ARTICLES

Tax Treaties for Investment and Aid to Sub-Saharan Africa

A CASE STUDY

Allison D. Christians†

I. INTRODUCTION

The U.S. is committed to increasing trade and investment to less developed countries (LDCs),¹ particularly

† Assistant Professor of Law, University of Wisconsin. I thank Professors Reuven Avi-Yonah, Yariv Brauner, David Cameron, Charlotte Crane, Steven Dean, Kwame Gyan, Michael McIntyre, Robert Peroni, and Miranda Stewart, as well as Justice Margaret Insaidoo and Kweku Ackah-Boafo, Esq., for their many helpful comments and suggestions. This Article benefited from a presentation at the International Economic Law Forum at Brooklyn Law School. I am grateful for the generous financial support for this research, provided under a grant by The Educational Partnership Programs Bureau of Educational and Cultural Affairs, U.S. Department of State, Education for Development and Democracy Initiative, as well as financial and academic support from the University of Ghana, Faculty of Law and the Northwestern University School of Law.

¹ There is no uniform convention for the designation of a country as “less developed.” The term is generally used to reflect a country’s economic status or growth potential. In the context of taxation, these labels may be used to distinguish “in a general way between countries with highly developed, sophisticated tax systems and those whose tax systems are at an earlier stage of development.” VICTOR THURONYI, TAX LAW DESIGN AND DRAFTING, at xxvii n.1 (1996). In the United States, the Central Intelligence Agency (CIA) delineates three categories in a hierarchy, consisting of 34 “developed countries,” 27 “former USSR/Eastern Europe,” and 172 “less developed countries” (all other recognized countries, including all of Sub-Saharan Africa except South Africa). See CENTRAL INTELLIGENCE AGENCY, OFFICE OF PUBLIC AFFAIRS, THE WORLD FACTBOOK 2005 (GPO 2005) [hereinafter WORLD FACTBOOK] (defining LDCs in Appendix B) (An internet version of the WORLD FACTBOOK is available at http://www.cia.gov/cia/publications/factbook. The internet version varies in format and content from the print version and is updated frequently; this article references the data found in the print version except where otherwise noted.) As a rough guide to U.S. foreign policy, this article incorporates the CIA terms. For a discussion of the arbitrary and often unyielding nature of these designations despite changes in a
those in Sub-Saharan Africa, where poverty-related conditions are extreme and foreign trade and investment minimal. This commitment is demonstrated in U.S. efforts to negotiate agreements to eliminate trade barriers such as tariffs and quotas with many of these countries. U.S. officials also consistently proclaim a commitment to enter into tax treaties with LDCs, on the theory that tax treaties can eliminate particular country's economic status or prospects, see What's in a name?, ECONOMIST, Jan. 17, 2004, at 11.

2 Since the late 1980s, increasing trade with and investment in LDCs has become a preferred means of providing aid to such countries. See, e.g., PAUL B. THOMPSON, THE ETHICS OF AID AND TRADE 2 (1992); see also Bruce Zagaris, The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?, 35 GEO. WASH. INT’L L. REV. 331, 384 (2003) (stating that the “official policies” of the U.S. “are to mobilize private capital rather than foreign aid.”). For an overview of poverty conditions and foreign investment in African nations, see, for example, U.N. Conference on Trade and Development, Foreign Direct Investment in Africa: Performance and Potential 1-2, 21 U.N. Doc. UNCTAD/ITE/ITI/Misc. 15 (1999) (hereinafter UNCTAD) (stating that foreign investors typically associate Africa with “pictures of civil unrest, starvation, deadly diseases and economic disorder,” and foreign investment “inflows into Africa have increased only modestly” since the 1980s).

3 The main agreement is the African Growth and Opportunity Act (AGOA), a trade preference agreement, discussed infra note 18. The U.S. is also currently negotiating a free trade agreement with the South African Customs Union (comprised of South Africa, Botswana, Lesotho, Namibia, and Swaziland). See United States Trade Representative, Background Information on the U.S.-SACU FTA (2003), available at http://www.ustr.gov/Trade_Agreements/Bilateral/Southern_Africa_FTA/Background_Information_on_the_US-SACU_FTA.html.

excessive taxation and therefore help to increase trade and investment between the partner countries.\textsuperscript{5} As such, tax treaties appear to be a perfect complement to trade agreements in furthering U.S. efforts to increase trade and investment in LDCs. Yet there are currently no tax treaties in force between the U.S. and any of the LDCs in Sub-Saharan Africa.\textsuperscript{6}


This theory has been officially propounded since the first independent U.S.-LDC treaty was contemplated. See Letter from John F. Dulles to the President (July 9, 1956), in STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, LEGISLATIVE HISTORY OF UNITED STATES TAX CONVENTIONS 1445 (1962) (proclaiming that a treaty with Honduras would increase U.S. investment in that country because “by eliminating double taxation . . . [tax treaties] have contributed much to the trade and investment flowing between [partner] countries and the United States”). For a recent restatement of the theory, see The Japanese Tax Treaty (T. Doc. 108-14) and the Sri Lanka Tax Protocol (T. Doc. 108-9): Hearing Before the Comm. on Foreign Relations, 108th Cong. 11 (2004) (statement of Barbara M. Angus, International Tax Council, U.S. Dep't of Treasury) (in regards to a proposed treaty with Sri Lanka, “[t]he goal of the tax treaty is to increase the amount and efficiency of economic activity” between the partner countries).

The U.S. tax treaty network at one time included ten LDCs in Sub-Saharan Africa, pursuant to extensions of existing tax treaties with the U.K. and Belgium. Press Release, U.S. Treasury Dep't, Treasury Dep't Announces Termination of Extensions of Income Tax Conventions Between the U.S. and the U.K. and the U.S. and Belgium to 18 Countries and Territories (July 1, 1983). All of these treaties were subsequently terminated. Id. Today, the only Sub-Saharan African country with a U.S. tax treaty is South Africa. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital Gains, U.S.-S. Afr., Feb. 17, 1997, S. Treaty Doc. No. 105-9 (1997). The United States considers South Africa to be a developed country. See supra note 1. Ethiopia, Ghana, and Liberia each have a treaty with the U.S. that deals solely with the taxation of
The lack of tax treaties between the U.S. and the LDCs of Sub-Saharan Africa cannot be explained by disinterest or lack of support on the part of academics, practitioners, or lawmakers: representatives from all of these sectors have urged the importance of entering into these agreements.  

Neither can the omission be attributed to disinterest on the part of the LDCs in Sub-Saharan Africa themselves. Many of these nations have long pursued tax treaties with the U.S., and a few have gone so far as to formally and publicly express their interest in commencing negotiations with the U.S.  


All of the LDCs in Sub-Saharan Africa are in urgent if not desperate need for foreign capital, and most are responding to the need by implementing measures to make their countries more attractive to foreign investors. See, e.g., James Gathii, A Critical Appraisal of the NEPAD Agenda in Light of Africa’s Place in the World Trade Regime in an Era of Market Centered Development, 13 TRANSNAT’L L. & CONTEMP. PHOBIS. 179 (2003). Given the powers ascribed to tax treaties in increasing trade and investment between partner countries, most LDCs would pursue the opportunity to commence negotiations with the U.S. (provided that the concessions required to secure such agreements are not too great).  

For example, Nigeria began pursuing a tax treaty with the United States in 1978, after Nigeria unilaterally withdrew from its coverage under an extension of the 1945 tax treaty between the U.K. and the U.S. (as a former U.K. territory). Nigeria to Terminate Tax Treaty with U.S., Seek Renegotiated One, WALL ST. J., Aug. 24, 1978, at 23; see supra note 6 (discussing the treaty extension); I.R.S. Announcement 78-147, 1978-41 I.R.B. 20 (Oct. 10, 1978) (terminating the treaty). Although the tax treaty was apparently negotiated at length, it was never completed.  

Calvin J. Allen, Botswana, Burundi Wish to Negotiate Tax Treaties with United States, 26 TAX NOTES INT’L 1264 (2002). This announcement is a rather unusual event, since tax treaties are generally commenced and negotiated in secret.
Finally, the lack of tax treaties cannot be charged to a lack of commitment on the part of the U.S. to conclude agreements that will increase trade and investment to assist in the economic growth of the countries of Sub-Saharan Africa.\textsuperscript{11} The U.S. has demonstrated its commitment by making significant concessions in the context of trade and aid agreements, in the form of direct aid as well as reduced tariffs.\textsuperscript{12}

That the lack of tax treaties cannot be explained by a lack of support or commitment on the part of scholars, policymakers, or governments suggests that there must be some other reason or reasons that tax treaties have not been concluded between the U.S. and the LDCs of Sub-Saharan Africa. This article explores many of these reasons by presenting as a case study a hypothetical tax treaty between the U.S. and Ghana, one of the LDCs of Sub-Saharan Africa.\textsuperscript{13} Hypothesizing the structure and operation of a tax treaty between these two countries provides a vehicle for measuring the potential effect of such a treaty on international commerce. While there has been some discussion among scholars and policymakers regarding the paucity and inefficacy of tax treaties between the U.S. and LDCs, much of the discussion has focused on abstract principles of international tax law. By examining the effects a U.S. treaty with Ghana might have on

Their existence is usually made public after negotiations have concluded and the treaty has been signed by the respective countries, pending ratification. \textsc{Richard E. Andersen & Peter H. Blessing, Analysis of United States Income Tax Treaties § 1.04[1][a][i], [ii] (2005). Thus, countries don't usually issue public proclamations regarding their desire to enter into tax treaties. Similarly, since there is little public disclosure regarding progress in treaty-making by the U.S. Treasury Department, there is little means to determine the reaction, if any, that the Treasury has had to these or other requests to initiate negotiations.\textsuperscript{11} See \textsc{Richard Mitchell, United States-Brazil Bilateral Income Tax Treaty Negotiations, 21 Hastings Int'l & Comp. L. Rev. 209, 225 (1997) (“[t]he United States displays eagerness to enter into tax treaties with developing nations”); \textsc{Miranda Stewart, Global Trajectories of Tax Reform: The Discourse of Tax Reform in Developing and Transition Countries, 44 Harv. Int'l L.J. 139, 148-49 (2003) (pointing to the number of U.S. treaties with other emerging economies as evidence that “the lack of U.S. treaty-making with [LDCs in Sub-Saharan Africa] cannot be explained solely by a general reluctance to enter into tax treaties with less developed or non-capitalist countries.”).}

\textsuperscript{12} The main agreements are the African Growth and Opportunity Act (AGOA), a preferential trade regime, discussed \textit{infra} note 18, and the recently introduced Millennium Challenge Act, an aid package tied to countries' demonstrated commitment to growth through investment and trade, discussed \textit{infra} note 19.

\textsuperscript{13} Ghana was chosen as a subject for this case study for several reasons, including its existing commercial ties to the U.S. These reasons are described \textit{infra} Part III.A.
investors, this article analyzes these legal principles in the context of current global tax conditions for investment in LDCs. This case study demonstrates that in today’s global tax climate, a typical tax treaty would not provide significant tax benefits to current or potential investors. Consequently, there is little incentive for these investors to pressure the U.S. government to conclude tax treaties with many LDCs.

There are of course any number of other reasons why tax treaties may not be concluded between the U.S. and the LDCs of Sub-Saharan Africa, including competing priorities for the U.S. government, either for tax treaties with other countries or for other domestic or international tax matters. Undoubtedly, socio-political factors play an important role as well.14 However, this article argues that since tax treaties with LDCs like Ghana would not provide major tax benefits to the private sector, even if concluded, these treaties would not have a significant impact on cross-border investment and trade. Accordingly, the main justification so consistently proclaimed to support the pursuit of tax treaties between the U.S. and LDCs is misguided. If the U.S. is truly committed to increasing investment and trade to the LDCs of Sub-Saharan Africa, an examination of how the global tax climate has changed since tax treaties were first implemented is in order. We must acknowledge that tax treaties cannot deliver the promised benefits, and examine the factors that prevent them from so doing.

An overview of the background and function of tax treaties and their proclaimed benefits is discussed in Part II of this article. Part III presents the case study of a hypothetical tax treaty between the U.S. and Ghana and shows that such a treaty would produce few tax benefits to current or potential investors and would therefore be largely ineffective in stimulating trade and investment between these two countries. Part IV concludes that after decades of adherence to the promise of tax treaties, we must acknowledge their failure to

---

14 For example, there may be national interests at stake, such as security, defense, or energy supply issues, that may contribute to the prioritization of concluding tax treaties with LDCs in other areas of the world, such as Sri Lanka (concluded in 2004) and Bangladesh (currently pending ratification). See John Venuti et al., Current Status of U.S. Tax Treaties and International Agreements, 34 TAX MGMT INT’L J. 653 (2005) (updating on a monthly basis the status of current U.S. tax treaties and international agreements). The various foreign policy goals that motivate the agenda for treaty-making is a subject that deserves much attention, but is beyond the scope of this article.
deliver, and search for alternative ways to achieve the goal of promoting aid through the vehicles of investment and trade.

