of the courts in resolving public disputes and set forth specific requirements that must be met before a litigant may bring an action in federal court.[74] Thus, drafting legislation in a certain way to frustrate a plaintiff's path to judicial review may further the goals of special interest groups.

Another tactic used to achieve the goals of special interest groups, by evading judicial review, is to draft a statute that includes civil penalties as opposed to criminal liability.[75] Individuals facing civil penalties do not receive the same constitutional protections secured for criminal litigants by the Fourth, Fifth, and Sixth Amendments of the U.S. Constitution.[76] The Amendments apply to government action, and not private, civil action.[77] This makes judicial review of civil statutes more difficult.[78] In the 1980s, the strategy of including civil penalties in legislation resulted in an unsuccessful attack on the pornography industry.[79] Legislative efforts attempted to slow down the spread of the pornography industry by granting individuals a means of recovery for the harm they experienced as a result of pornography.[80] The anti-pornography statutes

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[72] *See* Micheli, *supra* note 70.

[73] Plaintiffs must satisfy the justiciability requirements, standing, ripeness, mootness and political question, to bring a claim. *See* Bombero v. Bombero, 160 Conn. App. 118, 135 (2015). Thus, a statute may be drafted in a way that complicates the plaintiff's ability to satisfying the requirements.

[74] Warth v. Seldin, 422 U.S. 490, 498-99 (1978).

[75] *See* Am. Book Sellers Ass'n v. Hudnut, 771 F.2d 323, 333-34 (1985) (holding that an Indianapolis statute that permitted civil penalties to individuals emotionally injured by pornography was unconstitutional based on First Amendment free-speech rights).

[76] U.S. CONST. amends. IV, V, VI.

[77] *Id.*

[78] *See* PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 383-84 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018) (stating that while courts routinely apply a relaxed standing requirement to First Amendment challenges of criminal statutes, the application of the relaxed standing requirement to civil statutes is unclear).

[79] *See Am. Book Sellers*, 771 F.2d 323. *See* ANDREA DWORKIN & CATHARINE A. MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS: A NEW DAY FOR WOMEN'S EQUALITY 24-30 (1985), https://www.feministes-radicales.org/wp-content/uploads/2012/05/Catharine-A.-MacKinnon-Andrea-Dworkin-Pornography-and-Civil-Rights-A-New-Day-for-Women%E2%80%99s-Equality-1988.pdf (outlining the movement to attack pornography, not by criminalizing the distribution and production of pornography, but by permitting severe civil penalties to individuals emotionally injured by pornography).

[80] *See Am. Book Sellers*, 771 F.2d at 324-25; *see also* DWORKIN & MACKINNON, *supra* note 79.

were ultimately determined to unconstitutionally infringe on First Amendment rights.[81]

Furthermore, in the 1990s, in opposition to *Roe v. Wade*, states unsuccessfully attempted to criminalize abortion.[82] Consequently, Louisiana enacted a statute to deter physicians from performing abortions by imposing civil liability for damages incurred by patients during abortions.[83] This tactic also raised constitutional concerns.[84] In *Okpaloby v. Foster*, the district court stated that the statute permitting tort liability against abortion providers "place[d] an unconstitutional undue burden on a woman's right to abortion."[85] On rehearing en banc, the Court of Appeals held that the plaintiffs did not satisfy the standing requirement.[86] Therefore, other states viewed this as a successful approach, which led to the enactment of similar statutes to deter physicians in their states from performing abortions.[87]

The above tactics have gained traction again with PPA as tools to achieve special interests.[88] The application of severe civil penalties in place of criminal prosecution may increase the possibility that PPA, and statutes alike, will evade review.[89]

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[81] *See Am. Book Sellers*, 771 F 2d. at 332-334.

[82] Roe v. Wade, 410 U.S. 113 (1973). Abortion was banned except when necessary to save the pregnant woman's life or in limited cases of rape and incest. LA. STAT. ANN. §14:87 (1991), *invalidated by* Sojourner v. Edwards, 974 F.2d 27, 31 (5th Cir. 1992).

[83] LA. REV. STAT. § 9:2800.12(A) (2006). The Liability for Termination of Pregnancy Act states that "any person who performs an abortion is liable to the mother of the unborn child for any damages occasioned or precipitated by the abortion."

[84] *See* Okpaloby v. Foster, 244 F.3d at 409-10 (5th Cir. 2001) (citing the district court's opinion that statutes permitting tort liability for abortion providers "places an unconstitutional undue burden on a woman's right to abortion").

[85] *See id.* at 428-29 (discussing a Louisiana statute that allegedly forced physicians to stop performing abortions because of possible exposure to civil damage claims, thus achieving the goal of eliminating abortions, in which the court ultimately determined the plaintiffs had no case or controversy).

[86] *See id.* at 428-29 (holding by the U.S. Court of Appeals for the Fifth Circuit that the plaintiffs did satisfy the standing requirement).

[87] *See* Nova Health Sys. v. Gandy, 416 F.3d 1149, 1153-54, 1157 (10th Cir. 2005) (further demonstrating the constitutional concerns regarding statutes imposing civil penalties to deter acts, and the difficulty for plaintiffs to prove standing in such cases).

[88] *See* N.C. GEN. STAT. § 99A-2.

[89] *See id.*; *see also* PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 386 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018) (holding that the plaintiffs did not meet the standing requirement, which was reversed and remanded by the Court of Appeals for the Fourth Circuit; however, the unpublished decision lacks precedent).

C. WHISTLEBLOWER SILENCING BILLS THAT IMPOSE SEVERE CIVIL PENALTIES

The purpose of traditional ag-gag laws is to dissuade undercover investigators from documenting disturbing practices occurring at farm factories,[90] while modern whistleblower silencing laws expand the restriction to any workplace setting.[91] Expanding the scope of these statutes to include all employees increases the likelihood that employees will choose not to expose the mistreatment of vulnerable individuals for fear of severe civil penalties.

1. North Carolina's Property Protection Act, the New Ag-Gag Law

PPA, which is a civil—not criminal—statute, permits damages of up to $5,000 a day for each day that an employee violates any of PPA's provisions.[92] An employee violates PPA if the employee "intentionally gains access to the nonpublic areas[93] of [the employer's] premises and engages in an act that exceeds the person's authority to enter those areas."[94] Consequently, this may cause an employee engaged in an undercover investigation at work to be liable for up to $450,000 in damages if they carried out the investigation for three months.[95] Even an employee

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[90] *Ag-Gag Laws,* ANIMAL LEGAL DEF. FUND*, https://aldf.org/issue/ag-gag/* (last visited Mar. 1, 2019).

[91] *See* N.C. GEN. STAT. § 99A-2.

[92] *Id.*

[93] "For the purposes of this section, 'nonpublic areas' shall mean those areas not accessible to or not intended to be accessed by the general public." *Id.*

[94] "For the purposes of this section, an act that exceeds a person's authority to enter the nonpublic areas of another's premises is any of the following: (1) An employee who enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization captures or removes the employer's data, paper, records, or any other documents and uses the information to breach the person's duty of loyalty to the employer. (2) An employee who intentionally enters the nonpublic areas of an employer's premises for a reason other than a bona fide intent of seeking or holding employment or doing business with the employer and thereafter without authorization records images or sound occurring within an employer's premises and uses the recording to breach the person's duty of loyalty to the employer. (3) Knowingly or intentionally placing on the employer's premises an unattended camera or electronic surveillance device and using that device to record images or data. (4) Conspiring in organized retail theft, as defined in Article 16A of Chapter 14 of the General Statutes. (5) An act that substantially interferes with the ownership or possession of real property." *Id.*

[95] "[The] length of the investigation will be determined by a number of factors." EUGENE FERRARO, UNDERCOVER INVESTIGATIONS FOR THE WORKPLACE 30 (Elsevier Science 2000) (stating an investigation can take weeks or months). An undercover investigator facing civil penalties under PPA for a three-month investigation, could owe up to $450,000, or $5,000 for each day. *See* N.C. GEN. STAT. § 99A-2.

with a strong desire to uncover the most disturbing behavior might reconsider, self-censor their speech, and leave the behavior uncovered.

The district court in *PETA v. Stein* dismissed the First Amendment pre-enforcement challenge of PPA because PETA did not meet the standing requirement.[96] The court implied that the pre-enforcement challenge would have been reviewable by applying a relaxed standing standard if PPA was a criminal statute.[97] The U.S. Court of Appeals for the Fourth Circuit later reversed and remanded the decision, holding that the plaintiffs satisfied standing by proving an actual injury.[98] The decision remains unpublished.[99] Therefore, a plaintiff raising a pre-enforcement challenge to similar whistleblower silencing laws will likely face a similar battle in satisfying the standing requirement.[100]

2. Arkansas's Act 606 Modeled After the Property Protection Act

Less than two years after the enactment of PPA, Arkansas passed a nearly identical ag-gag law, Act 606.[101] The Act imposes civil penalties on any employee that exceeds his or her authority to enter into a nonpublic area and damages the employer by capturing or removing documents or recording images or sounds, placing a camera, conspiring in organized theft of employer belongings, or committing an act that substantially interferes with ownership of the property.[102] In addition, employees can be held liable if they knowingly assist or direct another employee to violate the statute.[103]

There are several differences between PPA and Act 606.[104] Although Act 606 broadened its scope of applicability compared to PPA by applying liability to employees and non-employees alike, Arkansas has reduced the number of work settings that Act 606 applies to.[105] First, Act 606 applies to anyone who "knowingly gains access to a nonpublic area

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[96] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 386-87 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[97] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 378 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[98] PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 130-31 (4th Cir. 2018) (holding the plaintiffs alleged a well-founded fear of injury).

[99] PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[100] The appropriate application of the standing doctrine to whistleblower silencing bills imposing severe civil penalties is unclear. *See* PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[101] ARK. CODE ANN. § 16-118-113.

[102] *Id.*

[103] *Id.*

[104] N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113.

[105] ARK. CODE ANN. § 16-118-113.

of a commercial property" and commits one of the acts noted above; whereas PPA only applies to employees.[106] Second, there are additional restrictions to Act 606's application that are not present in PPA's provisions.[107] Act 606 does not apply if the employer-at-issue is any of the following: a state agency, a public college or university, a police officer engaged in an investigation of commercial property, or a healthcare or medical services provider.[108] Arkansas acted swiftly to pass an ag-gag law mirroring North Carolina's PPA.[109] Other states may follow North Carolina's lead and pass anti-whistleblower legislation if PPA is not struck down as an unconstitutional restriction on the freedom of speech protected by the First Amendment.[110]

D. THE APPLICATION OF THE STANDING REQUIREMENT TO FIRST AMENDMENT INFRINGEMENT CLAIMS

The purpose of the standing doctrine is to safeguard the balance of power between the three branches of government, recognizing that judicial power can "[p]rofoundly affect the lives, liberty, and property of those to whom it extends."[111] Merely alleging that a statute is unconstitutional does not guarantee judicial standing because advisory opinions are not permitted by the Constitution.[112] The standing requirement ensures that the plaintiff has the right to bring a legal claim and also safeguards the defendant from an insufficient claim.[113] The judiciary has overseen the evolution of the standing doctrine, which ensures that before a case may be heard the party seeking relief (1) has a concrete injury, (2) that

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[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] PPA went into effect on January 1, 2016 and Act 606 was passed in March 2017, only 14 months later. N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113.

[110] *See* ARK. CODE ANN. § 16-118-113.

[111] Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 473 (1982).

[112] An advisory opinion is mere statutory interpretation without review of an actual controversy and violates the "case and controversy" requirement of the Constitution. U.S. CONST. art. III, § 2; *see* Howell v. Tex. Workers' Comp. Comm'n, 143 S.W.3d 416, 440-41 (Tex. App.—Austin 2004, pet. denied). "The Court has frequently called attention to the 'great gravity and delicacy' of its function in passing upon the validity of an act of Congress; and has restricted exercise of this function by rigid insistence that the jurisdiction of federal courts is limited to actual cases and controversies; and that they have no power to give advisory opinions." Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 345-46 (1936).

[113] The standing test ensures that the plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59, 72 (1978) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

the injury was caused by the conduct of the defendant, and (3) the judicial process can remedy the injury.[114] Although constitutional review should be avoided whenever possible,[115] the threat to free speech carries a societal interest that makes judicial review essential.[116] In this context, without constitutional review of state statutes that threaten the First Amendment protections of whistleblowers, unethical behavior in the workplace may remain undiscovered.

A chilling effect occurs when an action has the indirect effect of dissuading speakers from exercising their First Amendment rights.[117] Penalties that deter action can include criminal and civil actions, or loss of state benefits or privacy.[118] An individual's chilled speech may satisfy the standing requirement.[119] The concrete injury requirement is met when a statute forces individuals to change their conduct to avoid liability.[120] In cases regarding chilled speech, the traditional requirements that the injury be concrete and particularized are relaxed to permit attenuated claims.[121] This relaxed standing requirement is an important protection that may prevent states from overreaching and enacting unconstitutional

[114] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992). According to *Lujan*, to meet the standing requirements, first, the plaintiff must have suffered an injury in fact which is "concrete and particularized" (citing *Seldin*, 422 U.S. at 508) and "real and immediate," not "conjectural" or "hypothetical." *Id.* at 560 (quoting City of Los Angeles v. Lyons, 461 U.S. 95, 102 (1983)). Second, standing requires that the conduct caused the injury, thus, the injury must be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . the result [of] the independent action of some third party not before the court." *Id.* at 560-61 (quoting Simon v. E. Ky. Welfare Rights Org., 426 U.S. 26, 41–42 (1976)). Third, it must be "likely," not merely "speculative," that the injury will be "redressed by a favorable decision." *Id.* at 561 (citing *Simon*, 426 U.S. at 38).

[115] "The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision." *Ashwander*, 297 U.S. at 346-48 (explaining the safeguards that the Court has implemented to ensure its review of constitutional questions is limited).

[116] *See* Lopez v. Candaele, 630 F.3d 775, 785-87 (9th Cir. 2010) (discussing the relaxed application of the standing doctrine in First Amendment challenges "to avoid the chilling effect of sweeping restrictions").

[117] "Where . . . a statute imposes a direct restriction on protected First Amendment activity, and where the defect in the statute is that the means chosen to accomplish the State's objectives are too imprecise, so that in all its applications the statute creates an unnecessary risk of chilling free speech, the statute is properly subject to facial attack." Sec'y of Md. v. Joseph H. Munson Co., 467 U.S. 947, 967 (1984).

[118] *See* N.C. GEN. STAT. § 99A-2 (imposing civil penalties); *see* IDAHO CODE § 18-7042 (imposing criminal penalties).

[119] Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289, 298 (1979) ("If the injury is certainly impending that is enough." (quoting Pennsylvania v. West Virginia 262 U.S. 553, 593 (1923))).

[120] Meese v. Keene, 481 U.S. 465, 475 (1987) ("[T]he need to take such affirmative steps to avoid the risk of harm . . . constitutes a cognizable injury . . . .").

[121] "[W]here a First Amendment challenge could be brought . . . there is a possibility that, rather than risk . . . challenging the statute, [one] will refrain from engaging further in the protected activity. Society as a whole then would be the loser. Thus, when there is a danger of chilling free speech, the concern that constitutional adjudication be avoided whenever possible may be out-

anti-whistleblower laws by increasing the likelihood that such action by the states will undergo judicial review.[122]

The plaintiff satisfies the injury requirement in criminal litigation by a "credible threat" if a recently enacted statute facially restricts expressive activity.[123] However, to meet this exception, the plaintiff must prove that the threat is not "imaginary or wholly speculative."[124] The reasoning for the exception is that an individual should not have to undergo criminal prosecution to seek relief.[125] Considering the differences between criminal and civil proceedings, the application of a relaxed standing requirement for civil plaintiffs is not well established.[126]

II. THE NEED FOR A RELAXED APPLICATION OF THE STANDING REQUIREMENT TO CHILLING CIVIL STATUTES

The liberty interest of the Due Process Clause of the Fourteenth Amendment guarantees citizens certain protections against actions of state governments, including the rights guaranteed by the First Amendment of the Constitution.[127] States have a responsibility to act in a way that protects First Amendment rights.[128] However, if a state drafts a statute that infringes on these protections, judicial review is the most logical vehicle to address these concerns.[129] The District Court in *PETA v. Stein* dismissed a pre-enforcement challenge of PPA even though it acknowledged the possibility for the statute to chill First Amendment rights.[130] This sends a disquieting message that suggests the judiciary will not protect constitutional rights even when those very rights are threatened by governmental acts.

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weighed by society's interest in having the statute challenged." *Joseph H. Munson Co.*, 467 U.S. at 956.

[122] *See* PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 378-81 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[123] N.H. Right to Life Political Action Comm. v. Gardner, 99 F. 3d 8, 13 (1st Cir. 1996).

[124] *Babbitt*, 442 U.S. at 302.

[125] *Id.* (citing Steffel v. Thompson, 415 U.S. 452, 459 (1974)).

[126] For example, a few differences between criminal and civil proceedings include punishment, standard of proof, and trial by jury. *Criminal and Civil Justice*, NAT'L CTR. FOR VICTIMS OF CRIME, http://victimsofcrime.org/media/reporting-on-child-sexual-abuse/criminal-and-civil-justice (last visited Mar. 3, 2019).

[127] James W. Ely, Jr., *Due Process Clause*, HERITAGE GUIDE TO THE CONST., http://www.heritage.org/constitution/#!/amendments/14/essays/170/due-process-clause (last visited Mar. 3, 2019).

[128] Alan Rosenthal, *Beyond the Intuition that Says "I Know One When I See One," How do You Go About Measuring the Effectiveness of Any Given Legislature?*, STATE LEGISLATURES MAG. (July/Aug. 1999), http://www.ncsl.org/research/about-state-legislatures/the-good-legislature.aspx.

[129] *Id.*

[130] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 376 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018) ("[T]he court is constrained from reaching the merits of Plaintiffs' claims, notwithstanding the serious First Amendment issues at stake.").

A. THE FACIALLY UNCONSTITUTIONAL CHILLING EFFECT OF CIVIL STATUTES

The relaxed standing requirement, which permits pre-enforcement challenges to criminal statutes that chill free speech, should also apply to civil statutes that substantially chill First Amendment rights. If a statute causes a speaker to self-censor his protected speech, then the individual has been harmed.[131] If a civil statute chills free speech by permitting severe penalties against an individual, the statute's effect is like a criminal statute, thus the relaxed standard should apply.

1. A "Certainly Impending" Injury: Self-Censorship is Sufficient Harm

A concrete injury is one of the three standing requirements, but a fear of future injury can satisfy the requirement if the threatened injury is "certainly impending."[132] "Certainly impending" means that there is a substantial risk that the harm will occur.[133] Society's interest in protecting free speech outweighs other interests, such as the courts' interest in applying judicial avoidance principles in determining whether a case has standing.[134] In First Amendment cases, the injury requirement is met if an individual self-censors the right to free speech.[135] Therefore, the injury is that the speech was thwarted because the speech has not occurred and may never occur.[136]

PPA discourages undercover investigators from working to uncover unethical behavior in North Carolina businesses by threatening severe civil penalties.[137] The former governor of North Carolina, Pat McCrory, vetoed PPA because he was "concerned that subjecting employees to potential civil penalties would create an environment that discourages employees from reporting illegal activities."[138] The *PETA* court acknowledged that PPA raises a legitimate First Amendment concern.[139] The chilling of First Amendment rights, which PPA and similar

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[131] *Joseph H. Munson Co.*, 467 U.S. at 956.

[132] Clapper v. Amnesty Int'l U.S., 568 U.S. 398, 409-10 (2013).

[133] *Id.* at 409.

[134] *Joseph H. Munson Co.*, 467 U.S. at 956.

[135] *Id.* at 967-68.

[136] Initiative & Referendum Inst. v. Walker, 450 F.3d 1082, 1088 (10th Cir. 2006).

[137] *See* N.C. GEN. STAT. § 99A-2.

[138] Mark Binker & Laura Leslie, *Lawmakers Override McCrory Veto on Controversial 'Ag-Gag' Bill*, WRAL (June 3, 2015), http://www.wral.com/lawmakers-override-mccrory-veto-on-controversial-private-property-bill/14687952/.

[139] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 376 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

whistleblower bills cause, is significant enough to support the consistent application of a relaxed standing requirement—generally only applicable to criminal statutes—to ensure the judicial review of potentially unconstitutional legislation.[140] While the U.S. Court of Appeals for the Fourth Circuit held that PETA satisfied the standing requirement, the analysis was pertaining to an actual injury and did not address the standing application in a "certainly impending" injury.[141]

2. The Severe Civil Penalty: Remedial or Punitive?

A statute like PPA that imposes severe civil penalties—punitive fines—on[142] individuals who exercise their free speech rights warrants constitutional protections as applied to criminal statutes.[143] In *U.S. v. Halper*, the Court, in determining whether a civil penalty constituted punishment, held that punishment "cuts across the division" between criminal and civil law.[144] A medical service provider was convicted under the False Claims Act, which permitted a $2,000 fine for each of the 65 claims the medical provider violated under the Act, totaling over $130,000.[145] Civil action to recover penalties is "punitive in character," and resembles criminal penalties because the wrongdoer is punished.[146] After *Halper*, courts "look to [1] the purpose of the civil action and [2] the extent to which it is designed [to] punish[ ] or . . . reimburse[ ] the government's expenses."[147] If a civil statute imposing severe civil penal-

[140] The U.S. Court of Appeals for the Fourth Circuit held that the plaintiffs satisfied the standing requirement, but the court did not address the relaxed application of the standing requirement to civil statutes. PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 131 (4th Cir. 2018).

[141] PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 131 (4th Cir. 2018). The unpublished decision lacks precedent.

[142] A remedial fine compensates for actual or anticipated losses; a punitive fine compensates higher than reasonable for remedial purposes. Vikram Omar & David Reis, *Are Large Civil Fines For Minor Violations Unconstitutional? Applying Proportionality Standards Outside the Punitive Damages Context*, FINDLAW (June 11, 2004), https://supreme.findlaw.com/legal-commentary/are-large-civil-fines-for-minor-violations-unconstitutional.html.

[143] *See* United States v. Halper, 490 U.S. 435, 442 (1989) (discussing whether a civil penalty is equivalent to punishment and like a criminal penalty, the Court stated that case law did "not foreclose the possibility that in a particular case a civil penalty . . . may be so extreme and so divorced from the Government's damages and expenses as to constitute punishment").

[144] The terms "criminal" and "civil" are insignificant because "civil proceedings may advance punitive as well as remedial goals, and, conversely, that both punitive and remedial goals may be served by criminal penalties." *Id.* at 447-48.

[145] *Id.* at 437-38.

[146] United States v. LaFranca, 282 U.S. 568, 573-74 (1931).

[147] Eric Anielak, *Double Jeopardy: Protection Against Multiple Punishments*, 61 MO. L. REV. 169, 175-76 (1996), http://scholarship.law.missouri.edu/mlr/vol61/iss1/12.

ties was drafted to punish actors, then the relaxed standing doctrine should apply.[148]

PPA's severe civil penalty of $5,000 a day for each PPA violation can easily lead to enormous penalties for those who seek to uncover wrongdoing at their workplace.[149] Penalties could reach $25,000 after only one week on the job, $50,000 in just two weeks, and over $200,000 after just a few months of employment.[150] The first question, whether the legislature intended to label PPA as civil or criminal, can be determined by reviewing a history of ag-gag legislation.[151] Since 1990, 28 states have introduced numerous statutes criminalizing activities related to the documentation of conditions within agricultural businesses.[152] PPA, like traditional ag-gag statutes, threatens individuals who wish to uncover the disturbing practices of agricultural businesses.[153] Although PPA implies a criminal intent, legislatures drafted PPA as a civil statute, perhaps to avoid the attention of whistleblowers.[154] PPA has the same intent as every other ag-gag criminal statute, but the legislature intentionally drafted it as a civil statute to benefit the special interests of North Carolina's agricultural businesses.[155] Thus, the same standing requirement should be applied to PPA as would be applied to ag-gag laws.[156]

Regarding the second consideration, PPA permits severe civil penalties—punitive damages—thus, the penalty is comparable to criminal punishment.[157] PPA is equivalent to a criminal statute not just because of

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[148] "[C]riminal prosecutions masquerading in the guise of civil penalties will not be tolerated; the alleged offender in a civil penalty case should receive the same protections afforded a defendant in a criminal case." Jonathan Charney, *Need for Constitutional Protections for Defendants in Civil Penalty Cases*, 59 CORNELL L. REV. 478, 482 (1974), http://scholarship.law.cornell.edu/clr/vol59/iss3/5.

[149] *See* N.C. Gen. Stat. § 99A-2 (permitting fines up to $5,000 a day for every day an individual violates PPA).

[150] *See id.*

[151] ASPCA, *supra* note 8.

[152] ASPCA, *supra* note 8.

[153] *See* N.C. GEN. STAT. § 99A-2; ASPCA, *supra* note 8.

[154] *See Our Opinion: Time's Running Out for North Carolina's Atrocious Ag-Gag Law*, *supra* note 14 (stating "while our state hasn't criminalized undercover investigations, it uses the threat of steep fines to deter would-be whistleblowers" and "ag-gag laws are plainly intended to stop undercover investigations that expose abuse and embarrass factory farms").

[155] *See id.* ("Animal welfare groups often use secretly recorded video of poultry and livestock abuse to make their case for stricter farm regulations and food boycotts. That frightens farmers, who use their lobbying muscle to preempt the threat to their business. But the undercover operatives often uncover crimes, and without the evidence they gather, those crimes would go unpunished."). North Carolina is the second-largest hog producer in the U.S., totaling approximately $2.9 billion in sales. *2012 Ranking of Market Value of Ag Products Sold: North Carolina,* USDA CENSUS OF AGRIC., https://www.nass.usda.gov/Publications/AgCensus/2012/Online_Resources/Rankings_of_Market_Value/North_Carolina/index.php (last visited Feb. 23, 2019).

[156] *See* ASPCA, *supra* note 8.

[157] *See* N.C. GEN. STAT. § 99A-2.

the amount of damages—$5,000 a day—but also because of the broad application of violations applicable under the Act's provisions.[158] The penalty not only applies to employees who violate the statute, but also applies to any individual who "directs, assists, compensates, or induces" another person to violate PPA.[159] PPA was not enacted to compensate employers for losses due to undercover investigations.[160] Although fines of $250,000 or more are extreme, the recovery would not remedy the losses that businesses incur after wrongdoing is exposed: likely millions of dollars.[161] Hence, the goal of PPA is to punish whistleblowers, not to reimburse employers for injury caused by whistleblowers. When willing speakers chill their own speech due to fear of severe civil penalties, the statute punishes the speaker and thereby indicates a criminal statutory purpose.

B. Unconstitutional Civil Action Without State Action

Only a government actor can chill First Amendment rights.[162] Some legislatures attempt to disguise state action as a private action so that a relaxed standing requirement is applied, which consequently makes it easier to avoid judicial review. As in PPA, the result is that employees and outsiders cannot challenge the unconstitutional threat to freedom of speech caused by a statute without risking severe civil penalties.[163]

1. The Interplay of Private and Government Action Restricting First Amendment Rights

Restraints on free speech without direct government action may still trigger the protections of the First Amendment rights.[164] For example, in *NAACP v. Alabama,* the Alabama Supreme Court held that a state statute that required NAACP to disclose the names of its members was unconstitutional.[165] However, NAACP could not bring its constitutional challenge "until it purged itself of contempt by divulging its membership

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[158] PPA broadly applies to "any person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter those areas" and imposes liability on the individual "to the owner or operator of the premises for any damages sustained." N.C. Gen. Stat. § 99A-2.

[159] N.C. Gen. Stat. § 99A-2.

[160] *See id.*

[161] *See* Bottemiller, *supra* note 17.

[162] Babbitt v. United Farm Workers Nat. Union, 442 U.S. 289 (1979).

[163] *See* N.C. Gen. Stat. § 99A-2; *see also* PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[164] NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 461 (1958).

[165] *Id.*

lists."[166] Similarly, in PPA, the dismissal of the pre-enforcement challenge means that employees are required to violate PPA before the court will hear their constitutional challenges.[167] When state statutes permit private actors to seek damages against an individual for expressing his or her free-speech rights, there must be an immediate judicial recourse against such unconstitutional chilling of free speech.

The U.S. Supreme Court in *NAACP v. Alabama* held that private activity, like government action, can chill speech.[168] The Court held that the "interplay of governmental and private action" was sufficient to implicate the First Amendment.[169] Therefore, state laws that do not directly restrain speech, but create the conditions by which private actors can deter expressive conduct, may also fall within the scope of First Amendment prohibitions.[170] Private action chilling free speech, even without government action, may satisfy the standing requirement.

2. Indirect Government Action Chilling Free Speech

When provisions of a state statute chill free speech, indirect government action is at play regardless of whether the statute expressly permits government action.[171] In *Mobil Oil Corp. v. Attorney General of Virginia*, the court held that a statute imposing civil penalties was unconstitutional.[172] The court found that the Mobil Oil Corporation suffered a harm by self-censoring its actions.[173] However, the district court in *PETA* determined that this ruling did not apply to PPA.[174] In *Mobil Oil Corp.*, the statute specifically gave the Attorney General the authority to enforce the law and to investigate violations.[175] The court in *PETA* held that because the Attorney General was not expressly permitted by the statute to enforce the law, PPA was a completely private action; therefore, the relaxed standing requirement did not apply.[176] Yet, there was no indication in *Mobil Oil Corp.* that an expressed enforcement provision

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[166] *Id.* at 454.

[167] *See* PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[168] *NAACP*, 357 U.S at 463.

[169] *Id.*

[170] *See id.*

[171] Mobil Oil Corp. v. Att'y Gen. of Va. 940 F.2d 73, 77 (4th Cir. 1991).

[172] *Id.* at 75.

[173] *Id.* at 76.

[174] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 379 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

[175] *Mobil Oil Corp.*, 940 F.2d at 75.

[176] PETA, Inc. v. Stein, 259 F. Supp. 3d 369, 379-80 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122 (4th Cir. 2018).

was required to apply the relaxed standing requirement.[177] Here, North Carolina's enactment of PPA is the cause of the plaintiff's (PETA) decision not to participate in the prohibited act. Even without the Attorney General's express ability to enforce PPA, indirect government action is still at play and the relaxed standing requirement applies.

III. PPA AND ACT 606 ENCOURAGE THE ENACTMENT OF NEW WHISTLEBLOWER SILENCING BILLS THAT INVADE THE EMPLOYEE'S RIGHT TO UNCOVER WRONGDOING

Fourteen months after North Carolina implemented PPA, Arkansas followed North Carolina's civil approach with the 2017 enactment of Act 606.[178] If this new design of civil ag-gag statutes is not struck down under judicial review, then state legislatures will continue to draft ag-gag laws that utilize this strategy and infringe on whistleblowers' rights. In June 2018, the Court of Appeals for the Fourth Circuit reversed and remanded the district court decision, holding that the plaintiffs proved an actual injury and thereby satisfied the standing requirement without relaxing the standard for First Amendment purposes.[179] A new standard is required to ensure that cases with certainly impending injuries are reviewable regardless of whether it is a criminal or civil case, and that the standing requirement remains intact.

A. THE THREAT TO EMPLOYEE WHISTLEBLOWERS IN ALL WORKPLACES

Whistleblower-protection laws guarantee free speech to workers willing to expose wrongdoing in the workplace.[180] Although there are federal and state laws that protect whistleblowers, the application of those laws varies by state and by situation.[181] There are various issues that plague whistleblowers within different areas of the law. For instance, in drafting the Defend Trade Secrets Act of 2016, Congress hoped to address the rising issue of misuse of disclosure agreements to discourage the reporting of illegal activities in the workplace.[182] PPA and the new

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[177] *Mobil Oil Corp.*, 940 F.2d at 76.

[178] ARK. CODE ANN. § 16-118-113.

[179] PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 131 (4th Cir. 2018).

[180] Occupational Safety and Health Admin, *The Whistleblower Protection Program*, U.S. DEP'T OF LABOR, https://www.whistleblowers.gov/ (last visited Mar. 3, 2019).

[181] *Id.*

[182] Peter Menell, *Misconstruing Whistleblower Immunity Under the Defend Trades Secrets Act,* CLS BLUE SKY BLOG (Jan. 3, 2017), http://clsbluesky.law.columbia.edu/2017/01/03/misconstruing-whistleblower-immunity-under-the-defend-trade-secrets-act/.

design of ag-gag legislation magnify the concern that whistleblower silencing laws deter employees from uncovering wrongdoing.[183] The silencing of workplace whistleblowers will increase with an increase of laws like PPA and Act 606.

An increased silencing of whistleblowers will have detrimental effects for the most vulnerable members of society. At age 90, Erytha Mayberry's daughters moved her to Quail Creek Nursing Home where she suffered ongoing abuse and neglect by her two primary nursing-home attendants.[184] Erytha's family attempted to discuss concerns with the nursing home after finding bruises on Erytha's arms and leg, but the nursing home refused to take action.[185] After Erytha told her daughters that someone "was hurting her mouth," her daughters placed hidden cameras in her private room.[186] The video captured disturbing footage of two workers slapping Erytha in the face and stuffing her mouth with latex gloves.[187] The video also showed the workers forcibly pushing on Erytha's stomach, causing her to urinate so they would not have to change her diaper again.[188]

Under PPA and Act 606, employees of Quail Creek Nursing Home could be fined up to $5,000 a day for obtaining documents, recordings, or videotapes of such abuse.[189] Additionally, under Act 606, Erytha's daughters, who were nonemployees, could be found liable for damages to Quail Creek Nursing Home for secretly videotaping Erytha's private room to investigate concerns for the wellbeing of their mother.[190] Nursing homes are only one example of workplace settings where statutes like PPA and Act 606 would apply.[191] Childcare centers, restaurants, and a variety of businesses could also target employees, and in some cases nonemployees, for actions taken to expose wrongdoing in these facilities.[192]

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[183] *See* N.C. GEN. STAT. § 99A-2; *see* ARK. CODE ANN. § 16-118-113.

[184] Racher v. Westlake Nursing Home Ltd. P'ship, 871 F.3d 1152, 1157-58 (2017).

[185] *Id.* at 1158.

[186] *Id.*

[187] *Id.*

[188] *Id.*

[189] N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113.

[190] ARK. CODE ANN. § 16-118-113.

[191] N.C. GEN. STAT. § 99A-2; ARK. CODE ANN. § 16-118-113. Act 606 provides an exception for healthcare and medical providers; thus, nursing home employees who provide medical care may be exempt under the statute.

[192] *Id.*

B. THE ROBERTS COURT: CONCERNS OF AN INCREASE IN OVERREACHING STATUTES

The immediate action of the Roberts Court to address legislative overreach is essential to prevent the continued drafting of whistleblower silencing bills. "[T]he effect of many of the [Roberts] Court's decisions [is] to close the courthouse doors,"[193] but the Roberts Court has increased its review of standing cases compared to the Warren, Burger, and Rehnquist Courts that preceded it.[194] In some cases, the Court has provided a narrow interpretation of the standing doctrine, and in others, it has provided a more relaxed standing requirement. One of the most noteworthy standing cases that the Roberts Court has reviewed is *Clapper v. Amnesty International*.[195] In *Clapper*, the Court utilized the standing doctrine to avoid constitutional review of the executive branch's foreign surveillance practices, ruling that the plaintiff did not prove that the injury was "certainly impending."[196] Although the overall impact of the Roberts Court's decisions on substantive individual rights is unclear, there are legitimate concerns that the decisions so far have not combatted the concerns of an overreaching legislative body.

Through inaction, the Supreme Court has permitted other courts to accept and dismiss the questionable conduct of state legislatures in enacting speech-chilling statutes. However, courts are not required to go beyond acknowledging the problem. The Supreme Court needs to address a clear solution to legislative overreach by broadening the application of the standing doctrine to reduce state legislatures' use of the doctrine as a circumventive tool. Legislatures are challenging constitutional restrictions by using the PPA as the new vehicle to permit agricultural and other powerful businesses to have extensive influence in their potentially unethical practices, all while infringing on the First Amendment rights of their employees.

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[193] Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2D 423, 437 (2007), https://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=3812&context=facpubs; *see* Charles Whitebread, *The Conservative Kennedy Court—What a Difference a Single Justice Can Make: The 2006-2007 Term of the United States Supreme Court*, 29 WHITTIER L. REV. 1, 5 (2007).

[194] Lee Epstein et al., *The Bush Imprint on the Supreme Court: Why Conservatives Should Continue to Yearn and Liberals Should Not Fear*, 43 TULSA L. REV. 651, 663 (2008), http://epstein.wustl.edu/research/ChangeOrNot.pdf.

[195] Clapper v. Amnesty Int'l U.S., 568 U.S. 398, 414 (2013) (holding that the "speculative chain of possibilities" did not establish a potential future injury that was certainly impending or fairly traceable to the code).

[196] *See id.* at 409-14.

IV. CONCLUSION

Agricultural businesses and state legislatures, influenced by special interests, aim to conceal the unethical practices existent within farm factories. The inhumane treatment of animals raised for food negatively impacts the quality of the food supply and the safety of the workers within the industry. The traditional ag-gag laws designed to prevent undercover investigators from entering farm factories transformed into whistleblower silencing laws. These statutes threaten the whistleblowers' right to access workplace settings and expose workplace wrongdoing. Without this access, vulnerable individuals who depend on undercover investigations to expose unethical behavior remain unprotected.

First Amendment free speech challenges "raise unique standing considerations that tilt dramatically toward a finding of standing."[197] A rise in statutes silencing workplace whistleblowers is expected because the unpublished *PETA v. Stein* decision failed to address a certainly impending injury in its application of the standing requirement.[198] Farm factories that struggled to pass legislation to protect their businesses from whistleblowers succeeded with the enactment of PPA.[199] The danger of PPA is that any state may enact a statute that limits employees' rights to uncover wrongdoing. The application of the relaxed standing requirement to free-speech claims alleging certainly impending injuries is essential. Regardless of whether a statute is criminal or civil, and whether direct government action is implicated, use of the relaxed standing requirement will ensure that courts can address alleged infringements of First Amendment rights. Inaction by the judicial branch will create a vast threat to individual rights and a detachment from the objective of the standing doctrine, which is intended to eliminate overreach—not empower it. Over 100 years later, state legislation threatens the same investigative methods that Upton Sinclair utilized to generate major reform in the food industry.[200] Today under PPA or Act 606, Sinclair's seven-week undercover investigation would expose Sinclair to $250,000 in fines.[201] When a concerned whistleblower is menacingly silenced and prevented from exposing wrongdoing within factories, nursing homes, and childcare centers, the cost to society is devastating.

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[197] Cooksey v. Futrell, 721 F.3d 226, 235 (4th Cir. 2013) (quoting Lopez v. Candaele, 630 F.3d 775, 781 (9th Cir. 2010)).

[198] PETA, Inc. v. Stein, 259 F. Supp. 3d 369 (M.D.N.C. 2017), *rev'd*, 737 F. App'x 122, 131 (4th Cir. 2018).

[199] ASPCA, *supra* note 8.

[200] *See* Sinclair, *supra* note 1.

[201] *Upton Sinclair*, BIOGRAPHY, https://www.biography.com/people/upton-sinclair-9484897 (last visited Mar. 3, 2019) (stating Sinclair spent several weeks investigating the meatpacking industry). The author used a seven-week investigation to estimate $250,000 in fines at $5,000 a day.

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The Transformation of the Antiquities Act: A Call for Amending the President's Power Regarding National Monument Designations

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COMMENT

THE TRANSFORMATION OF THE ANTIQUITIES ACT: A CALL FOR AMENDING THE PRESIDENT'S POWER REGARDING NATIONAL MONUMENT DESIGNATIONS

*ANDREW DIAZ**

"It is not what we have that will make us a great nation, it is the way in which we use it."[1]

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[1] DAVID MCCULLOUGH, MORNINGS ON HORSEBACK: THE STORY OF AN EXTRAORDINARY FAMILY, A VANISHED WAY OF LIFE AND THE UNIQUE CHILD WHO BECAME THEODORE ROOSEVELT 349 (1981) (a quote by Theodore Roosevelt made in his Address to Ranchers in North Dakota on July 4, 1886).

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INTRODUCTION

Over the past few decades, environmental awareness has been on the rise in the United States, and this rise has led to numerous environmental laws being passed at the state and federal level.[2] These laws were passed to address specific environmental concerns, ranging from the protection of plant and wildlife to the preservation of the land and its natural resources.[3] Overall, these laws have enjoyed the public's support, due in large part to the fact that today most Americans favor stricter environmental laws and regulations.[4] However, despite the overall support, some environmental issues do elicit more controversy than others; one such issue is the way in which land is used.[5] Disagreements arise regarding how much protection should be afforded to public land, including how much land to set aside and the scope of restrictions placed upon its use.[6] Despite the many different competing interests in how the country's land is used, it is the duty of this nation's people to use the land in the most sustainable way possible. A sustainable approach will ensure that future generations will continue to have access to important natural resources while still being able to enjoy the land's natural beauty. Through the use of the many different environmental laws, this goal can be achieved; one of these laws being the Antiquities Act ("Act").

On April 26, 2017, President Donald Trump issued Executive Order 13792 ("Order"), entitled "Review of Designations Under the Antiquities Act."[7] The Order directed Secretary of the Interior Ryan Zinke ("the Secretary") to review national monument designations made since 1996 that fell into the following categories: designations larger than 100,000 acres in size, designations expanded to cover more than 100,000 acres, or des-

[2] *See generally* Brian Clark Howard, *48 Environmental Victories Since the First Earth Day*, NATIONAL GEOGRAPHIC (Apr. 18, 2018), https://news.nationalgeographic.com/2016/04/160422-earth-day-46-facts-environment/ (listing some of the most significant environmental protection laws since 1970).

[3] *Id.*

[4] Kristen Bialik, *Most Americans favor stricter environmental laws and regulations*, PEW RESEARCH CENTER (Dec. 14, 2016), http://www.pewresearch.org/fact-tank/2016/12/14/most-americans-favor-stricter-environmental-laws-and-regulations/.

[5] *See generally* Brian Clark Howard, *Why Federal Lands Are So Wildly Controversial in the West*, NATIONAL GEOGRAPHIC (Jan. 4, 2016), https://news.nationalgeographic.com/2016/01/160104-oregon-protest-malheur-national-wildlife-refuge/ (explaining the controversy surrounding the use and management of federally owned land in the western half of the United States).

[6] *Id.*

[7] Review of Designations Under the Antiquities Act, 82 Fed. Reg. 20,429 (Apr. 26, 2017).

ignations or expansions that the Secretary determined were made without public outreach and coordination with the relevant stakeholders.[8] In reviewing these designations, the Order instructed the Secretary to consider the effects that the designation has had, along with the concerns of those affected by it.[9] The Order called for the Secretary to produce a final report that included recommendations for presidential actions, legislative proposals, or other measures consistent with the law that would achieve the purpose of the Order.[10] The Order's stated purpose was to ensure that such designations were made in accordance with the Act's requirements and original objectives; in addition, it was supposed to help ensure that the appropriate balance between protection and use of the land is reached.[11] Secretary Zinke reviewed eight national monuments in six states and submitted his recommendations to the President on August 24, 2017.[12]

In response to Secretary Zinke's recommendations, President Trump announced major size reductions to two national monuments on December 4, 2017.[13] The two monuments, both located in Utah, were Bears Ears National Monument and Grand Staircase-Escalante National Monument.[14] The presidential proclamations reduced these monuments in size by 85% and 46%, respectively.[15] Although Presidents have reduced the size of national monuments in the past, the practice is not common,[16] especially when it comes to significant reductions.[17] These two presidential proclamations could just be the beginning of what is to come. Additional national monuments could face a similar fate as the two in Utah, or could be abolished altogether. In order to provide certainty to future des-

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[8] *Id.*

[9] *Id.* (The Secretary was instructed to consider the requirements and objectives of the Act; whether designated lands were appropriately classified under the Act; the effects of a designation on the available uses of designated Federal lands; the effects of designation on the use and enjoyment of non-federal lands within or beyond monument boundaries; concerns of state, tribal, and local governments affected by a designation; and the availability of federal resources to properly manage designated areas.).

[10] *Id.* at 20,430.

[11] *Id.* at 20,429.

[12] *Secretary Zinke Sends Monument Report to The White House*, U.S. DEP'T OF THE INTERIOR (Aug. 24, 2017), https://www.doi.gov/pressreleases/secretary-zinke-sends-monument-report-white-house.

[13] *Remarks by President Trump on Antiquities Act Designations*, WHITE HOUSE (Dec. 4, 2017, 12:20 PM), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-antiquities-act-designations/.

[14] *Id.*

[15] Hannah Nordhaus, *What Trump's Shrinking of National Monuments Actually Means*, NATIONAL GEOGRAPHIC (Feb. 2, 2018), https://news.nationalgeographic.com/2017/12/trump-shrinks-bears-ears-grand-staircase-escalante-national-monuments/.

[16] *See id.*

[17] *See id.*

ignations, the Act should be amended to include more concrete guidelines on how a president may designate national monuments.

Part I of this Comment discusses the background of the Antiquities Act, including: the legislature's intent in drafting the Act, changes to the law, and how it has been used throughout the years. This section then discusses various legal challenges to designations made under the Antiquities Act and looks at why these designations are sometimes controversial. Part II discusses the calls by many politicians to either amend or repeal the Act and explains why current proposed legislation is insufficient. This Comment critiques the proposed legislation and calls for the passage of sensible legislation that would require a more transparent designation process while also implementing more concrete requirements for how national monuments are modified or designated. Part III concludes by explaining why the Antiquities Act should be amended, not repealed, in order to ensure the protection of public lands for future generations.

I. AN OVERVIEW OF THE ANTIQUITIES ACT OF 1906

A. THE PRESIDENT'S POWER TO DESIGNATE NATIONAL MONUMENTS

The power of the President of the United States to designate national monuments is derived from the Antiquities Act of 1906.[18] The Antiquities Act was passed by Congress and signed into law by President Theodore Roosevelt on June 8, 1906.[19] The Act's purpose was to prevent the looting of Native American artifacts, which had become prevalent at that time.[20] The Act sought to achieve this goal by giving the President the authority to set aside federal land to be designated as a national monument.[21] The President was given the power to declare by proclamation that "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States [are] to be national monuments."[22] Further, the language in the Act stated that the area of the land reserved "shall be confined to the smallest area compatible with proper care and management of the objects to be protected."[23]

[18] *American Antiquities Act of 1906*, NAT'L PARK SERV., https://www.nps.gov/subjects/legal/american-antiquities-act-of-1906.htm (last updated June 22, 2017).

[19] *Id.*

[20] *Id.*

[21] Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (repealed 2014).

[22] *Id.*

[23] *Id.*

In 2014, the Antiquities Act was amended and codified in Title 54 of the United States Code, sections 320301 through 320303.[24] The amended language of the newly codified statute declared that, "[t]he President may, in the President's discretion, declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated on land owned or controlled by the Federal Government to be national monuments."[25] Similar to the original Antiquities Act, the statute also declared that "the limits of the parcels shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."[26] One noteworthy change that was incorporated into the amended Act was the explicit limitation on the "extension or establishment of national monuments in Wyoming . . . except by express authorization of Congress."[27] In other words, the new statute banned the President from unilaterally designating national monuments in Wyoming; today the President needs authorization from Congress prior to designating national monuments in that state.[28] Overall, there were no major amendments to the Act's language; specifically, there were no additional limits placed on the President's power to designate national monuments.[29]

B. CHALLENGES TO THE ANTIQUITIES ACT

Presidential authority to designate large areas of public land to create national monuments has, at times, been a highly controversial issue.[30] Although originally created to protect objects of antiquity, such as objects of cultural and historical significance, the Antiquities Act has also been used to protect areas of natural significance.[31] Those challenging such designations claim that the President is going beyond the scope of his authority granted under the Antiquities Act; in essence, that the President is abusing his power.[32]

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[24] 54 U.S.C. §§ 320301-320303 (West 2014).

[25] *Id.* § 320301(a).

[26] *Id.* § 320301(b).

[27] *Id.* § 320301(d). In 1950, an amendment to the Antiquities Act of 1906 added this limitation to the President's power to designate national monuments in the state of Wyoming. Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1906*, 37 GA. L. REV. 473, 498 (2003).

[28] *See* 54 U.S.C. § 320301(d).

[29] Compare Antiquities Act of 1906, with 54 U.S.C. §§ 320301-32303.

[30] Mark C. Rutzick, *Modern Remedies for Antiquated Laws: Challenging National Monument Designations Under the 1906 Antiquities Act*, 11 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 29, 29 (2010), https://fedsoc-cms-public.s3.amazonaws.com/update/pdf/JZDXF0g3mpDDwtBdh2FlFGXltrgYQsXRXNm9P6o7.pdf.

[31] Richard H. Seamon, *Dismantling Monuments*, 70 FLA. L. REV. 553, 563 (2018).

[32] *Id.* at 590-99.

Since the Act's passage, there have been numerous court cases challenging the validity of several designations. Plaintiffs have argued that certain designations violate the Constitution, the Antiquities Act itself, and other various federal statutes.[33] One example is a 2004 case challenging President Clinton's designation of Grand Staircase-Escalante National Monument in Utah.[34] The designation was controversial because of the vast size of land designated: 1.7 million acres.[35] The Utah Association of Counties brought suit against the President and the United States claiming, among other things, that the President's designation violated the Antiquities Act.[36]

When the court analyzed the claim that the Grand Staircase-Escalante designation violated the Antiquities Act, it first examined the original purpose of the Act and its use throughout the years.[37] The court noted that every legal challenge to designations has been unsuccessful and that courts have consistently found that the President clearly acted within his discretionary power pursuant to the Act.[38] The court explained that Supreme Court precedent clearly establishes that judicial review in these circumstances is limited to determining whether the President did in fact invoke his powers under the Act.[39] The court reasoned that to go beyond this simple inquiry would result in the President's judgment being substituted with its own.[40] Thus, the President continues to have broad discretion under the Act, and courts may not review the President's reasoning in designating a national monument.[41]

As to the other claims, the district court found that the Antiquities Act did not violate the non-delegation doctrine[42] because in passing the law, Congress set forth clear standards and limitations.[43] These standards are set out in the Act's provisions, which state what can be included in national monuments and how large the monuments can be.[44] Further, the

[33] Rutzick, *supra* note 30, at 31.

[34] Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172 (D. Utah 2004).

[35] *Id.* at 1176.

[36] *Id.* at 1176-77.

[37] *Id.* at 1177-78.

[38] *Id.* at 1179.

[39] *Id.* at 1183.

[40] *Id.* at 1183-84.

[41] *Id.* at 1184 ("Only Congress has the power to change or revoke the Antiquities Act's grant of virtually unlimited discretion to the President.").

[42] "The non-delegation is a principle in administrative law that Congress cannot delegate its legislative powers to other entities." *Nondelegation Doctrine*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/nondelegation_doctrine (last visited Mar. 4, 2019).

[43] Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d at 1190-91.

[44] *Id.* at 1191.

federal statutes[45] that the plaintiffs claimed were violated do not provide for a private right of action.[46] The court noted that the only way that the plaintiffs could have complained of a violation was through the Administrative Procedure Act ("APA").[47] However, the court explained that the APA requires a finding of final agency action,[48] and since the President is not a federal agency, his actions do not constitute final agency actions.[49] Thus, the APA does not apply to the President's designations of national monuments under the Act.[50]

In addition to judicial challenges, there have also been calls to amend or repeal the Antiquities Act.[51] Congress has proposed multiple bills which seek to either limit the President's power under the Act or eliminate the power altogether.[52] However, none of these bills have been passed.[53] Likewise, judicial challenges have also been unsuccessful because courts have consistently upheld the President's discretionary power to designate national monuments.[54] The President's power to designate national monuments remains highly controversial and divisive,[55] especially for those that are affected by such designations.[56]

C. THE CONTROVERSY SURROUNDING THE ANTIQUITIES ACT

Presidential designations of national monuments can be very controversial, especially when designations include large areas of land.[57] The Antiquities Act allows the President, in his discretion, to create national monuments with only minor limitations.[58] One limitation that the Act does place on the President's power to designate a national monument is that the monument may only be created to protect "historic landmarks,

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[45] These federal statues included the National Environmental Policy Act, Federal Land Policy and Management Act, Federal Advisory Committee Act, and Anti-Deficiency Act. *Id.* at 1184.

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html.

[52] CAROL HARDY VINCENT, CONG. RESEARCH SERV., R41330, NATIONAL MONUMENTS AND THE ANTIQUITIES ACT 11 (last updated Nov. 30, 2018), https://fas.org/sgp/crs/misc/R42346.pdf.

[53] *See id.*

[54] Rutzick, *supra* note 30, at 30.

[55] *See e.g.,* VINCENT, *supra* note 52, at 1-3.

[56] *Id.* at 11.

[57] *Id.* at 4-5.

[58] *But see* John Yoo & Todd Gaziano, *Presidential Authority to Revoke or Reduce National Monument Designations*, 35 YALE J. ON REG. 617, 624-26 (2018) (discussing the legal significance of the Act's language and arguing that such language "was not meant to include vast scenic or geological parks").

historic and prehistoric structures, and other objects of historic or scientific interest."[59] Although the specificity of the terms "historic landmarks" and "historic and prehistoric structures" limit designations, the vagueness of "other objects of historic or scientific interest" ultimately gives the President broad discretion in what he may designate as a national monument.[60] A second limitation is that designations must not exceed the area necessary to protect the objects of interest.[61] As is the case with the vague language of what constitutes objects to be protected, "smallest area necessary" also gives the President broad discretion in determining what size a monument needs to be in order to protect the objects of interest that are located there.[62] Together, these broad and vaguely worded limitations allow the President to exercise a lot of discretion when designating a national monument.[63]

Aside from the Act's language giving the President broad discretion, designations are also controversial in that they can affect many different groups of people with many different competing interests.[64] Some of these interests include Native American tribal rights, rights of local residents to access and use the land, economic possibilities, federal land ownership, and the need for environmental protection.[65] These issues often arise when large areas of public land are designated as national monuments and restrictions are placed on its use.[66] One example was the designation of Bears Ears National Monument ("Bears Ears").[67] Bears Ears was seen as especially controversial because of when it was designated and the amount of land it encompassed.[68] Bears Ears was designated by President Barack Obama on December 28, 2016,[69] less than a month before he left office. The new monument, located in San Juan County, Utah, comprised of approximately 1.35 million acres of land.[70]

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[59] *Id.* (arguing that such language was not intended to allow large-sized designations).

[60] *But see id.* (arguing that the purpose of the Antiquities Act was to preserve "sites made historic by human endeavors and not geologic 'history'").

[61] *Id.* at 625-26.

[62] *But see id.* at 625-26 (arguing that this "provision was added to provide flexibility for special situations and not to allow a million-acre designation").

[63] *Id.* at 628-29 (explaining that "[m]uch legal scholarship . . . defends a broad interpretation of the Antiquities Act that supports virtually unchecked presidential discretion to create or expand vast national monuments").

[64] Squillace, *supra* note 27, at 550-51.

[65] FRANCIS P. MCMANAMON, ARCHAEOLOGICAL METHOD AND THEORY: AN ENCYCLOPEDIA 33-35 (Linda Ellis ed., 2000).

[66] Howard, *supra* note 5.

[67] Yoo & Gaziano, *supra* note 58, at 655.

[68] *Id.* at 618.

[69] Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

[70] *Bears Ears National Monument Questions and Answers*, U.S. FOREST SERV. 4, https://www.fs.fed.us/sites/default/files/bear-ears-fact-sheet.pdf (last visited Oct. 25, 2018).

In addition to the timing and the size of President Obama's designation, local residents argued that the designation limited their access to the land and described it as a "federal land grab."[71] Local residents were especially concerned about their access to the land because they used it for ranching.[72] In a 2016 economic report to the Governor of Utah, the Utah Economic Council found that the food and agriculture sector contributed more than $17 billion to the state's economy.[73] The cattle sector alone made up about 40% of Utah's economy.[74] Furthermore, food and agriculture businesses generated more than 80,000 jobs for the state.[75] Of the 45-million acres of rangeland suitable for livestock, 33-million acres are owned by the federal government;[76] thus, ranchers claimed that designations such as Bears Ears have devastating effects on ranching in Utah, and in turn, the overall economy of the state.[77]

Also, the abundance of natural resources often located in and around national monuments is of great concern. Opponents point to the rich deposits of natural resources located in areas that are designated as national monuments.[78] Before the Bears Ears designation, the American Petroleum Institute ("API") sent letters to the chairmen of both the Senate Energy and Natural Resources Committee and to the House Natural Resources Committee urging Congress "to re-examine the role and purpose of the Antiquities Act with a focus on the economic consequences to the affected state and communities."[79] API argued that having access to land that could be developed into potential energy sources was vital.[80] According to API, national monument designations limited access to the land that fell within the monument's boundary and explained that, "[i]n most every instance, designation . . . has resulted in a prohibition of the search for or development of energy sources from such land."[81]

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[71] John Flesher, *AP Explains: National Monuments and Why They're Divisive*, U.S. NEWS (Dec. 4, 2017, 8:16 PM), http://www.chicagotribune.com/sns-bc-us—ap-explains-trump-national-monuments-20171204-story.html.

[72] Letter from Randy N. Parker, Chief Exec. Officer, Utah Farm Bureau, to Sally Jewell, Sec'y of the Interior (July 16, 2016) (on file with Comm. on Energy and Nat'l Res.).

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.*

[77] *Id.*

[78] Letter from Erik Milito, Grp. Dir., Upstream & Indus. Operations, Am. Petroleum Inst., to Lisa Murkowski, Chairman, S. Energy and Nat'l Res. Comm., and to Rob Bishop, Chairman, H. Nat'l Res. Comm. (Jan. 13, 2017) (on file with Am. Petroleum Inst.).

[79] *Id.*

[80] *Id.*

[81] *Id.*

However, on the other side of the debate are those who support the President's power to designate national monuments.[82] These supporters see presidential designations of national monuments as a way of protecting the land when Congress refuses to act, or is simply unable to do so.[83] An example of Congress's inaction can be seen in Bears Ears.[84] For many years, the Bears Ears Inter-Tribal Coalition ("Coalition")[85] wanted Congress to pass legislation that would ensure that their ancestral land was protected, in order to preserve their strong cultural ties to Bears Ears.[86] These cultural ties to Bears Ears are evidenced by the more than 100,000 archaeological sites, which include many items of historical importance, ranging from projectile points to cliff dwellings.[87] Despite the cultural and historical significance of the land, the Coalition was unsuccessful in securing protection from Congress.[88] Congress's inaction led the Coalition to seek protection through other means.[89] Eventually, through President Obama's proclamation that established Bears Ears, the Coalition received the protection it sought.[90]

On December 4, 2017, President Donald Trump issued a presidential proclamation announcing that the size of Bears Ears would be reduced, despite strong opposition.[91] The proclamation listed several factors that the President considered when he determined the size of the reduction. These factors included: the uniqueness and nature of the objects at the site, the nature of the needed protection, and the protection provided by other laws currently in place.[92] To support the reduction, the proclamation stated that some objects listed in the original proclamation by President Obama were not unique to the monument; not of significant

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[82] *See generally* Denise Ryan, *Five Reasons We Support the Antiquities Act*, NAT'L TR. FOR HISTORIC PRES. (Mar. 29, 2014), https://savingplaces.org/stories/five-reasons-support-antiquities-act#.XH5XAVNKjOQ.