II. BACKGROUND: TAX TREATIES, INVESTMENT, AND TRADE

This Part provides the context for a discussion of the role of tax treaties in delivering investment and aid to LDCs. Section A describes some of the strategies employed by the U.S. to assist LDCs, and how tax treaties comport with these strategies. Section B explains the role tax treaties play as the locus of international tax law by outlining the purposes and goals surrounding the origin and evolution of these agreements. Section C discusses the limitations that arise because international tax law concepts are embodied in a network of overlapping, varying, and mostly bilateral agreements between select nations. This section introduces some of the problems faced by the LDCs of Sub-Saharan Africa, which operate largely outside of this network.

A. U.S. Strategy for Assistance to LDCs

The U.S. has adopted a foreign aid strategy towards Sub-Saharan Africa that centers on the idea that creating investment and trade opportunities for LDCs will most effectively boost economic growth in these countries, thereby lifting them out of poverty through commercial interaction with the global community. A key component of this foreign aid strategy is the identification and elimination of barriers to trade and investment. Among the most significant potential barriers are double taxation, which occurs when two countries impose similar taxes on the same taxpayer in respect to the same item of income, regulatory barriers, such as currency exchange and other market controls, and tariffs. These barriers have historically been addressed in very different ways.

Regulatory barriers and tariffs have been addressed by most countries in a generally uniform manner through regional and global trade agreements. The main multilateral agreement is the General Agreement on Tariffs and Trade (GATT), to which 147 countries are signatories through the

---

15 See supra note 2.
16 Regulatory barriers are also addressed, to a lesser extent, in bilateral investment treaties (BITs), as discussed infra Part IV.E.
World Trade Organization (WTO). Additional tariff and regulatory barrier reduction between the U.S. and Sub-Saharan Africa has been accomplished through the African Growth and Opportunity Act (AGOA), an agreement that seeks to increase growth and alleviate poverty through the elimination of tariffs and quotas for selected imports from designated Sub-Saharan African nations. Another barrier reduction device is the Millennium Challenge Act of 2003 (MCA), a new official direct assistance initiative that will direct foreign aid only to countries demonstrating a commitment to poverty reduction through economic growth.

According to the Organization for Economic Cooperation and Development (OECD), the harmful effects of double
taxation on cross-border trade and investment “are so well known that it is scarcely necessary to stress the importance of removing the obstacles that double taxation presents to the development of economic relations between countries.” 21 The U.S. government mirrors this sentiment, identifying the eradication of “tax barriers” as a major component of its dedication “to eliminating unnecessary barriers to cross-border trade and investment.” 22

Yet, unlike other barriers to trade and investment, double taxation has not been reconciled on a global scale. Instead of a world tax organization to coordinate efforts and resolve disputes, 23 relieving double taxation remains the
diverge from the views of the United States in some of these classifications. For instance, the IMF classification of “developing countries,” while similar in most respects to the United States’ classification of LDCs, diverges by including in its list both Mexico and Turkey. Id. at 628. Mexico is not independently listed as a developed country under the United States’ classification system, and the Czech Republic, Hungary, and Slovakia are separately categorized as “former USSR/Eastern European” countries, but the term developed countries is defined as including all of the OECD member countries. See OECD, Ratification of the Convention on the OECD and OECD Member Countries, http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html; WORLD FACTBOOK, supra note 1, at 628, 639, 641 (Appendix B provides a listing of LDCs that includes the “Four Dragons,” a group that includes South Korea. Country data on South Korea provides GDP and poverty statistics, available at http://www.cia.gov/cia/publications/factbook/geos/ks.html). The CIA still considers South Korea an LDC despite its 2004 estimated per capita GDP of $19,200, well over the typical $10,000 threshold separating developed from less-developed, and despite the fact that just 4% of the population is considered to be living in poverty conditions. WORLD FACTBOOK, supra note 1, at 304, 628, 639. In contrast, the inclusion of Mexico as a developed country is anomalous, given its per capita GDP of $9,600. Id. at 365, 628. As discussed below, the OECD developed and continually updates a model income tax convention that both encapsulates and sets international tax standards.

21 OECD COMM. ON FISCAL AFFAIRS, MODEL TAX CONVENTION ON INCOME AND ON CAPITAL 7 (2005) [hereinafter OECD MODEL].


23 See What is the WTO?, http://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm (last visited Oct. 9, 2005) (noting that the WTO is “the only international organization dealing with the rules of trade between nations”). The several international organizations concerned with standardizing and coordinating global taxation do not approach the level of member country participation in the WTO. For
Nevertheless, a consensus has emerged regarding the appropriate tax treatment of cross-border investment activity. Under this consensus, double taxation is addressed primarily by tax treaties, which allocate tax revenue among jurisdictions based on concepts of residence and source.

Thus, the U.S., along with the rest of the developed world, has a network of tax treaties, spanning most of its major trading partners across the globe. Expanding the tax treaty network has been termed by the Treasury Department as a commitment, an ongoing effort, and the “primary means” for the elimination of tax barriers to international trade and

example, the OECD is one of the primary international organizations that concerns itself with setting standards for international taxation, but it has only 30 members, few new members are added (the latest addition was the Slovak Republic, in 2000), and many countries with rapidly growing economies, such as Brazil, Russia, India, and China, are not members. OECD, Ratification of the Convention on the OECD and OECD Member Countries, http://www.oecd.org/document/58/0,2340,en_2649_201185_1889402_1_1_1_1,00.html (last visited Jan. 12, 2006).

The vast majority of international agreements that address the problem of double taxation are bilateral. See, e.g., Reuven Avi-Yonah, International Tax as International Law, 57 TAX L. REV. 483, 497 (2004) (noting that there are over 2,000 bilateral tax treaties). However, there are a few regional multilateral tax treaties currently in force, including the Andean Pact Income Tax Convention between Bolivia, Colombia, Ecuador, Peru, and Venezuela (Nov. 16, 1971); the Arab Economic Unity Council Tax Treaty between Egypt, Iraq, Jordan, Kuwait, Sudan, Syria, and Yemen (Y.A.R.) (Dec. 3, 1973); the Agreement Among the Governments of the Member States of the Caribbean Community for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, Profits, or Gains and Capital Gains and for the Encouragement of Regional Trade and Investment between the Caribbean Community (CARICOM) countries of Antigua, Belize, Dominica, Grenada, Guyana, Jamaica, Montserrat, St. Christopher and Nevis, St. Lucia, St. Vincent and the Grenadines, and Trinidad and Tobago (July 6, 1994); the Tax Convention Between the Member States of the West African Economic Community (C.E.A.O.) between Burkina Faso, Côte D’Ivoire, Mali, Mauritania, Niger, and Senegal (Oct. 29, 1984); the Agreement on the Avoidance of Double Taxation on Personal Income and Property, signed by Bulgaria, Czechoslovakia, Germany (G.D.R.), Hungary, Mongolia, Poland, Romania, and the Soviet Union (still in force with respect to various successor states) (May 27, 1977); and the Convention Between the Nordic Countries for the Avoidance of Double Taxation With Respect to Taxes on Income and on Capital, between Denmark, the Faeroe Islands, Finland, Iceland, Norway, and Sweden (Sept. 23, 1996) (generally based on the OECD Model).

Officials from other countries echo these sentiments. From the perspective of LDCs, a major problem with embodying international tax laws aimed at preventing double taxation in tax treaties is that LDCs typically have few of these treaties in place. But the tax treaty network, with its central role in the evolution of international tax law, directly affects these countries regardless of their level of inclusion. To demonstrate the extent of this influence, the following Section discusses why and how tax treaties became the source of international tax law, and explores how this international tax system has impacted tax treaties between the U.S. and the LDCs of Sub-Saharan Africa.

B. Origins of Tax Treaties as International Law

Every country establishes its jurisdiction to impose income taxation under sovereign claim of right. In the U.S., the taxation of income from international transactions turns on whether the income is earned by a resident or a nonresident. In the case of residents, the U.S. purports to tax “all income from whatever source derived.” In the case of nonresidents, the U.S. taxing jurisdiction is generally limited to income derived from investments and business activities carried out in

29 Treasury Press Release JS-1809, supra note 4; Treasury Press Release JS-1786, supra note 22; see also Letter from Gregory F. Jenner thanking Sen. Susan M. Collins for her Comments on a Possible Chile-U.S. Tax Treaty, U.S. Treasury Thanks Senator for Comments on Possible Chile-U.S. Tax Treaty (Apr. 22, 2004), 2004 WTD 83-16 (“Income tax treaties can serve the important purpose of addressing tax-related barriers to cross-border trade and investment.”).

30 For example, Bangladeshi officials assert that when the new treaty between the U.S. and Bangladesh enters into force, it “will encourage U.S. investment in the education, highway, and communication sectors in Bangladesh.” U.S. Treaty Update, PuC In & Out, 15 J. INT’L TAX’N 4-5 (Dec. 2004).

31 Whether individual or entity. See I.R.C. § 7701(a), (b) (2005).

32 Id.

33 I.R.C. § 61(a) (2005) (“gross income means all income from whatever source derived”); see also I.R.C. §§ 1, 11(a) (2005) (imposing tax on incomes of individuals and corporations, respectively); Treas. Reg. §§ 1.1-1(b), 1.11-1(a). The authority to extend its jurisdiction in this broad fashion is confirmed by Cook v. Tait. 265 U.S. 47, 56 (1924):

The basis of the power to tax was not and cannot be made dependent upon the situs of the property in all cases, it being in or out of the United States, nor was not and cannot be made dependent upon the domicile of the citizen, that being in or out of the United States, but upon his relation as citizen to the United States and the relation of the latter to him as citizen.

Id.
the U.S. (known as source-based taxation). 34 Most developed countries similarly impose worldwide, or residence-based, income taxation on residents, and source-based taxation on income earned within their borders. 35 As a result, ample potential exists for double taxation of international transactions involving two developed countries. 36 Therefore, the U.S. and most of the other countries that impose worldwide taxation provide a foreign tax credit, 37 which essentially removes the residence-based layer of tax while preserving the source-based layer. Thus, the U.S. and most other countries imposing worldwide income taxation generally relieve double taxation on a unilateral basis under statutory law.

The same result is attained under treaties. Tax treaties are contracts, generally between two countries, 38 under which the signatory countries agree to the taxation each will impose on the activities carried out between their respective jurisdictions. 39 Because the U.S. unilaterally provides a

35 OECD countries generally impose some form of worldwide taxation, although a few (Australia, Austria, and Switzerland) provide certain statutory exemptions, and many provide for exemption under treaty, as discussed below. See Ernst & Young, WORLDWIDE CORPORATE TAX GUIDE 29-53, 894-910 (2005), available at http://www.ey.com/global/download.nsf/Ireland/WorldWideCorporateTaxGuide/$file/WW_Corporate_Tax_guide_2005_.pdf (describing the tax systems of, and treaty benefits provided by Australia, Austria, and Switzerland, respectively). Some countries such as France are generally source-based, or territorial systems, which generally refrain from taxing the foreign income earned by their residents. See id. at 240-52. However, these countries enforce worldwide taxation of certain kinds of income earned in low-tax jurisdictions in order to prevent capital flight. Id. Thus, France imposes worldwide taxation on certain low-taxed foreign income. See generally id. (providing tax system features and rates).
36 The most common form of double taxation occurs when there is a residence-source overlap, as a taxpayer's country of residence (the home country) imposes residence-based tax on income earned in a foreign (source, or host) country, while the host country imposes source-based tax on the same item. Overlaps can also occur when countries have overlapping or conflicting rules for determining the source of an item of income or the residence of a taxpayer. For example, while the United States assigns corporate residence according to country of incorporation, the U.K. assigns corporate residence according to the seat of management and control. See I.R.C. § 7701(a)(4), (5) (2005) (assigning corporate residence to country of incorporation).
37 See generally Ernst & Young, supra note 35.
38 But see supra note 24 (noting that some treaties are multilateral).
39 In the U.S., treaties have the same effect as acts of Congress, and are equivalent to any other U.S. law. U.S. CONST. art. VI, cl. 2; see Samann v. Comm'r, 313 F.2d 461, 463 (4th Cir. 1963); American Trust Co. v. Smyth, 247 F.2d 149, 152 (9th Cir. 1957). As such, they are subject to and may be overridden by subsequent revisions in domestic law (“treaty override”) under the “last in time” rule of I.R.C. § 7852(d) (2005). See Cherokee Tobacco, 78 U.S. (11 Wall.) 616, 621 (1871) (“a treaty may supersede a prior act of Congress, and an act of Congress may supersede a prior treaty.”); Edye v. Robertson, 112 U.S. 580, 597-600 (1884) (“A treaty, then, is a law of the land as an act
mechanism to prevent U.S. taxation in the event foreign taxation applies, treaties aimed at relieving double taxation would appear to be duplicative.\footnote{See generally Elisabeth Owens, United States Income Tax Treaties: Their Role in Relieving Double Taxation, 17 RUTGERS L. REV. 428 (1963) (arguing that treaties play a relatively small role in relieving double taxation, owing to the U.S. foreign tax credit); see also Tsilly Dagan, The Tax Treaties Myth, 32 N.Y.U. J. INT’L L. & POL. 939 (2000) (showing that tax treaties are not needed to relieve double taxation, since each country would find it in its own best interest to unilaterally relieve double taxation on its citizens and residents).} Treaties might seem unnecessary \textit{ab initio}, since the U.S. provided the foreign tax credit mechanism almost immediately following the inception of the income tax itself, decades before any tax treaties were ever negotiated.\footnote{After a brief and limited stint during the Civil War, the income tax was reintroduced in 1913. See STEVEN R. WEISMAN, THE GREAT TAX WARS 5, 278 (2002). The foreign tax credit was enacted quickly thereafter, in 1918. See Revenue Act of 1918, ch. 18, §§ 222(a)(1), 238(a), 240(c), Pub. L. No. 65-254, 40 Stat. 1057, 1073, 1080-82 (1919). Section 222(a)(1) was applicable to individuals, 238(a) to corporations, and 240(c) defined the taxes for which credit would be allowed.} Nevertheless, the U.S. began entering into tax treaties in 1932 and the practice continues to the present.\footnote{The first U.S. tax treaty was signed with France in 1932 and entered into force on April 9, 1935. Convention on Double Taxation, U.S.-Fr., Apr. 9, 1935 S. Exec. Doc. K, 72-1 (1935). Since then, the U.S. tax treaty network has grown by an average of one treaty per year, based on the entry-in-force dates of all U.S. tax treaties ever entered into force. The most recent treaty to enter into force is with Sri Lanka. See U.S.-Sri Lanka Treaty, supra note 4 (entered into force June 13, 2004). The most recently signed is with Bangladesh, which was signed on September 26, 2004, but as of the time of publication has not yet entered into force. See Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes On Income, U.S.-Bangl., Sept. 26, 2004, S. TREATY DOC. NO. 109-5; see also Muhammad Kibria, Bangladesh, United States Sign Tax Treaty, 2004 WTD 188-3 (Sept. 28, 2004).} One of the original reasons to enter into treaties was that before they existed, there was no international standard for relieving double taxation: the U.S. was alone in providing a comprehensive foreign tax credit that unilaterally relieved