[83] *Id.*

[84] *See generally 5-Year Timeline of Tribal Engagement to Protect Bears Ears*, BEARS EARS INTER-TRIBAL COALITION, https://bearsearscoalition.org/timeline/ (last visited Mar. 4, 2109).

[85] The Bear Ears Inter-Tribal Coalition is comprised of several Native American tribes, these tribes include: the Navajo Nation, Hopi, Ute Mountain Ute, Ute Indian Tribe, and the Pueblo of Zuni. *Who We Are*, BEARS EARS INTER-TRIBAL COALITION, http://bearsearscoalition.org/about-the-coalition (last visited Sept. 18, 2018).

[86] *Proposal to President Barack Obama for the Creation of Bears Ears National Monument*, BEARS EARS INTER-TRIBAL COALITION 1 (Oct. 15, 2015), http://www.bearsearscoalition.org/wp-content/uploads/2015/10/Bears-Ears-Inter-Tribal-Coalition-Proposal-10-15-15.pdf [hereinafter INTER-TRIBAL COALITION'S PROPOSAL].

[87] Proclamation No. 9558, 82 Fed. Reg. 1139 (Dec. 28, 2016).

[88] INTER-TRIBAL COALITION'S PROPOSAL, *supra* note 86, at 1-4.

[89] *Id.* at 8-13.

[90] *About the Monument*, BEARS EARS INTER-TRIBAL COALITION, https://bearsearscoalition.org/about-the-monument/ (last visited Mar. 5, 2019).

[91] Proclamation No. 9681, 82 Fed. Reg. 58,081 (Dec. 4, 2017).

[92] *Id.*

scientific or historic interest; and, were not under any threat of damage or destruction at the time of the designation.[93] Additionally, multiple laws enacted after the Antiquities Act provided specific protection for archaeological, historical, cultural, paleontological, as well as plant and animal resources.[94] Put simply, the proclamation declared that some of the objects within Bears Ears did not warrant protection under the Act and that such a large area was not warranted.[95] Overall, President Trump's modification of Bears Ears reduced its size by 85%, from 1.35 million acres down to 201,876 acres.[96]

Bears Ears in Utah exemplifies the conflict surrounding national monument designations under the Antiquities Act. On one side of the debate are those who seek protection and preservation of the land, such as environmentalists or Native American tribes that have cultural ties to the land.[97] On the other side, opponents include local residents who are affected by the designations, along with companies who seek access to the land for its natural resources.[98] These individuals argue that presidential designations are one-sided because they do not take into account the concerns of local residents who will be directly affected.[99] Furthermore, local residents argue that these designations limit their access to land that they have a right to use.[100] In addition, opponents point to the fact that many designations come late in a President's second term when there are no political ramifications for the President's action.[101] Many opponents of designations either support reductions in the size of large monuments or support limits on the President's power to designate monuments.[102]

President Trump's proclamation that reduced the size of Bears Ears faces judicial challenges by many that claim he does not have the power to reduce or abolish national monuments.[103] Although Congress expressly granted the President the power to designate national monuments under the Antiquities Act of 1906, Congress was silent on whether the

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[93] *Id.*

[94] *Id.* at 58,082.

[95] *Id.*

[96] Nordhaus, *supra* note 15.

[97] *See id.*

[98] *Id.*

[99] *See The Potential Impacts of Large-Scale Monument Designations: Field Hearing Before the S. Comm. on Energy & Nat. Res.*, 114th Cong. 6 (2016) [hereinafter *Hearings*] (opening statement of Sen. Mike Lee, Member, S. Comm. on Energy & Nat. Res.).

[100] *See* VINCENT, *supra* note 52, at 8-9.

[101] *Hearings*, *supra* note 99, at 16 (statement of Rep. Rob Bishop).

[102] VINCENT, *supra* note 52, at 3.

[103] Kirk Siegler, *Was It 'Illegal' for Trump to Shrink Utah's Monuments? The Battle Begins*, NPR (Dec. 5, 2017, 5:17 AM), https://www.npr.org/2017/12/05/568507002/legal-challenges-mount-after-trumps-reduction-of-national-monuments.

President could abolish or reduce the size of monuments.[104] Multiple congressional bills have been proposed to address this lack of clarity, and seek to either limit the President's authority under the Act or implement additional requirements into the designation process; however, none of these bills have been passed.[105] In addition to these attempts to amend the Act, there have been judicial challenges to several designations made under the Act.[106] Although courts have consistently upheld designations, more judicial challenges in the future are likely, especially challenges to reductions of existing monuments.[107] Until the Act is amended, the uncertainty surrounding designations will continue to exist.

II. THE FUTURE OF THE ANTIQUITIES ACT

A. CURRENT PROPOSED LEGISLATION AND ITS EFFECT ON THE ANTIQUITIES ACT

Recently, both the House and the Senate have proposed several bills seeking to amend the Antiquities Act by adding new requirements to the process of national monument designation, limiting the President's power to designate monuments, or abolishing his power altogether.[108] The following section discusses the current proposed legislation and how it would amend the Act.

The first bill, known as the Nevada Land Sovereignty Act, seeks to prohibit the further extension or establishment of national monuments in the State of Nevada unless there is express authorization by Congress.[109] The bill would amend the statute by inserting language that expressly states that national monument designations are prohibited in Nevada, as was done for Wyoming.[110] Likewise, Minnesota's Economic Rights in the Superior National Forest Act seeks to prohibit the extension or establishment of national monuments on National Forest System lands in the State of Minnesota except by express authorization of Congress.[111] Bills such as these seek to limit the President's power by requiring authoriza-

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[104] Antiquities Act of 1906, 16 U.S.C. §§ 431-33 (repealed 2014).

[105] Mark Squillace, *The Looming Battle Over the Antiquities Act*, HARV. L. REV. BLOG (Jan. 6, 2018), https://blog.harvardlawreview.org/the-looming-battle-over-the-antiquities-act/.

[106] Rutzick, *supra* note 30, at 30.

[107] *See* Siegler, *supra* note 103.

[108] John D. Leshy & Mark Squillace, *The Endangered Antiquities Act*, N.Y. TIMES (Mar. 31, 2017), https://www.nytimes.com/2017/03/31/opinion/the-endangered-antiquities-act.html.

[109] Nevada Land Sovereignty Act, H.R. 243, 115th Cong. (1st Sess. 2017); S. 22, 115th Cong. (1st Sess. 2017).

[110] 54 U.S.C. § 320301(d).

[111] Minnesota's Economic Rights in the Superior National Forest Act, H.R. 3905, 115th Cong. § 2 (1st Sess. 2017).

tion from Congress but leave open the question of how to institute such authorization.[112] Additionally, these bills go against the original intent of the Act: to give the President the power and discretion to designate national monuments.[113]

Another bill, the Public Input for National Monuments Act, would require compliance with the National Environmental Policy Act ("NEPA") as a condition that must be met before the President could exercise his discretion to designate a national monument.[114] NEPA is a federal law that requires federal agencies to conduct a study assessing the environmental impacts of their proposed actions prior to making decisions.[115] These evaluations must also include social and economic impacts related to the proposal.[116] In addition, the NEPA process involves a period of review, during which the public may comment on the proposed action.[117] NEPA further requires that before a decision can be made the public's comments must be addressed.[118] Although this amendment would require an assessment of the proposed designation's environmental impact, and incorporates a process for public input, it still fails to address other issues, such as: how large can designations be or whether the President may reduce or abolish prior designations.[119]

The Outer Continental Shelf Energy Access Now Act ("OCEAN Act") proposed amending the Act to terminate the President's authority to establish marine national monuments, but would not affect existing marine national monuments.[120] Although the current version of the Act is silent as to designations of marine national monuments, Presidents have used the Act to designate such monuments.[121] One such notable designation was Papahānaumokuākea Marine National Monument by President George W. Bush.[122] The marine monument is located northwest of the

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[112] *See id.*

[113] NAT'L PARK SERV., *supra* note 18.

[114] Public Input for National Monuments Act, H.R. 2074, 115th Cong. § 2 (1st Sess. 2017).

[115] *What is the National Environmental Policy Act?*, U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/nepa/what-national-environmental-policy-act (last updated Jan. 24, 2017).

[116] *Id.*

[117] *Id.*

[118] *Id.*

[119] *See* Public Input for National Monuments Act, H.R. 2074, 115th Cong. § 2 (1st Sess. 2017).

[120] Outer Continental Shelf Energy Access Now Act, H.R. 2157, 115th Cong. § 2(b)(1) (1st Sess. 2017); S. 956, 115th Cong. § 2(e)(2) (1st Sess. 2017).

[121] Arnold Porter & Kaye Scholer, *Legal Analysis of the Antiquities Act and Marine Monuments*, NAT'L PARKS CONSERVATION ASS'N, 1 (Aug. 9, 2017), https://www.npca.org/resources/3210-legal-analysis-of-the-antiquities-act-and-marine-monuments.

[122] *Papahānaumokuākea Expands, Now Largest Conservation Area on Earth*, NAT'L MARINE SANCTUARIES (Aug. 2016), https://sanctuaries.noaa.gov/news/aug16/president-announced-expansion-of-papahanaumokuakea-marine-national-monument.html.

Hawaiian islands and encompasses 583,000 square miles.[123] Although this proposed amendment adds some clarification to the Act, by explicitly stating what the President cannot do,[124] it is still too narrow because it only addresses one small aspect of the Act.

Rather than abolish the President's power to designate federal land as national monuments altogether, more complex pieces of legislation seek to amend the designation process. The Improved National Monument Designations Process Act calls for congressional approval of proposed national monuments, places a prohibition on restricting the public use of national monuments, and calls for the establishment of a set of requirements that pertain to the declaration of marine national monuments.[125] Specifically, this bill would require that, before the President exercises his power to designate national monuments, he must first not only obtain congressional approval but also comply with NEPA.[126] Moreover, the legislature of the state where the national monument is to be located must approve the designation.[127] Regarding marine national monuments, the bill would impose similar requirements before a presidential designation.[128] In addition, the statute would prohibit the Secretary of the Interior from implementing any restrictions on the public use of a marine national monument until after a mandatory review period was completed, during which citizens could submit their input, and the designation would have to obtain congressional approval.[129]

Similarly, the National Monument Designation Transparency and Accountability Act of 2017 would amend the Act to require congressional and state approval of national monument designations and compliance with NEPA.[130] The proposed statute would also prohibit the Secretary from implementing any restrictions on the public use of the national monument until the expiration of an appropriate review period, during which the public could submit their input and Congress would have to approve the designation.[131]

The Marine Access and State Transparency Act also calls for congressional approval and compliance with NEPA before the President can

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[123] *Id.*

[124] H.R. 2157 § 2(b).

[125] Improved National Monument Designations Process Act, S. 33, 115th Cong. (1st Sess. 2017).

[126] *Id.* § 2(a)(1).

[127] *Id.*

[128] *Id.* § 2(a)(2).

[129] *Id.* § 2(b).

[130] National Monument Designation Transparency and Accountability Act of 2017, S. 132, 115th Cong. § 2(1) (1st Sess. 2017); H.R. 2284, 115th Cong. § 2(1) (1st Sess. 2017).

[131] National Monument Designation Transparency and Accountability Act of 2017, S. 132, 115th Cong. § 2(1) (1st Sess. 2017); H.R. 2284, 115th Cong. § 2(2) (1st Sess. 2017).

designate a national monument.[132] Furthermore, the President may not designate any area in the Exclusive Economic Zone[133] to be a marine national monument unless the designation is specifically authorized by an act of Congress and the President has submitted a proposal to the governor of each state that is located within 200 nautical miles of the proposed monument.[134] In addition, the President may not place restrictions on the public use of any area in the Exclusive Economic Zone designated as a national monument until the expiration of a review period.[135]

The most complex piece of proposed legislation is the National Monument Creation and Protection Act.[136] The bill proposes major amendments to the Act, including a limitation on the size of national monuments and what eligible objects can be designated.[137] Specifically, the act would strike the current language that states, "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest," and replace it with "object or objects of antiquity."[138] The term "objects or objects of antiquity" is defined as "relics, artifacts, human or animal skeletal remains, fossils (other than fossil fuels), and certain buildings constructed before the date of . . . enactment."[139] The term does not include "natural geographic features and objects not made by humans, except fossils (other than fossil fuels) or human or animal skeletal remains."[140] This language alone is a major restriction on what can be designated as a national monument. It would prevent designations of land simply because of its natural importance.

The National Monument Creation and Protection Act also calls for removing the provision in the Act that states "confined to the smallest area compatible with the proper care and management of the objects to be protected," and replacing it with actual size limitations to remove any ambiguity caused by the previous phrasing.[141] The size limitation would

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[132] Marine Access and State Transparency Act, H.R. 1489, 115th Cong. § 2(a)(2) (1st Sess. 2017).

[133] Exclusive Economic Zone of the United States of America, 48 F.R. 10,605 (Mar. 10, 1983) (The Exclusive Economic Zone of the United States is "a zone beyond its territory and adjacent to its territorial sea . . . [where] a coastal State may assert certain sovereign rights over natural resources and related jurisdiction . . . . The Exclusive Economic Zone extends to a distance 200 nautical miles from the baseline from which the breadth of the territorial sea is measured.").

[134] H.R. 1489 § 2(b).

[135] *Id.*

[136] National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017).

[137] *Id.*

[138] *Id.* § 2(1).

[139] *Id.* § 2(3)(n)(3)(A)(i)-(v).

[140] *Id.* § 2(3)(n)(3)(B)(i)-(ii).

[141] *Id.* § 2(2).

state that the President may not declare a national monument "that is more than 640 acres and whose exterior boundary is less than 50 miles from the closest exterior boundary of another national monument."[142] The statute does provide exceptions for designations that are larger than 640 acres, however, there are additional requirements that must be met.[143] For national monument designations larger than 640 acres but less than 5,000 acres, a review under NEPA must be conducted.[144] For designations between 5,000 and 10,000 acres, an environmental assessment or environmental impact statement must be prepared in accordance with NEPA.[145] Lastly, for designations larger than 10,000 but smaller than 85,000 acres, there must be approval by the elected governing body of each county, and by the legislature and governor of each state where the monument would be located.[146] The National Monument Creation and Protection Act would also allow an exception for emergency designations of any acreage amount "to prevent imminent and irreparable harm to the object or objects of antiquity to be protected by the designation."[147] However, these emergency designations would have a one-year limitation, can only be designated once, and may not be permanently designated as a national monument.[148]

Additionally, the National Monument Creation and Protection Act would allow the President to reduce the size of declared monuments by 85,000 acres or less.[149] Reductions of more than 85,000 acres would be allowed if approved by the elected governing body of each county, the legislature, and governor of each state where the monument is located.[150] The National Monument Creation and Protection Act also requires that the reduction is reviewed under NEPA.[151] Overall, this proposed bill calls for a complete rewriting of the Act. Not only does it restrict designations to 85,000 acres in size and from being located within 50 miles of the nearest monument, it also drastically limits what can be designated as a monument, and being a place of natural beauty is not enough.[152] In addition, the President would be allowed to reduce the size of monuments by up to 85,000 acres without any restrictions.[153] Essentially, the

[142] *Id.* § 2(3)(e)(1)-(2).
[143] *Id.* § 2(3)(e)-(h).
[144] *Id.* § 2(3)(f)(3).
[145] *Id.* § 2(3)(g)(2).
[146] *Id.* § 2(3)(h)(3).
[147] *Id.* § 2(3)(i)(1).
[148] *Id.* § 2(3)(i)(2)-(3).
[149] *Id.* § 2(3)(j)(1).
[150] *Id.* § 2(3)(j)(2).
[151] *Id.* § 2(3)(j)(2)(B).
[152] *See id.* § 2(3)(n)(3)(B)(i).
[153] *Id.* § 2(3)(j)(1).

National Monument Creation and Protection Act would make it easier to reduce national monuments in size but have less impact on how one can be created.

B. A Call for Sensible Legislation: Amending the Antiquities Act

Although some of the proposed bills currently in the House and the Senate seek to amend the Act by addressing certain issues surrounding it, not one of the bills sufficiently addresses all the issues. To remedy the uncertainty surrounding designations and modifications of national monuments, an amendment to the Act must address the following: The President's authority to reduce or abolish prior designations, requirements that must be met before the designation of a national monument, limits on the size and manner of designations, and a process for designating or modifying monuments. To accomplish this, the Act's text should be amended to include specific requirements that must be met before the President designates a monument, as well as language that either explicitly authorizes or prohibits modification. Guidelines outlining a formal process for designating or modifying a national monument will help ensure that fully informed decisions are made. The following sections discuss the form these changes may take and the potential results.

1. Designation of National Monuments

One controversial aspect of the Act is the current power of the President to designate monuments of virtually unrestricted size.[154] President Trump's executive order specifically called for review of designations that cover more than 100,000 acres or designations that have been expanded to cover more than 100,000 acres.[155] Although the Act's current language requires national monuments to be limited to "the smallest area compatible with the proper care and management of the objects to be protected," no court has found a designation to violate this requirement, and the courts have held that they have no power to do so.[156]

Sensible legislation should impose limits on the size of national monument designations and could do so in several ways. One option would require that the designation's size be "reasonable," similar to the current language of the statute.[157] What constitutes reasonable depends

[154] *See* Exec. Order No. 13792, 82 Fed. Reg. 20429, 20430 (2017).

[155] *Id.*

[156] Rutzick, *supra* note 30, at 30-32.

[157] *See generally* Vincent, *supra* note 52, at 11-12 (discussing recent legislative activity regarding amending the President's power to designate national monuments).

on the circumstances surrounding the proposed designation; it would be a factual determination that would differ from case to case.[158] Under this approach, for a designation to meet the "reasonable" size standard, it must be shown that "historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest" are located throughout the entire proposed area. The ambiguity of the term "reasonable" raises the question of what happens if a President makes a designation that does not seem to be reasonable in size. In that case, the Act would have to allow for judicial review, otherwise, the same problem that arises under the current version of the Act would remain.

Another option for placing a limit on the size of the designation would be to include a numerical limit. For example, a limit of 100,000 acres could be included in the statute.[159] The President would have the power to designate a larger area, but only if authorized by Congress.[160] Although, creating a concrete numerical size limit may pose a problem because there are different circumstances and needs that arise with each designation. However, it would be a better option than the "reasonable" standard outlined above because a numerical limit provides a concrete restriction on the size of the designation. If the "reasonable" standard were implemented, it would most likely result in a multitude of judicial challenges to designations.

Sensible legislation should also amend the current language of the statute pertaining to what objects are included for designation as national monuments under the Act. The Act, as it currently stands, contains vague language, such as "other objects of historic or scientific interest."[161] As discussed above, the language is vague and has resulted in controversial designations of vast size.[162]

A proposed amendment to the Act could address this problem in several ways. One option would be to simply strike this language from the text of the Act. This would leave historic landmarks, historic structures, and prehistoric structures as the only objects that could be designated as national monuments. This option places an extreme limit on the President's discretion. A second option would be to specifically list all

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[158] *See generally* 54 U.S.C. § 320301(a)-(b) (current language in the statute already gives the President the discretion to designate national monuments to protect historic landmarks and other objects of historic or scientific interest).

[159] *See generally* National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017) (this bill is one of several proposed amendments in recent years seeking to put an actual limitation on the size of designations).

[160] *See generally id.* § 2(3)(h)(3) (proposing a similar restriction on larger monument designations).

[161] *See* 54 U.S.C. § 320301.

[162] *See* Yoo & Gaziano, *supra* note 58, at 628-29 (discussing that supporters of large-scale designations "justify the broad presidential use of the Antiquities Act on . . . its broad language").

the objects that could be designated as national monuments.[163] Although this option would provide concrete guidelines, it may prove difficult because a specific list would likely be long, and it may also require constant revisions to add additional objects. The last option, and perhaps the most effective, would be to include a list of objects that are excluded from designation.

Another requirement that legislation should impose for the designation of a national monument is compliance with NEPA, or a similar process, to ensure that a proper assessment of the potential impacts is conducted before the President makes a designation.[164] The assessment should consider the environmental, social, and economic impacts of the proposed designation. Additionally, like with NEPA, the review process should allow for public comment and should require responses to these comments.[165] Although courts have found that NEPA does not automatically apply to actions taken by the President,[166] Congress can still require the President to comply with NEPA if it expressly states so in the Act.[167]

In addition to allowing for the potential impacts of the designation to be assessed, the process would also likely prevent last-minute designations by exiting Presidents[168] because a review process requires notice to individuals likely to be affected by the proposed action and must follow a mandatory timeframe.[169] Thus, a President would be prevented from making an unexpected, last-minute designation.

Even though public input and environmental assessment would likely result in more informed decision-making, the process does have its downsides. Not only would this process raise the costs of designating monuments, but the final authority on whether to make the designation would remain with the President, regardless of the assessment's findings.[170]

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[163] *See* H.R. 3990 (proposing such an option).

[164] Yoo & Gaziano, *supra* note 58, at 649-650.

[165] *See generally National Environmental Policy Act Review Process,* U.S. ENVTL. PROT. AGENCY, https://www.epa.gov/nepa/national-environmental-policy-act-review-process (last updated Jan. 24, 2017).

[166] Utah Ass'n of Ctys. v. Bush, 316 F. Supp. 2d 1172, 1194-95 (D. Utah 2004).

[167] *See id.* at 1184.

[168] *See generally Hearings, supra* note 99, at 16 (statement of Rep. Rob Bishop discussing abuse of discretion).

[169] *See generally* U.S. ENVTL. PROT. AGENCY, *supra* note 165 (outlining the NEPA review process).

[170] *See generally The NEPA Review Process,* NAT'L PRES. INST., https://www.npi.org/NEPA/process (last visited Mar. 4, 2019) (explaining that NEPA "does not require a particular result; it does not require that the best alternative from an environmental perspective be selected").

2. Modification of Prior Designations—Abolishment or Reduction

One of the biggest questions regarding the Act is whether it allows the President to reduce the size of national monuments or rescind the designations altogether.[171] The current language of the Act is silent on the President's authority to reduce or rescind prior designations.[172] As discussed above, this silence has led to conflicting interpretations.[173] One interpretation is that because the Act does not explicitly give the President the power to modify prior designations, he does not have the authority to do so.[174] The other interpretation is that since the President is authorized to designate national monuments, it is only logical that he also has the authority to reduce or abolish prior designations.[175] To resolve this conflict, Congress could either expressly grant the President the power to modify prior designations or expressly prohibit such action. However, if Congress passed legislation that expressly grants the President the authority to modify prior designations, requirements must be in place to prevent arbitrary modifications.

As some scholars on this topic have concluded, it seems only logical that since the President has the power to designate national monuments, he also has the authority modify prior designations.[176] This express grant of power would allow future Presidents to modify designations based upon changed circumstances.[177] Although designations can currently be modified by Congress pursuant to their power in the Property Clause,[178] this amendment would allow for modification by the President in situations when Congress fails to act. However, if the President is expressly granted this power, there should be limits and requirements in place, like there is for making designations.

One such requirement should be that the President could modify designations, either by reducing or abolishing them, only after a review has been conducted. This review may take several different forms. One option would be to implement compliance with NEPA or a similar environmental assessment process when attempting to modify designa-

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[171] *See* Yoo & Gaziano, *supra* note 58, at 633-39.

[172] *Id.* at 632.

[173] *Id.* at 632-33.

[174] *Id.* at 631.

[175] *See id.* at 639.

[176] *Id.* at 659.

[177] *See generally id.* at 659-65 (discussing the President's power to reduce the size of prior designations).

[178] *See generally* Thomas W. Merrill, *Property Clause,* HERITAGE GUIDE TO THE CONSTITUTION, https://www.heritage.org/constitution/#!/articles/4/essays/126/property-clause (last visited Mar. 4, 2019) (explaining that the Property Clause is "[t]he primary constitutional authority for the management and control" of federal land).

tions.[179] Another option would be to implement a system of periodic review, which could be done on an annual basis or after a set number of years.[180] Although these periodic reviews would not be as detailed as an initial review,[181] they would allow for the accounting of changed circumstances to help determine if the designation or the restrictions on the land are still necessary.[182] By doing this, periodic review would help create a path for modification of monuments in the future. Based upon the findings of a periodical review, if a President wishes to pursue modification of the designation, he must continue to comply with the NEPA process before taking such action. Just as this process would help ensure that potential impacts of designations are evaluated before designating a national monument, it would similarly help to ensure that the impacts of modifying designations are also properly assessed.

Additionally, a more stringent standard should be implemented that must be met before a President can modify prior designations. This standard should require that the President justify any modification with specific findings after review.[183] Examples of justification for modifying designations could include changed circumstances that show that the entire size of the monument is no longer necessary or that there is a better use for the land.[184] Although this heightened standard would limit when the President could modify designations, it may possibly lead to more judicial challenges claiming that reduction or abolishment was not justified, or was not based upon sufficient evidence.

Lastly, limitations on the size of reductions by a President and a prohibition on abolishment should be implemented. A limitation on the size of the reduction would help ensure that designations are not reduced in a way that would render them ineffective. Similar to limits on how much land could be designated, there should be a numerical limit on the

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[179] National Monument Creation and Protection Act, H.R. 3990, 115th Cong. (1st Sess. 2017) (bill proposing such a review process).

[180] *See generally The Federal Land Policy and Management Act of 1976*, U.S. DEP'T OF THE INTERIOR BUREAU OF LAND MGMT. 10-11 (Oct. 2001), https://www.blm.gov/or/regulations/files/FLPMA.pdf (discussing the Secretary of the Interior's review of lands withdrawn pursuant to the Federal Land Policy and Management Act).

[181] *See generally id.*

[182] *Id.* Reports would be prepared by the agency responsible for overlooking the monument. Periodical review may allow for review of land use permits such as grazing and natural resource extraction. Also, these periodical reviews could help ensure that the purpose and goals of the designations are being properly met (i.e. the agency is properly managing the monument).

[183] *See generally id.* at 19 (discussing similar requirements and limitations on the Secretary of the Interior's power to withdraw federal lands pursuant to the Federal Land Policy and Management Act).

[184] *See id.*

size of reductions.[185] A condition could also be implemented that would allow for reductions beyond the numerical limit, but such reductions must be approved by Congress.[186] For the extreme action of abolishing monuments, legislation should prohibit the President from taking such action and leave the possibility of abolishment to Congress instead.[187] Although requirements cannot be placed on Congress for abolishing or reducing the size of designations, Congress should conduct an assessment before making such a decision. Even if Congress did not incorporate an assessment before modification, a periodical review may help provide valuable information that Congress can use in making their decision. Overall, an amendment such as this would allow for the development of a process that would ensure that designations are properly serving their intended purpose.

III. CONCLUSION

The question of federal land use, especially the designation of national monuments by the President through the Act, is a complex issue. There are many competing interests, which makes finding a solution difficult. As was the case with Bears Ears, many see designations of large areas of land as a federal land-grab or as the federal government imposing its will on the people of that state.[188] This is especially true in a state like Utah, where the federal government owns 63.1% of the land.[189] Overall, the federal government owns about 27.4% of all land in the United States.[190]

The power of the President to designate national monuments under the Act has long been a controversial issue.[191] There have been numerous judicial challenges to the Act and many proposed House and Senate Bills that sought to amend it.[192] To address uncertainty surrounding designations and the modifications, the Act should be amended to provide for more discernible guidelines that would define what a President can

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[185] *See* National Monument Creation and Protection Act, H.R. 3990, 115th Cong. § 2(3)(j) (1st Sess. 2017) (bill proposing such limitations).

[186] *Id.*

[187] *See generally* Mark Squillace, *Presidents Lack the Authority to Abolish or Diminish National Monuments*, 103 VA. L. REV. 55, 57 (2017) (arguing that the Antiquities Act does not grant the President the power to revoke a national monument).

[188] Christine A. Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1386-89 (2002).

[189] CAROL HARDY VINCENT ET AL., CONG. RESEARCH SERV., R43246, FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 8 (2017), *available at* https://fas.org/sgp/crs/misc/R42346.pdf.

[190] *Id.* at 9.

[191] Squillace, *surpa* note 5.

[192] VINCENT, *surpa* note 52, at 1-2.

and cannot do in regards to designations. The amendment should also allow for a more transparent process, that would involve public input, to ensure proper decisions on how designations are made can be achieved. Overall, amending the Act to include further requirements and guidelines would provide certainty in the designation.

The Antiquities Act was enacted to give the President the power to designate federal land as a national monument in order to protect objects of historic or scientific interest.[193] Over the years, Presidents have expanded this power by protecting entire natural landscapes.[194] Likewise, Presidents have used the Act to reduce the size of prior designations.[195] Regardless of how the issues surrounding the use of the Act are addressed, it is important that the Act remain in effect. The Antiquities Act is one part of a system that helps ensure that federal land and the objects upon it are protected for future generations.

[193] NAT'L PARK SERV., *supra* note 18.
[194] Yoo & Gaziano, *supra* note 58, at 628.
[195] Nordhaus, *supra* note 15.

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Bringing Specificity to Child Custody Provisions in California

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COMMENT

BRINGING SPECIFICITY TO CHILD CUSTODY PROVISIONS IN CALIFORNIA

*SHAWN MCCALL**

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INTRODUCTION

Broadly speaking, social science studies help Western nations develop an increased understanding of how children benefit from having strong relationships, including frequent and continuous contact, with both of their parents even in the wake of separation and divorce.[1] Social sciences can inform policy conversations during legislative and judicial processes by providing legal determinations that are empirically supported rather than simply rationally derived.[2] Policies can be based on information and conclusions drawn from what scientists observe in studies as opposed to what the decision-makers—legislators or judges—opine as relevant factors in a particular case.[3]

The current standard for courts to make child custody determinations in California is the "best interest of the child."[4] This standard has been

[1] *See* Robert Bauserman, *Child Adjustment in Joint-Custody Versus Sole-Custody Arrangements: A Meta-Analytic Review*, 16 J. FAM. PSYCHOL. 91, 97 (2002); *see also* Mo-Yee Lee, *A Model of Children's Postdivorce Behavioral Adjustment in Maternal- and Dual-Residence Arrangements,* 23 J. FAM. ISSUES 672, 691-92 (2002).

[2] *See generally* John Monahan & Laurens Walker, *Social Science Research in Law: A New Paradigm*, 45 AM. PSYCHOLOGIST 465 (1988); Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877 (1988).

[3] *See generally* Monahan & Walker, *supra* note 2; Walker & Monahan, *supra* note 2.

[4] CAL. FAM. CODE § 3011 (2018).

criticized for being vague.[5] Other criticism includes that the standard's subjectivity limits predictable results from court actions and provides "courts with . . . no guidance or objective basis" to make child custody determinations.[6] This Comment evaluates the empirical evidence from social science studies to demonstrate that there is currently a sturdy body of social science research to justify using tangible evidence to define terms in the California Family Code, the California Family Courts, and beyond. Because the standard for custody determinations in California is the "best interest of the child" per the state's legislation,[7] social science research provides a vehicle that can define the "best interest of the child standard." This Comment argues that this can be done empirically by calculating the minimum amount of time a child—in the aggregate—needs with each parent during a two-week period in order to have an optimal opportunity for successful development. Including this calculation in either the statutes or as a judicial bright-line rule would offer a starting point to apply the best interest of the child standard as a matter of policy in all family court proceedings. This Comment prefers this approach for matters involving children over the current method of determining parenting plans on a case-by-case basis using evidentiary proceedings in contested litigation. Additionally, the empirically supported demarcation is a baseline of how much time children need with each parent to maximally benefit during their developmental years and this Comment argues that it should be instituted as a rebuttable presumption in any proceedings involving children. Moreover, the empirically supported demarcation would provide much-needed clarity to parents, attorneys, and judges from the present, disjointed approach that contains neither adequate legislative regulation nor judicial bright-line rules.

The proposed rebuttable presumption would both extend and clarify current California law. Presently, the state Legislature has codified an explicit presumption that joint custody is in the best interest of any involved children, though only when the parents agree.[8] This Comment argues that the presumption of joint physical custody should be extended to both contested and uncontested matters as a rebuttable presumption. Specifically, social science findings suggest a minimum timeshare for children to spend with each parent to serve the child's best interests dur-

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[5] Eugene Volokh, *Parent-Child Speech and Child Custody Speech Restrictions*, 81 N.Y.U. L. REV. 631, 656 (2006).

[6] Richard A. Warshak, *Parenting by the Clock: The Best-Interest-of-The-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule*," 41 U. BALT. L. REV. 83, 102-04 (2011).

[7] FAM. § 3011.

[8] CAL. FAM. CODE § 3080 (2018).

ing developmental years, and California should follow those findings.[9] This Comment argues that global social science findings demand that a rebuttable presumption must be instituted, either legislatively with a statute or judicially with a bright line rule. For the current inquiry, a child is defined as a person between the ages of 4 and 18 to avoid entanglement with a separate, controversial question about young children and overnights.[10] This Comment argues that the best interest of the child is served by access to each of the child's parents for at least 35% of the time during a two-week period.[11]

Part I identifies the issues that confuse parents, lawyers, and judges and examines how social science can provide clarity. A discussion of terminology follows. Part II discusses examples of how social science research findings have influenced both legislative and judicial processes as well as discusses limitations of social science methodologies and models. Part III explores the development of the best interest of the child standard, California's implementation of it, and the shortcomings of the current usage. Finally, Part IV provides a detailed exposition of the germane social science research findings about children having maximum contact with both of their parents.

I. BACKGROUND

A. PRESENTING ISSUES: CLARIFYING CHILD CUSTODY TERMINOLOGY

In the family law context, the term "custody" often encompasses two concepts: decision-making and how much time a child spends with each parent.[12] The decision-making concept is often referred to as legal custody.[13] In California, when parents share decision-making authority, it is called joint legal custody.[14] However, when only one parent is empowered to make legal choices for the child, it is called sole legal custody.[15]

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[9] *See generally* Linda Nielsen, *Shared Residential Custody: Review of the Research (Part I of II)*, 27 AM. J. FAM. L. 61, 62 (2013).

[10] *See* Marsha Kline Pruett, Jennifer E. McIntosh & Joan B. Kelly, *Parental Separation & Overnight Care of Young Child., Part I: Consensus Through Theoretical & Empirical Integration,* 52 FAM. CT. REV. 240, 241 (2014). *See also* Jennifer E. McIntosh, Marsha Kline Pruett & Joan B. Kelly, *Parental Separation & Overnight Care of Young Child., Part II: Putting Theory into Practice.,* 52 FAM. CT. REV. 256 (2014).

[11] *See generally* Nielsen, *supra* note 9, at 62.

[12] *See* Cal. Fam. Code § 3002 (2018); *see also* CAL. FAM. CODE §§ 3003-3007 (2018).

[13] *See* Fam. § 3003; *see also* FAM. § 3006.

[14] FAM. § 3003.

[15] FAM. § 3006.

The second concept of time spent with parents has a more developed nomenclature.[16] This is variably referred to as residential custody, parenting access, physical custody, parent-child contact, visitation, and parenting time.[17] In California when a child spends "significant periods" of time with each parent, it is called joint physical custody.[18] When the child resides predominately with only one parent, though the child may have some parenting time with the other parent, it is called sole physical custody.[19] Further, California law defines joint custody as the presence of both joint legal custody and joint physical custody.[20] California statutes define the parameters of joint physical custody as a parenting-time schedule where the child has significant periods of time with each parent[21] that "assure[s] a child of frequent and continuing contact with both parents."[22]

1. Examples of Different Custody Arrangements

Under California case law, the interpretative guidance illustrates some examples of circumstances that can be characterized as joint physical custody as well as some that cannot.[23] In *Brody v. Kroll*, the child frequently saw his father four-to-five days per week, and this amount of contact was sufficient to categorize as joint physical custody.[24] Specifically, the child spent each Tuesday and Friday overnight with his father, he spent the entire day with his father on Saturday except for those Saturdays that the child attended Hebrew school, and had numerous other contacts with his father during the week.[25] In both *In re Marriage of McGinnis* and *In re Marriage of Battenburg*, six complete days—or approximately 43% of the timeshare—spent overnight with one parent in a two-week period satisfied the significant period of time criterion for joint physical custody in jurisprudence.[26] Those children spent four days per week with one parent and three days per week with the other parent.[27] Conversely, in *In re Marriage of Whealon*, the court held that it was a

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[16] *See* Nielsen, *supra* note 9, at 62.

[17] *Id*.

[18] FAM. § 3004.

[19] FAM. § 3007.

[20] FAM. § 3002.

[21] FAM. § 3004.

[22] FAM. § 3004; *see also* CAL. FAM. CODE § 3020(b) (2018).

[23] *See* Brody v. Kroll, 45 Cal. App. 4th 1732, 1734-35 (1996); *see also In re* Marriage of McGinnis, 7 Cal. App. 4th 473, 475 (1992); *In re* Marriage of Battenburg, 28 Cal. App. 4th 1338, 1342 (1994); *In re* Marriage of Whealon, 53 Cal. App. 4th 132, 137 (1997).

[24] *Brody*, 45 Cal. App. 4th at 1734-35.

[25] *Id.* at 1735.

[26] *McGinnis*, 7 Cal. App. 4th at 475; *Battenburg*, 28 Cal. App. 4th at 1342.

[27] *McGinnis*, 7 Cal. App. 4th at 475; *Battenburg*, 28 Cal. App. 4th at 1342.

sole parenting arrangement with liberal visitation to the other parent.[28] Here, the child spent five days including overnights, approximately 28% of the timeshare, in a two-week period with one of the parents.[29]

As a practical matter, the majority of family court matters do not end up in the appellate process because cases often settle before trial, which effectively means that parties stipulate to agreements.[30] When facing various issues wherein the type of custody has particular bearing, the *Whealon* court made the observation that prior orders must be analyzed to understand if there is actual joint physical custody in practice or if it is only in name.[31] This is critical to understand when examining circumstances, such as in *In re Marriage of Lasich*, wherein the judgment—decided a decade after *McGinnis*—identified that there was a joint physical custody arrangement even though the child only had parenting time with one parent for approximately 20% of the time during a two-week period.[32] Despite the parents' agreement to call their stipulation a joint physical custody arrangement, the court held that the quantity of time that children spend with each parent constituted a sole parenting arrangement with visitation.[33] Unlike in *Monroe v. Rodriguez*, where the trial court's order was for sole physical custody to one parent with visitation to the other, and the trial court calculated the child's parenting time was split 80% and 20%.[34] However, the appellate court—which held this case not citable—found that the appropriate split was actually 65% and 35%, which satisfied the criterion of substantial time consistent with joint physical custody.[35]

2. Government Publications Regarding Custody

The issue of what defines sole or joint physical custody is further complicated by California's court-approved Judicial Council forms[36] as

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[28] *Whealon*, 53 Cal. App. 4th at 137.

[29] *Id.*

[30] *See* Judicial Council of Cal., *2016 Court Statistics Report*, CAL. CTS. 132-35, http://www.courts.ca.gov/documents/2016-Court-Statistics-Report.pdf (last visited Sept. 9, 2018) (identifying that only 3,228 of the combined 380,160 marital and non-marital family law petitions filed in 2014-2015 had to be resolved by a trial).

[31] *Whealon*, 53 Cal. App. 4th at 142.

[32] *In re* Marriage of Lasich, 99 Cal. App. 4th 702, 710 (2002) (the court erred in stating that the children had 60 hours per week with their father when in fact it was actually 60 hours per two-week period).

[33] *Lasich*, 99 Cal. App. 4th at 710.

[34] Monroe v. Rodriguez, No. G034854, 2005 Cal. App. LEXIS 11463, at *2-3 (4th Dist. Dec. 13, 2005).

[35] *Monroe*, 2005 Cal. App. LEXIS 11463, at *7-12.

[36] Judicial Council of Cal., *Child Custody and Visitation (Parenting Time) Order Attachment FL-341,* CAL. CTS. (July 1, 2016), http://www.courts.ca.gov/documents/fl341.pdf.

well as various informational offerings by different California counties because none of those sources provide either comprehensive or clear information.[37]

> The greatest damage from the lack of clarity in the law occurs in those divorces, the overwhelming majority, that are settled by the parties before trial. . . . To the extent that it is impossible to get or give sound advice on how a court is likely to resolve a given issue—and a large measure of discretion means exactly that . . . .[38]

Practical experience finds that records are replete with cases that identify joint physical custody where the child has far less than 'substantial time' with both parents, including as little as a few hours of parenting time per week with one parent,[39] and since the vast majority of these cases settle at the trial court before trial,[40] there is no readily accessible appellate record to review.[41]

Judicial Council form FL-341 is used throughout California at the local level by courts, attorneys, and litigants as part of judgments and orders relating to children.[42] Paragraph 5 of that form does not provide instructions regarding how physical custody should be understood or applied.[43] Partial guidance is provided on the Judicial Council's website, though it is consistent with the statutory language rather than plain language.[44] Another form that is available, FL-314-INFO, is represented to provide information about child custody.[45] Therein, the definitions for joint physical custody arrangements are that "both parents have certain

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[37] *See generally Child Custody and Visitation Stipulation and Order,* SUPERIOR CT. OF CAL. COUNTY OF S.F. (2018), http://www.sfsuperiorcourt.org/forms-filing/forms (follow "Child Custody and Visitation Stipulation and Order"); *Developing a Child Custody Parenting Plan*, SUPERIOR CT. OF CAL. COUNTY OF SAN DIEGO 4-5 (2012), http://www.sdcourt.ca.gov/pls/portal/docs/page/sdcourt/generalinformation/forms/familyandchildrenforms/fcs058.pdf; *Custody*, SUPERIOR CT. OF CAL. COUNTY OF SANTA CLARA, http://www.scscourt.org/self_help/family/custody_visitation.shtml#types (last visited Mar. 2, 2018); *Stipulation and Order for Custody and/or Visitation of Children Packet,* STANISLAUS COUNTY SUPERIOR CT. (July 2012), http://www.stanct.org/sites/default/files/stipulation_and_order_for_cv.pdf.

[38] Mary Ann Glendon, *Fixed Rules and Discretion in Contemporary Family Law and Succession Law*, 60 TUL. L. REV. 1165, 1170 (1986).

[39] The combined experiences of the author's prior career as a forensic psychologist as well as law school professional training experiences as a judicial extern and civil extern in family courts has provided the author with an abundance of exposure to family court cases.

[40] Glendon, *supra* note 38, at 1170.

[41] *See* Judicial Council of Cal., *supra* note 30, at 132-35.

[42] Judicial Council of Cal., *supra* note 36.

[43] *Id.*

[44] *Basics of Custody & Visitation Orders*, CAL. CTS., http://www.courts.ca.gov/17975.htm (last visited Mar. 6, 2018).

[45] Judicial Council of Cal., *Child Custody Information Sheet,* CAL. CTS. (Jan. 1, 2012), http://www.courts.ca.gov/documents/fl314info.pdf.

responsibilities" and in sole physical custody arrangements "one parent has the responsibility alone."[46]

Multiple counties have deployed local forms, aggregations of available forms, and posting of information on their websites.[47] For example, the City and County of San Francisco provides a repository of local forms that are available to the general public,[48] including a judgment checklist stating that custody orders must be filed if there are children.[49] To meet this requirement, San Francisco provides a local form compelling identification of sole or joint physical and legal custody with no additional guidance about what the terms mean or how they are defined.[50] Likewise, San Diego County prepares an informative packet that provides the statutory language, and it does mention sole and joint physical custody by name.[51] Also, Santa Clara County provides a unique form that ostensibly provides definitions related to custody.[52] Therein, sole physical custody is never mentioned—sole legal custody is not mentioned either—and the included text alludes to the statutory language without providing further specificity.[53]

Other counties prepare information packets, which are compilations of the already readily available Judicial Council forms. For example, Stanislaus County offers a packet that is dedicated to child custody.[54] Therein, the aforementioned FL-341-INFO is included as the sole provided guidance.[55] Similarly, San Diego County provides consolidated packets that provide no further clarity[56] and Contra Costa County's packets do no better.[57]

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[46] *Id.*

[47] *See e.g., All Local Forms*, SUPERIOR CT. OF CAL. COUNTY OF S.F., http://www.sfsuperiorcourt.org/forms-filing/forms (last visited Mar. 3, 2018); *Custody*, *supra* note 37; *Custody/Visitation Stipulation,* SUPERIOR CT. OF CAL. COUNTY OF CONTRA COSTA, http://www.cc-courts.org/forms/packets/famLaw010_CustodyVisitationStipulationPacket_7.1.16.pdf (last visited Mar. 3, 2018).

[48] *All Local Forms*, *supra* note 47.

[49] *Family Law Judgment Checklist,* SUPERIOR CT. OF CAL. COUNTY OF S.F., http://www.sfsuperiorcourt.org/forms-filing/forms (follow "Family Law 11.15: Judgment Checklist") (last visited Mar. 3, 2018).

[50] *Child Custody and Visitation Stipulation and Order, supra* note 37.

[51] *Developing a Child Custody Parenting Plan, supra* note 37, at 4-5.

[52] *Custody*, *supra* note 37.

[53] *Id.*

[54] *Stipulation and Order for Custody and/or Visitation of Children Packet, supra* note 37.

[55] *Id.*

[56] *Family Law Packets*, SUPERIOR CT. OF CAL. COUNTY OF SAN DIEGO, http://www.sdcourt.ca.gov/portal/page?_pageid=55,1058589,55_1524847&_dad=portal&_schema=portal (last visited Mar. 2, 2018).

[57] *Custody/Visitation Stipulation, supra* note 47.

Some counties mention these terms on their websites.[58] On its website, San Mateo County offers language that parallels the state statutes as well as the aforementioned Judicial Council website.[59] The information provided by Alameda County does not mention sole custody.[60] Sacramento County's website information similarly lacks references to sole custody.[61]

B. SOCIAL SCIENCE TERMINOLOGY

Turning to the social science literature, there are three broad categories of parenting-time schedules: sole physical custody, joint physical custody, and equal-shared custody.[62] In sole physical custody, children spend most of the time with one parent and have visitation of less than approximately 35% of the timeshare with the other parent.[63] This equates to less than five days in a two-week span.[64]

Generally, children that spend at least 35% of the timeshare with each parent, would be considered a joint physical custody arrangement.[65] An equal, shared parenting-time schedule allocates roughly the same amount of parenting time to each parent during a two-week period.[66] This is colloquially referred to as a "50/50" arrangement.[67] There are numerous ways to effectuate an equal-shared parenting-time schedule.

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[58] *See Child Custody and Visitation*, SUPERIOR CT. OF CAL. COUNTY OF SAN MATEO, https://www.sanmateocourt.org/court_divisions/family_law/child_custody_visitation.php (last visited Mar. 3, 2018); *see also Basics of Custody & Visitation Orders*, *supra* note 44; *Child Custody and Visitation: Types of Custody*, SUPERIOR CT. OF CAL. COUNTY OF ALAMEDA, http://www.alameda.courts.ca.gov/pages.aspx/child-custody-and-visitation#3 (last visited Mar. 2, 2018); *Child Custody/Visitation*, SUPERIOR CT. OF CAL. COUNTY OF SACRAMENTO, https://www.saccourt.ca.gov/family/custody-visitation.aspx#types (last visited Mar. 7, 2018).

[59] *Child Custody and Visitation*, *supra* note 58; *see also Basics of Custody & Visitation Orders*, *supra* note 44.

[60] *Child Custody and Visitation: Types of Custody*, *supra* note 58; *see also Custody*, *supra* note 37.

[61] *Child Custody/Visitation*, *supra* note 58.

[62] Nielsen, *supra* note 9, at 62. *See also* Malin Bergström et al., *Fifty Moves a Year: Is there an Association Between Joint Physical Custody and Psychosomatic Problems in Children?*, 69 J. EPIDEMIOLOGY & CMTY. HEALTH 769, 769 (2015).

[63] Nielsen, *supra* note 9, at 62.

[64] As identified *supra*, there are many names for this, including sole residential custody, sole parenting, or traditional parenting, and this Comment will use sole physical custody as that most closely matches California's established terminology.

[65] Nielsen, *supra* note 9, at 62. Other names include shared residential custody, joint residential custody, joint parenting, and shared parenting, and this Comment will use joint physical custody in accordance with California's established terminology.

[66] Bauserman, *supra* note 1, at 93.

[67] *See generally* Sanford L. Braver et al., *Lay Judgments About Child Custody After Divorce*, 17 PSYCHOL. PUB. POL'Y & L. 212, 220 (2011); *see also* William V. Fabricius et al., *What Happens When There Is Presumptive 50/50 Parenting Time? An Evaluation of Arizona's New Child Custody Statute*, 59 J. DIVORCE & REMARRIAGE 414, 414-28 (2018); William Fabricius, *Equal Parenting*

The unifying principle is that the child has parenting time with each parent for seven days in a two-week span.[68] Both joint physical custody and equal-shared parenting require that a child spends at least 35% of the time with each parent.[69] However, in social science literature, an equal-shared schedule is a subset of the joint physical custody category because the child spends an equal, or very near equal, amount of time with each parent.[70] The global trend is toward using a rebuttable presumption of equal-shared custody.[71] However, the science has not yet matured to the point that such a conclusion is beyond reasonable reproach, and this Comment focuses on establishing a rebuttable presumption of joint physical custody in California.[72]

II. SOCIAL SCIENCE'S INFLUENCE IN LEGISLATION, LITIGATION, AND POLICY

Both legislative and judicial processes can be influenced by and informed with scientific research.[73] Both at the federal and state level, judicial and legislative branches have used findings of scientific inquiry to make its respective determinations.[74]

A. SOCIAL SCIENCE'S INFLUENCE IN LEGISLATION

In the United States, federal, state, and local representative bodies use legislative processes to create laws that then provide a framework for the courts to interpret that law when presented with particular facts of

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Time: The Case for a Legal Presumption, *in* OXFORD HANDBOOK OF CHILDREN AND THE LAW (J. G. Dwyer. ed., 2019).

[68] *Planning for Parenting Time: Arizona's Guide for Parents Living Apart*, ARIZ. SUP. CT. (2009), https://www.azcourts.gov/portals/31/parentingTime/PPWguidelines.pdf.

[69] Nielsen, *supra* note 9, at 62; Bauserman, *supra* note 1, at 93.

[70] Bergström et al., *supra* note 62, at 769.

[71] *See generally id*.; *see also* Fabricius et al., *supra* note 67, at 414-28.

[72] Amandine Baude, Jessica Pearson & Sylvie Drapeau, *Children's Adjustment in Joint Physical Custody Versus Sole Custody: A Meta-Analytic Review*, 57 J. DIVORCE & REMARRIAGE 338 (2016) (only one review currently exists comparing children's outcomes with less than 30% time with each parent, between 30% and 35% time with each parent, and between 40% and 50% time with each parent). *But see* Fabricius (*Equal Parenting Time*), *supra* note 67 (identifying that an exactly equal timeshare should be used for children's maximal benefit).

[73] *See generally* Monahan & Walker, *supra* note 2; Walker & Monahan, *supra* note 2.

[74] *See generally* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252 (1964); *see also Pub. Health: Vaccinations: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, Cal. State Leg. 2015-16 Sess., 10, http://www.leginfo.ca.gov/pub/15-16/bill/sen/sb_0251-0300/sb_277_cfa_20150617_130902_asm_comm.html; *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992); *see also* Massachusetts v. EPA, 549 U.S. 497, 507-12 (2007); *see also* Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 934-36 (N.D. Cal. 2010).

specific cases in controversy.[75] Members of the legislature may be informed by scientific, scholarly research and findings as part of their respective decision-making processes.[76] For example, the U. S. Congress used extensive scientific findings from economists in developing the Civil Rights Act of 1964.[77] More recently, California's legislators considered medical findings regarding immunology during the passage of California Senate Bill 277.[78] The personal belief exemption for mandatory childhood vaccinations was voided due to an increase in both incidents of certain illness as well as increased vulnerability of the general population to illness.[79]

B. SOCIAL SCIENCE'S INFLUENCE IN LITIGATION

Courts also use scientific findings when rendering decisions. One of the factors the United States Supreme Court considers in overturning a prior holding and departing from precedent is whether the understanding of the underlying factual basis that guided the prior holding has substantially changed.[80] The Court's embrace of scientific information can be readily observed in *Massachusetts v. Environmental Protection Agency*, wherein the Supreme Court discussed extensive, germane scientific findings about climate change.[81] The U.S. District Court for the Northern District of California heard extensive testimony about scientific data regarding differences in families headed by same-sex versus opposite-sex parents, including outcomes of children raised in both situations.[82] The court held that the law in question was unconstitutional because there was no valid demonstration of a difference in families headed by same-sex versus opposite-sex parents upon which to form a basis of validity of a state interest in limiting marriage to only opposite-sex couples.[83]

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[75] *Sources of Law*, LAWSHELF, https://lawshelf.com/courseware/entry/sources-of-law-judicial (last visited Oct. 7, 2018).

[76] *See generally Heart of Atlanta*, 379 U.S. at 252; *see also Pub. Health: Vaccinations: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, *supra* note 74.

[77] *Heart of Atlanta*, 379 U.S. at 252.

[78] *Pub. Health: vaccinations: Hearing on S.B. 277 Before the Assemb. Comm. on Health*, *supra* note 74.

[79] *Id.*

[80] *Casey*, 505 U.S. at 855 (citing Roe v. Wade, 410 U.S. 113 (1973)) (holding that medical technology had advanced to a point that the viability of fetuses was no longer consistent with *Roe's* trimester model).

[81] Massachusetts v. EPA, 549 U.S. at 507-12.

[82] *Perry*, 704 F. Supp. 2d at 934-36.

[83] *Id.* at 999-1000.

C. SIMILARITIES AND DIFFERENCES IN UTILIZATION OF SOCIAL SCIENCES BY THE LEGISLATURE AND THE JUDICIARY

Both the legislature and the judiciary use social science to support policy determinations.[84] Whereas the legislature would likely use social science research findings to support the passage of a piece of legislation, the judiciary would use social science research findings in varied ways. The judiciary can use findings to evaluate if a law should be upheld, stricken, or modified. Moreover, the judiciary can also use social science research findings to invalidate laws that serve the majority's will by compromising the rights of the minority.

D. LIMITATIONS OF SOCIAL SCIENCE RESEARCH

Prior authors have discussed the role of social science findings in shaping laws and public policy.[85] Three noteworthy limitations of social science research are that a true experiment cannot be achieved, there are numerous factors that influence human behavior and outcome, and the results of studies may vary across time.[86]

First, true experiments regarding custody arrangements cannot be conducted because children cannot be randomly assigned to groups where either their parents stay together or get divorced or separated.[87] There cannot be placebo groups where children are administered what they think is divorced parents when in actuality their parents are not divorced.[88] This limits research's ability to pinpoint an identifiable cause of an outcome. Second, children's behavior and how well they transition to adulthood are determined by a number of potential factors, including but not limited to genetic predispositions, cultural mores, and personal

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[84] *See Casey*, 505 U.S. at 855; *see also EPA*, 549 U.S. at 507-12; *Perry*, 704 F. Supp. 2d at 934-36.

[85] Ben K. Grunwald, *Suboptimal Social Science and Judicial Precedent*, 161 U. PA. L. REV. 1409, 1410 (2013); Ronald G. Roesch, Stephen L. Golding, Valerie P. Hans & N. Dickon Reppucci, *Social Science and the Courts: The Role of Amicus Curiae Briefs*, 15 L. & HUM. BEHAV. 1, 1-3 (1991).

[86] *True Experimental Design*, EXPLORABLE (Dec. 12, 2018), https://explorable.com/true-experimental-design. *See generally* DONALD CAMPBELL & JULIAN STANLEY, EXPERIMENTAL AND QUASI-EXPERIMENTAL DESIGNS FOR RESEARCH (1963), https://www.sfu.ca/~palys/Campbell&Stanley-1959-Exptl&QuasiExptlDesignsForResearch.pdf.

[87] A true experiment meets a number of conditions and is able to isolate one particular variable or group of variables to measure outcome differences when those variables are manipulated.

[88] *Placebo-Controlled Study*, WIKIPEDIA, https://en.wikipedia.org/wiki/Placebo-controlled_study (last visited Dec. 12, 2018) (a group is led to believe that they are receiving the treatment though in fact they are not in order to assess the psychological effect of belief).

experiences.[89] This similarly limits research's ability to pinpoint an identifiable cause of an outcome. Third, results may vary across time as a society changes, such that the findings that applied 20 years ago might not hold true 40 years in the future due to factors affecting society as a whole.[90] With that stated, there is an imperative to use the available tools—flawed or not—to make policy decisions that are likely to promote the best possible outcomes for California's children.

III. BACKGROUND AND EVOLUTION OF THE CURRENT LEGAL STANDARD FOR CUSTODY: BEST INTEREST OF THE CHILD

A. TENDER YEARS DOCTRINE

In the 19th and 20th centuries, there was broad adoption of the "tender years doctrine," which presumed that mothers were the superior parents for raising children to the exclusion of fathers.[91] The tender-years doctrine was likely initially formulated in an 1813 Pennsylvania case involving two daughters, aged seven and ten years.[92] The children were undisputedly well-cared for and educated by their mother throughout their lives up to the time of the trial.[93] The court held that "[i]t is to *them* [the children], that our anxiety is principally directed; and it appears to us, that considering their tender age, they stand in need of that kind of assistance, which can be afforded by none so well as a mother."[94]

B. BEST INTEREST OF THE CHILD STANDARD

During the 1960s and 1970s, a new standard emerged: the best interest of the child.[95] Though it took a while to gain momentum, the best interest of the child standard may have seen its earliest formulation in a

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[89] *Confounding*, WIKIPEDIA, https://en.wikipedia.org/wiki/Confounding (last visited Dec. 12, 2018).

[90] *Cohort effect*, WIKIPEDIA, https://en.wikipedia.org/wiki/Cohort_effect (last visited Dec. 12, 2018).

[91] *See* Stephanie N. Barnes, *Strengthening The Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601, 605-07 (1999); *see also* Melissa A. Tracy, *The Equally Shared Parenting Time Presumption—A Cure-All or a Quagmire for Tennessee Child Custody Law?*, 38 U. MEM. L. REV. 153, 156-57 (2007); James W. Bozzomo, *Joint Legal Custody: A Parent's Constitutional Right in a Reorganized Family*, 31 HOFSTRA L. REV. 547, 549 (2002).

[92] The Tender Years doctrine maintains that mothers should be the primary caretaker of children, particularly young children. *See* Commonwealth v. Addicks, 5 Binn. 520, 521 (Pa. 1813).

[93] *Addicks*, 5 Binn. at 521.

[94] *Id.*

[95] *See* Barnes, *supra* note 91, at 608; *see also* Tracy, *supra* note 91, at 157-58; Bozzomo, *supra* note 91, at 549-50; Warshak, *supra* note 6, at 86.