of Congress is . . . [so a] court resorts to the treaty for a rule of decision for the case before it as it would to a statute."); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (“a treaty is placed on the same footing, and made of like obligation . . . . If the two are inconsistent, the last one in date will control the other”); see also Philip F. Postlewaite & David S. Makarski, The ALI Tax Treaty Study—A Critique and a Modest Proposal, 52 TAX LAW. 731, 740 (1999) (arguing that treaty override is seen as a “serious problem” because it potentially places the U.S. in violation of existing international obligations); Richard L. Doernberg, Overriding Tax Treaties: The U.S. Perspective, 9 EMORY INT’L L. REV. 71, 131 (1995) (discussing treaty override in the U.S. and concluding that “these provisions embody an important contractual principle”: that breach of an obligation is desirable when “what is gained from the party that breaches exceeds what is lost by the party against whom the breach occurred,” thus a breach might be appropriate as long as the United States compensates the aggrieved party).
residence-based taxation. The provision of unilateral relief of double taxation was seen as a “present of revenue to other countries," for which the possibility of source-based taxation was preserved. Other European nations, especially Italy and France, relied heavily on source-based taxation and therefore vigorously defended the U.S. position of ceding residence-based taxation to that of source. In stark contrast, Britain imposed worldwide taxation and provided a foreign tax credit that was extremely limited and generally preserved its residence-based taxation.

The conflicting views of the U.S. and the U.K. regarding the proper method for relieving double taxation prompted several years of debate out of which a consensus emerged in the early 1920s. Under this consensus, “personal taxation” was to be preserved for residence-based taxation, and “impersonal taxation” was to be preserved for source. How these terms would be defined and implemented in the context of the then vastly differing tax systems depended on long and

44 Edw. R. A. Seligman, Double Taxation and International Fiscal Cooperation, 132, 135 (1926). Source-based taxation was even enhanced to the extent the foreign country’s tax rates were lower than that of the U.S. In such cases, foreign countries could raise their tax rates to the U.S. level with the assurance that these taxes would be creditable in the U.S., leaving the investor indifferent as to the higher foreign rate. See Richard E. Caves, Multinational Enterprise and Economic Analysis 190 (1996) (“Neutrality depends on who pays what tax, not which government collects it.”).
45 Graetz & O’Hear, supra note 43, at 1072.
46 Britain’s view was supported by the Netherlands. See Ernst & Young, supra note 35, at 631-32. Both countries were primarily capital-exporting nations, and thus the importance of preserving residence-based taxation was high. The U.S. was also a capital-exporting nation at the time, but arguably regarded source-based taxation as having the superior claim. Graetz & O’Hear, supra note 43, at 1046.
47 Discussions began in the newly formed International Chamber of Commerce (ICC) in 1920. In 1921 the ICC adopted a resolution that taxing jurisdiction turned on the nature of the tax, with distinctions being made between “super” and “normal” taxes. However, the U.S. rejected this resolution and endorsed closer adherence to the U.S. system, with exceptions made for particular kinds of income, including that from international shipping (as to which residence-based taxation was to be preserved) and that from sales of manufactured goods (to be apportioned under formula). The ICC synthesized the views of the U.S. and fourteen other countries and produced a new resolution in Rome, in 1923. The League of Nations began to take over the discussions in 1923, using the Rome resolutions as a basis for discussion. The compromise of the ICC as to “super” and “normal” taxes resurfaced in League of Nations discussions. See id., at 1067-70; Mitchell B. Carroll, International Tax Law: Benefits for American Investors and Enterprises Abroad, 2 Int’l L. 692, 696 (1968).
48 Graetz & O’Hear, supra note 43, at 1080.
contentious negotiations, held under the auspices of the League of Nations, in which the U.S. played a large part.49

Ultimately, the League of Nations promulgated a model tax treaty under which countries would reciprocally restrict source-based taxation of passive income items, such as dividends and interest, in favor of preserving residence jurisdiction over these items,50 and reciprocally relieve residence-based taxation on foreign-source business income, as had been done unilaterally by the U.S. through the foreign tax credit.51 By subsequently entering into tax treaties following the League of Nations model, the U.S. retreated from its position of unilaterally providing foreign tax credits. The tax concessions thereby obtained from treaty partners reduced the revenue cost of the foreign tax credit, which had been the main goal of U.S. involvement in first negotiating these instruments.52

The concepts embodied in the League of Nations model treaty evolved into a model treaty developed by the OECD in 1963, which has been updated periodically since then (the OECD Model).53 The OECD Model has become the standard upon which most of the over 2,000 tax treaties currently in force are based.54 Following the League of Nations and OECD standards, tax treaties minimize source-based taxation of income derived from passive investment activity, such as

49 See Carroll, supra note 47, at 693, 698 (stating that in the early 1920s the U.S. had been invited by the League of Nations to participate in forming tax treaty policy, but the Department of State had not responded because of the Senate’s rejection of membership in the League (by virtue of its failure to consent to ratification of the Treaty of Versailles). Nevertheless, interest in tax treaties grew in the U.S. and the League planned subsequent Committee meetings to “facilitate attendance by Americans.”).

50 Graetz & O’Hear, supra note 43, at 1086-87 (citing Britain’s strong role in producing this result); Avi-Yonah (1996), supra note 25, at 1306.


52 See Carroll, supra note 47, at 693-94 (interest in pursuing tax treaties grew because these instruments “would reduce the amount of foreign taxes that could be credited against the United States tax . . . and possibly leave something for the Treasury to collect.”).

53 The OECD Model was itself based on a series of model treaties promulgated by the League of Nations. It has since been updated several times to cope with the changing nature of business, culminating with the most recent update on February 1, 2005. Unless otherwise noted, references in this article to the OECD Model refer to the 2005 version, which is available at http://www.oecd.org. See OECD MODEL, supra note 21.

dividends, interest and royalties, while preserving residence-based taxation of these items. Once activities increase to a sufficiently significant level of engagement, however, source-based jurisdiction again takes precedence.55

As a member of the OECD, the U.S. participated in the development of the OECD model, but also developed its own model to reflect specific policies (the U.S. Model).56 First published in 1977 and most recently updated in 1996, the U.S. Model is based on the OECD Model in most respects.57 One notable difference between the models, however, is that the OECD Model allows for the alleviation of double taxation either via a foreign tax credit or by providing that the residence country will exempt the income earned in the source country (known as the exemption method).58 The U.S. Model, in keeping with its historical preference to impose worldwide taxation and alleviate double taxation via the foreign tax credit mechanism, allows only the credit method.59 All modern U.S. tax treaties are based on the U.S. Model, with modifications made to reflect changes in law or policy since the release of the latest model.60 The consensus forged through the original

55 The required level of engagement is defined as a “permanent establishment” as discussed infra Part II.C.2.
57 The Joint Committee on Taxation compares provisions of both the U.S. and OECD models when analyzing and describing new tax treaties entered into by the U.S. See, e.g., George Yin, Chief of Staff, Joint Comm. on Taxation, Testimony of the Staff of the Joint Committee on Taxation before the Senate Comm. on Foreign Relations Hearing on the Proposed Tax Treaties with Japan and Sri Lanka (Feb. 25, 2004) (explaining the use of the U.S. and OECD models in treaty negotiations and describing ways in which the new Japan-U.S. Treaty deviates from each model), available at http://www.house.gov/jct/jct/x-13-04.pdf.
58 OECD Model, supra note 21, arts. 23A (exemption method), 23B (credit method). For example, among OECD countries, Belgium, Denmark, Finland, Germany, and Poland have treaties in which they completely relinquish their residual taxation of income derived by a permanent establishment. See generally Ernst & Young, supra note 35. For a recent example, see the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and on Capital, Belg.-Ecuador, Dec. 18, 1996, 2248 U.N.T.S. 676 (entered into force Mar. 18, 2004).
59 See U.S. MODEL, supra note 56, art. 23.
60 A revised U.S. Model is apparently forthcoming from the Treasury Department. It was originally scheduled for release in December 2004. See Kevin A. Bell, New Model Treaty Won’t Provide for Zero Dividend Withholding, 2005 TNT 70-7 (Apr. 13, 2005); Lee A. Sheppard, Angus Talks Treaty Policy, 2004 TNT 232-3 (Dec. 2, 2004) (stating that Treasury will issue an updated model treaty to reflect clauses in recently negotiated treaties).
model treaties has remained constant: in general, residence-based, or worldwide taxation is accorded primary status in the case of dueling tax jurisdictions, with treaties serving to set the limited boundaries within which source-based taxation will continue to take precedence.

Residence-based, or worldwide income taxation is typically justified on the grounds that it promotes capital export neutrality, an efficiency principle dictating that taxpayers will not differentiate on tax grounds between locating activities domestically or abroad on tax grounds, since in either case the income generally will be subject to tax at the same rate. Thus, if taxation is imposed by a source country, the U.S. as home country generally provides the foreign tax credit against the U.S. tax imposed on the same item of income, leaving the U.S. investor in the same tax position as if the investment had been subject only to domestic tax.

However, most countries, including the U.S., do not completely adhere to principles of capital export neutrality, regardless of the existence of tax treaties. Because the U.S. generally does not tax the foreign income of foreign companies, it is a relatively simple matter to avoid U.S. tax on much foreign income by placing the income stream in a foreign

---

61 See generally Peggy Musgrave, United States Taxation of Foreign Investment Income: Issues and Arguments (1969). The concept of capital export neutrality and its converse, capital import neutrality, were first developed by Peggy Musgrave in 1969 and they have been vigorously analyzed and debated ever since. For an overview of these norms, and an argument that capital export neutrality is generally the best principle for international taxation of both portfolio and direct investment, see Avi-Yonah, infra note 164, at 1604. See also Staff of Joint Comm. on Taxation, 108th Cong., Background Materials on Business Tax Issues Prepared for the House Committee on Ways and Means Tax Policy Discussion Series 53-54 (JCX-23-02) (Comm. Print 2002) (arguing that a worldwide tax system promotes economic efficiency, because investment location decisions will be governed by business considerations rather than tax considerations, and equity, because domestic and multinational activities are treated alike, and suggesting that worldwide taxation in some form is requisite to preserve the tax base from erosion by flight of activities to tax havens); Caves, supra note 44, at 190 (stating that all relevant taxes taken together are neutral if domestic and overseas investments that earn the same pre-tax return also yield the same after-tax return).

62 If tax credits perfectly offset foreign taxes paid, the taxpayer is indifferent to the allocation of the tax. See Caves, supra note 44, at 190. Most foreign tax credit systems are not perfectly offsetting but impose limitations as to creditability of taxes based on type or source of income and amount paid relative to domestic tax otherwise imposed. In the U.S., foreign taxes are currently segregated among several baskets according to the type of income that gave rise to the tax for purposes of applying a limit on the allowable tax credit. I.R.C. §§ 901-904 (2005). As a result, pooling of income from low-tax countries may be advantageous to taxpayers who have paid foreign taxes in excess of the allowable tax credit. See, e.g., David R. Tillinghast, Tax Treaty Issues, 50 U. Miami L. Rev. 455, 477 (1996).
In so doing, U.S. persons may defer U.S. taxation until the foreign earnings are repatriated in the form of dividends or capital gains.64 Deferral of this kind is the equivalent of a statutorily optional exemption of foreign income from U.S. taxation, as U.S. tax can be suspended indefinitely, according to the needs and desires of the shareholders.65 Thus, deferral allows taxpayers to convert U.S. residence-based taxation to source-based taxation when it suits their purposes.66 To protect revenues, the U.S. has responded with a series of anti-deferral rules to prevent the easy escape of capital to foreign jurisdictions.67 To date, these anti-deferral measures have

---

63 See, e.g., Julie A. Roin, United They Stand, Divided They Fall: Public Choice Theory and the Tax Code, 74 CORNELL L. REV. 62, 113 (1988) (discussing the ease of avoiding U.S. tax through foreign entities); Avi-Yonah, supra note 25, at 1324-25 (arguing that as a result of the distinction between foreign and domestic companies in I.R.C. §§ 7701(a)(4) and (5) (2005) and the ensuing difference in taxation under I.R.C. §§ 11(d), 881, and 882 (2005), “taxpayers can easily choose between classification as foreign or domestic according to the formal jurisdiction of their incorporation”).