Kansas court in 1881.[96] The court held that "when the custody of children is the question . . . the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that."[97]

The best interest of the child standard has received its own criticism despite the intention to promote the welfare of children. Scholarly critiques assert that the best interest of the child standard is too subjective, does not focus on a single determinative factor, provides no guidance, and encourages the use of mental health professionals in legal proceedings.[98] The criticism is that the best interest of the child standard is nebulous, which both increases litigation due to lacking the explicit limitations that help promote negotiations as well as being so generalized that decisions are excessively subject to personal biases rather than objective guideposts.[99]

In response to the contention between the tender years doctrine and the best interest of the child standard, a competing domestic policy emerged in the 1970s that focused on effectuating five specific factors enumerated in section 402 of the Uniform Marriage and Divorce Act.[100] The courts must consider the following factors in formulating parenting-time plans pursuant to the Uniform Marriage and Divorce Act:

> (1) The wishes of the child's parent or parents as to his custody;
> (2) The wishes of the child as to his custodian;
> (3) The interaction and interrelationship of the child with his parent or parents, his siblings, and any other person who may significantly affect the child's best interest;
> (4) The child's adjustment to his home, school, and community; and
> (5) The mental and physical health of all individuals involved.[101]

In the early 2000s, the American Law Institute offered the "approximation rule" to replace the best interest of the child standard with a concept that had some clarity and upon which finders of fact could locate some tangible footing for rendering decisions.[102] The rationale underlying the approximation standard is that the child should have about the same amount of parenting time with each of her parents after the parents separate as she had prior to the separation.[103]

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[96] *See generally In re* Bort, 25 Kan. 308 (1881).

[97] *Id.* at 309-10.

[98] Warshak, *supra* note 6, at 102-06.

[99] *Id*. at 94.

[100] UNIF. MARRIAGE & DIVORCE ACT § 402 (amended 1973), 9A U.L.A. 561 (1987).

[101] *Id*.

[102] Warshak, *supra* note 6, at 86; Shelley A. Riggs, *Is the Approximation Rule in the Child's Best Interests?*, 43 FAM. CT. REV. 481, 481 (2005).

[103] Warshak, *supra* note 6, at 117.

C. California's Implementation of the Best Interest of the Child Standard

Today in California, the best interest of the child standard persists.[104] California law further developed to include that custody determinations should be aimed at supporting "frequent and continuous contact" between a child and both parents.[105] Additionally, custody determinations should "encourage parents to share the rights and responsibilities" of raising the child, except in instances when such an arrangement would not actually serve the best interest of the child.[106] Although one section of the California Family Code states that it does not create a presumption of any type of parenting plan,[107] the Family Code subsequently creates an explicit presumption that joint custody is in the best interest of the children, which is predicated upon the parents' agreement on the issue.[108]

The California Family Code directly outlines the best interest of the child standard in five paragraphs.[109] In section 3011, the code enumerates what the best interest of the child analysis examines: the child's health, safety, and welfare; if the person seeking custody has a history of perpetuating abuse against others; the history of the child's contact with each parent; and the parents' history of drug and alcohol use.[110] California's public policy goals are that "the health, safety, and welfare of children shall be the court's primary concern in determining the best interest of children when making any orders regarding the physical or legal custody or visitation of children."[111] Section 3020 also states that the public policy of California is for "children [to] have frequent and continuing contact with both parents."[112]

Section 3040 identifies that there are no presumptions about either a sole or joint custody arrangement being in the child's best interest with an exception if the parents agree to a joint custody arrangement.[113] The section also addresses when neither parent is fit or if there is an immigration-related concern.[114] Section 3042 concerns children speaking to the

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[104] Cal. Fam. Code § 3011 (2018).

[105] Fam. § 3020; *see also* Cal. Fam. Code § 3040 (2018).

[106] Fam. § 3020.

[107] Fam. § 3040(c).

[108] Fam. § 3080.

[109] *See* Fam. § 3011. *See also* Cal. Fam. Code §§ 3020, 3040, 3042, 3044 (2018).

[110] Fam. § 3011.

[111] Fam. § 3020(a).

[112] Fam. § 3020(b).

[113] Fam. § 3040.

[114] Fam. § 3040(a)-(b).

court.[115] Finally, sections 3020 and 3044 specify that it is not in a child's best interest to be in an abusive household.[116]

D. CALIFORNIA'S CURRENT BEST INTEREST OF THE CHILD STANDARD DOES NOT SERVE CHILDREN'S BEST INTERESTS

The crux of the problem with the best interest of the child standard is captured in Family Code section 3040(c) which "establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child."[117] Wide discretion allows parental feuds to prevent a child from getting the time with each of his or her parents which social sciences have empirically found to be best for most children in the aggregate.[118] The factors used by the current best interest of the child standard analysis may continue to find use in modifying any presumptive starting point.[119] There should be an empirically supported starting point that may then be modified on a case-by-case basis. Thus, social science findings provide a starting point from which discretion can determine whether a different place is in any particular child's best interest.[120]

Currently, the presumption of joint custody neither extends into contested matters nor is joint custody effectively defined,[121] notwithstanding the fact that California blazed the trail in 1980 by being the first state to authorize courts to make joint custody determinations as well as findings that agreements by the parents to the joint custody were preemptively in the children's best interests.[122] California needs to lead the nation again—and catch up to some other countries—by taking action.[123] California needs to continue the legal community's tradition of employing scientific findings either to codify or to set a bright line to define a rebuttable presumption of the bounds of a custody determination that has been

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[115] FAM. § 3042.

[116] FAM. §§ 3020(a), 3044.

[117] FAM. § 3040(c).

[118] *See* Fabricius et al., *supra* note 67, at 412-15.

[119] *But see* FAM. § 3011.

[120] *But see id.*

[121] *See* FAM. § 3040(c).

[122] Nancy K. Lemon, *Joint Custody as a Statutory Presumption: California's New Civil Code Sections 4600 and 4600.5*, 11 GOLDEN GATE U. L. REV. 485, 485 (1981).

[123] *See generally* Nielsen, *supra* note 9, at 62; *see also* Fabricius (*Equal Parenting Time*), *supra* note 67.

shown to actually capture what is, in fact, in most children's best interests.[124]

IV. Exposition of the Benefits to Child with at Least 30-35% Time with Both Parents

The de facto standard has been that children maximally benefit from being with their mother, which has resulted in the presumptive awarding of custody of the child to mothers throughout most of the 20th century.[125] Moreover, social sciences and psychology have only been scientific disciplines since after the tender years doctrine was firmly instantiated.[126] Thus, there is no existing research on the effects of custody awards and differential contributions by mothers and fathers from the time of English or American common law.[127] Therefore, social science is admittedly skewed towards looking at the effects of adding fathers' involvement into parenting because the baseline assumption was that children do well with mothers.[128]

The available studies reflect that mothers have been awarded general custody since the time of studying divorce began, and studies have been generally aimed at understanding if either parenting time with fathers was problematic for children or if parenting time with fathers provided any benefits to children.[129] Thus, the exposition of these studies is not meant to devalue the role of mothers in children's lives; rather, their inclusion is meant to provide empirical support for the benefit of children having maximal contact with *both* parents in their developmental years.[130] Moreover, while the research examined here relates to mothers and fathers, the author would like to revisit information noted before that the courts have previously examined and determined that there are no

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[124] *See generally* Nielsen, *supra* note 9, at 62; *see also* Fabricius (*Equal Parenting Time*), *supra* note 67.

[125] Nielsen, *supra* note 9, at 62 ("Other families will be referred to as "sole residence" or "maternal" residence, since *95% of the children living with only one parent are living with their mothers.*") (emphasis in original).

[126] *See* Barnes, *supra* note 91, at 605-07; *see also* Tracy, *supra* note 91, at 156-57; Bozzomo, *supra* note 91, at 549.

[127] John Bowlby, *Forty-Four Juvenile Thieves: Their Character and Home-Life*, 25 Int'l J. of Psychoanalysis 19, 19 (1944).

[128] Nielsen, *supra* note 9, at 62 ("Other families will be referred to as 'sole residence' or 'maternal' residence, since 95% of the children living with only one parent are living with their mothers.").

[129] Paul R. Amato & Joan G. Gilbreth, *Nonresident Fathers and Children's Well-Being: A Meta-Analysis*, 61 J. Marriage & Fam. 557, 557 (1999).

[130] *See* Fabricius (*Equal Parenting Time*), *supra* note 67; *see also* Bergström et al., *supra* note 62, at 769; Fabricius et al., *supra* note 67, at 425-26; Baude et al., *supra* note 72, at 338; Nielsen, *supra* note 9, at 63.

significant differences between same-sex and opposite-sex parents.[131] Therefore, the prevailing policy should be that a child needs two parents in their life in most cases.

From a traditional, litigation-focused adversarial perspective, parenting-time awards are a zero-sum scenario wherein increasing parenting time with one parent necessarily leads to a diminution in the other parent's parenting time.[132] Harkening back to the earliest iteration of the best interest of the child standard in 1881, "when the custody of children is the question . . . the best interest of the children is the paramount fact. Rights of father and mother sink into insignificance before that."[133] Additionally, since the system of child support in the United States is based on parenting-time allotments, policymakers will have to further consider how that system provides a tangible, financial incentive for one parent to seek parenting that may be entirely separate from the best interest of the child.[134]

A. General Benefits of Maximum Time with Both Parents

Children experience the limited time of a traditional visitation schedule that alternates weekends and Wednesdays as both inadequate and stressful, such that the relationship between a child and that parent deteriorates over time.[135] However, when children have a positive relationship with their fathers, including more frequent and continuous contact with their fathers, the children evidence better behavioral adjustment and academic performance.[136] This is particularly true when fathers are involved in their children's activities and education as well as when they discipline in an authoritative manner.[137] Paternal provision of emotional support to children leads to similar benefits.[138] The benefits to a child of

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[131] *Perry*, 704 F. Supp. 2d at 934-36.

[132] *See generally* Edward Greer, *Custodial Relocation and Gender Warfare: Thinking About Section 2.17 of the ALI Principles of the Law of Family Dissolution*, 13 J. L. Fam. Stud. 235, 258 (2011) (For example, if a child spends 70% of the time with one parent, mathematical law dictates that the child must spend exactly 30% of the child's time with the other parent.).

[133] *In re* Bort, 25 Kan. at 309-10.

[134] Karly Schlinkert, *The Numbers Game: Why California's Child Support Formula Should Be Amended to Avoid Parental Abuse*, 44 Golden Gate U. L. Rev. 257, 266 (2014).

[135] Joan B. Kelly & Robert E. Emery, *Children's Adjustment Following Divorce: Risk and Resilience Perspectives*, 52 Fam. Rel. 352, 354 (2003).

[136] Amato & Gilbreth, *supra* note 129, at 564.

[137] An authoritative parenting style is characterized as having expectations of the child and promoting the maturity and autonomy to rise to the tasks while remaining responsive to the child's experience, interests, and needs. Diana Baumrind, *Effects of Authoritative Parental Control on Child Behavior*, 37(4) Child Dev. 887, 891-92 (1966).

[138] Paul R. Amato, *The Consequences of Divorce for Adults and Children*, 62 J. Marriage & Fam. 1269, 1280 (2000); Chadwick L. Menning, *Absent Parents are More than Money: The Joint*

having ample time with both parents are observable despite the presence of moderate conflict between the parents themselves.[139]

Recent studies have reported that approximately half of children and adolescents from separated and divorced households state a desire for more frequent contact with their fathers, and one-third would like to have longer periods of contact with their fathers.[140] A New Zealand study found that only 2% of children desired to have less contact with a non-residential parent because they experienced their fathers as angry, difficult, or uninterested.[141] In a survey of college students whose parents divorced an average of 11 years prior to the study, more than 50% stated that they wished they would have been able to spend more time with their fathers.[142] Only 10% had wanted to see their fathers less.[143] In Sweden, 15-year-olds who spent equal time with both parents after separation demonstrated better well-being than children who lived primarily with one parent.[144] Seventy percent of a group of college-aged students reported that an equal parenting-time plan would have been ideal, and 93% of the college students who had lived in a shared parenting arrangement following their parents' divorce believed that their arrangement was the best for them.[145] A similar finding came from a group of Norwegian adolescents.[146] In sum, children fare significantly better when their fathers are actively engaged in their lives as well as when the children's relationships with their fathers are positive.[147]

Effect of Activities and Financial Support on Youths' Educational Attainment, 23(5) J. FAM. ISSUES 648, 651 (2002); Christine Nord, DeeAnn Brimhall & Jerry West, *Fathers' Involvement in Their Children's Schools*, NAT'L CTR. FOR EDUC. STAT. (1997), https://nces.ed.gov/pubs98/98091.pdf.

[139] Nielsen, *supra* note 9, at 63.

[140] Joan Kelly, *Children's Living Arrangements Following Separation and Divorce: Insights from Empirical and Clinical Research*, 46 FAM. PROCESS 35, 43 (2007).

[141] *Id.*

[142] William V. Fabricius, *Listening to Children of Divorce: New Findings that Diverge from Wallerstein, Lewis, and Blakeslee*, 52 FAM. REL. 385, 387 (2003).

[143] *Id*.

[144] Malin Bergström et al., *Living in Two Homes-A Swedish National Survey of Wellbeing in 12 and 15 Year Olds with Joint Physical Custody*, 13 BMC PUB. HEALTH 868, 868 (2013).

[145] Fabricius, *supra* note 142, at 387.

[146] Linda Nielsen, *Shared Residential Custody: Review of the Research (Part II of II)*, 27 AM. J. FAM. L. 123, 132 (2013).

[147] William V. Fabricius, Sanford L. Braver, Priscila Diaz & Clorinda E. Velez, *Custody and Parenting Time: Links to Family Relationships and Well-Being After Divorce*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 201, 202 (Michael E. Lamb ed., 2010).

B. THERE ARE POSITIVE ENHANCEMENTS TO CHILDHOOD DEVELOPMENT WHEN CHILDREN SPEND THE MAXIMUM AMOUNT OF PARENTING TIME WITH BOTH PARENTS

The quality of the relationship between the father and child is a crucial consideration in understanding how a child does or does not benefit.[148] It is reductionist to only consider the frequency of contact between a father and child.[149] A feeling of closeness between a child and their parent is often used as a variable in research.[150] Studies show that children perceive their relationships with their fathers as incrementally greater the more time they spend together.[151]

There are several specific findings about the benefits that fathers can provide to adolescents when there is a positive father-child relationship.[152] Fathers have powerful direct and indirect impacts on their children's development.[153] Additionally, fathers can have a positive impact on their adolescent children's academic performance.[154] Moreover, a large study of nearly 1300 Taiwanese eighth-graders found that each parent had independent contributions to children's development.[155] For example, fathers were found to have an especially meaningful contribution to children's success in sports.[156]

A recent study examining a group of 17-year-olds found that the participants who demonstrated secure attachments were rated as being more social and less aggressive by their peers.[157] In the study, the 17-year-olds were administered the Adult Attachment Interview, which is a seminal psychological assessment tool that measures the test taker's attachment with his or her family of origin, as opposed to peers or romantic partners.[158] Thus, adolescent peer relationships are related to

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[148] Kelly & Emery, *supra* note 135, at 356-57.

[149] *Id*. at 356.

[150] Bauserman, *supra* note 1, at 98.

[151] Fabricius, *supra* note 142, at 389.

[152] Fabricius et al., *supra* note 147, at 217-18.

[153] Vicky Phares, Ariz Rojas, Idia B. Thurston & Jessica C. Hankinson, *Including Fathers in Clinical Interventions for Children and Adolescents*, *in* THE ROLE OF THE FATHER IN CHILD DEVELOPMENT 459, 478-79 (Michael E. Lamb ed., 2010).

[154] Xinyin Chen, Mowei Liu & Dan Li, *Parental Warmth, Control and Indulgence and Their Relations in Chinese Children: A Longitudinal Study,* 14 J. FAM. PSYCHOL. 401, 413-14 (2000).

[155] Yih-Lan Liu, *An Examination of Three Models of the Relationships Between Parental Attachments and Adolescents' Social Functioning and Depressive Symptoms,* 37 J. YOUTH & ADOLESCENCE, 941, 950 (2008).

[156] Kathleen M. Jodl, Alice Michael, Oksana Malanchuk, Jacquelynne S. Eccles & Arnold Sameroff, *Parents' Roles in Shaping Early Adolescents' Occupational Aspirations*, 72 CHILD DEV. 1247*,* 1247 (2001).

[157] Matthew J. Dykas, Yair Ziv & Jude Cassidy, *Attachment and Peer Relations in Adolescence,* 10 ATTACHMENT & HUM. DEV. 123, 123 (2008).

[158] *Id*.

children's relationships with their parents.[159] Whereas the conventional wisdom from the middle of the last century was that the adolescent years were a rift where peers' input was more important to adolescents than parents' input,[160] this does not appear to be the case.[161]

Several large studies have found that most adolescents make use of their parents' emotional and social resources.[162] A recent meta-analysis examined 52 studies on the topic of children's well-being as a function of paternal involvement in situations of separation and divorce.[163] The finding was that positive paternal involvement was associated with the children demonstrating better social functioning, emotional functioning, behavioral adjustment, and academic achievement.[164] Examples of positive paternal involvement included the father's involvement in the child's activities and having a positive father-child relationship.[165] Importantly, fathers contribute more than just money to children's lives.[166]

Moreover, the father-child attachment has been found to have a stronger relationship with a child's adjustment in school in the domains of social and emotional skills than the child's academic achievement.[167] In this way, a father's relationship with a child gives the child the interpersonal skills to succeed in life, which is distinct from a child's intellect.[168] A large study of 4,663 nonresident fathers and their children determined that there was particular benefit to daughters for increased, positive engagement with their fathers.[169] Though both sons and daughters benefited from increased, positive parental contact in terms of better academic performance and fewer sanctions for behavioral issues, the daughters enjoyed the additional benefit of a better internal sense of

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[159] *Id.*

[160] Anna Freud, *Adolescence,* 13 PSYCHOANALYTIC STUDY OF THE CHILD 255, 277-78 (1958).

[161] Dykas et al., *supra* note 157, at 132.

[162] Eleanor E. Maccoby & John A. Martin, *Socialization in the Context of the Family: Parent-Child Interaction, in* 4 HANDBOOK OF CHILD PSYCHOLOGY 1, 24-26 (E. Mavis Hetherington ed., 1983); *see generally* Sheena McGrellis, Sheila Henderson, Janet Holland & Sue Sharpe, THROUGH THE MORAL MAZE: A QUANTITATIVE STUDY OF YOUNG PEOPLE'S VALUES (2000); Patricia Noller & Victor J. Callan, *Adolescent and Parent Perceptions of Family Cohesion and Adaptability*, 9 J. OF ADOLESCENCE 97, 97 (1986).

[163] Kari Adamsons & Sara K. Johnson, *An Updated and Expanded Meta-Analysis of Nonresident Fathering and Child Well-Being*, 27 J. FAM. PSYCHOL. 589, 590-91 (2013).

[164] *Id*.

[165] *Id*.

[166] *Id*. at 595.

[167] Lisa Newland, Hui-Hua Chen, & Diana D. Coyl-Shepherd, *Associations Among Father Beliefs, Perceptions, Life Context, Involvement, Child Attachment and School Outcomes in the U.S. and Taiwan,* 11 FATHERING 3, 23 (2013).

[168] *Id*.

[169] Katherine S. Mitchell, Alan Booth & Valarie King, *Adolescents with Nonresident Fathers: Are Daughters More Disadvantaged Than Sons?*, 71 J. MARRIAGE & FAM. 650, 655 (2009) (children's ages averaged 16 years).

well-being.[170] Specifically, the daughters were observed to experience fewer internalizing problems when they felt close to their fathers.[171] Furthermore, increased involvement by the father has a number of desirable social, behavioral, and psychological benefits for children, including fewer occurrences of behavioral problems for young women and men according to a Swedish study.[172]

C. THERE IS A REDUCTION IN PROBLEMATIC BEHAVIORS WHEN CHILDREN SPEND THE MAXIMUM AMOUNT OF PARENTING TIME WITH BOTH PARENTS

Unlike physical symptoms and illnesses, psychosomatic illnesses are related to stress.[173] Recently, children who lived in shared parenting arrangements were found to be healthier than those who lived mostly with one parent, such that the children living in shared parenting arrangements had fewer sleeping problems and experienced fewer headaches.[174] A recent Swedish study of nearly 150,000 twelve- and fifteen-year-olds found that children who have an equal-shared parenting-time plan experience fewer psychosomatic illnesses than children living with mostly or predominately one parent.[175]

The National Longitudinal Study of Youth has been collecting data for over four decades in order to allow researchers to capture children's development over time.[176] One particular study looked at the benefits of fathers in adolescents' lives during separation and divorce.[177] From a sample of 2,733 adolescents, the study found that the involvement of fathers in adolescents' lives served a protective function.[178] The findings made three conclusions about children whose fathers gave them continuous emotional support through contact and social interaction.[179] First, those children demonstrated a significantly diminished risk of behavioral

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[170] *Id*. at 657-59.

[171] *Id*.

[172] Anna Sarkadi, Robert Kristiansson, Frank Oberklaid & Sven Bremberg, *Fathers' Involvement and Children's Developmental Outcomes: A Systematic Review of Longitudinal Studies,* 97 ACTA PAEDIATRICA 153, 153 (2008).

[173] Bergström et al., *supra* note 62, at 772.

[174] *Children's Health Worse if Staying with One Parent, But Better if Custody is Shared*, EDU. J. 17 n.231 (2015).

[175] Bergström et al., *supra* note 62, at 772.

[176] *National Longitudinal Surveys*, BUREAU OF LAB. STAT., https://www.bls.gov/nls/ (last visited Oct. 9, 2018).

[177] Marcia J. Carlson, *Family Structure, Father Involvement, and Adolescent Behavioral Outcomes,* 68 J. MARRIAGE & FAM. 137, 137 (2006).

[178] *Id*.

[179] *Id*. at 150-51.

problems.[180] Second, each functional unit of parenting involvement carried two to three times the effect when the father lived with the child.[181] Third, there is no difference in how paternal involvement affects adolescent boys or girls.[182]

Another study that used the National Longitudinal Survey of Youth data set focused on data of adolescents regarding father-child relationships and the father's parenting style as predictor variables.[183] The focus was on predictors of delinquency and substance use among adolescents.[184] The study found that there was reduced risk of adolescents engaging in various risky behaviors with more positive relationships between the father and the child.[185]Additionally, it observed that a positive relationship between a father and a child reduces the negative impact of a father's authoritarian parenting style,[186] as opposed to an authoritative parenting style, and that a positive relationship between a father and child reduces the negative impact of a father's permissive parenting style.[187]

A Norwegian study found that adolescents in shared parenting arrangements were less likely to smoke cigarettes, suffer from depression, and engage in anti-social behaviors (i.e., criminal behaviors, or experience low self-esteem).[188] A similar finding came from a study of Dutch adolescent girls wherein the children from shared parenting arrangements reported feeling less depressed, less fearful, and less aggressive than those from sole parenting arrangements where they lived mostly with just one parent.[189] Adolescents living in shared parenting-time arrangements rated their relationships with both parents as better than those who lived primarily with just one parent.[190]

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[180] *Id*.

[181] *Id*.

[182] *Id*.

[183] Jacinta Bronte-Tinkew, Kristin A. Moore & Jennifer Carrano, *The Father-Child Relationship, Parenting Styles, and Adolescent Risk Behaviors in Intact Families*, 27 J. FAM. ISSUES 850, 850 (2006).

[184] *Id*.

[185] *Id*.

[186] An authoritarian parenting style is characterized as being harsh, focused on discipline and punishment, and generally not responsive to a child's experience. *See*, Baumrind, *supra* note 137, at 887-907; *see also*, Diana Baumrind, *Child Care Practices Anteceding Three Patterns of Preschool Behavior*, 75(1) GENETIC PSYCHOL. MONOGRAPHS 43, 43-88 (1967).

[187] Bronte-Tinkew et al., *supra* note 183, at 876-77. A permissive parenting style is characterized as having few expectations of the child, allows the parent to be used as a resource by the child, and avoids applying punishments and consequences. *See* Baumrind, *supra* note 137, at 887-907; *see also* Baumrind, *supra* note 186.

[188] Nielsen, *supra* note 146, at 126.

[189] *Id.*

[190] Sofie Vanassche et al., *Commuting Between Two Parental Households: Joint Physical Custody and Adolescent Wellbeing Following Divorce*, 19 J. FAM. STUDIES 139, 151 (2014).

The National Survey of Families and Households has focused on long-term data collection amongst large samples and has collected data at multiple points over two decades.[191] A study with 453 adolescents found that a strong father-child relationship with a nonresident father helped decrease the amount of internalizing and externalizing behaviors of a child who had a weak mother-child relationship when compared to other adolescents that had weak relationships with both of their parents.[192] Similarly, adolescent females were found to be less likely to engage in risky sexual behaviors when they have frequent, on-going contact with a father who is engaged in his children's lives and with whom the daughter has a positive, close relationship.[193] This is in contrast to the adolescent females who perceived their fathers to be distant or angry and indicated that they experienced more emotional and behavioral problems.[194] Furthermore, the risk increased with the father's absence.[195]

D. Specific Outcomes in Adult Development that are Correlated with Maximum Parenting Time with Both Parents During Childhood

The research identifies areas of concern as well as reason for hope. Numerous studies have observed impaired relationships between young adult children of divorce and their fathers.[196] When compared with young adults from intact families, adult children of divorce also demonstrate the following difficulties in future relationships: lacking affection, lacking trust, and making fewer offers of assistance to others.[197] Heartteningly, young adults who had more frequent contact with their fathers after their parents' separation experienced less distrust of others when compared to other young adults who did not have as much contact with

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[191] *National Survey of Families and Households*, U. of Wis., https://www.bls.gov/nls/ (last visited Oct. 9, 2018).

[192] Valarie King & Juliana M. Sobolewski, *Nonresident Fathers' Contributions to Adolescent Well-Being*, 68 J. Marriage & Fam. 537, 537 (2006) (internalizing behaviors are known as acting in and externalizing behaviors are known as acting out).

[193] Binta Alleyne-Green, Claudette Grinnell-Davis, Trenette T. Clark, Camille R. Quinn & Qiana R. Cryer-Coupet, *Father Involvement, Dating Violence, and Sexual Risk Behaviors Among a National Sample of Adolescent Females*, 31(5) J. Interpersonal Violence 810, 823 (2014).

[194] *Id*. at 814.

[195] *Id*. at 823-24.

[196] Constance R. Ahrons & Jennifer L. Tanner, *Adult Children and Their Fathers: Relationship Changes 20 Years After Parental Divorce*, 52 Fam. Rel. 340, 348 (2003); Alan Booth & Paul R. Amato, *Parental Predivorce Relations and Offspring Postdivorce Well-Being*, 63 J. Marriage & Fam. 197, 210 (2001).

[197] Amato, *supra* note 138, at 1277-82; Booth et al., *supra* note 196, at 210-11 (2001); *see generally* Mavis E. Hetherington, *Should We Stay Together for the Sake of the Children?, in* Coping with Divorce, Single Parenting and Remarriage 93, 93-116 (Mavis E. Hetherington ed., 1999).

their fathers after their parents' separation.[198] This effect was so pronounced that the young adults who had more contact with their fathers showed no differences when compared to young adults whose parents did not divorce.[199]

A readily available father figure during the early and adolescent time frame is positively correlated with development of adults who are more compassionate and responsible when they grow up.[200] In particular, "boys who feel close to their fathers, regardless of biological status, have better attitudes about intimacy and the prospect of their own married lives than boys who do not feel close to their fathers."[201] In a study looking at how childhood experiences related to the children's own later romantic relationships, the sample of 205 young adults indicated that people who had experienced more positive and loving fathers were better able to seek solace and comfort from their adult partners as well as feel secure in allowing themselves to rely on their partners.[202]

College students who lived in a shared parenting-time arrangement expressed fewer feelings of loss and were better able to perceive their lives as being less defined by their parents' divorce.[203] There does appear to be a positive correlation between how positively young adults retrospectively rate their relationship with their father in adolescence and time spent with their father.[204] The more time that a child spent with their father during adolescence directly relates to how positively they view that relationship in retrospect as an adult.[205] The effect was sufficiently distinct that even bad relationships seemed better to children who spent more time with their fathers.[206] Recently, it was found that the strength

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[198] Valarie King, *Parental Divorce and Interpersonal Trust in Adult Offspring*, 64 J. MARRIAGE & FAM. 642, 650 (2002).

[199] *Id*.

[200] John R. Snarey, HOW FATHERS CARE FOR THE NEXT GENERATION: A FOUR-DECADE STUDY 18-20 (Harv. U. Press ed., 1993).

[201] Sharon C. Risch, Kathleen M. Jodl & Jaquelynne S. Eccles, *Role of the Father-Adolescent Relationship in Shaping Adolescents' Attitudes Toward Divorce*, 66 J. MARRIAGE & FAM. 46, 55 (2004).

[202] Katherine A. Black & Emily D. Schutte, *Recollections of Being Loved: Implications of Childhood Experiences with Parents for Young Adults' Romantic Relationships*, 27 J. FAM. ISSUES 1459, 1459 (2006).

[203] Lisa Laumann-Billings & Robert E. Emery, *Distress Among Young Adults from Divorced Families*, 14(4) J. FAM. PSYCHOL. 671-687 (2000).

[204] William V. Fabricius, Karina R. Sokol, Priscilla Diaz & Sanford Braver, *Parenting Time, Parent Conflict, Parent-Child Relationships, and Children's Physical Health, in* PARENTING PLAN EVALUATIONS: APPLIED RESEARCH FOR THE FAMILY COURT 188, 193-97 (Kathryn Kuehnle & Leslie Drozd eds., 2012).

[205] *Id.*

[206] *Id*. at 194-96.

of a child's relationship *with both parents* may be more strongly related to children's and adolescents' well-being than parental conflict.[207]

V. CONCLUSION

In the United States and elsewhere, the benefits to children of increased parenting time with both parents following separation and divorce is more widely appreciated and more thoroughly studied.[208] As developed nations embrace equalizing parenting time at the policy level, larger scale studies are able to assess and evaluate the impact on the real lives of children.[209] Concerns about the "lingering situation of minimal parenting time with fathers for great numbers of children is a serious public health issue."[210] There are significant benefits for most children to spend as much time as possible with both parents after a separation or divorce.[211] Thus, the body of research indicates that allowing children to enjoy parental involvement from both parents in their daily lives, education, and other activities to the maximum degree possible appears to be optimal for children's development.[212] The best interest of the child is served by having contact with both of her parents and them being involved in her life regardless of the parents' gender. There are no observable differences between same-sex and opposite-sex parents and research has shown that children benefit from having both parents' in their lives.[213] Given that the available research stems from a time when mothers were routinely granted sole physical custody of children and same-sex couples were stigmatized, the welfare of children should not have to wait until each permutation of parenting combinations has been examined. It is sufficient that there are no differences between same-sex and opposite-sex parents as well as that children maximally benefit from having both parents involved in their lives.

Although the California legislative decree that decisions regarding the custody of children should be decided according to the best interest of the child standard, the disjointed approach with neither legislative specificity nor a judicial bright line does not satisfy the best interest of the child standard in many cases. By using social science findings, current law can be extended and clarified to succeed in effectuating custody

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[207] Linda Nielsen, *Re-Examining the Research on Parental Conflict, Coparenting, and Custody Arrangements*, 23 PSYCHOL. PUB. POL'Y & L. 211, 227-28 (2017).

[208] Fabricius (*Equal Parenting Time*), *supra* note 67.

[209] Bergström et al., *supra* note 62; *see also* Nielsen, *supra* note 9, at 61-62.

[210] Fabricius et al., *supra* note 204, at 188.

[211] Fabricius (*Equal Parenting Time*), *supra* note 67.

[212] *Id.*

[213] *Perry*, 704 F. Supp. 2d at 934-36.

determinations that are actually in the best interests of most children between the ages of 4 and 18. Currently, the legislature provides no tangible guidance as to how much contact with a child's parents constitutes joint physical custody.[214] California jurisprudence states that joint physical custody is satisfied when a child sees each of his or her parents for at least 43% of the time.[215] A definition of joint physical custody as a child having access to each of his or her parents for a minimum of 35% of the time, five days in a two-week span, is consistent with prior California jurisprudence that is not citable.[216] Using this definition will extend the presumption that joint physical custody is in the child's best interest when the parents agree[217] to all proceedings involving children by creating a rebuttable presumption that is scientifically supported as a starting point and can be instituted for the best interest of all children, which could be modified on a case-by-case basis with the current best interest of the child factors.

[214] CAL. FAM. CODE § 3011 (2018); Volokh, *supra* note 5, at 656; Warshak, *supra* note 6, at 102-04.

[215] *McGinnis*, 7 Cal. App. 4th at 475; *Battenburg*, 28 Cal. App. 4th at 1342.

[216] Monroe v. Rodriguez, No. G034854, 2005 Cal. App. LEXIS 11463, at *7-12 (4th Dist. Dec. 13, 2005).

[217] FAM. § 3080.

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California's Capital Crisis Continues: Voter-Initiated Time Limit on Capital Appellate Review Upheld Under Improper Directive Interpretation

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COMMENT

CALIFORNIA'S CAPITAL CRISIS CONTINUES: VOTER-INITIATED TIME LIMIT ON CAPITAL APPELLATE REVIEW UPHELD UNDER IMPROPER DIRECTIVE INTERPRETATION

*STEPHANIE NATHANIEL**

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INTRODUCTION

With 739 condemned inmates currently on death row,[1] California houses the largest death-row population in the Western Hemisphere.[2] Facing delays of nearly twice that of the national average, the time between a death sentence and execution is longer in California than in any other death penalty state.[3] As of January 2019, the states with the next two largest death-row populations after California are Florida, with 353 capital prisoners; and Texas, with 232 capital prisoners.[4] In Florida, the average time a capital defendant spends on death row before execution is 14 years; and in Texas, the average time on death row before execution is 10 years.[5] Although the delays in Florida and Texas appear significant, they pale in comparison to the death-row delays in California, where the

[1] *Condemned Inmate List,* CAL. DEP'T OF CORR. & REHAB. DIV. OF ADULT OPERATIONS http://www.cdcr.ca.gov/Capital_Punishment/docs/CondemnedInmateListSecure.pdf?pdf=Condemned-Inmates (last visited Feb. 9, 2019).

[2] *California*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/california-1#sent (last visited Sept. 3, 2018) (citing Chris Nichols, *Truth be told: California has 'Largest Death Row in Western Hemisphere,'* S. CAL. PUB. RADIO (Aug. 12, 2016), http://www.scpr.org/news/2016/08/12/63532/truth-be-told-california-has-largest-death-row-in).

[3] California's average lapsed time from judgment of death to execution is 20-25 years; the national average is 11-14 years. *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUST., FINAL REPORT 123-25 n.32 (N. Cal. Innocence Project Publ'n 2008), http://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1000&context=ncippubs.

[4] *Death-Row Prisoners by State*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/death-row-inmates-state-and-size-death-row-year (last visited Jan. 18, 2019).

[5] CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 124-25 & n.32.

time from a judgment of death to execution often takes 20 to 25 years.[6] The length of delay between sentence and disposition of appellate review gets longer each year as California's death-row population continues to grow.[7]

California's death-penalty system has placed the state in a capital crisis.[8] Without the proper funding, California has been unable to litigate the increasingly unmanageable backlog of pending capital appeals and habeas corpus petitions.[9] Legitimate efforts to remedy the state's capital crisis through statutory reform must account for the system's underlying problems, or they will otherwise risk causing additional delays that will further burden the system.

Proposition 66, a recently passed California initiative, is a prime example of a death-penalty reform that will only contribute to the inefficiency of California's broken capital system.[10] Designed to speed up the capital appellate review process, Proposition 66 changed procedures governing state court challenges to death sentences, including setting a five-year time limit for capital appellate review.[11] The initiative, however, was silent as to the means of achieving this five-year time frame.[12] Without providing judicial guidance on how a significantly shorter time frame could be effectuated and funded, Proposition 66 fails to yield any realistic chance at reform.[13]

Briggs v. Brown challenged the constitutionality of Proposition 66.[14] The court addressed whether Proposition 66's five-year time limit for capital appellate review violated the separation of powers doctrine by

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[6] *Id*. at 123 ("The average lapse of time between pronouncement of death and execution in California is 17.2 years, but using an 'average' number may be misleading since only thirteen have been executed."). *See also* Arthur L. Alarcón, *Remedies for California's Death Row Deadlock*, 80 S. CAL. L. REV. 697, 707-08 (2007) (In 2007, of the 662 capital inmates on death row, 30 people had been on California's death row for more than 25 years; 119 had been on death row for more than 20 years; and 240 had been on death row for more than 15 years.).

[7] CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 125.

[8] The term "capital crisis" is used throughout this Comment in reference to challenges faced by the state in the processing of death-penalty cases. *See, e.g.,* Arthur L. Alarcón & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. (SPECIAL ISSUE) 41, 186 (2011) ("crisis confronting California in its processing of capital litigation").

[9] *See id*. at 46-47.

[10] *See* CAL. SEC'Y OF STATE, *Analysis by the Legislative Analyst*, *in* OFFICIAL VOTER INFO. GUIDE 104, 104-07 (2016), https://vig.cdn.sos.ca.gov/2018/general/pdf/complete-vig.pdf [hereinafter Voter Guide].

[11] *Id*. at 106.

[12] *See Briggs*, 3 Cal. 5th 808, 863, 871 (Liu, J., concurring) (2017).

[13] *See id*. ("[R]ealistic reforms must emanate from a clear understanding of the way the post-conviction death penalty process works in California. . . . [T]he five-year time limit is not grounded in the realities of California's death penalty process or in the reasonable possibilities for reform.").

[14] *Id*. at 822 (majority opinion).

materially impairing the court's core function to hear and decide cases.[15] Solely to preserve the initiative's constitutionality and avoid a conceded separation of powers violation, the California Supreme Court improperly interpreted the measure in a manner that directly conflicts with the voters' intent and the initiative's primary purpose.[16]

Despite the provision's mandatory language and purpose, the court ruled that Proposition 66's five-year time limit for capital appellate review was merely "directive" and not mandatory.[17] A directive interpretation of a judicial time limit provision allows for a court's ultimate authority in deciding the matter and does not place an actual or strict time requirement on the courts as would a mandatory interpretation.[18] A directive interpretation is appropriate where it is (1) reasonable, as evidenced by the provision's language and statutory intent,[19] and in the context of judicial time limits, (2) necessary to prevent an unconstitutional encroachment on the judiciary's power.[20] The court upheld the five-year time limit under a directive interpretation by supplying a saving construction that "saved" the provision from unconstitutionally violating the separation of powers doctrine.[21] A "saving construction" is an exercise of judicial statutory construction whereby a court may interpret a law in a manner that avoids unconstitutionality: "If the terms of a statute are by fair and reasonable interpretation capable of a meaning consistent with the requirements of the Constitution, the statute will be given that meaning, rather than another in conflict with the Constitution."[22]

By upholding Proposition 66 under a directive interpretation, the court inadvertently promoted the drafting of unworkable, unconstitutional legislation and the application of inconsistent, arbitrary capital appellate review. Once the *Briggs* decision was issued, Proposition 66 went into effect, setting new procedures and time limits for capital appellate review.[23] This Comment focuses on the court's analysis of the constitutionality of Penal Code section 190.6(d), which sets a five-year limit on the completion of the appellate and initial habeas corpus review

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[15] *Id*. at 845; *see* CAL. CONST. art. III, § 3.

[16] *See Briggs*, 3 Cal. 5th at 857.

[17] *Id*. at 857, 860.

[18] *Id.* at 870 (Liu, J., concurring).

[19] Smith v. Trapp, 249 Cal. App. 2d 929, 938 (1967).

[20] *See, e.g., Briggs*, 3 Cal. 5th at 850-55; People v. Engram, 50 Cal. 4th 1131, 1151 (2010); Metromedia, Inc. v. City of San Diego, 32 Cal. 3d 180, 186-87 (1982).

[21] *See Briggs*, 3 Cal. 5th at 858 (holding that it is the practice of California courts to construe statutes that unduly interfere with judicial functions "so as to maintain the court's discretionary control" rather than strike them down).

[22] *Metromedia*, 32 Cal. 3d at 186 (quoting County of Los Angeles v. Legg, 5 Cal. 2d 349, 353 (1936)).

[23] *Briggs*, 3 Cal. 5th at 862.

processes where a judgment of death has been imposed.[24] This Comment asserts that courts have a duty to strike down a voter-initiated time limit on capital appellate review when the will of the voters indicates an intent for the time limit to be mandatory—in violation of the separation of powers doctrine—and where the measure fails to provide courts with meaningful guidance on how to achieve the time limit. This Comment argues that the *Briggs* court neglected this duty by supplying a saving construction rather than invalidating the provision. As a result, the court's decision to uphold a time limit that is both fiscally and procedurally unrealistic threatens to exacerbate California's capital crisis.

Part I begins with an overview of the separation of powers doctrine. Part II provides an overview of Proposition 66 and the California Supreme Court case that challenged its constitutionality. This section discusses Proposition 66's statutory objective, the petitioners' claim of unconstitutionality, the respondents' claim about the initiative's purpose, and the court's separation of powers analysis. Part III discusses the state of California's capital crisis by (1) examining the *Briggs* ruling's effect on death-row inmates; (2) providing a brief background of California's death-penalty system; and (3) evaluating the *Briggs* ruling in connection with the court's duty to provide meaningful appellate review. Part IV evaluates the court's separation of powers analysis regarding the constitutionality of the five-year time limit and addresses the problems with the court's directive interpretation. To illustrate the inappropriateness of the court's directive interpretation of the time limit, this section analyzes the language and purpose of the initiative, the intent of the voters, and the court's cited case law. Finally, part V concludes that the California Supreme Court had a duty to invalidate an unworkable judicial time limit that was passed by voter initiative when it is evident that the voters intended for the time limit to place a mandatory requirement on the courts.

I. THE SEPARATION OF POWERS DOCTRINE

Article III establishes the separation of powers of the executive, legislative, and judicial branches of government, and requires that the three branches remain separate and distinct from one another.[25] Although each branch maintains its own distinct governmental authority, the branches

[24] CAL. PENAL CODE § 190.6(d) (2018) (all references hereinafter are to the penal code unless otherwise stated); *Briggs*, 3 Cal. 5th at 848-61.

[25] CAL. CONST. art. III, § 3 ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.").

are interrelated and each branch must respect the constitutional power of the others.[26]

A. THE LEGISLATURE'S POWER OF STATUTORY ENACTMENT

The judicial and executive branches generally must yield to the legislature's power to enact statutes.[27] The legislature's power of statutory enactment includes the people's initiative power.[28] The initiative power is the right reserved to the people "to propose statutes and amendments to the Constitution and to adopt or reject them," and it must be broadly interpreted to maintain maximum power in the people.[29] While the legislature's power to statutorily regulate judicial proceedings and appeals is broad, it is not unlimited.[30] Restricted by the separation of powers doctrine, the legislature is only permitted to prescribe reasonable rules of judicial procedure that do not "defeat or materially impair" the courts' core constitutional functions.[31]

B. THE JUDICIARY'S POWER OF STATUTORY INTERPRETATION

A court may declare a legislative regulation invalid as a violation of the separation of powers doctrine when "the statutory provision[ ] as a whole, viewed from a realistic and practical perspective, operate[s] to defeat or materially impair" the court's exercise of its constitutional functions.[32] The courts' functions may not be "so restricted by unreasonable rules as to virtually nullify them."[33] However, when a regulation may be logically and reasonably interpreted in a manner that does not divest the court of its core functions, it is within the court's judicial authority to uphold it under the non-imposing statutory construction.[34] This judicial statutory, or "saving," construction is appropriate only when the language and primary objective or purpose of the provision indicates a

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[26] *See Briggs*, 3 Cal. 5th at 846 (quoting Superior Court v. County of Mendocino, 13 Cal. 4th 45, 52 (1996)).

[27] *Id*. (quoting Brydonjack v. State Bar of Cal., 208 Cal. 439, 442 (1929)).

[28] Indep. Energy Producers Ass'n v. McPherson, 38 Cal. 4th 1020, 1032 (2006).

[29] *Briggs*, 3 Cal. 5th at 827 (quoting *Indep. Energy*, 38 Cal. 4th at 1032); CAL. CONST. art. IV § 1; CAL. CONST. art. II, § 8(a).

[30] *See Briggs*, 3 Cal. 5th at 846 (quoting *Brydonjack*, 208 Cal. at 442-43).

[31] *Id*. at 846 (quoting *Brydonjack*, 208 Cal. at 444).

[32] Marine Forests Soc'y v. Cal. Coastal Comm'n, 36 Cal. 4th 1, 15, 45 (2005); *see also Briggs*, 3 Cal. 5th at 846 (quoting Le Francois v. Goel, 35 Cal. 4th 1094, 1104 (2005)).

[33] *Briggs*, 3 Cal. 5th at 850 (quoting *In re* Shafter-Wasco Irrigation Dist., 55 Cal. App. 2d 484, 487 (1942)).

[34] *Id*. (quoting Garrison v. Rourke, 32 Cal. 2d 430, 436-37 (1948)); *see* People v. Engram, 50 Cal. 4th 1131, 1151 (2010); Thurmond v. Superior Court of S.F., 66 Cal. 2d 836, 839 (1967); Lorraine v. McComb, 220 Cal. 753, 756-57 (1934).

clear intent not to divest or impair the courts' core functions.[35] Such a regulation is reasonably interpreted under a saving construction because, based on the provision's language and purpose, any other interpretation would logically defeat the aims and purposes of the statute.[36]

As James Madison acutely acknowledged in the Federalist Papers, the "interpretation of the laws is the proper and peculiar province of the courts."[37] However, this duty to decipher a law's meaning becomes more complicated for the judiciary when the law is passed by voter initiative.[38] Voter initiatives are not subject to the same process as laws proposed by the state legislature, and consequently do not include the typical legislative hearings or committee reports that are often critical to a court's determination of a law's purpose.[39] When the constitutionality of a voter-initiated statute is challenged, the courts are faced with the difficult task of ascertaining the voters' intent in passing the new law without the usual guidance of a legislative history.[40] The lack of a legislative history poses especially serious problems when the challenged voter initiative affects criminal justice policy or procedure.[41] Because the California initiative process prohibits the legislature from amending or repealing voter-initiated legislation, it is left solely to the judiciary to strike down a voter-initiated provision that is unconstitutional and unworkable.[42]

II. PROPOSITION 66 AND *BRIGGS V. BROWN*: REFORMS INTENDED TO FIX A "BROKEN SYSTEM" BY SHORTENING THE TIME FOR CAPITAL APPELLATE REVIEW

In an effort to address the significant backlog of capital cases awaiting the California Supreme Court's appellate review, the 2016 California ballot included two initiatives aimed at reforming the death-penalty system: Proposition 62 and Proposition 66.[43] Proposition 62 sought to abolish the state's death penalty but failed by a slim margin, with 53.15% of

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[35] *See Briggs*, 3 Cal. 5th at 850 (quoting *Garrison*, 32 Cal. 2d at 436-37); *see also Engram*, 50 Cal. 4th at 1151; *Metromedia*, 32 Cal. 3d at 186-87.

[36] *See, e.g.,* Cal. Sch. Emps. Ass'n v. Governing Bd., 8 Cal. 4th 333, 340 (1994) ("[T]he legislative purpose underlying [the challenged statutes] is effectuated not by a literal interpretation of the statutory language, but rather, by construing the statutory language in order to avoid capricious results unintended by the Legislature."); *Garrison*, 32 Cal. 2d at 437 ("Words otherwise generally mandatory or permissive will be given a different meaning when the provisions of the statute, properly construed, require it.").

[37] THE FEDERALIST NO. 78 (James Madison).

[38] Alarcón et al., *supra* note 8, at 121-22.

[39] *Id*. at 122.

[40] *Id*.

[41] *See id*.

[42] *See id*. at 124, 160.

[43] *Quick Reference Guide*, *in* VOTER GUIDE, *supra* note 10, at 8, 13, 15.

voters voting against it.[44] Proposition 66 intended to speed up the death-penalty appeals process and passed by a narrow margin of 51.1%.[45]

A. PROPOSITION 66

Formally titled "The Death Penalty Reform and Savings Act of 2016," the initiative asserted that California's death-penalty process is ineffective due to "waste, delays, and inefficiencies."[46] Drafted predominantly by death-penalty prosecutors,[47] the measure enacted a series of statutory reforms designed to speed up the death-penalty appeals system.[48]

Proposition 66 requires that the direct appeal and initial habeas corpus proceedings are completed within five years from the imposition of the death sentence.[49] Without providing any guidance on how this time limit is to be achieved, the initiative instructs the Judicial Council to adopt rules and standards to ensure that the capital appellate review process is completed within this time frame.[50] Additionally, the Judicial Council must adopt such rules within 18 months of the effective date of the initiative, and must continuously amend the rules and standards to further guarantee that the time limit is met.[51] All pending challenges are subject to the enactment and must be completed within five years of the date the Judicial Council adopts the revised rules.[52] If the process exceeds this five-year time limit, Proposition 66 provides that "either party or any victim of the offense may seek relief by petition for writ of mandate," which the court must act on within 60 days of filing.[53] Although the initiative asserts that a court order may be sought to address a delay

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[44] *California Proposition 62, Repeal of the Death Penalty (2016)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_62,_Repeal_of_the_Death_Penalty_(2016)#cite_note-1 (last visited Mar. 10, 2018).

[45] *California Proposition 66, Death Penalty Procedures (2016)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_66,_Death_Penalty_Procedures_(2016)#cite_note-7 (last visited Mar. 10, 2018).

[46] *Text of Proposed Laws: Proposition 66, in* VOTER GUIDE, *supra* note 10, at 212, §§ 1-2 at 212-213.

[47] *California Proposition 66, Death Penalty Procedures (2016)*, *supra* note 45.

[48] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 105.

[49] *Text of Proposed Laws: Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3(d) at 213.

[50] *Id.*

[51] *Id.* At the time this Comment was written, the Judicial Council had not yet announced any new rules to meet the five-year time limit.

[52] *Id.*

[53] *Id.* § 3(e) at 213.

that exceeds the time limit, it fails to address the exact relief the courts may provide in such a situation.[54]

Opponents of the initiative cautioned the California Supreme Court that Proposition 66 "threatens to deal a mortal blow" to California's courts by dictating the judicial docket and limiting the courts' ability to hear civil cases.[55] The impracticality of the time limit is sweeping: as of 2016, there were 337 direct appeals and 263 state habeas corpus petitions pending in the California Supreme Court.[56] Placing a five-year time limit on the court to determine all currently pending capital appeals, in addition to any new death sentences, is an unrealistic demand on the court's limited resources.[57] Opponents asserted that the measure will overwhelm all the state's courts with extra work, but will affect the California Supreme Court the most.[58] "Calculations based on the court's typical annual production indicate" that adherence to the five-year time limit could result in the California Supreme Court spending 90% of its time on capital cases, causing "civil case rulings [to] decline from about 50 a year to just a handful."[59]

B. *BRIGGS V. BROWN*

1. Overview

On November 9, 2016, one day after Proposition 66 passed, Ron Briggs and former State Attorney General John Van de Kamp filed a petition with the California Supreme Court challenging the constitutionality of Proposition 66.[60] In their petition, Briggs and Van de Kamp ar-

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[54] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 106.

[55] *See* Maura Dolan, *Trying to Speed Up Executions Could Deal 'Mortal Blow' to California Supreme Court*, L.A. TIMES (Apr. 2, 2017, 3:00 AM), http://www.latimes.com/local/lanow/la-me-ln-death-penalty-appeals-measure-20170402-story.html (asserting that the time limit is "completely unworkable" and "would require the California Supreme Court to decide virtually nothing but death penalty appeals for at least the next five years—almost no civil cases at all and no criminal cases other than capital murder").

[56] *Proposition 66*, LEGISLATIVE ANALYST'S OFFICE (Nov. 8, 2016), http://www.lao.ca.gov/BallotAnalysis/Proposition?number=66&year=2016.

[57] *See* Bobby Lee, *Prop. 66, Which Speeds up State Death Penalty Process, is Challenged in CA Supreme Court*, DAILY CALIFORNIAN (June 12, 2017), http://www.dailycal.org/2017/06/12/prop-66-speeds-state-death-penalty-process-challenged-ca-supreme-court ("The system is stuck because we don't have the necessary resources.").

[58] Dolan, *supra* note 55.

[59] *Id*.

[60] Amended & Renewed Petition for Extraordinary Relief at 2, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309), https://www.dropbox.com/sh/wisbubhyoi2maz7/AAATRdd0FTZms0h-h0zKjpy8a?dl=0&preview=4.+Petitioners-amended-renewed-pet-extraordinary-relief-S238309.pdf. John Van de Kamp died after petition was filed, leaving Ron Briggs as the sole petitioner. *See Briggs*, 3 Cal. 5th at 822 n.1.

gued, and amici agreed,[61] that Proposition 66's five-year time limit violates the separation of powers doctrine by materially impairing the constitutional and inherent powers of the courts to resolve capital appeals and habeas corpus cases.[62]

The named defendants included then-Governor Jerry Brown, then-Attorney General Kamala Harris, Secretary of State Alex Padilla, and the Judicial Council, which is the policymaking body for California's courts.[63] Respondents were joined by Intervenor Californians to Mend, Not End, the Death Penalty ("Intervenor"), "a campaign committee representing the proponents of the initiative."[64] Chief Justice Tani Cantil-Sakauye and Justice Ming W. Chin recused themselves from the case because they are members of the Judicial Council, one of the aforementioned named defendants.[65] In their place, California Courts of Appeal Justices Andrea Lynn Hoch and Raymond J. Ikola sat pro tempore.[66] The California Supreme Court stayed the implementation of Proposition 66 on December 20, 2016,[67] and granted review on February 1, 2017.[68]

Alleging a separation of powers violation, Petitioners argued that the five-year requirement for capital review is an impracticable time limit that divests the court of its constitutionally mandated judicial discretion.[69] Petitioners asserted that the time limit failed to provide for important considerations, such as the complexity of a case, the substantiality of the legal issues presented, and the possibility of an attorney having rea-

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[61] Amici in support of Petitioner were: Constitutional law professors Erwin Chemerinsky (UCI), Kathryn Abrams (Berkeley), Rebecca Brown (USC), Devon Carbado (UCLA), Jennifer Chacón (UCI), Sharon Dolovich (UCLA), David Faigman (Hastings), Ian F. Haney López (Berkeley), Karl M. Manheim (Loyola), Russell Robinson (Berkeley), Betrall Ross (Berkeley), and the Brennan Center for Justice; California Appellate Defense Counsel; the Los Angeles County Bar Association, the California Academy of Appellate Lawyers, the Beverly Hills Bar Association, and the Bar Association of San Francisco; the California Appellate Project; the Habeas Corpus Resource Center; California Attorneys for Criminal Justice and Death Penalty Focus; the Innocence Network, American Civil Liberties Union of Northern California, American Civil Liberties Union of Southern California, and the American Civil Liberties Union of San Diego and Imperial Counties; and the Offices of the Federal Public Defenders for the Central and Eastern Districts of California. Petitioner's Reply to Amicus Curiae Briefs at 1-2, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309).

[62] Amended & Renewed Petition, *supra* note 60 at 14-15.

[63] Petition for Extraordinary Relief at 4-5, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309), http://www.courts.ca.gov/documents/1-s238309-petitioners-pet-writ-mandate-req-stay-110916.pdf.

[64] *Briggs*, 3 Cal. 5th at 822.

[65] Order Recusing Chief Justice Cantil-Sakauye & Justice Chin, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309), http://www.courts.ca.gov/documents/2-s238309-orf-111616.pdf.

[66] *Briggs*, 3 Cal. 5th at 822.

[67] Stay Order, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309), http://www.courts.ca.gov/documents/6-s238309-stf-122016.pdf.

[68] Order to Show Cause, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309).

[69] Petition for Extraordinary Relief, *supra* note 63, at 32-34.

sonable schedule limitations.[70] Petitioners argued that the voters' intent to "impose obligatory guidelines" on the courts was evident based on the following: (1) the initiative's repeated use of the word "shall" instead of "may;" (2) the consequences established by the initiative for a court's failure to meet the prescribed time limits; and (3) the fact that the ballot materials informed voters that, if enacted, "Proposition 66 *would* impose *required* time limits on the lengthy capital appeals process."[71]

Petitioners asserted that a saving construction of the time limit would be improper and would result in "legislation [that] would be unrecognizable to the proponents who authored it and the voters who adopted it."[72] Petitioners argued that construing the time limit provision as directive instead of mandatory, by use of a saving construction, would disregard the basic rule of statutory interpretation when a voter initiative is challenged because such an interpretation would ignore the initiative's purpose and contradict the voters' intent in enacting it.[73]

In response, Intervenor and Respondents conceded in their pleadings that Proposition 66's five-year time limit imposes a "required" deadline on the courts that "was intended to be" enforceable through a petition for writ of mandate.[74] However, Respondents and Intervenor argued that the required five-year time limit does not violate the separation of powers doctrine because it is both a reasonable restriction on the constitutional functions of the courts and a valid exercise of the legislature's power to regulate criminal proceedings.[75] Notably, neither Respondents nor Intervenor argued in their pleadings that a saving construction was necessary for the time limit to pass constitutional muster.[76] Rather, the proponents insisted that Proposition 66's five-year time limit is not an "absolute or inflexible rule" since it does not require an automatic issuance of a writ, but provides for writ relief only when the court does not have "extraordinary and compelling reasons justifying the delay."[77] The "time limit[ ]

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[70] *Id*. at 34.

[71] Petitioner's Reply to Amicus Curiae Briefs, *supra* note 61, at 9-10 (emphasis in original).

[72] *Id*. at 12.

[73] *Id*. at 9 (quoting Hodges v. Superior Court, 21 Cal. 4th 109, 114 (1999)) ("In the case of a voters' initiative statute . . . [the court] may not properly interpret the measure in a way that the electorate did not contemplate: the voters should get what they enacted, not more and not less.").

[74] Intervenor's Brief in Reply to Amicus Curiae Briefs at 36, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309); Respondents' Preliminary Opposition to Petitioners' Amended & Renewed Petition for Extraordinary Relief at 4, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309).

[75] Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 12-16; Preliminary Opposition of Intervenor to Petition for Extraordinary Relief at 37-41, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309).

[76] Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 13, 15-16; Preliminary Opposition of Intervenor to Petition, *supra* note 75, at 40.

[77] Intervenor's Return to the Order to Show Cause at 41-42, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309), http://www.courts.ca.gov/documents/28-s238309-intervener-written-return-

[was] crafted with enough flexibility to preserve the judicial branch's ability 'to properly and effectively function as a separate department.' "[78] Thus, the proponents argued in their pleadings that the time limit does not rise to the level of judicial infringement that constitutionally demands a saving construction.[79]

However, admitting at oral argument that a five-year deadline would "perhaps not" be constitutional, proponents argued—for the first time—that the five-year requirement was actually not required; but instead asserted it was merely a "goal" that was really just "an invitation to take up the question of how long these appeals should take."[80] Despite this revelation at oral argument, nowhere in Respondents' or Intervenor's six cumulative briefs, providing over 300 pages of argument, did either party claim that the five-year time "requirement," as it is repeatedly referred to in their pleadings, warranted or required a directive interpretation.[81]

The court conceded that the five-year time limit is mandatory in light of the language therein; the court also admitted that the voters believed the time limit would be "binding and enforceable."[82] Despite the voters' clear intent and the initiative's mandatory purpose, the court agreed with the initiative's proponents that the five-year time limit may be properly construed as directive, instead of mandatory.[83]

The California Supreme Court upheld Proposition 66 in a 5-2 ruling on August 24, 2017.[84] Finding that Petitioners' constitutional challenges did not warrant relief,[85] the court effectuated the entirety of the initiative's proposed reforms, with one exception.[86] To avoid serious separation of powers problems, the court modified the mandatory language of the time limit provision to be interpreted in a "directive manner"—that is, the time limit provisions that "appear to impose strict deadlines" on

030117.pdf; *Text of Proposed Laws*: *Proposition 66*, in VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

[78] Preliminary Opposition of Intervenor to Petition, *supra* note 75, at 40 (quoting *Engram*, 50 Cal. 4th at 1146).