64 Deferral is limited to some extent, as discussed infra Part III.B. However, a U.S. person that earns active foreign income through a foreign corporation is generally not subject to U.S. tax until profits are repatriated as a dividend or the stock is sold, under the rules of Subpart F, I.R.C. §§ 951-964.


66 See Peroni, supra note 65, at 987.

67 See, e.g., S. REP. No. 99-313, at 363 (1986) (“[I]t is generally appropriate to impose current U.S. tax on easily movable income earned through a controlled foreign corporations since there is likely to be limited economic reason for the U.S. person’s use of the foreign corporation . . . .”). In practice, current taxation applies to a significantly lesser extent than is contemplated under the subpart F rules, as these rules are apparently “not fully effective in meeting their objectives.” Harry Grubert, Tax
largely been restricted to passive income items so that deferral is still available for active income (residual taxation of which the U.S. might forego, under the foreign tax credit, if foreign taxes are in fact imposed).

Despite the significance of deferral in curtailing the imposition of worldwide income taxation, the concept of residence-based taxation is the default system of most developed countries. The protection of residence-based taxation, by scaling back the need for foreign tax credits, was (and is) given as a reason—perhaps the primary reason—for entering into tax treaties. The OECD Model, as the baseline for the majority of the world’s tax treaties, thus represents an international consensus that the appropriate jurisdiction to tax income arising from cross-border activity is primarily the residence jurisdiction.68 This consensus, however, has not eliminated the limitations inherent in using tax treaties as the primary mechanism for the international coordination of tax matters.

C. Limitations on the Use of Treaties as International Tax Law

Treaties are the traditional mechanism used for relieving double taxation on cross-border activity. However, they have several significant limitations which render them an inefficient and unsatisfactory means of achieving their goals. This Section discusses some of these limitations, including the incomplete coverage and restricted scope of tax treaties, their lack of uniformity, and their reliance on the assumption of reciprocal capital flows, and therefore reciprocal tax regimes, among contracting states.

Planning by Companies and Tax Competition by Governments: Is There Evidence of Changes in Behavior?, in INTERNATIONAL TAXATION & MULTINATIONAL ACTIVITY 113, 137 (James R. Hines, Jr., ed. 2001) (less than 50% of after-tax income of subsidiaries located in three Caribbean tax havens was subject to current tax under subpart F); see also Robert J. Peroni et al., Getting Serious About Curtailing Deferral of U.S. Tax on Foreign Source Income, 52 SMU L. Rev. 455, 464 (1999) (“Anti-deferral provisions can be readily circumvented . . . .”). For a discussion of the deferral privilege and its inconsistency with U.S. international tax principles including the norm of capital export neutrality, see Peroni, supra note 65.

1. Limited Coverage, Scope, and Uniformity

Not all countries have tax treaties, and no country has tax treaties with all the other countries of the world. The average individual tax treaty network comprises just 17 treaty partners, and over half of all countries have tax treaty networks of five or fewer treaty partners. In addition, the benefits of treaties are typically limited to activities conducted between the two signatory countries. As a result, there would have to be over 32,000 bilateral tax treaties to cover every possible cross-border transaction. The U.S. would have to enter into new treaties with over 160 countries to ensure that its coverage spanned the globe. At its current average rate of expansion of one new treaty per year since its first treaty was concluded with France in 1935, the prospect of completing a universal U.S. tax treaty network in a timely fashion appears slight.

In addition, the OECD Model is aimed at only income taxation, to the exclusion of other kinds of taxes. Thus the

---

69 About 30% of countries have no tax treaties in force. For the 35 countries considered by the U.S. to be developed, the average network is about 49 treaties; for OECD countries, the average is 60. For less developed countries, the average is 8. Compiled in February 2005 from Ernst & Young, WORLDWIDE CORPORATE TAX GUIDE (2004) and the LexisNexis Tax Analysts Worldwide Tax Treaties database, supra note 55.

70 This is almost universally true when the U.S. is a party. See U.S. MODEL, supra note 56, art. 22, at 31-33.

71 This figure is based on the assumption that there are approximately 255 independent nations in the world today—a figure that is an estimate because sovereignty of nations is a matter of foreign policy that varies from nation to nation. A currently prominent example is the case of Taiwan. See, e.g., Chen Redux: Inside the Rhetoric, There are Hints of a Thaw All Round, THE ECONOMIST, May 22, 2004, at 37 (discussing China’s tight grip and world response). See also WORLD FACTBOOK, supra note 1, at 610-13 (country data on Taiwan), available at http://www.cia.gov/cia/publications/factbook/geos/tw.html.

72 The United States currently has 56 comprehensive income tax treaties in force which cover 64 countries. See John Venuti et al., Current Status of U.S. Tax Treaties and International Agreements, supra note 14 (listing all countries covered by tax treaties). The United States formally recognizes a total of 233 nations. See World Factbook at 628, 630, and 639 (acknowledging the existence of 34 developed countries, 27 former USSR/Eastern European countries, and 172 less developed countries).

73 Compiled by averaging the first entry-in-force dates of all comprehensive U.S. income tax treaties ever in force (on file with author).

74 For reasons owing to historical distinctions that may be less clear today, income taxes have generally been attended to in tax treaties, while trade taxes are addressed in trade agreements. See generally Reuven S. Avi-Yonah & Joel Slemrod, Treating Tax Issues Through Trade Regimes, 26 BROOK. J. INT’L L. 1683 (2001); Paul R. McDaniel, Trade and Taxation, 26 BROOK. J. INT’L L. 1621 (2001); Alvin C. Warren, Income Tax Discrimination Against International Commerce, 54 TAX L. REV. 131 (2001).
term “double taxation” refers more particularly to double income taxation, and the term “relief of double taxation” refers particularly to the alleviation of circumstances in which two countries assert income taxation on the same item of income.\(^\text{75}\)

Yet, there are a number of other taxes applied on businesses and individuals. Increasingly prominent throughout the world are consumption and trade taxes, and, primarily in developed countries, social security and other payroll taxes. As these taxes increase in application, tax treaties may cover a shrinking portion of revenues collected by countries.

Finally, as contracts forged through negotiation, individual treaties deviate to various degrees from the standards set in the OECD Model.\(^\text{76}\) Treaties among OECD member countries generally adhere to the pattern and main provisions of the OECD Model.\(^\text{77}\) Treaties between developed

---

\(^\text{75}\) The OECD Model describes double taxation as “the imposition of comparable taxes in two (or more) states on the same taxpayer in respect of the same subject-matter and for identical periods.” OECD MODEL, supra note 21, at 7.

\(^\text{76}\) Even if their language is similar or identical, tax treaties may also vary due to differing interpretations under the domestic law of each country, or, in the case of U.S. treaties, pursuant to the agreement of the competent authorities. This is authorized under art. 3, ¶ 2 of the OECD, US, and UN Models, which state that any term not defined in the treaty is defined under the laws of each country as of the time the treaty is applied—i.e., “internal law, as periodically amended.” Postlewaite & Makarksi, supra note 39, at 741 (adding that “[w]hen countries take different approaches to treaty interpretation, serious consequences may result, such as double taxation or the avoidance of any taxation.”). The U.S. Model adds, “or the competent authorities agree to a common meaning pursuant to the provisions of Article 25 (the Mutual Agreement Procedure).” U.S. MODEL, supra note 56, art. 3, ¶ 2. Variation among treaties is also authorized under Article 25 of the OECD, US, and UN Models, which states that the competent authorities “shall endeavor to resolve by mutual agreement any difficulties or doubts arising as to the interpretation or application” of the treaty, and that the competent authorities “may also consult together for the elimination of double taxation in cases not provided for” in the treaty. U.S. MODEL, supra note 56, art. 25, ¶ 3; OECD Model, supra note 21, art. 25, ¶ 3; UN Model, infra note 78, art. 25, ¶ 3. The U.S. Model adds that “[t]he competent authorities also may agree to increases in any specific dollar amounts . . . to reflect economic or monetary developments.” U.S. MODEL, supra note 56, art. 25, ¶ 4. Finally, treaties may deviate from the international consensus even if they closely follow the model treaties due to periodic updates to the models and commentary thereeto. For example, recent revisions to the OECD Model commentary with respect to the definition of a permanent establishment potentially broadens the scope of such provisions and may ultimately lead to a revision of Article 5 of the OECD Model. See, e.g., Richard M. Hammer, The Continuing Saga of the PE: Will the OECD Ever Get it Right?, 33 TAX MGMT. INT’L J. 472 (2004) (suggesting that the current commentary should be revised because it is “murky and ambiguous,” and arguing for the incorporation of a clear de minimus rule in the OECD Model itself).

\(^\text{77}\) See OECD MODEL, supra note 21, at 10. However, improvements and advances in international business and tax practices contribute to increased deviation even among OECD countries. Recently, so-called “double non-taxation” provisions have been introduced in new treaties. These provisions directly contravene existing
and less-developed countries, however, often contain non-standard provisions. These provisions generally derive from a third model tax convention, first promulgated by the United Nations in 1980 (the UN Model). The UN Model was the product of a series of discussions and meetings of an Ad Hoc Group of Experts formed in 1967 to address concerns that the OECD Model (and, by association, the U.S. Model) was not appropriate for tax treaties involving non-reciprocal cross border activity.

2. Assumption of Reciprocal Activity

The U.S. and OECD Models are directed at and work most effectively between two nations that export capital and transfer services in roughly reciprocal amounts. When treaty countries export and import capital to each other, each acts as a source country to investors from the other. Under these circumstances, tax treaties coordinate taxation without necessarily causing an imbalance in revenue allocation between the two countries: revenues given up by countries in their “source” role are recouped in their “residence” role. Consequently, such treaties are expected to have little revenue effect on either country.


78 The Group of Experts included members from Latin American, North American, African, Asian, and European countries. The group also had observers from the IMF, the International Fiscal Association, the OECD, the Organization of American States, and the International Chamber of Commerce. See UNITED NATIONS, COMMENTARY ON THE ARTICLES OF THE 1980 UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES 2 (Jan. 1, 1980); see also UNITED NATIONS DEP’T OF ECONOMIC AND SOCIAL AFFAIRS, UNITED NATIONS MODEL DOUBLE TAXATION CONVENTION BETWEEN DEVELOPED AND DEVELOPING COUNTRIES viii (2001) [hereinafter UN MODEL].

79 See Leif L. Mutén, Double Taxation Conventions Between Industrialised and Developing Countries, in DOUBLE TAXATION TREATIES BETWEEN INDUSTRIALISED AND DEVELOPING COUNTRIES; OECD AND UN MODELS, A COMPARISON 3 (Kluwer Law and Tax’n Pubs. 1990).

80 For example, while the U.S. may give up revenue by refraining from taxing dividends paid to foreign persons under a treaty, it recoups the loss by collecting the full tax on dividends paid by the foreign country to U.S. residents (without reduction under the foreign tax credit provisions, since under the treaty, the foreign country does not tax the dividend). See I.R.C. §§ 61 (U.S. persons taxed on income from whatever source derived) and 901 (foreign tax credit generally allowed only when foreign tax has been paid or accrued).

81 See, e.g., STAFF OF THE S. COMM. ON FOREIGN REL., 105TH CONG., REPORT ON THE TAX CONVENTION WITH IRELAND 17 (Comm. Print 1997) (“The proposed treaty is estimated to cause a negligible change in . . . Federal budget receipts.”); STAFF OF THE S. COMM. ON FOREIGN REL., 108TH CONG., REPORT ON THE TAX CONVENTION WITH THE
If instead the flow of capital moves primarily from one country to another, reciprocity is lost. One country becomes primarily the source, or host country, while the other becomes primarily the residence, or home country. Because LDCs are typically capital importing countries, their primary role under tax treaties is as a source country. Residence jurisdiction will therefore be minimally exercised by LDCs. In such cases, a tax treaty shifts tax revenues inversely to the flow of capital. As a result, while the contraction of taxing jurisdictions is technically reciprocal in the treaty document, the one-sided
flow of capital towards the LDC as source-country ensures that only that country experiences a true contraction of its taxing jurisdiction. The provider of the capital, namely the developed country, preserves its rights as the country of residence just as if the treaty had never been concluded.

Non-reciprocal contraction by the LDC occurs in the context of portfolio investment as its role as the source country requires it to reduce its tax rates on dividends, interest, and royalties, while the residence country preserves the right to impose full taxation on these items. Non-reciprocal contraction also occurs in the context of active business income, as threshold rules for taxing business income prevent source-country taxation of certain activities, such as storing and displaying goods or building and construction activities.\footnote{See U.S. Model, supra note 56, art. 5; OECD Model, supra note 21, art. 5; UN Model, supra note 78, art. 5.} These threshold rules are embodied in the concept of the “permanent establishment.”

The permanent establishment rules are found in Article 5 of each of the US, OECD, and UN model treaties. Under these rules, the source country agrees to refrain from taxing business income unless it is attributable to business activities that meet physical presence requirements, and even then, in some cases, only if the activities are conducted for a given duration or rise to a substantial enough level.\footnote{Id.} Accordingly, under the U.S. and OECD Models, a permanent establishment is generally deemed to exist and therefore create taxing jurisdiction in the source country if business activities are conducted through a fixed place of business and consist of more than “peripheral or ancillary activities.” Certain activities, such as building and construction, however, must last more than a year in order to be deemed “permanent establishments.”\footnote{See U.S. Model, supra note 56, ¶ 3. Peripheral and ancillary activities include exploratory or preparatory functions such as research and development, as well as activities considered incidental to the economic source of the income, such as storage, display, or delivery of goods. The U.S. Model is virtually identical to the OECD Model.}

Responding to the non-reciprocal aspects of relationships between developed and less developed countries, the UN Group of Experts sought to preserve source-country taxation in tax treaties in its Model. Thus, the UN Model provides for lower thresholds by shortening duration and
presence requirements and including certain activities not included in the OECD and U.S. Models. For example, under the UN Model, a permanent establishment may arise after a duration of as low as six months for certain activities, fewer ancillary activities are excluded, and more income is attributed to permanent establishments via a force of attraction rule. Nevertheless the UN Model limits source-country taxation simply by using the permanent establishment concept at all. In the absence of the treaty, the source country would typically provide little or no threshold to taxation.

In addition, the UN Group of Experts determined that in treaties between developed and less developed countries,

87 It otherwise adheres in large part to the OECD Model, and the two have become more similar. Indeed, the relevance of the UN Model has diminished significantly and it may be seen as irrelevant to the extent developed countries agree to higher source-based tax in their tax treaties, which they have done to a significant extent. See, e.g., John F. Avery Jones, Are Tax Treaties Necessary?, 53 TAX L. REV. 1, 2 (1999) (“There seems [to be] little need for a separate model for developing countries.”).

88 UN MODEL, supra note 76, art. 5, ¶ 3. In paragraph 3(a), building and construction activities and related supervisory activities are a permanent establishment if they last more than six contiguous months; in paragraph 3(b), consulting services are a permanent establishment if such services continue for a cumulative (even if non-contiguous) six months. In the OECD model, building and construction activities must continue for more than twelve months to constitute a permanent establishment, related supervisory activities are not included, and there is no parallel provision regarding consulting services. For a comparison of the OECD and UN Model permanent establishment provisions, see Bart Kosters, The United Nations Model Tax Convention and Its Recent Developments, ASIA-PACIFIC TAX BULLETIN, January/February 2004, at 4, available at http://unpan1.un.org/intradoc/groups/public/documents/other/unpan014878.pdf.

89 For example, in the OECD and U.S. Models, the use of facilities or maintenance of a stock of goods for delivery is specifically excluded from the definition of permanent establishment, while in the UN Model it is not. Compare U.S. MODEL, supra note 56, art. 5, ¶ 4, and OECD MODEL, supra note 21, art. 5, ¶ 4, with UN MODEL, supra note 78, art. 5, ¶ 4.

90 The OECD and U.S. Models provide source-country taxation only of profits that are attributable to the permanent establishment. The UN Model includes profits attributable to the sale of the same or similar goods or merchandise as those sold through the permanent establishment and profits from the same or similar business activities as those conducted through the permanent establishment. Compare U.S. MODEL, supra note 56, art. 7, ¶ 1, and OECD MODEL, supra note 21, art. 7, ¶ 1, with UN MODEL, supra note 78, art. 7, ¶ 1.

91 For an argument that thresholds are appropriate, should be used even in the absence of a treaty, and should be made more uniform (in the current models, there are different thresholds for different activities), see Brian J. Arnold, Threshold Requirements for Taxing Business Profits Under Tax Treaties, in THE TAXATION OF BUSINESS PROFITS UNDER TAX TREATIES 55 (Brian J. Arnold et al. eds., 2003). The permanent establishment concept has been revised and updated to adapt to changes in business and technology over the years, but generally remains consistent with the original version introduced in the first OECD Model Tax Convention, which was released in 1963. OECD, Income and Capital Draft Model Convention, Draft Convention For the Avoidance of Double Taxation With Respect to Taxes on Income and Capital, art. 5, ¶¶ 1-2 (July 30, 1963).
higher source-based taxation of passive items is appropriate. Just how high, however, has not been determined. While the OECD Model provides recommended maximum source-country tax rates for dividends (5% on “direct dividends” (those paid to corporate shareholders holding at least 10% of the paying company’s stock) and 15% on “regular dividends” (all other shareholders)), interest (10%), and royalties (0%),92 and the U.S. Model is virtually identical (but provides zero source-country taxation of interest),93 the UN Model leaves the source-country taxation of these items to be established through bilateral negotiations.94 Thus, the UN Model implies that higher tax rates are appropriate in tax treaties with LDCs, but declines to recommend exactly what rate is appropriate.95

The U.S. has frequently used the provisions and concepts of the UN Model in its tax treaties with developed as well as less developed countries.96 For example, the U.S. income tax treaties with Barbados, Canada, China, Cyprus, Egypt, Estonia, India, Indonesia, Jamaica, Kazakhstan, Korea, Latvia, Lithuania, Mexico, Morocco, the Philippines, Thailand, Tunisia, Turkey, the Ukraine, and Venezuela each provide for lower permanent establishment duration requirements, narrower definitions of ancillary and preparatory activities, higher source-country tax rates on passive income items, or a combination of these features.97

92 See OECD Model, supra note 21, arts. 10, 11, 12.
93 U.S. Model, supra note 56, art. 11.
94 UN Model, supra note 78, art. 11 (including a blank line and a parenthetical that states “the percentage is to be established through bilateral negotiations”).
95 See generally U.S. Model, supra note 56, arts. 10, 11, 12; OECD Model, supra note 21, arts. 10, 11, 12; UN Model, supra note 78, arts. 10, 11, 12.
96 Kosters, supra note 88, at 9.
The consequence of preserving source-country taxation to overcome non-reciprocal capital flows, however, is that it undermines the relief of double taxation ostensibly sought as the primary purpose for entering into the treaty in the first place. This has been a source of problems for drafters and negotiators of tax treaties and treaty models, who appear to have difficulty determining whether it is better for LDCs to preserve source-country taxation so as to allow the source country to collect the maximum amount of revenues, or to relieve source-country taxation so as to attract the maximum amount of foreign investment. As discussed in Part IV, this choice is one of the main reasons tax treaties have become obsolete for many investors in LDCs. Yet new U.S. tax treaties with LDCs continue to be sought, and when concluded, they continue to provide for higher source-country taxes on passive income items, even, on occasion, when the treaty rate exceeds that of the internal laws of the LDC.

The importance of reciprocity as requisite to make a tax treaty appropriate is demonstrated in the current composition of the U.S. tax treaty network. Like all developed countries, the U.S. has tax treaties in place with all of its major reciprocal trading partners and with the bulk of its foreign direct investment sources and destinations. Yet, with just 55 comprehensive tax treaties covering 62 countries, the U.S. network is comparatively small relative to the other major...
economies of the world, and it excludes more than 20% of U.S. foreign direct investment. Moreover, just 16 U.S. tax treaties are with LDCs, as compared with an average of 22 in other leading economies. To the extent that tax treaties influence the flow of trade and investment between the U.S. and the rest of the world, they may impact U.S. foreign investment, trade, and aid efforts to LDCs. The following Part explores whether more complete U.S. tax treaty coverage could impact these flows by considering a hypothetical tax treaty with Ghana, an LDC in Sub-Saharan Africa.

III. U.S. Tax Treaties with LDCs: Case Study of Ghana

This Part presents as a case study a hypothetical tax treaty between the U.S. and Ghana, based on current U.S. tax treaty standards with respect to LDCs. The case study demonstrates that the lack of tax treaties between the U.S. and the LDCs of Sub-Saharan Africa may be explained in large part by the fact that in today’s global tax climate, these agreements would not significantly impact the global tax burden that current or potential international investors are facing. As a result, even if governments are committed to concluding them, and even though they are supported by academics, practitioners, and lawmakers, tax treaties between the U.S. and the LDCs of Sub-Saharan Africa would nevertheless be largely ineffective in stimulating cross-border investment and trade.

102 In contrast, the U.K. and France each have tax treaties with over 100 countries; Canada and the Netherlands with over 80. See Ernst & Young, supra note 35, at 134-36, 263-65, 641-42, 984-85.
103 See supra note 69.
105 Seventeen of the thirty OECD countries have larger LDC tax treaty networks. For example, the U.K. and France each have tax treaties with 60 LDCs, Canada has 40, Germany has 36, Norway has 35, and Italy and Sweden each have 32. Compiled from Ernst & Young, supra note 35, at 129-31, 250-52, 287-88, 426-28, 652-53, 855-57, 938-39 and the LexisNexis Tax Analysts Worldwide Tax Treaties database, http://w3.nexis.com/sources/scripts/info.pl?250064 (last visited Nov. 11, 2005).
A. Ghana as Case Study Subject

The pursuit of a tax treaty with Ghana, a nation of 20 million people in West Africa, would support current U.S. commercial and non-commercial interests in this country. Non-commercial interests of the U.S. in Ghana include longstanding diplomatic ties, an interest in fostering economic stability in this region of the world for humanitarian reasons, and recognition that conditions of extreme poverty like those found in Ghana are a potential breeding ground for terrorism.

U.S. commercial interests in Ghana include both trade and investment relationships. Several large foreign investments in Ghana are owned by U.S. companies, and U.S. companies continue to express interest in pursuing business opportunities in this country. U.S. investment in

---

106 See U.S. Department of State, Background Note: Ghana, http://www.state.gov/r/pa/ei/bgn/2860.htm (last visited Nov. 11, 2005) (“The United States has enjoyed good relations with Ghana at a nonofficial, personal level since Ghana’s independence. Thousands of Ghanaians have been educated in the United States. Close relations are maintained between educational and scientific institutions, and cultural links, particularly between Ghanaians and African-Americans, are strong.”).

107 Embassy bombings in Kenya and Tanzania in 1998, allegedly linked to the international terrorist organization al-Qaeda, provide perhaps the most illustrative reason for U.S. interests in brokering peace and stability in Sub-Saharan Africa. The U.S. also has interests in Sub-Saharan Africa for social justice reasons, including the extreme poverty faced by a majority of the population in this region. For a discussion of the importance of pursuing tax treaties in response to these issues, see Brown, supra note 7, at 48-51.

108 These include the Volta Aluminum Company, Ltd (Valco), a Ghanaian aluminum manufacturing company that is jointly owned by Kaiser Aluminum Corp. (a Texas corporation owning 90%) and Alcoa Inc. (a Pennsylvania corporation owning 10%); Regimanuel Gray, a construction company jointly owned by Regimanuel Ltd. (a Ghanaian company) and Gray Construction (a Texas corporation); and Equatorial Bottlers, a bottling company wholly owned by the Coca Cola Company (a Delaware corporation). See the company websites of Valco at http://www.alcoa.com/ghana/en/home.asp, Regimanuel Gray at http://www.regimanuelgray.com/about.asp, and Equatorial Bottlers at http://www.ghana.coca-cola.com (each describing the respective companies’ U.S. ownership and Ghanaian operations).

109 See, e.g., Newmont to Start up in Ghana, DAILY TELEGRAPH (Sydney, Australia), Dec. 22, 2003, at 59 (discussing the purchase by Newmont Mining Corp., a Delaware corporation, of the Ahafo gold mine in Ghana); Elinor Arbel, AMR, Pier 1 Imports, Sun Microsystems: U.S. Equity Movers Final, BLOOMBERG NEWS, Aug. 16, 2004 (discussing plans by Alcoa Inc., a Pennsylvania corporation, to buy and restart an aluminum smelter in Ghana); G. Pascal Zachary, Searching for a Dial Tone in Africa, N.Y. TIMES, July 5, 2003, at C1 (quoting a former senior executive of Microsoft who surveyed Ghana as a potential regional hub for an information-technology industry, and stated that Ghana “has the potential to become for Africa what Bangalore became for India;” and discussing Rising Data Solutions, a Maryland corporation that recently
and trade with Ghana is generally facilitated by a number of factors. For instance, as a former colony of the U.K., Ghana’s official language is English, its laws are a blend of customary law and English common law, and its regulatory state derives much from the British system, thus providing a familiar framework for commercial relations.

U.S. trade and aid initiatives specifically identify Ghana as regionally significant to U.S. trade interests due to its central location in an international business corridor that stretches from Nigeria to Côte d’Ivoire. As is the case for many LDCs, the U.S. is one of Ghana’s principal trading partners, although U.S. goods comprise a small portion of

introduced a call center in Ghana, and Affiliated Computer Services, a Dallas company that began doing business in Ghana in 2001 and is looking to expand its operations).