[79] *Id*. (quoting *Engram*, 50 Cal. 4th at 1151); *see also* Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 15-16.

[80] *Briggs*, 3 Cal. 5th at 874-75 (Cuéllar, J., dissenting).

[81] *See* Respondents' Preliminary Opposition to Amended Petition, *supra* note 74; Intervenor's Complaint in Intervention in Opposition to Petitioner's Petition for Writ of Mandate, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309); Intervenor's Return to Order to Show Cause, *supra* note 77; Intervenor's Brief in Reply to Amicus Curiae Briefs, *supra* note 74; Respondent's Reply to Amicus Curiae Briefs, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309); Respondent's Return to Petition for Writ of Mandate, Briggs v. Brown, 3 Cal. 5th 808 (2017) (No. S238309).

[82] *Briggs*, 3 Cal. 5th at 854; CAL. PENAL CODE § 190.6(d) (2018).

[83] *Briggs*, 3 Cal. 5th at 855; PENAL § 190.6(d).

[84] *Briggs*, 3 Cal. 5th at 862.

[85] *Id.* at 823.

[86] *Id*. at 860-62.

the courts do not, but instead "serve as a benchmark to guide courts, if meeting the limits is reasonably possible."[87]

2. The Court's Separation of Powers Analysis

In determining the constitutionality of the five-year time limit, the court held that its sole function was to evaluate the initiative "legally in light of established constitutional standards."[88] The court did not consider "the economic or social wisdom or general propriety of the initiative"[89] nor the "possible interpretive or analytical problems that might arise from the measure in the future."[90]

In its separation of powers analysis, the court acknowledged that California has a long-established precedent for finding that fixed time limits on a court's exercise of its judicial functions raise serious separation of powers concerns.[91] However, the *Briggs* court's underlying reasoning for applying a directive interpretation to the five-year time limit was that it is within a court's authority to "preserve[ ] jurisdiction and maintain[ ] the separation of powers by holding that time limits phrased in mandatory terms [are] merely directory."[92] The court acknowledged that many other states have established that imposing fixed deadlines on judicial decision-making is a quintessential violation of the separation of powers doctrine.[93] But none of the cases cited by the court upheld a clearly mandatory and unconstitutional judicial time requirement by giving it a different interpretation; where a court found a time requirement materially impaired the court's exercise of its core functions, the statute was struck down.[94]

The *Briggs* court asserted that California's departure from invalidating an unconstitutional statute is preferable: "The California approach has the benefit of allowing time limits set by the legislative branch to

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[87] *Id*. at 823, 860.

[88] *Id.* at 828 (quoting Calfarm Ins. Co. v. Deukmejian, 48 Cal. 3d 805, 814 (1989)).

[89] *Id*. (quoting *Calfarm*, 48 Cal. 3d at 814).

[90] *Id*. at 827 (quoting Raven v. Deukmejian, 52 Cal. 3d 336, 341 (1990)) (internal quotations omitted).

[91] *Id*. at 849.

[92] *Id*. at 851.

[93] *Id*. at 851 & n.28.

[94] *See* State v. Buser, 302 Kan. 1, 8-9 (2015); *In re* Grady, 348 N.W.2d 559, 570 (Wis. 1984); Coate v. Omholt, 662 P.2d 591, 593 (Mont. 1983); Sands v. Albert Pike Motor Hotel, 434 S.W.2d 288, 291-92 (Ark. 1968); State *ex rel.* Kostas v. Johnson, 69 N.E.2d 592, 595 (Ind. 1946); Atchinson Topeka & Santa Fe Ry. Co. v. Long, 251 P. 486, 489 (Okla. 1926); Schario v. State, 138 N.E. 63, 64 (Ohio 1922); Resolute Ins. Co. v. Seventh Judicial Dist. Court of Okla. Cty., 336 F. Supp. 497, 503 (W.D. Okla. 1971); United States v. Brainer, 515 F. Supp. 627, 636 (D. Md. 1981); *Cf.* State *ex rel.* Emerald People's Util. v. Joseph, 640 P.2d 1011, 1014 (Or. 1982).

function as nonbinding guidelines, when reasonably possible."[95] The court cited *Garrison*, *Engram*, *Thurmond*, *Shafter-Wasco*, *Lorraine*, and *Verio* as examples of a directive interpretation applied to an otherwise mandatory statute to avoid a separation of powers violation.[96] The court asserted that these cases created nearly a century of precedent that a court must "decline to infer that lawmakers intended strict adherence to a fixed deadline that would undermine the courts' authority as a separate branch of government."[97]

The court proffered two justifications for its directive interpretation of the five-year time limit.[98] First, the court claimed that the time limit provision "provides no effective mechanism" of enforcement.[99] Second, the court refused to interpret the time limit provision "to conform with the voters' probable intent" because the voters were not "informed of the details of an enforcement mechanism" or "how such an order could effectively result in compliance."[100]

The first justification derives from the court's reading of section 190.6(e). This provision establishes: "If a court fails to comply without extraordinary and compelling reasons justifying the delay, either party or any victim of the offense may seek relief by petition for writ of mandate."[101] The court interpreted this provision as providing relief only for a delay in filing the opening appellate brief, discussed in section 190.6(b), and not for a delay exceeding the five-year time limit, discussed in section 190.6(d).[102] Those defending the initiative expressly informed the court that subdivision (e) was intended to reference subdivision (d), and that the reference to subdivision (b) was a drafting error, but the court dismissed these assertions.[103]

The court held that even if it did interpret the provision as the parties intended, a directive interpretation was nevertheless appropriate because the provision did not provide a "workable" means of enforcement.[104] Focusing on the plausibility of writ relief to enforce the time limit, the court

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[95] *Briggs*, 3 Cal. 5th at 851 & n.28.

[96] *Id*. at 849-51, 853-54 (2017) (citing *Garrison*, 32 Cal. 2d 430; *Engram*, 50 Cal. 4th 1131; *Thurmond*, 66 Cal. 2d 836; *Shafter-Wasco*, 55 Cal. App. 2d 484; *Lorraine*, 220 Cal. 753; Verio Healthcare, Inc. v. Superior Court, 3 Cal. App. 5th 1315 (2016)).

[97] *Briggs*, 3 Cal. 5th at 858.

[98] *Id*. at 855.

[99] *Id*.

[100] *Id*. at 857.

[101] *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

[102] *Briggs*, 3 Cal. 5th at 855; *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3(b), (d)-(e) at 213.

[103] *Briggs*, 3 Cal. 5th at 855.

[104] *Id*. at 857.

found that adherence to such a deadline is impractical because it would require a "coordination of efforts by multiple courts and other actors" in addition to substantial additional funding by the legislature.[105] The court also noted that writ relief requiring the California Supreme Court, the state's highest court, to comply with the deadline is not possible because a writ must be issued to an inferior tribunal.[106]

The court's second justification for upholding the time limit under a directive interpretation goes to the heart of the issue: the intent of the voters. The court found the voters intended to impose a mandatory and enforceable judicial time limit, but the court declined to interpret the statute in a way that would accurately reflect the voters' intent when such an interpretation would render the provision unconstitutional as a violation of the separation of powers.[107] The court did not disagree that it was the intention of the voters to have a mandatory five-year time limit, but the court nevertheless refused to interpret it that way, holding that "[i]t has never been our practice to rewrite a statute only to strike it down as unconstitutional."[108] Because the voters were not "informed of the details of an enforcement mechanism" and how a writ of mandate "could effectively result in compliance," the court held that the voters did not intend to "intrude on the right of the courts."[109]

For the foregoing reasons, the court declined to conform with voter intent by giving the time limit's mandatory language effect.[110] Instead, the court held that the time limit is properly construed under a directive interpretation "as an exhortation to the parties and the courts to handle cases as expeditiously as is consistent with the fair and principled administration of justice."[111]

III. California's Capital Crisis Continues: The *Briggs* Ruling Failed to Account For the Realities Facing the State's Capital System

A. The *Briggs* Ruling's Effect on Death-Row Inmates

Underlying the legal arguments proffered by both sides and the court is the human reality: the initiative risks the execution of innocent people.

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[105] *Id*. at 856.

[106] *Id*.

[107] *Id*. at 857.

[108] *Id*. (claiming that the drafting error would require the court to "rewrite" the provision).

[109] *Id*. at 857-58.

[110] *Id*. at 858.

[111] *Id*. at 858-59 (citing *Garrison*, 32 Cal. 2d at 435-36; *Shafter-Wasco*, 55 Cal. App. 2d at 489).

There is ample evidence to show that five years is not enough time for inmates to prove their innocence on appeal. First, certain evidence may not be available to the defendant until years later. "For every ten prisoners executed in the United States since 1976, one has been set free because of advances in DNA and other forensics."[112] Typically, it takes a great deal of time for this evidence to be discovered. Second, reaching a determination in a capital appeal is a tedious process, and the judiciary must be afforded the necessary time to evaluate the voluminous records inherent to a capital case. For all capital cases from 2000 to 2015, the California Supreme Court overturned the death penalty in 8.46% of cases, including 3.32% of cases where the verdict was reversed or the judgment vacated.[113] In cases where the court reversed a death sentence, the average time under submission was 100 days; and in cases where a death sentence was affirmed, the average time under submission was typically one-third shorter.[114] This evidence demonstrates that it takes longer for the court to determine a death-row inmate's innocence. Despite its exceedingly large death-row population, California "has carried out only 13 of the [total] 1,242 executions that have occurred" in the United States since 1976.[115] Notably, of the 13 capital inmates executed in California, 2 were "volunteers" who requested execution after voluntarily withdrawing their appeals and habeas corpus petitions; thereby, California has executed only 11 death-row inmates after completion of the capital appellate review process.[116]

Accelerating the capital process threatens to create a criminal justice structure that executes individuals before their guilt has been fully established by the judicial appellate system. Specifically, the five-year time limit fosters a system that is susceptible of executing an innocent person because it demands that the courts "go faster" while failing to address the major causes for the long delays in California death-penalty cases.

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[112] Mercury News Editorial Board, *Prop. 66 Unfair to Death Row Inmates*, MERCURY NEWS (June 8, 2017, 1:31 PM), http://www.mercurynews.com/2017/06/08/editorial-prop-66-unfair-to-death-row-inmates-and-bad-for-california; *see also* Samuel R. Gross et al., *Innocence in Capital Sentencing: Article: Exonerations in the United States 1989 Through 2003*, 95 J. Crim. L. & Criminology 523, 529 (2005) (there were 74 death sentence exonerations in the country between 1989 and 2003).

[113] Kirk Jenkins, *What is the Supreme Court's Reversal Rate for Death Penalty Appeals?,* CAL. SUP. CT. REV. (Jan. 27, 2017), https://www.californiasupremecourtreview.com/2017/01/what-is-the-supreme-courts-reversal-rate-for-death-penalty-appeals.

[114] Kirk Jenkins, *How Long Does the Typical Death Penalty Appeal Take to Decide Following the Oral Argument?*, CAL. SUP. CT. REV. (Feb. 3, 2017), https://www.californiasupremecourtreview.com/2017/02/how-long-does-the-typical-death-penalty-appeal-take-to-decide-following-the-oral-argument.

[115] As of May 2011, 1,242 executions have been carried out in the country since 1976. *See* Alarcón et al., *supra* note 8, at 51.

[116] *See* CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 122 n.25.

Merely telling the courts to "go faster" in their review of capital cases without proper guidance or a means to achieve such a goal is an unworkable approach that does nothing to further justice, especially in a system that is vulnerable to prejudice and discrimination.[117] Capital cases are lengthy in their appeals process because of the enormity, complexity, and multitude of problems intrinsic to the nature of a death-penalty case, which Proposition 66 fails to address or cure.[118] Erwin Chemerinsky, Dean of the University of California, Berkeley, School of Law, observed Proposition 66's failure to address the realities of California's capital system: "The courts are proceeding with these cases as expeditiously as possible under the circumstances, and imposing deadlines on the courts will not address the shortage of lawyers to argue them or judges to hear them."[119]

B. A Brief History of California's Death-Penalty System: Death Eligibility, Voter Initiatives, and Inadequate Funding

The history of the state's current death-penalty system is critical to understanding the cause of its substantial death-row population. Strikingly, California's current death-penalty system has been adopted entirely through voter initiatives.[120] There are only 17 states that allow constitutional amendment by voter initiative and of these 17 states, California's initiative process is deemed the most "extreme" for providing a nearly unrestricted opportunity to amend the state's constitution.[121] Although the death penalty was repealed in 1972 when the California Supreme Court ruled that the state's capital-punishment system was unconstitutional,[122] California voters nullified the California Supreme Court's ruling by passing Proposition 17 only nine months later.[123] Proposition 17 amended California's Constitution to provide that the death

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[117] *See generally* Steven F. Shatz, *The Meaning of "Meaningful Appellate Review" in Capital Cases: Lessons from California*, 56 Santa Clara L. Rev. 79, 130 (2016) ("On a national level, numerous studies have found race, gender and geographic disparities in the administration of the death penalty, the same disparities have been found in California.").

[118] *See Briggs*, 3 Cal. 5th at 867 (Liu, J., concurring).

[119] Erwin Chemerinsky, *Voters' Attempt to Speed Executions Should be Quickly Nullified*, L.A. Daily News (Apr. 5, 2017, 12:25 PM), http://www.dailynews.com/2017/04/05/voters-attempt-to-speed-executions-should-be-quickly-nullified-erwin-chemerinsky.

[120] Shatz, *supra* note 117, at 94.

[121] Alarcón et al., *supra* note 8, at 115, 118; Ronald M. George, *State Constitution*, 62 Stan. L. Rev. 1515, 1516 (2010).

[122] People v. Anderson, 6 Cal. 3d 628, 656-57 (1972).

[123] Alarcón et al., *supra* note 8, at 131-32.

penalty is not cruel and unusual punishment, which effectively reinstated the death penalty.[124]

Several years later, voters passed Proposition 7, also known as the 1978 Briggs Death Penalty Initiative, which broadened the list of crimes that qualify a defendant for capital punishment.[125] The Briggs Initiative[126] was intended to give "Californians the toughest death-penalty law in the country" by creating a capital system "which threatens to inflict the penalty on the maximum number of defendants."[127] And that it has done. In 2010, the largest and most comprehensive study ever conducted of death-sentence rates in California evaluated 27,453 homicide cases from 1978 to 2002 and found that California has "the highest [rate] in the nation by every measure" with a 95% death-eligibility rate.[128] This study, performed by David C. Baldus and his colleagues, confirmed that the scope of California's death-penalty system is the largest in the country[129] because there is a broader category of crimes that qualify a criminal defendant for the death penalty in California than in any other state.

Following the 1978 Briggs Initiative, "California voters passed six additional crime initiatives, each one further broadening the scope of California's death penalty by expanding the list of death-eligible crimes," making it easier for a defendant to receive a death sentence.[130] As of 2019, California Penal Code section 190.2 enumerates 33 special circumstances that qualify a first-degree murder convict for the death penalty.[131] This list of special circumstances qualifies almost all forms of first-degree murder for death sentence consideration.[132] The breadth of the special circumstances creates an extraordinarily large pool of defendants who are potentially eligible to receive a death sentence, qualifying 87% of all first-degree murders committed in the state for the death penalty.[133] For example, California is one of only five states where "an uninten-

[124] *Id*. at 131-32.

[125] *Id.* at 138 (2011); *see also* Shatz, *supra* note 117, at 94.

[126] The 1978 Briggs Initiative was written by State Senator John Briggs, the father of the challenger of Proposition 66, Ron Briggs, in Briggs v. Brown, 3 Cal. 5th 808 (2017). *See* Amended & Renewed Petition, *supra* note 60, at 4.

[127] Shatz, *supra* note 117, at 94.

[128] *Id*. at 111.

[129] *Id*.

[130] Alarcón et al., *supra* note 8, at 49.

[131] Under this section, there are 22 "numbered special circumstances, one of which (felony-murder) has" 12 separate sub-parts; this list of death-eligible crimes includes such circumstances as the intentional killing of a peace officer, murder committed for financial gain or to escape arrest, and murder committed (by anyone) during the defendant's attempted first or second-degree burglary. *See* CAL. PENAL CODE § 190.2 (2018); Shatz, *supra* note 117, at 95 n.90.

[132] Shatz, *supra* note 117, at 95; CAL. PENAL CODE § 189(a) (2018) (providing the scope of "first-degree murder" in California).

[133] CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 177.

tional, even wholly accidental, killing during a felony" would make a defendant death-sentence eligible.[134] California's overbroad definition of death eligibility is arguably the very source of the state's dysfunctional and lengthy capital-punishment system because it undermines the system's objective to ensure that the "very worst members of our society" are put to death.[135] Since the enactment of the state's current death-penalty law in 1978, a total of 930 individuals have received a death sentence.[136] Presently, an average of 20 individuals receives a death sentence in California annually.[137]

Delays are pervasive throughout all stages of the appellate process as a result of minimal judicial resources for adjudicating these voluminous and intensive cases.[138] On average, it can take approximately three-to-five years for appointment of appellate counsel, two years before a case is heard by the California Supreme Court after filing briefs, eight-to-ten years for appointment of counsel for habeas corpus petitions, and two years for the California Supreme Court to reach a decision after a petition has been filed.[139] These lengthy delays illustrate the growing problem California faces in having both an overbroad list of death-eligible crimes and grossly inadequate funds to litigate the large pool of capital defendants.[140] Any attempt to systematically remedy the delays thereby requires careful consideration of these issues.

C. THE *BRIGGS* COURT NEGLECTED ITS DUTY TO PROVIDE MEANINGFUL APPELLATE REVIEW

The *Briggs* court failed to use its judicial power to strike down a law that effectively threatens to encourage arbitrary and capricious appellate review of capital cases—the very cases that justice demands a higher procedural standard for to ensure consistency in the imposition of the

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[134] The other four states where an unintentional, accidental killing during a felony qualifies for the death penalty are Florida, Georgia, Idaho, and Mississippi. *See* Shatz, *supra* note 117, at 96 n.94 (citing People v. Watkins, 290 P.3d 364, 390 (2013)).

[135] Alex Kozinski & Sean Gallagher, *Canary Lecture: Death: The Ultimate Run-On Sentence*, 46 CASE W. RES. L. Rev. 1, 29 (1995).

[136] *Proposition 66*, *supra* note 56.

[137] *Id.*

[138] Alarcón et al., *supra* note 8, at 49, 80. Upon receiving a death sentence, all capital defendants have the right to an automatic direct appeal, which is reviewed by the California Supreme Court to determine whether the defendant was given a fair trial. Capital defendants also have a constitutional right to file a habeas corpus petition, which has historically been reviewed by the California Supreme Court as well. *See generally* Alarcón, *supra* note 6, at 715.

[139] CAL. COMM'N ON THE FAIR ADMIN. OF JUST., *supra* note 3, at 122-23.

[140] *See* Alarcón et al., *supra* note 8, at 47, 184.

death sentence.[141] When faced with a constitutional challenge to legislation, it is the responsibility of the court to render "constitutional rulings clear enough to foster meaningful deliberation" and provide proper guidance for those entrusted with the fair and efficient administration of justice.[142] The importance of this principle is amplified in capital cases where the concept of "meaningful appellate review" emphasizes the necessity of "procedural protections that are intended to ensure that the death penalty [is] imposed in a consistent, rational manner."[143]

By upholding the five-year time limit under a construction that directly conflicts with the intent of the voters, as evidenced by the language of the ballot materials, the court validated the drafting of unworkable legislation and authorized the very thing that it is entrusted to protect against in capital cases: unconstitutional and arbitrary judicial rulings subject to broad and unguided discretion.[144] The court held that such an interpretation of the time-limit provisions does not "empty them of meaning" because it will still "serve as [a] benchmark[ ] to guide courts."[145] But a time limit cannot serve as a meaningful benchmark when it "purports to dictate what is not 'reasonably possible' to achieve," which is precisely the case with the five-year time limit in 190.6(d).[146] The extent of the five-year time limit's infeasibility is unmistakable when viewed in light of the history and ramifications of California's capital appellate process.[147] Reasonable direction on how to meet the five-year time limit requires much more than a mere command for the courts to "speed up" the process. It requires a drastic reorganization of the California Supreme Court's functions, a more thorough plan for restructuring the lower courts, and a substantial increase in funding from the legislature.[148] Absent any such discussion or direction, the five-year time limit fails to provide meaningful guidance for the reforms now in effect.[149]

Although it may be easier to simply hold that the five-year time limit is merely directive, the California Supreme Court has a duty to carry out its judicial function as the last resort of legislative interpretation, which

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[141] Parker v. Dugger, 498 U.S. 308, 321 (1991) ("We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.").

[142] *Briggs*, 3 Cal. 5th at 876 (Cuéllar, J., dissenting).

[143] Shatz, *supra* note 117, at 81 (citing Barclay v. Florida, 463 U.S. 939, 960 (1983) (Stevens, J., dissenting)).

[144] *See generally id*. ("meaningful appellate review" is meant to ensure that "the death penalty will be imposed in a consistent, rational manner").

[145] *Briggs*, 3 Cal. 5th at 860.

[146] *Id*. at 871 (Liu, J., concurring).

[147] *Id.*

[148] *Id*.

[149] *Id.*

includes declaring laws unconstitutional when they materially impair a court's core constitutional functions by encroaching on its discretion.[150] Under the separation of powers doctrine, the judiciary is required to undertake the indisputably challenging task of simultaneously protecting the powers of all three branches of government while making "reasoned calls on claims of encroachment"—a "tall order, and an impossible one without a good rule of decision."[151] This is no easy task, "but fidelity to its duty requires a measure of fortitude."[152] Petitioners provided the court with an opportunity to address the issues that a poorly drafted and underfunded initiative will inevitably incite, especially when considering the vulnerability of California's overwhelmed capital system. The *Briggs* court missed this opportunity. By upholding, rather than invalidating, the time limit under an interpretation that conflicts with the provision's statutory intent, the *Briggs* court failed to perform its duty as the state's highest court and make the call that it was created to make. The so-called saving construction of Proposition 66 will "save" no one. It is unworkable for the courts who are tasked with applying it and it is unjust for the people that it will inevitably and harshly effect. Justice is, or at least it should be, a process and not a rush to the finish line.

IV. A Directive Interpretation of the Five-Year Time Limit is Improper Because the Voters Intended For it to be Mandatory

In interpreting the initiative, the court made a grave misstep by providing a directive—rather than mandatory—reading of the five-year time limit. A court's determination of the constitutionality of legislation relies solely on an evaluation of the challenged statute's language to assess the law's purpose and intent.[153] The judiciary "has no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed."[154] Instead, courts are "limited to interpreting the statute, and such interpretation *must* be based on the language used" therein.[155]

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[150] *See* Alarcón et al., *supra* note 8, at 160 ("With the hands of the executive and legislators tied by an initiative process that authorizes voters to enact legislation that cannot be vetoed by the Governor or amended or repealed by the Legislature, the California courts have been called upon to assume an increasingly important role in construing the reach of the California initiative process.").

[151] David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. Rev. 655, 687-88 (2011).

[152] *Id*. at 687 n.191 ("The preservation of a viable constitutional government is not a task for wimps." (quoting Obrien v. Jones, 999 P.2d 95, 122 (2000) (Brown, J., dissenting))).

[153] *See* Seaboard Acceptance Corp. v. Shay, 214 Cal. 361, 365-66 (1931).

[154] *Id*. at 365.

[155] *Id*. (emphasis added).

The dispositive question the *Briggs* court was enlisted to consider was whether a death-penalty system that imposes mandatory time limits on the courts was what the voters intended.[156] The key problem with the court's ruling is that a directive interpretation does not reflect the law's purpose nor the voters' intent. Proposition 66's language demonstrates the mandatory intent and purpose of the five-year time limit because (1) it provides a method of enforcement for failure to meet the time limit, (2) it consistently used mandatory language throughout the initiative and ballot materials, and (3) precedent does not support supplying a directive interpretation of a statute that expresses a mandatory intent and provides for a method of enforcement.

A. THE VOTERS INTENDED FOR THE TIME LIMIT TO BE MANDATORY BECAUSE THE PROVISION PROVIDED FOR ENFORCEMENT BY WRIT OF MANDATE

The court's interpretation of 190.6(e), the provision that establishes relief by writ of mandate,[157] is misguided and unreasonable. Placing fixed time limits on the judiciary has been long understood in California to be a latent separation of powers violation because it materially impairs a court's ability to determine and manage its docket.[158] An intent to materially impair the courts' constitutional function to hear and decide cases by imposing time requirements may not be read into the statute, but instead must be clear from the language of the statute or otherwise clearly indicated to be the underlying purpose of the statute.[159] When a statute provides a penalty or consequence for the failure to meet the prescribed time requirement, it strongly suggests a legislative intent to control the court's functions.[160]

The *Briggs* court's evaluation of the penalty provision for the time limit appears focused only on whether the relief provided by the provision was plausible, despite the importance of determining the legislative

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[156] *See* Alarcón et al., *supra* note 8, at 161 (quoting Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537, 576 (2000) (George, J., dissenting)) ("In construing constitutional or statutory provisions, whether enacted by the Legislature or by initiative, the intent of the enacting body is the paramount consideration. . . . [I]n reviewing a voter initiative's validity, the Court's 'task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent.'").

[157] *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

[158] *Briggs*, 3 Cal. 5th at 849.

[159] *Garrison*, 32 Cal. 2d at 435.

[160] *See* Gowanlock v. Turner, 42 Cal. 2d 296, 301 (1954) ("The requirements of a statute are directory, not mandatory, unless means be provided for its enforcement."); *Garrison*, 32 Cal. 2d at 435.

intent when undertaking a question of statutory interpretation.[161] Although the question of plausibility of the stated relief is a useful factor in reaching a final determination on the legislative intent, the intent and purpose of the statute should be the ultimate question before the court—especially when the challenged statute was passed by voter initiative.[162] When analyzed with the question of legislative intent in mind, it is clear that the voters who passed Proposition 66 intended to set a mandatory time limit on the courts and to enforce that time requirement by writ of mandate; the fact that writ relief in such a situation is implausible should be of minor significance considering the general voter population, although entrusted to enact important criminal law and policy, does not have exhaustive knowledge or understanding of the criminal process or judicial procedure.[163]

The significance of looking to whether a provision includes an enforcement mechanism is important for determining whether a directive or mandatory reading is appropriate because it indicates that the voters intended for the law to have a binding and enforceable effect. The fact that the enforcement mechanism may not, in actuality, have a binding or enforceable effect does not diminish the voters' mandatory intent in passing the law. Thereby, the *Briggs* court's focus on the impracticality of the enforcement mechanism was improper because such an inquiry is irrelevant to the determination of the voters' intent and the purpose of the initiative.

The majority opinion acknowledged that the five-year time limit "reflect[s] the voters' will, which [the court] respect[s]" but continued that it was "presented to the voters . . . without the benefit of hearings or research exploring their feasibility or their impact on the rest of the courts' work."[164] However, it was not for the court to decide whether the chosen enforcement mechanism would be effective. "In order to further the fundamental right of the electorate to enact legislation through the initiative process, [courts] must on occasion indulge in a presumption that the voters thoroughly study and understand the content of complex initiative measures."[165]

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[161] *See Briggs*, 3 Cal. 5th at 856-57 (holding that since "there is no tribunal to issue a writ of mandate to this court" the five-year time limit "provides no workable means of [enforcement]").

[162] *See, e.g.,* Hodges v. Superior Court, 21 Cal. 4th 109, 114-18 (1999) (holding that statutory interpretation of a voter initiative requires a determination of the electorate's purpose, "as indicated in the ballot arguments and elsewhere").

[163] *See Briggs*, 3 Cal. 5th at 887 (Cuéllar, J., dissenting) ("[the court has] never required the voters to sit through a constitutional law lecture before [it] would be willing to interpret a law as it was written").

[164] *Id*. at 860-61.

[165] Taxpayers to Limit Campaign Spending v. Fair Political Practices Comm'n, 51 Cal. 3d 744, 768 (1990).

Thereby, the *Briggs* court's singular task was to decide whether the voters intended to place a mandatory limitation on the court's authority to decide its cases while presuming that the voters studied and understood what they enacted. While certain judicial time limits are properly construed as directive, mandatory effect must be supplied when "the language contains negative words" or otherwise "shows that the designation of the time was intended as a limitation of power, authority or right," such as by including a method of enforcement.[166] It is inappropriate for a court to interpret a ballot initiative based on the electorate's knowledge of the legal process. But if it was, then perhaps it is time to reconsider the acceptable scope of legislative power afforded to the voters when there is a lack of faith in their knowledge of the processes in which they may enact legislation. "Our society being complex, the rules governing it whether adopted by legislation or initiative will necessarily be complex. Unless we are to repudiate or cripple use of the initiative, risk of confusion must be borne."[167]

Next, in addition to the court's misguided focus on the provision's plausibility of enforcement, the court's interpretation of 190.6(e) is further undermined by its inherent unreasonableness. The provision establishes relief by writ of mandate if "a court fails to comply" with the time requirement.[168] If read as the court here instructs, the provision would allow relief for something that never happens: the filing of an opening brief by the court itself. How can a court fail to comply with the filing of an opening brief? The answer: it cannot. Section 190.6(e) was meant to provide an enforcement mechanism for the five-year time limit—a fact further evidenced by Proposition 66's proponent's statements at oral argument. Intervenor expressly admitted to the court that the provision's reference to subdivision (b) was merely a drafting error, and that subdivision (e) was intended to reference a delay in relation to subdivision (d), which prescribed the five-year time limit, and not to a delay in filing the opening brief found in subdivision (b).[169] Nevertheless, the court insisted that such an error was not clearly apparent.[170] Yet, taking into consideration all of the ballot materials and summaries of the law, it is distinctly evident that the writ relief provided in 190.6(e) was for a delay in excess of the five-year time limit.[171]

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[166] Pulcifer v. County of Alameda, 29 Cal. 2d 258, 262 (1946).