Seventeen LDCs in Sub-Saharan Africa are former colonies of the U.K.: Botswana, Gambia, Ghana, Kenya, Lesotho, Malawi, Mauritius, Nigeria, Seychelles, Sierra Leone, Somalia, Sudan, Swaziland, Tanzania, Uganda, Zambia, and Zimbabwe; all but Somalia and Sudan designate English as their official language; an additional four countries list English among their official languages. See WORLD FACTBOOK, supra note 1, at 73, 204, 214, 295, 318-19, 339-40, 359-60, 406, 487-90, 502, 515-16, 522-23, 536, 562-63, 605-06, 608-09.


U.S. multinational companies may prefer to invest in countries with which they have economic, political, linguistic, or cultural ties. JOHN H. DUNNING, THE GLOBALIZATION OF BUSINESS: THE CHALLENGE OF THE 1990s 37-43 (1993) (discussing geographical clustering of multinational companies).


The U.S. is a principal export partner to 55% of LDCs, and a principal import partner to 40%. Compiled from WORLD FACTBOOK, supra note 1, at 16, 93, 99, 104, 109, 111, 126, 129, 131, 139, 156, 174, 176, 182, 203, 205, 215, 236, 296-97, 320, 322, 339, 341, 360, 382, 385, 404, 407, 491, 524, 564.
Ghana’s total imports. As a result, like most of the LDCs in Sub-Saharan Africa, Ghana is a relatively untapped market for U.S. exports.

Trends in U.S. trade and investment interests in Ghana support the notion that increasing investment in this country is a viable goal, which is being advanced by current efforts in executing international agreements. For example, U.S. trade with Ghana increased following the enactment and implementation of AGOA. Nevertheless, U.S. investment in Ghana remains relatively slight by global standards.

Low levels of investment in Ghana may be explained by a number of factors including several non-tax barriers to investment. For instance, Ghana’s low level of infrastructure has been blamed as a major impediment to increased investment. Examples of Ghana’s infrastructural shortcomings include obvious physical burdens such as poorly...
maintained roads, interruptions in electricity, a lack of clean water, and a paucity of institutions such as schools and hospitals. Equally problematic are Ghana’s excessive administrative requirements and bottlenecks, as well as other barriers to the entry and operation of businesses by foreign persons. For example, Ghana continues to struggle with land and property protection, restricts foreign ownership of real

120 As John Torgbenu, a taxi driver in Accra, describes the multitude of certifications needed to obtain a cab license in Ghana: “Cars must be road-worthy, but the roads need not be car-worthy.” Interview with John Torgbenu, Taxi Driver in Accra, Ghana (2003) (on file with author). See also Memorandum of Economic and Financial Policies of the Government of Ghana for 2003-05, ¶ 8 (March 31, 2003) [hereinafter MEFP] (“Ghana’s basic infrastructure continues to remain in very poor shape. The building of roads, ports, and communication networks . . . have been driving forces behind the government’s efforts to secure a predictable flow of external financing for infrastructure development.”).

121 Despite the presence of West Africa’s largest hydro-electric plants at Volta Lake in northern Ghana, electricity outages are such a frequent phenomenon that individuals, businesses and institutions that can afford generators have them, and put them to use on a regular basis. Fueling the modernization process is one of the key developments sought in connection with Ghana’s requests for IMF funding. See MEFP, supra note 120.

122 Ghana is among the majority of LDCs in the world that have not developed an improved water supply. See WORLD HEALTH ORGANIZATION, WATER SUPPLY, SANITATION AND HYGIENE DEVELOPMENT, http://www.who.int/water_sanitation_health/hygiene/en/ (last visited Nov. 11, 2005).


124 Much of these administrative regimes are a lasting legacy of colonization, under which the European nations imposed severe market controls to preserve the resources of their colonies for their exclusive use. See, e.g., FRANCIS AGBODEKA, AN ECONOMIC HISTORY OF GHANA 126-27 (1992). For an overview of ease of entry issues for LDCs generally, see JEFFREY C. HOOKE, EMERGING MARKETS: A PRACTICAL GUIDE FOR CORPORATIONS, LENDERS, AND INVESTORS (2001) (discussing the entrenched obstacles to entry in LDCs); see also Leora Klapper et al., Business Environment and Firm Entry: Evidence from International Data 16 (Nat’l Bureau of Econ. Research, Working Paper No. 10380, 2004), available at http://papers.nber.org/papers/w10380.pdf (finding that bureaucratic entry regulations are a significant burden that hampers the entry of firms into foreign markets).

125 Courts in Ghana are overwhelmed with land disputes. See, e.g., Joseph Coomson, Country Achieves Below 40 Percent Delivery, GHANAIAN CHRONICLE, Aug. 18, 2005 (discussing “many land disputes among traditional authorities” and stating that there are currently “more than 62,000 land disputes . . . being heard at the courts”).

property, and has only recently dismantled regulations that completely closed several industries to foreign investors.

As part of its approach to poverty reduction and economic growth through the creation of a business-friendly environment, Ghana’s current administration has pledged to make significant improvements to its infrastructure. The reduction of administrative obstacles, combined with greater certainty with regard to the legal and regulatory regime, is credited with a recent surge in foreign investment from South Africa to other countries in Sub-Saharan Africa. It is hoped that this surge will be followed by increased investment from other countries, including the U.S.

An increased share of foreign investment is also expected to lead to spillover effects that would remedy some of the current deficiencies in physical infrastructure. Limited spillover effects have been achieved recently in connection with Ghana’s gold mining operations, which have provided funding

---


127 See WIR 2003, supra note 118, at 36.


129 Nicole Itano, South African Companies Fill a Void, N.Y. TIMES, Nov. 4, 2003, at W1 (“It’s safer to go in, it’s easier to get materials in and out, easier to repatriate your profits,” according to Keith Campbell, a managing director of a South African risk management firm and vice-chairman of the South Africa-Angola Chamber of Commerce). The overload of economies has often been initiated by the international lending organizations, which have faced much criticism and been the subject of much debate in the face of the apparent failure of many of their reform efforts. However, the extreme opposite approach, as unfortunately presented in the case of Zimbabwe, illustrates the need for some fundamental certainty in dealing with foreign businesses in order to attract foreign investment and maintain a stable economy. See, e.g., Michael Wines, Around Ruined Zimbabwe, Neighbors Circle Wagons, N.Y. TIMES, July 6, 2005, at A4 (describing the “fiscal and political collapse” of that country since it began seizing white-owned farms in 2000); David White & John Reed, Showdown over Pariah State Leaves the Commonwealth Divided and Frustrated, FIN. TIMES, Dec. 9, 2003 (discussing ramifications of Zimbabwe’s withdrawal from the British Commonwealth); Tony Hawkins, Zimbabwe Dollars Cut 80% at Auction, FIN. TIMES, Jan. 13, 2004 (stating that massive currency devaluation is in line with market expectations for Zimbabwe).
to improve transportation routes. In Nigeria, one of Ghana’s close neighbors, investors in the telecommunications industry funded the installation of communication networks throughout the country. Ghana’s growing telecommunications industry may draw like commitments from future investors. However, the components of infrastructure that are not produced by spillover, such as the legal and regulatory framework that protects businesses and creates an environment for growth, generally must be directly supported and funded by the government.

Despite the infrastructural obstacles present in Ghana, U.S. investment in this country continues to grow, albeit slowly. The following Section explores whether and how such a tax treaty between the two countries might affect investment in Ghana.

---

130 Ghana’s gold mines have recently sparked interest from foreign investors, who will spend millions of dollars to upgrade and develop operations following years of neglect and under-maintenance of these operations, because they expect productivity to increase dramatically and produce significant profit as a result. See Mr. Jonah Goes to Joburg, ECONOMIST, Jan. 17, 2004, at 56 (AngloGold (South Africa) expects to spend between $220 and $500 million to upgrade its newly acquired Ghanaian gold mine (Ashanti Goldfields)); Newmont to Go for Ghana Gold, ADVERTISER (S. Austl.), Dec. 22, 2003, Finance at 50 (Newmont (U.S.) plans to spend about $350 million to develop its recently-acquired Ghanaian gold mine (Ahafo)). See also Big-Game Hunting, ECONOMIST, Aug. 16, 2003, at 57; Gargi Chakrabarty, Newmont OKs Project in Ghana; Gold Producer Invests $350 Million in W. African Mine, ROCKY MOUNTAIN NEWS, Dec. 19, 2003, at B2; and Gargi Chakrabarty, Latest Global Hot Spot for Gold Mining: Ghana, ROCKY MOUNTAIN NEWS, Oct. 30, 2003, at B1.

131 South Africa’s Vodacom recently spent $119 million building a cellular network in the Congo, a critically impoverished country that has only recently emerged from devastating civil war. South Africa’s MTN Group spent approximately $1.75 billion building cellular networks in five different Sub-Saharan Africa countries ($900 million in Nigeria alone), and experiences a 40% profit margin in these markets—despite having to build power generators to overcome a lack of stable power sources and a transmission network to connect cities and towns across the country—compared to its 30% return at home in South Africa. Itano, supra note 129.

132 See Zachary, supra note 109.

133 Coercion of various forms may induce companies to provide such infrastructure in the absence of voluntary action. For example, in 2003 foreign oil workers were kidnapped in Nigeria in an effort to extract a promise from a foreign company to build a school or a health center. See Nigeria’s Oil-Rich Area Mired in Poverty, DAILY GRAPHIC (Ghana), Dec. 3, 2003, at 5. Clearly no government should be encouraged to rely on these kinds of tactics to build adequate infrastructure, but the fact that citizens of a nation are willing to engage in illegal acts to secure public goods illustrates the tensions and pressures facing both international businesses and the governments struggling to attract such businesses.
B. Structure of a Tax Treaty Between Ghana and the U.S.

As discussed in Part I, the U.S. Model serves as the template for all new tax treaties negotiated by the Treasury Department, though the OECD Model and other recent treaties are also consulted. Thus, in structure and overall content, a tax treaty between the U.S. and Ghana would emulate the model treaties, especially the U.S. Model, to a substantial degree. However, in negotiations with LDCs, the Treasury Department also consults the UN Model.\footnote{See, e.g., Department of the Treasury Technical Explanation of the Convention Between the Government of the United States of America and the Government of the Democratic Socialist Republic of Sri Lanka for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, Mar. 14, 1985, as Amended by a Protocol Signed at Washington on Sept. 20, 2002, http://www.treas.gov/press/releases/reports/tesrlanka04.pdf (“Negotiations also took into account the [OECD Model], the [UN Model], and recent tax treaties concluded by both countries.”).} As a result, these treaties usually contain several standard deviations from the U.S. Model, described in reports and technical explanations as “developing-country concessions.”\footnote{This designation has been consistently propounded throughout U.S. tax treaty history, and continues virtually unchanged today. Compare, e.g., STAFF OF JOINT COMMITTEE ON TAXATION, 101ST CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY (AND PROPOSED PROTOCOL) BETWEEN THE UNITED STATES OF AMERICA AND THE REPUBLIC OF INDIA 10-11 (Comm. Print 1990) (“The proposed treaty contains a number of developing country concessions...providing for relatively broad source-basis taxation.”), and STAFF OF S. FOREIGN RELATIONS COMMITTEE, 101ST CONG., REPORT ON THE TAX CONVENTION WITH THE REPUBLIC OF INDIA 2-8 (Comm. Print 1990), with STAFF OF JOINT COMMITTEE ON TAXATION, 108TH CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY BETWEEN THE UNITED STATES AND THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA 18, 64 (Comm. Print 2004) [hereinafter EXPLANATION OF SRI LANKA TREATY] (describing these deviations as substantive, and outlining the major provisions).} They are called concessions because they typically concede U.S. residence-based taxing jurisdiction in favor of greater source-country taxation.\footnote{EXPLANATION OF SRI LANKA TREATY, supra note 135, at 64. To the extent that source-based taxing jurisdiction is theoretically more justifiable, the term “concession” is something of a misnomer. See discussion in Part II.B. Nevertheless, as much source-based jurisdiction has been ceded in favor of residence-based jurisdiction in the evolution of the model treaties, a reversal of this norm, especially in the case of non-reciprocal capital flows, can in theory shift greater tax revenue collection to the country of source. By so doing, it requires the residence country to revert to the role of relieving double taxation via the generosity of the foreign tax credit, discussed supra, note 43 and accompanying text. However, the theory that revenues are conceded under these provisions only holds if the source country actually imposes and collects the tax. This is an assumption which cannot be relied upon in today’s global economy, as discussed infra Part IV.B.2.}

An example of a U.S. treaty with an LDC, as compared to the U.S. Model Treaty, demonstrates the operation of these
concessions. At the time it was entered into, the U.S. tax treaty with Jamaica was deemed to be the “precedent for negotiations” with other LDCs. At twenty-four years of age, that treaty is substantially out of date, as many tax laws in the U.S. (and presumably in Jamaica) have changed significantly since it entered into force in 1981. However, the principle of enlarging source-country taxation found in the U.S.-Jamaica treaty continues to appear in new tax treaties with other LDCs. Therefore, the following discussion uses the U.S.-Jamaica treaty to model the terms that might be expected in a U.S.-Ghana tax treaty, should one be concluded.

In the U.S. tax treaty with Jamaica, as in most U.S. tax treaties with LDCs, the expectation that non-reciprocal capital flows may negatively impact the LDC is addressed by preserving source-country taxation. This is mainly accomplished through modifications to the articles dealing with the determination of thresholds for taxing income from business activities (the permanent establishment provision) and those dealing with the taxation of passive-type income (dividends, interest, and royalties provisions).

First, under the permanent establishment concept, source-country taxation is enlarged by expanding the definition to allow the LDC to impose taxation on more of the business profits earned by foreign persons in the source country. Thus, in the U.S.-Jamaica treaty, the permanent establishment provision mirrors the structure of the U.S. and OECD Models, but incorporates the UN Model approach, shortening the threshold durational requirement from one year to six months in the case of construction, dredging, drilling, and similar activities. It also provides that the furnishing of services can create a permanent establishment if continued for more than

---


139 Evidently, in some cases this is done regardless of the pre-existing legal framework in the LDC. See EXPLANATION OF SRI LANKA TREATY, supra note 135, at 62 (stating that “it is not clear that . . . Sri Lankan laws have been fully taken into account” since “[s]everal of the articles of the proposed treaty contain provisions that are less favorable to taxpayers than the corresponding rules of the internal Sri Lankan tax laws”).

140 See supra Part II.C.

141 U.S.-Jamaica Treaty, supra note 4, art. 5, ¶ 2(i). The activity must continue for “more than 183 days in any twelve-month period,” and at least 30 days in any given taxable year to constitute a permanent establishment. Id.
ninety days a year.\textsuperscript{142} Finally, it provides that maintaining substantial equipment or machinery in a country for four months can constitute a permanent establishment.\textsuperscript{143} One or more of these deviations from the U.S. Model are found in most U.S. tax treaties with LDCs.\textsuperscript{144} Consequently, similar provisions would likely be suggested, negotiated, and agreed to in a U.S.-Ghana tax treaty.

Second, under the passive income provisions, source-country taxation is enlarged by allowing the source country to impose tax rates on these items of income in excess of the maximum rates provided in the U.S. Model. The U.S. Model allows source-country tax rates of no more than 5 and 15\% on direct and regular dividends, respectively, and 0\% on interest and royalties.\textsuperscript{145} In contrast, the U.S.-Jamaica treaty provides for source-country tax rates of 10\% on direct dividends,\textsuperscript{146} 15\%
on regular dividends,\textsuperscript{147} 12.5\% on interest,\textsuperscript{148} and 10\% on royalties.\textsuperscript{149}

Despite the general trend of higher source-country taxation of passive income items in U.S. tax treaties with LDCs, source-country taxation of certain items of passive income have recently been lowered in a number of U.S. tax treaties, including one with Mexico, arguably an LDC.\textsuperscript{150} The U.S. agreed to eliminate source-country taxation on direct dividends paid with respect to stock held by foreign controlling parent companies\textsuperscript{151} in a recent protocol to the U.S.-Mexico tax treaty.\textsuperscript{152} A most-favored nation provision in the original treaty\textsuperscript{153} caused the elimination of source-country taxes on these direct dividends when the U.S. negotiated the same provision in recent treaties and protocols with Australia,\textsuperscript{154} Japan,\textsuperscript{155} and Britain.\textsuperscript{156} According to Treasury officials, the elimination of source-country tax on direct dividends earned by foreign controlling companies reduces tax barriers and

\begin{itemize}
\item \textsuperscript{147} Id. art. X, \S 2(b).
\item \textsuperscript{148} Id. art. XI.
\item \textsuperscript{149} Id. art. XII.
\item \textsuperscript{150} Second Additional Protocol that Modifies the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Mex., art II Nov. 26, 2002, T.I.A.S No. 108-4 (providing a zero-rate for dividends in the case of certain controlled companies), available at http://www.ustreas.gov/press/releases/docs/mexico.pdf [hereinafter U.S.-Mex.]. Mexico is not designated as an LDC in the World Factbook, but is included by reference to its OECD membership within the definition of developed countries, even though its per capita GDP of less than $10,000 would align it with other LDCs. See supra note 20.
\item \textsuperscript{151} Those owning at least 80\% of the foreign subsidiary's stock. Id. art. II, \S 3(a).
\item \textsuperscript{153} See Protocol Amending the U.S.-Mexico Treaty, supra note 97, \S 8(b) ("If the United States agrees in a treaty with another country to impose a lower rate on dividends than the rate specified . . . both Contracting States shall apply that lower rate instead of the rate specified . . . ").
\item \textsuperscript{154} Protocol Amending the Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income, U.S.-Austl., art. VI, May 2003 [hereinafter Australia Protocol].
\end{itemize}
increases the economic ties between the partner countries. Following the logic of this position, a U.S.-Ghana tax treaty should involve a significant lowering, if not complete elimination, of source-country taxation of dividends. The fact that the U.S. tax treaty with Mexico very recently adopted this position would seem to support the expectation of a similar provision in a tax treaty with Ghana.

However, the more likely result is that in a U.S.-Ghana tax treaty, source-country tax rates on dividends would be closer to the rates found in the Jamaica treaty than those found in the Mexico treaty. No recent U.S. tax treaty with an LDC has incorporated a zero rate for dividends paid to controlling company shareholders, and all provide for maximum source-country tax rates on passive income items that are higher than those provided in the U.S. Model.

Thus, as in the case of the permanent establishment provisions, the higher source-country rates that are typical in U.S. tax treaties with LDCs would likely be suggested, negotiated, and agreed to in a U.S.-Ghana tax treaty. Using

---

157 See Staff of S. Foreign Relations Comm., 108th Cong., Report on the Convention with Japan (Comm. Print 2003) (noting that many bilateral tax treaties to which the United States is not a party eliminate taxes on direct dividends, that the EU’s Parent-Subsidiary Directive achieves the same result, and that the United States has signed treaty documents with the U.K. and Australia that include provisions similar to the one in the Mexico protocol); see also John W. Snow, U.S. Sec’y of the Treasury, Remarks at the U.S.-Japan Income Tax Treaty Signing Ceremony (Nov. 6, 2003), available at http://www.treas.gov/press/releases/js975.htm (stating that the new U.S.-Japan Treaty “will significantly reduce existing tax-related barriers to trade and investment between Japan and the United States” and “will foster still-closer economic ties” between the two countries).

158 The Mexico treaty now provides for a maximum of 5% source-country taxation on direct dividends, 10% on regular dividends, and 0% on direct dividends paid to foreign companies with a controlling interest in the paying company. See U.S.-Mexico Treaty, supra note 97, art. 10.

159 See, e.g., U.S.-Sri Lanka Treaty, supra note 4, arts. X-XII (providing maximum rates of 15% on all dividends and 10% on interest and royalties); U.S.-Bangladesh Treaty, supra note 42 (same rates as in the U.S.-Sri Lanka Treaty). Other than the lower rates on dividends, the U.S.-Mexico Treaty is consistent with other tax treaties with LDCs in that it provides for maximum source-country tax rates of 15% on interest and 10% on royalties. See U.S.-Mexico Treaty, supra note 97.

160 The U.S. tax treaties with Greece (a developed country), the former countries of the U.S.S.R. (each a transition country), and Trinidad & Tobago (an LDC), each provide for a maximum 30% source-country tax rate for dividends, and those with Israel (a developed country), India, and the Philippines (each an LDC), provide a maximum 25% rate. See Convention for the Avoidance of Double Taxation and Prevention of Fiscal Evasion with Respect to Taxes on Income, Feb. 20, 1950, U.S.-Greece, 5 U.S.T. 47, TIAS 2902; TIAS; Convention on Matters of Taxation, Jun. 20, 1973, U.S.-U.S.S.R., TIAS 8225, 27 U.S.T. 1; U.S.-Trin. & Tobago Treaty, supra note 4; Convention with Respect to Taxes on Income, Nov. 20, 1975, U.S.-Isr.; U.S.-India Treaty, supra note 4; U.S.-Philippines Treaty, supra note 4. The newest U.S. tax
the U.S.-Jamaica treaty and other recent treaties with LDCs as a guide, a U.S.-Ghana tax treaty could be expected to provide maximum source-country tax rates of 10 to 15% on direct dividends, 10 to 15% on regular dividends,\(^{161}\) and 10% on interest and royalties.

The narrower permanent establishment thresholds and higher source-country tax rates are expected in a U.S.-Ghana tax treaty because they continue to appear in other U.S. tax treaties with LDCs. They appear in these treaties because it is believed that they will provide some benefit to the governments of the LDCs entering into these agreements. Yet, the overriding purpose of these treaties is the same as that for treaties exclusively between developed countries: they are supposed to relieve double taxation and therefore increase cross-border investment between the partner countries. The next Part explores the extent to which either of these goals are achieved under this hypothetical tax treaty between Ghana and the U.S.


Assuming that Ghana is otherwise a viable destination for U.S. investment as described above, a tax treaty between these two countries would theoretically complement U.S. investment interests as well as its trade and aid initiatives. However, this Part demonstrates that in today's global tax climate, a tax treaty that follows the international standards set forth in the model treaties will likely be ineffective in achieving its goals as a result of several interrelated phenomena.

First, the scope of tax treaties appears to be too narrow in the context of these LDCs. Second, double taxation appears to be disappearing in international transactions involving these LDCs as a result of the widespread reduction in taxation

---

\(^{161}\) Forty-eight of the U.S. tax treaties currently in force provide a rate of 10-15% on regular dividends. *Internal Revenue Serv., U.S. Dep't of the Treasury, Publ'n 901, U.S. Tax Treaties 33-34 tbl. 1 (2004); U.S.-Sri Lanka Treaty, supra note 4, art. 10.

---
caused by global tax competition and an ever-increasing availability of opportunities to avoid and evade income taxation. Third, there may be little differential between tax treaties and statutory law in the LDCs of Sub-Saharan Africa. Fourth, tax treaties may have little impact on multinational investment behavior in the face of non-tax characteristics of LDCs, such as inadequate infrastructure. Finally, tax treaties may offer little more than perception about the commercial and legal climate of a country for foreign investment. Because of the impact of each of these factors on global commercial activity, a tax treaty between Ghana and the U.S. would yield an insignificant impact on investment and trade between these two countries.

A. Non-Comparable Taxation

The first phenomenon that tends to reduce the potential benefit of a tax treaty between the U.S. and Ghana is the fact that U.S. multinational companies are likely to face non-income types of taxation in Ghana. Like many LDCs, Ghana relies on a broad range of taxes that are not relieved under tax treaties, including consumption, excise, and trade taxes. The reliance on trade and excise taxes is historical, arising out of practices that have since been abandoned in developed countries in favor of personal income taxation and, outside of the U.S., consumption taxation, typically in the form of the value added tax (VAT).

VATs are relatively new to LDCs, having been introduced in the 1970s and 1980s largely as part of tax reforms initiated by international monetary organizations as a condition of lending. Prior to the introduction of the VAT,

---

162 That is, if they face any taxation at all. See infra Part IV.B.

163 See, e.g., Guttenberg, supra note 4, at 452 (“[W]e have noted a trend where developing countries question the desirability of maintaining high source based taxation, but need to find alternative sources of revenue . . . many of them rely to a lesser extent on OECD type tax systems . . . instead, there is a greater reliance on value added taxes and asset taxes.”).


165 From 1950, when the VAT emerged in its modern form, until 1980, many countries shifted from consumption taxes to payroll (social security) taxes, and since 1980, many countries have begun to shift from personal income taxes to VAT. Ken
many LDCs, including those in Sub-Saharan Africa, followed the customs of the developed world that were introduced under colonization and relied heavily on trade taxes for revenue. The increased focus on the VAT was part of an overall effort to gradually reduce and, eventually, completely eliminate taxes on international trade.

In Ghana, the government introduced a 20% VAT in 1995 but quickly repealed it in the face of violent protests. After a lengthy educational campaign, the government reinstated the VAT in 1998, this time at 10%. Since then, the VAT has not led to a decrease in any other taxes. A decrease in international trade taxes (tariffs) and excise taxes was initially realized soon after introduction of the VAT, but this trend has since reversed itself, and tariffs are currently increasing as a percentage of total revenues collected. Moreover, a temporary rise in corporate income taxation that accompanied the introduction of the VAT appears to have leveled off and corporate tax rates are currently decreasing. As a result, the introduction of the VAT in Ghana has lead to an overall increase in taxes that are not addressed by treaties.


166 Vito Tanzi, Taxation in Developing Countries, in TAX SYSTEMS IN NORTH AFRICA AND EUROPEAN COUNTRIES 1, 8-9 (Luigi Bernardi & Jeffrey Owens, eds., 1994) (discussing revenue composition in LDCs). In Sub-Saharan Africa trade taxes averaged about 27% of total revenues from 1994 to 1999. Percentages of revenues collected attributable to trade taxes ranged from 5% in Angola, to 49% in Uganda. Scott Riswold, IMF VAT Policy in Sub-Saharan Africa, WTD, Sep. 1, 2003, at 8. For a discussion of the impact of colonization on tax systems in LDCs, see Stewart, supra note 11, at 145.