[167] Fair Political Practices Comm'n v. Superior Court of L.A. Cty., 25 Cal. 3d 33, 42 (1979).

[168] *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 213.

[169] *Briggs*, 3 Cal. 5th at 855.

[170] *Id*.

[171] *See Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3 at 213 (codified at CAL. PENAL Code § 190.6(d)-(e) (2018)).

First, the court's interpretation of 190.6(e) does not provide a practical construction of the statute.[172] As is reasonably understood, a court could not and does not file the opening brief for an appeal. Thus, the court could never be the cause of such a delay. Further, 190.6(e) provides relief *for* a party *against* a court.[173] Under the court's interpretation, it would provide a party the opportunity to compel a court's adherence to the briefing schedule for the opening appellate brief. This is an illogical conclusion and would imply that an appealing party would seek a court order to compel itself to file its own brief.

The penalty provision's mistaken reference to subdivision (b) and intended reference to subdivision (d) is further supported by the last sentence of 190.6(e), which states "Paragraph (1) of subdivision (c) of Section 28 of Article I of the California Constitution, regarding standing to enforce victim's rights', applies to this subdivision *and subdivision (d)*."[174] This language makes it apparent that writ relief was intended for a delay that exceeds the five-year time limit in subdivision (d), and not for a delay in filing the opening brief in subdivision (b).[175] The court's finding that subdivision (e) applies to subdivision (b) effectively renders the last sentence of subdivision (e) moot as pointless, unenforceable, excess verbiage, which is an improper exercise of judicial statutory interpretation.[176]

Second, even if the intended reference to subdivision (d) was not facially obvious from the provision's text, it is easily discernible from the ballot materials and summaries of the law.[177] The ballot materials informed voters several times that the five-year time limit was "required" and was enforceable by "writ of mandate."[178] Additionally, under the unambiguous heading, "Requires Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years," the analysis by the Legislative Analyst expressly stated the relief available to enforce the time limit: "If the process takes more than five years, victims or their attorneys could request a court order to address the delay."[179]

In light of the clear language of the ballot materials and proposed law expressly providing for a method of enforcement, the proponents' assertions about the intent of the provision despite the drafting error, and

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[172] *Id.* § 3(e) at 213.

[173] *Id.*

[174] *Id.*

[175] PENAL § 190.6(b), (d)-(e).

[176] *See, e.g.,* People v. Rizo, 22 Cal. 4th 681, 687 (2000) (the courts must avoid interpreting statutory language "in a manner that would render some part of the statute surplusage").

[177] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 104-09.

[178] *Id.*

[179] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 106.

the nonsensical meaning the provision would derive from the court's interpretation, it is evident that the court erred in finding that the provision did not provide for an enforcement mechanism.

B. THE VOTERS' MANDATORY INTENT IS EVIDENT FROM THE LANGUAGE IN THE BALLOT MATERIALS AND TEXT OF THE PROPOSED LAW

The court's second justification for applying a directive interpretation equally fails to provide an adequate basis for its ruling because the language in the ballot materials and text of the law expresses the voters' intent for the five-year time limit to be mandatory. Upholding the time limit under a directive interpretation, the court reasoned that "in the absence of clearer indications that this was the voters' intent, we will not presume they meant to hamper the courts in the conduct of their business."[180] As Justice Cuéllar noted in his dissenting opinion, the court's directive interpretation can at best be described as a "novel reinterpretation" of the five-year time limit that is "at odds—entirely—with what the initiative says, how it was designed to work, and how it was sold."[181]

The fundamental problem with the *Briggs* ruling is that a directive interpretation does not accurately depict the purpose and intent of the law, as reflected in the language and terms of the initiative. To "resolve questions of purpose and ambiguity, '[courts] look to the materials before the voters.'"[182] Leading up to the polls, all ballot materials and information on Proposition 66 provided to voters directly and expressly indicated that the proposed time-limit changes to the capital review process were to impose a required (i.e., mandatory) time frame for the courts to decide capital appeals.[183] These materials are often the sole source of information that a person relies on when making a decision on how to vote.[184]

Nothing in the language of Proposition 66's voter materials stated or implied that time limits *may* be imposed; instead, it was clearly stated that time limits *will* be imposed. The ballot summary, ballot label, and ballot title are key in determining the voters' intent.[185] Here, the Voter's Information Guide stated that "A YES vote on this measure means" that "[c]ourt procedures for challenges to death sentences would be subject to

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[180] *Briggs*, 3 Cal. 5th at 858.

[181] *Id*. at 875 (Cuéllar, J., dissenting).

[182] People v. Valencia, 3 Cal. 5th 347, 364 (2017) (quoting Robert L. v. Superior Court of Orange Cty., 30 Cal. 4th 894, 905 (2003)).

[183] *Quick Reference Guide*, *in* VOTER GUIDE, *supra* note 10, at 8, 15.

[184] Alarcón et al., *supra* note 8, at 128.

[185] *See id*. at 161-62.

various changes, such as time limits on those challenges."[186] As such, the first thing voters were told was that if they voted "yes" then time limits would be imposed.[187]

Throughout the text of the initiative and related ballot materials, "time limits" and the need to "expedite" was referenced consistently.[188] The voters were expressly informed that Proposition 66 "places time limits on legal challenges to death sentences" by: (1) requiring completion of the direct appeal and habeas corpus petition process within five years; (2) requiring filing of habeas corpus petitions within one year of attorney appointment; and (3) placing other limitations "to help meet the above time frames," such as restricting a defendant from filing more than one habeas corpus petition, with limited exceptions.[189] Viewed in its entirety, Proposition 66 was drafted to impose restrictive time limits on the judiciary for the purpose of "shorten[ing] the time that legal challenges to death sentences take."[190] This clear intention is unambiguously communicated by the language used throughout Proposition 66's ballot materials regarding the initiative's purpose and objective: "places time limits on legal challenges to death sentences;" "[t]he measure requires that the direct appeal and habeas corpus petition review process be completed within five years;" "[e]stablishes time frame for state court death penalty review;" "the measure requires that [all currently pending challenges] be completed within five years from when the Judicial Council adopts revised rules;" "[i]n order to help meet the above time frames, the measure places other limits on legal challenges to death sentences."[191]

Not only did the court ignore the clear intent and purpose of the provision, the court also failed to abide by the centuries-old precedent of statutory interpretation.[192]

> It is a general rule of statutory construction that the courts will interpret a measure adopted by vote of the people in such manner as to give effect to the intent of the voters adopting it. It must be held that the voters judged of the amendment they were adopting *by the meaning apparent on its face* according to the general use of the words employed.[193]

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[186] *Quick Reference Guide*, *in* VOTER GUIDE, *supra* note 10, at 8, 15.

[187] *Id*.

[188] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 104-09; *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, § 3(e) at 212-14.

[189] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 106.

[190] *Id*. at 105.

[191] *Id*. at 104-07.

[192] *See* Kaiser v. Hopkins, 6 Cal. 2d 537, 538-39 (1936).

[193] *Id.* at 538 (emphasis added).

The initiative power of the people to enact and amend state law inherently demands that voters "get what they enacted, not more and not less."[194] Giving more than what the voters passed by initiative oversteps the reach of the initiative power, while giving less undercuts the power—just as the authority of the three distinct branches of government must be balanced to maintain a just society, so too must the power of the people. Petitioners recognized that a directive interpretation of the time limit would be an improper reach because such an interpretation would not give the voters what they passed by initiative.[195] Thus, Petitioners urged the court to consider what a directive version of the time limits would have looked like in the ballot materials if that was, in fact, the intent and purpose of the proposition.[196] Petitioners advanced an example, "*Encourages Completion of Direct Appeal and Habeas Corpus Petition Process Within Five Years,"* and challenged the court to consider whether the results at the polls would have seen the same, or even a remotely similar, outcome.[197] When viewed holistically, it is difficult to find a basis for not agreeing with Petitioner. If the ballot materials had indicated anything but a mandatory time requirement, it cannot be asserted that the same results would have patently ensued. The question remains how the court reached its decision and upheld a time limit that was unmistakably and concededly not what the voters passed, especially when such provisions potentiate grave consequences for the courts and capital defendants.

It is impossible to construe the provision in a way that both maintains its constitutionality and accurately reflects the will of the voters because all of the language in the voter materials indicated that the time requirement is mandatory. The only valid and reasonable conclusion the court could have—and should have—reached was to declare the measure unconstitutional in violation of the doctrine of separation of powers. The court's failure to issue a decision that accurately reflects the will of the voters who passed it is regrettable and deeply unfortunate for California's criminal justice system.

The *Briggs* court's exercise of its duty to "jealously guard the precious initiative power"[198] appears to have crossed the line from proper to inappropriate. The court did not "jealously guard" the initiative power by applying a directive interpretation to the time limit requirement in Proposition 66.[199] The court failed to properly rule on the constitutionality

[194] Hodges v. Superior Court, 21 Cal. 4th 109, 114 (1999).
[195] *See* Petitioner's Reply to Amicus Curiae Briefs, *supra* note 61, at 12.
[196] *Id*.
[197] *Id*. (emphasis in original).
[198] *Briggs*, 3 Cal. 5th at 827 (quoting Legislature v. Eu, 54 Cal. 3d 492, 501 (1991)).
[199] *Id*. (quoting *Eu*, 54 Cal. 3d at 501).

of the initiative that the voters passed and instead adopted an interpretation of the time limit provision that undermines the central objective of the initiative.[200] A directive reading of the five-year time limit is inconsistent with the court's statutory interpretation power: "[w]hen the language of a statute is 'clear and unambiguous' and thus not reasonably susceptible of more than one meaning, 'there is no need for [judicial] construction, and courts should not indulge in it.'"[201] To construe Proposition 66's time limit as directive in order to uphold its constitutionality is to enact legislation that was not passed by the people. Such an act of judicial construction is outside the authority of the court's power of statutory interpretation, and in conflict with the purpose of the constitutional avoidance canon.

C. Precedent Does Not Support a Directive Interpretation in *Briggs*

The *Briggs* court mistakenly asserted that its holding follows "nine decades of precedent."[202] The saving construction the *Briggs* court implemented goes well beyond established precedent and takes a vague, blanket approach in evaluating the statute, devoid of the reasoning on which it relies. Justice Cuéllar, in his dissenting opinion, distinguished the majority's directive saving construction from the constitutional avoidance canon, arguing that the majority misused the principle when it attempted to save an unsound construction.[203] "[I]t is one thing to declare a statute unconstitutional when it cannot be saved, yet quite another to pretend a statute means what it does not simply so it can be saved."[204]

The court maintained that because the ballot materials did not make clear how a court order by writ of mandate could "effectively result in compliance," it was proper to construe the mandatory provision as directive.[205] The court reasoned that because it would be impossible to interpret 190.6 in a manner that would both "conform with the voters' probable intent" and maintain its constitutionality, it was appropriate to effectively rewrite the statute as directive to avoid a separation of powers violation and preserve judicial authority.[206] However, the court improperly disregarded the initiative's purpose, even when a remedy was clearly

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[200] *See id*. at 857-58.

[201] People v. Gardeley, 14 Cal. 4th 605, 621 (1996) (quoting Cal. Fed. Savings & Loan Ass'n v. City of Los Angeles, 11 Cal. 4th 342, 349 (1995)) (overruled in part on separate issue).

[202] *Briggs*, 3 Cal. 5th at 858.

[203] *Id*. at 876-77, 900-01 (Cuéllar, J., dissenting).

[204] *Id*. at 876-77.

[205] *Id*. at 857 (majority opinion).

[206] *Id*. at 857-58.

articulated in the text of the law that illustrated the mandatory effect the voters intended by passing the five-year time limit.

The court cited *Garrison*, *Engram*, *Thurmond*, *Shafter-Wasco*, *Lorraine*, and *Verio* to support a directive interpretation of an otherwise mandatory statute to avoid a separation of powers violation.[207] These cases, however, are distinguishable and do not support the *Briggs* ruling. Each of the court's cited cases advanced the legislative purpose by interpreting the law as directive, which is precisely the opposite of what a directive interpretation of the five-year time limit achieves.[208]

In *Garrison*, the statute at issue required a trial court to rule on all issues arising from a contested election within ten days of trial.[209] The parties were opposing candidates in a local election and the initial poll results rendered the defendant, who secured two more votes than the plaintiff, the victor.[210] The plaintiff challenged the election results and the trial court entered judgment for the plaintiff, finding that the correct poll results showed that the plaintiff won the election by five votes.[211] On appeal, the defendant sought reversal of the trial court's judgment, arguing that the court lost jurisdiction to decide the case because its decision was not filed within the statutorily required ten-day time frame.[212] The California Supreme Court rejected the defendant's claim, holding that the statute's purpose would not be furthered by a mandatory application of the time limit.[213] Instead, the court held that a directive interpretation of the statute was appropriate despite its mandatory language because the statute's purpose was premised on the public's valid concern with the fair, accurate, and timely determination of election results.[214] The court reasoned that, while speed in deciding contested-election cases is a desirable component of the statute's primary objective, it is "not the primary statutory aim but is merely incidental to the main purpose of the law."[215] A literal application of the statute would strip the court of jurisdiction, consequently defeating the primary purpose of the statute to determine which candidate is rightfully entitled to office.[216]

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[207] *Id*. at 849-54 (citing *Garrison*, 32 Cal. 2d 430; *Engram*, 50 Cal. 4th 1131; *Thurmond*, 66 Cal. 2d 836; *Shafter-Wasco*, 55 Cal. App. 2d 484; *Lorraine*, 220 Cal. 753; *Verio*, 3 Cal. App. 5th 1315).

[208] *Briggs*, 3 Cal. 5th at 879 (Cuéllar, J., dissenting).

[209] *Garrison*, 32 Cal. 2d at 434.

[210] *Id*. at 433.

[211] *Id*.

[212] *Id*.

[213] *Id*. at 437.

[214] *Id*. at 436.

[215] *Id*. at 436-37.

[216] *Id*. at 437.

Despite the *Briggs* court's assertion to the contrary, the statute at issue in *Garrison* is notably inapposite from Proposition 66.[217] In *Garrison*, the court held that the statute must be construed as directive because the law's purpose was to ascertain "the will of the people at the polls, fairly, honestly, and legally expressed," which would be negated if speed in reaching a judicial decision was given priority.[218] The time limit in *Garrison* was motivated by the public's desire and right to ensure that only officials who were elected by the voters hold a seat in public office.[219] This right of the people naturally includes an importance for timeliness, secondary to its primary objective, since a judicial determination may be required before the rightful candidate can take office. In contrast, Proposition 66's five-year time limit on capital appellate review was not intended to protect a predominant public interest aside from a mere desire to shorten the time frame that death challenges take.[220] Speed is not "merely incidental" to the time limit's purpose, as it was in *Garrison*,[221] but instead is the sole objective of the entire initiative.

Speeding up the capital appellate review process was repeatedly addressed in Proposition 66's ballot materials.[222] The ballot pamphlet's summary of the proposition began by unmistakably stating the initiative's ultimate objective: "This measure seeks to shorten the time legal challenges to death sentences take."[223] The initiative was presented to voters as a "reform" to the death-penalty process and stated that "California's death penalty system is ineffective because of waste, delays, and inefficiencies."[224] To support the reform and address the delays, the ballot materials stated that murder-victim families "should not have to wait decades" for capital appeals to be decided.[225] To ensure such "timely justice" for victim's families, the findings and declarations concluded that, if enacted, capital cases "can be fully and fairly reviewed by both state and federal courts within ten years."[226] The initiative expressly provided that "state courts *shall* complete" the capital appellate review pro-

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[217] *Briggs*, 3 Cal. 5th at 858 (citing *Garrison*, 32 Cal. 2d 430).

[218] *Garrison*, 32 Cal. 2d at 436-37 ("[W]ords otherwise generally mandatory or permissive will be given a different meaning when the provisions of the statute, properly construed, require it.").

[219] *Garrison*, 32 Cal. 2d at 434, 436.

[220] *See Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 105 ("This measure seeks to shorten the time that the legal challenges to death sentences take.").

[221] *Garrison*, 32 Cal. 2d at 436-37.

[222] *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, 212-214; *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 104-109.

[223] *Id*. at 105.

[224] *Text of Proposed Laws*: *Proposition 66*, *in* VOTER GUIDE, *supra* note 10, at 212, §§ 1-2(1).

[225] *Id.* § 2(3) at 213.

[226] *Id.* § 2(10) at 213.

cess within five years of the entry of judgment.[227] The legislative intent underlying Proposition 66 was similarly expressed throughout the ballot materials: the analysis by the Legislative Analyst referred to the five-year time limit in mandatory language, such as a "requirement" five times; and referenced "time limits," "time frame" and "time lines" seven times.[228]

Construing the time limit in Proposition 66 as mandatory would not defeat its primary purpose as it did in *Garrison*, where prioritizing judicial speed over an accurate determination of election results would defeat the statute's purpose.[229] A mandatory interpretation of the five-year time limit would achieve the opposite outcome of what it would have in *Garrison*—a mandatory interpretation of Proposition 66 would maintain its purpose of shortening the time frame for capital appellate review.[230] By construing the five-year deadline as mandatory, the purpose of the initiative is promoted, rather than defeated.

In addition to *Garrison*, the court cited several more cases, all of which are equally distinguishable due to the explicit mandatory intent of Proposition 66's five-year time limit.[231] In *People v. Engram,* the court held that a statute required a directive interpretation because the text of the statute stated that it must be applied "in accordance with the policy of expediting criminal cases 'to the greatest degree that is consistent with the ends of justice.' "[232] Thus, because the statute was explicitly conditioned on "justice," the court held that the statute was not a strict rule and that a mandatory interpretation would effectively contradict the statute's stated intent.[233]

In *Thurmond v. Superior Court*, the court provided a directive interpretation of a statute that ordered a stay of proceedings when a party or attorney is a member of the legislature.[234] The court held that a mandatory reading of the statute could have serious injurious results, especially in a guardian ad litem case.[235] The court found that because the legislature did not intend these injurious effects or outcomes, the statute required a directive interpretation.[236] Here, a directive interpretation allowed the court to consider whether "the attorney who is a member of

[227] *Id.* § 3(d) at 213 (emphasis added).
[228] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 104.
[229] *Garrison*, 32 Cal. 2d at 436-37.
[230] *Briggs*, 3 Cal. 5th at 881 (Cuéllar, J., dissenting); *Garrison*, 32 Cal. 2d at 436-37.
[231] *Briggs*, 3 Cal. 5th at 857-58.
[232] People v. Engram, 50 Cal. 4th 1131, 1151 (2010) (emphasis omitted).
[233] *Id*.
[234] Thurmond v. Superior Court, 66 Cal. 2d 836, 839 (1967).
[235] *Id*.
[236] *Id*.

the Legislature was employed for no other purpose than attempted delay," which furthered the statute's legislative purpose.[237]

Similarly, in *Lorraine v. McComb*, the court provided a directive interpretation of a statute that required a court to grant a trial continuance "for a period not to exceed thirty days" when all parties agree in writing to the continuance.[238] The court ruled that the legislature did not intend for the conveniences of the parties to override judicial control if such a continuance is impracticable for the court to accommodate, especially where the only harm to the parties is a delayed trial date.[239]

In each case cited by the court, a directive interpretation of the laws advanced and protected the legislative purpose, which was determined by evaluating the statute in the context of its real application and the possible consequences or outcomes that could result from its strict adherence.[240] Unlike in *Garrison*, *Engram*, *Thurmond*, *Lorraine*, and *Verio* where the courts considered the language of the regulations in ascertaining the statutory objective, the *Briggs* court failed to make the same necessary and thoughtful determination of Proposition 66's legislative intent.[241] Although the *Briggs* court asserted that *Verio Healthcare, Inc. v. Superior Court* supports construing mandatory language as directory, even when the statute does not include conditional language, as it did in *Thurmond*,[242] the decision in *Verio* conflicts with the *Briggs* ruling.[243] In contrast to *Briggs*, the *Verio* court struck down and invalidated the portion of the revised law that included unconstitutional mandatory language that was incapable of a reasonable directive interpretation.[244] In reaching its determination, the *Briggs* court appeared to disregard the language of the provision entirely and failed to evaluate the initiative in

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[237] *Id*. at 840.

[238] Lorraine v. McComb, 220 Cal. 753, 754, 757 (1934).

[239] *Id*. at 755-57.

[240] *See Garrison*, 32 Cal. 2d at 436-37; *Engram*, 50 Cal. 4th at 1151; *Thurmond*, 66 Cal. 2d at 839; *Lorraine*, 220 Cal. at 756-57; *Verio*, 3 Cal. App. 5th at 1329-30; *Shafter-Wasco*, 55 Cal. App. 2d at 485-89 (At issue in the case was an act that "provide[d] for the dissolution of irrigation districts" by establishing that an appeal of such matter "shall be speedily tried" and "must be heard and determined within three months." The court ruled that the legislature did not intend to divest the court of jurisdiction because a corresponding constitutional provision provided that the court shall have 90 days to determine an appeal and "[the legislature] will not be presumed to have inconsistent provisions as to the same subject in the immediate context.").

[241] *Briggs*, 3 Cal. 5th at 855-61.

[242] *Id.* at 854 (citing *Verio*, 3 Cal. App. 5th at 1329; *Thurmond*, 66 Cal. 2d at 839).

[243] *See Verio*, 3 Cal. App. 5th at 1329-30.

[244] *Id*. at 1329-30.

the context of its real application and the consequences of such an application.[245]

The *Garrison* court recognized that a determination of legislative intent requires the judiciary to consider "the statute as a whole," "the nature and character of the act to be done," and "the consequences which would follow the doing or not doing of the act at the required time."[246] Accounting for all of these factors, Proposition 66 was intended to control the court's timeliness in adjudicating death-penalty appeals and habeas corpus petitions. Unlike the above cases, if the five-year time limit was given literal and mandatory effect, Proposition 66's purpose of "shorten[ing] the time that the legal challenges to death sentences take" would not be thwarted, but supported.[247]

It remains evident that the court's rewriting of the five-year time limit as merely directive was inappropriate and inconsistent with the long-established rules of statutory interpretation. The court failed to produce a single case that supports a directive interpretation of a voter initiative where the initiative at issue (1) explicitly establishes a consequence for failure to do the act in the required timeframe, (2) includes express mandatory language, and (3) is reasonably understood to have a legislative intent to control or impair the court's core functions in violation of the separation of powers doctrine, as determined through the basic rules of statutory interpretation.

In each case cited by the court that applied a directive interpretation to a statute with mandatory language, a directive interpretation was appropriate because it furthered the statute's primary goal and adherence to the mandatory language would have effectively defeated that purpose.[248] It is within a court's authority to interpret legislation in a manner that avoids constitutional issues or a separation of powers violation, but only when the properly construed legislative purpose is furthered by a saving construction.[249] In other words, a saving construction "saves" a statute from being struck down as unconstitutional if the statute can be reasonably understood as requiring a directive effect to promote the statute's

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[245] *Briggs*, 3 Cal. 5th at 854 (supplying a directive interpretation despite the fact that the "statute [was] framed in mandatory terms, and the voters were told in the ballot materials that the five-year limit on the posttrial review process would be binding and enforceable").

[246] *Garrison*, 32 Cal. 2d at 437.

[247] *Analysis by the Legislative Analyst*, *in* VOTER GUIDE, *supra* note 10, at 104, 105.

[248] *See Garrison*, 32 Cal. 2d at 436; *Engram*, 50 Cal. 4th at 1151; *Thurmond*, 66 Cal. 2d at 839; *Shafter-Wasco*, 55 Cal. App. 2d at 488; *Lorraine*, 220 Cal. at 756-57; *Verio*, 3 Cal. App. 5th at 1329-30.

[249] *See* People v. McGee, 19 Cal. 3d 948, 958 (1977) ("[I]n evaluating whether a provision is to be accorded mandatory or directory effect, courts look to the purpose of the procedural requirement to determine whether invalidation is necessary to promote the statutory design."); s*ee also Garrison*, 32 Cal. 2d at 437.

primary objective. The cited cases allowed for a saving construction not merely because a directive interpretation avoided constitutional problems, but because a directive interpretation was necessary to support the challenged regulation's underlying purpose and objective.

Briggs provides the polarity: instead of finding that the regulation required a directive interpretation to support and maintain its underlying statutory intent, the court disregarded the initiative's intent and applied a directive interpretation that undermines the express purpose of the statutory reforms solely to avoid constitutional violations.[250] Despite its assertion that established separation of powers precedent required a saving construction of the five-year time limit, none of the cited cases went as far as to apply a directive interpretation where the statutory language clearly expressed a contrary legislative intent. These cases are markedly dissimilar, and neither compel nor authorize the court to impose a saving construction on every statute, regardless of the legislative intent, simply to uphold its constitutionality. Such an approach would venture outside the scope of the judiciary's power.

V. CONCLUSION

The *Briggs* court had a duty to strike down Proposition 66's five-year time limit in its entirety because it was intended by the voters to place a mandatory time requirement on the court, in violation of the separation of powers doctrine. The court refused to give the time limit the appropriate, mandatory effect it required as evidenced by the initiative's purpose and the voters' intent. Instead, the court improperly supplied a directive interpretation that concededly and expressly contradicts the will of the voters. The mandatory intent of the time limit is clearly indicated from the text of the proposed law and the language of the ballot materials. Moreover, it was undisputed by the parties and the court that the initiative "required" the courts to meet the five-year time limit; it was undisputed that the initiative provided for a method of enforcement if such a time frame was not met by the courts; it was undisputed that the voters intended for the time limit to be mandatory;[251] and it was acknowledged by the court that judicial time limits imposed by legislation

[250] *Briggs*, 3 Cal. 5th at 857-58 ("[T]he voters intended the five-year limit to be mandatory. We do not dispute that point." However, "we too decline to infer that lawmakers intended strict adherence to a fixed deadline that would undermine the courts' authority as a separate branch of government.").

[251] *Id*. at 855; Intervenor's Brief in Reply to Amicus Curiae Briefs, *supra* note 74, at 36; Respondents' Preliminary Opposition to Amended Petition, *supra* note 74, at 12.

are a prototypical example of a separation of powers violation.[252] Dismissing these facts, the court erred when it failed to interpret the initiative in a manner that conformed with the voters' intent.

California's appellate system is inundated with a large number of death-penalty cases,[253] and the *Briggs* ruling only adds to that effect. By upholding the time limit under a directive interpretation, the court left unworkable death penalty procedural reforms in its wake that encourage arbitrary and inconsistent rulings which are likely to result in further delays and a higher volume of capital appeals. First, Proposition 66 fails to address the real problems that cause delays in California's death-penalty system, obstructing any realistic opportunity for reform. Second, the *Briggs* court's ruling that the five-year time limit is merely directive threatens to incur more delays and more inconsistency due to the lack of guidance and the inevitable issues its application will raise.

The reality of California's death-penalty system demands judicial sensitivity and caution because the state's capital system has been exclusively established through voter initiatives that cannot be "vetoed by the Governor or amended or repealed by the Legislature"—consequently, placing a heavy yet distinct burden on the judiciary.[254] California courts must now assume the "increasingly important role [of] construing the reach of the California initiative process" and determine whether the capital-punishment system created by voter initiative infringes on fundamental constitutional policies and protections.[255] For the judiciary to effectively assume this role, it is imperative for courts to determine an initiative's validity by plainly interpreting and applying its language "so as to effectuate the electorate's intent."[256] Regrettably, the *Briggs* court failed to fulfill this duty because a directive interpretation of the five-year time limit does not effectuate the voters' intent. However, this Comment urges California courts to refrain from using the *Briggs* approach and instead to exercise the utmost caution when undergoing judicial interpretation and construction of a voter-initiated statute or provision. This is especially important when the initiative at issue involves changes to the capital-punishment process where what is at stake is literally a matter of life or death. When faced with a constitutional challenge to a voter-initiated judicial time limit for capital cases, a court must strike it down as an unconstitutional violation of the separation of powers doctrine

[252] *Briggs*, 3 Cal. 5th at 849, 852, 858 ("Deciding cases and managing dockets are quintessentially core judicial functions. . . . and may not be materially impaired by statute.").

[253] Shatz, *supra* note 117, at 122.

[254] Alarcón et al., *supra* note 8, at 160.

[255] *Id*. at 160-61.

[256] *Id*. at 161 (quoting Hi-Voltage Wire Works, Inc. v. City of San Jose, 24 Cal. 4th 537, 576 (2000) (George, J., dissenting)).

where it is clearly indicated that (1) the voters intended to place a mandatory time limit on the judiciary and (2) the statutory purpose of the time limit is not promoted by a saving construction or directive interpretation.

The *Briggs* court continuously reiterated that although this is its interpretation now, individuals may challenge these new laws based on their impact and application on a particularized, individualized level.[257] Thus, opportunities to remedy the problems with this initiative remain available to those who will inevitably and undoubtedly wish to seek redress. In the meantime, courts, capital defendants, and counsel will be forced to endure the consequences of Proposition 66.

[257] *Briggs*, 3 Cal. 5th at 827, 841, 845, 848, 859.