167 Such efforts have been encouraged by international monetary organizations such as the International Monetary Fund (IMF) and the World Bank as part of an overall tax reform package introduced in various forms as a condition to ongoing lending arrangements. Stewart, supra note 11, at 170.


169 Miranda Stewart & Sunita Jogarajan, The International Monetary Fund and Tax Reform, 2 BRIT. TAX REV. 146, 155 (2004).


171 Id.

172 See Reuven S. Avi-Yonah, From Income to Consumption Tax: Some International Implications, 33 SAN DIEGO L. REV. 1329, 1350 (1996) (theorizing the obsolescence of the U.S. tax treaty network in the event the U.S. adopts a consumption
Finally, investors are likely to encounter non-comparable taxation in Ghana as a result of government stake-holding in many formerly state-owned enterprises. For example, cocoa produced in Ghana is not subject to income taxation, but is subject to levy by the Ghana Cocoa Board, a monopsony for the international sale of Ghanaian cocoa products. Similarly, the government extracts mining profits by owning shares in all mining operations and requiring the payment of dividends on such shares. Thus, a focus on the VAT, income, international trade, and excise taxes in Ghana provides only an incomplete picture of the full burden of taxation imposed in this country. As treaties focus only on income taxation, they address taxation in LDCs to a very limited degree.

B. Decreasing Global Tax Burdens

As non-comparable taxation increases, income taxation is decreasing throughout the world. As a result, multinationals investing in LDCs may face little or no income taxation on their foreign earnings. First, taxation may be reduced or eliminated by residence countries pursuant to rules that provide assets in offshore companies an indefinite suspension (deferral) of residence-based taxation. Second, taxation may be reduced or eliminated by source countries pursuant to tax incentives that eliminate taxation for specified durations or perpetually. Third, taxation by both countries may be reduced and repeals the income tax, since “[f]undamentally, income tax conventions apply to taxes on ‘income and capital’”). There are some tax treaties that address consumption taxes, specifically VAT. However, in most countries, the VAT employed is destination-based, meaning that exports are exempt from VAT and imports are subject to VAT. As a result, double VAT is avoided to a certain extent without need for international agreement (some double taxation will continue to occur to the extent there are varying definitions of exempted and included items). The inconsistency occurs to various degrees in every country that employs a VAT. Developed countries, however, continue to rely more heavily than LDCs on income taxation, which is relieved by, and therefore necessitates the continued existence of, tax treaties.

173 G.I.R.A., supra note 83, § 11(7) (“income from cocoa of a cocoa farmer is exempt from tax”).

174 Acting as the intermediary between farmers and the global market, the Ghana Cocoa Board has the “sole responsibility for the sale and export of Ghana cocoa beans,” and delivers only a fraction of realized proceeds to farmers, thus imposing a gross basis tax that currently approximates some 33%. See Ghana Cocoa Beans Production, Export And Prices, available at http://www.cocobod.gh/corp_div.cfm?BrandsID=13. See also STATE OF THE GHANAIAN ECONOMY, supra note 170, at 26.

or eliminated through strategies of tax avoidance and evasion. Finally, taxation by both countries may be reduced or eliminated pursuant to express efforts to do so by both taxing jurisdictions, usually through a tax treaty. The combination of reduction or elimination of taxation in both countries, whether express or not, leads to complete non-taxation of multinational activities. As discussed more fully below, the resulting lack of taxation obviates the need to pursue tax relief under treaty.

1. Reduced Taxation Through Deferral

As discussed above, most developed countries impose taxation on a worldwide basis, yet most protect this right only with respect to certain items of income, allowing suspension of taxation on other items to continue indefinitely at the will of the shareholders. Thus, despite the support for the primacy of residence-based taxation that originally served as a major reason for entering into tax treaties, much residence-based taxation is undermined by the persistent allowance of deferral.

Deferral is antithetical to residence-based taxation. By allowing it, nominally residence-based jurisdictions like the U.S. mirror source-based (or territorial) systems by effectively providing tax exemptions for foreign income. Deferral is defended on grounds of neutrality: it is argued that companies from residence-based countries like the U.S. face heavier global tax burdens than companies from territorial countries, when both operate in third countries that impose little or no source-based taxation. For example, it is suggested that U.S.-based multinational companies operating abroad may be subject to little source-based taxation as foreign countries compete to attract their investment by offering low tax burdens, but because of the U.S. system of worldwide taxation, the U.S.-based company is still subject to the higher U.S. domestic tax rates. In contrast, it is supposed that multinationals from territorial systems will have a tax advantage in the minimally-

---

176 Sometimes called double non-taxation to indicate the coordinative effort that produces it.
177 See supra text accompanying note 35.
178 See supra text accompanying note 68.
179 See Peroni, supra note 65, at 987. Passive income items such as dividends, interest, and royalties are generally not eligible for deferral and are therefore subject to current tax in the U.S.
taxing foreign country because these companies can combine low taxation abroad with exemption at home.\textsuperscript{180}

Based on this argument, deferral continues to be vigorously defended under principles of capital import neutrality,\textsuperscript{181} as requisite to allow U.S. companies to compete in low-tax countries against the multinational companies of territorial jurisdictions.\textsuperscript{182} That few multinational companies are actually residents of purely territorial systems,\textsuperscript{183} and that deferral provides the equivalent of exemption for much of the foreign income earned by U.S. multinationals while simultaneously providing them with a competitive advantage over their domestic counterparts,\textsuperscript{184} appears to have little effect

\textsuperscript{180} See Roin, \textit{supra} note 63, at 114 (citing deferral proponents who argue that “[a]ny businesses that Americans can successfully operate in low tax jurisdictions . . . foreign investors can carry on equally well [and that if deferral was ended] foreign investors would use their now unique tax advantage to overwhelm their American competitors, wherever located.”).

\textsuperscript{181} See discussion of neutrality \textit{supra} note 61 and accompanying text.

\textsuperscript{182} See, e.g., Mark Warren, \textit{Democrats Would Increase Taxes on Companies’ Income Earned Abroad Repealing the Deferral Rule: The Wrong Answer to U.S. Job Losses}, 2004 WTD 88-16 (May 3, 2004) (arguing that some countries exempt the foreign earnings of their multinationals, U.S. companies would face a higher overall tax burden when operating in low-tax jurisdictions in the absence of deferral, and that U.S. companies “cannot be expected to succeed if they are handicapped by a 35-percent corporate-tax rate on their worldwide income”); National Foreign Trade Council, Inc., \textit{The NFTC Foreign Income Project: International Tax Policy for the 21st Century, 1999 WTD 58-37} (Mar. 25, 1999); \textit{Impact of U.S. Tax Rules on International Competitiveness: Hearing Before the H. Comm. on Ways and Means}, 106th Cong. 64 (1999) (statement of Fred F. Murray, Vice President for Tax Policy National Foreign Trade Council, Inc.), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_house_hearings&docid=f:c66775.pdf (arguing that “[i]f the local tax rate in the company of operation is less than the U.S. rate, . . . competitors will be more lightly taxed than their U.S.-based competition,” whether they are locally based or foreign, “unless their home countries impose a regime that is as broad as subpart F, and none have to date done so”). The argument is perhaps as old as U.S. taxation itself. In the newly independent United States, import duties were favored over export duties or other forms of taxation, because the imposition of either export duties or property taxes on farmers would equally increase the price of goods destined for export, thus serving to “enable others to undersell us abroad.” See \textit{United States in Cong. Assembled, Reply to the Rhode Island Objections, Touching Import Duties} (1782), \textit{reprinted in 1 The Debates in the Several State Conventions on the Adoption of the Federal Constitution} 100, 105 (Jonathan Elliot, ed. 1996).

\textsuperscript{183} For example, of the top 100 multinationals, eighteen are from generally territorial systems (one from Hong Kong, three from Switzerland, one from Malaysia, and thirteen from France). Since France imposes a form of world-wide taxation on low-taxed earnings of controlled foreign companies, even this number is an exaggeration. Other countries may impose worldwide income generally, but exempt the foreign income of their multinationals under treaty. See UNCTAD World 100 Non-Financial TNCs, \textit{supra} note 82.

\textsuperscript{184} Domestic companies are subject to worldwide taxation and cannot generally opt to suspend the taxation of their profits. See generally Clifton Fleming Jr. et al., \textit{An Alternative View of Deferral: Considering a Proposal to Curtail, Not Expand, Deferral}, 2000 WTD 20-15 (Jan. 31, 2000) (arguing that deferral is a subsidy for
on the efforts of U.S. multinationals to preserve the deferral privilege.\footnote{185}{See supra text accompanying note 182.}

The effect of deferral is to increase the sensitivity of U.S. taxpayers to foreign tax rates, thus forcing source countries to continually lower their internal tax burdens so as to attract the ever more demanding foreign capital. Deferral thus causes tax competition, as any income taxation imposed by a source country, such as Ghana, subjects a potential foreign investor to a burden it could otherwise avoid.\footnote{186}{Deferral removes the existing (residual) tax burden, thereby ensuring that any tax imposed by a foreign country is a tax wedge. In the absence of deferral, the tax wedge is created by the home country and, outside of limitations on foreign tax credits, taxes imposed by the source country do not increase the wedge. For a discussion of the interaction of deferral and the subsequent efforts of source countries to eliminate tax wedges, see Dagan, supra note 40, at 952-56.}

Elimination of competition and tax sensitivity could be achieved if all countries adhered to principles of capital export neutrality. However, this would require international coordination and cooperation to a degree that appears overwhelmingly unattainable.\footnote{187}{See Victor Thuronyi, International Tax Cooperation and a Multilateral Treaty, 26 BROOK. J. INT'L L. 1641, 1642 n.8 (2001) (an internationally harmonized system is "too utopian to merit discussion"); Charles E. McLure, Jr., Tax Policies for the XXIst Century, in Visions of the Tax Systems of the XXIst Century 9, 28-29 (1997). But see Yariv Brauner, An International Tax Regime in Crystallization, 56 TAX L. REV. 259, 260 (2003) (arguing that there has been a “modelization” of the international tax rules that could be built upon to achieve some measure of rule harmonization). Recent developments in the EU indicate that less, rather than more, cooperation is likely. See Joann M. Weiner, EU Governments Fear Increased Tax Competition in Wake of Accession, 2004 WTD 81-1 (Apr. 6, 2004); Joe Kirwin, International Taxes European Commission Rejects Effort For Harmonized Corporate Tax Rates, DAILY TAX REP., June 1, 2004, at G-8.}

The consequence is that U.S. multinationals may generally avoid U.S. taxation on their foreign income by operating through subsidiary companies in source countries,\footnote{188}{Stephen E. Shay, Exploring Alternatives to Subpart F, 82 TAXES 3-29, 31 (2004) (multinationals are free to choose to operate through a branch or subsidiary, and they will generally choose subsidiary form unless the foreign effective tax rate is greater than the U.S. rate or if they benefit from pooling high- and low-taxed earnings).} which they generally do.\footnote{189}{For example, several of the largest foreign investments in Ghana are U.S. controlled foreign corporations (CFCs), including the Valco, Regimanuel Gray, and Equatorial Bottlers, discussed supra note 108. Operating through a domestic subsidiary is also more advantageous from a Ghanaian perspective, since foreign companies are subject to strict scrutiny from the taxing and regulatory authorities to an extent exceeding that paid to domestic companies. The differential treatment is especially acute in the case of mining and other extractive operations, which are...
elimination of taxation on foreign income becomes the norm in the developed world, LDCs respond accordingly, by increasingly offering corresponding tax relief in the form of tax incentives. These incentives have become a standard tool for capturing a share of the global flow of foreign investment.  

2. Reduced Taxation Through Tax Incentives

Most countries use various forms of tax incentives to encourage particular behavior in taxpayers, and neither the U.S. nor Ghana is an exception. The U.S. employs numerous tax incentives to attract foreign investment and encourage domestic investment. These provisions are generally embedded in the tax base, rather than being reflected in the tax rates. For example, along with the privilege of deferral, tax credits for research and development (R&D) and accelerated depreciation deductions are among the major tax incentives the U.S. offers.

strictly regulated and limited as to foreign ownership by the Government of Ghana. Interview with Bernard Ahafor, Attorney, in Ghana (Dec. 2, 2003). See also Shay, supra note 188, at 31.

The evidence is perhaps most obvious in regards to the number of countries offering tax holidays—over one hundred in 1998 and increasing—and the share of foreign investment directed at tax havens that are decried by the OECD for their harmful tax practices. While these countries command a fraction of the world’s population and its GDP, they attract a disproportionately large amount of U.S. foreign investment capital. See Avi-Yonah, supra note 164, at 1577, 1589, 1643.

Since the 1960s, an awareness of the danger of the hidden costs of such incentives has led to expenditure budgeting, which quantifies the cost of embedded provisions. For an example, see Analytical Perspectives, supra note 65, at 285 (explaining the concept of expenditures and providing a selected list). Incentives currently provided in the U.S. tax base include accelerated depreciation and exclusions from taxation for certain forms of income such as tax-exempt interest. Tax incentives include any exclusions or exemptions that reduce or defer the tax base. See generally Alex Easson & Eric M. Zolt, Tax Incentives, 2002 WORLD BANK INST. 3 ("[t]ax incentives can take the form of tax holidays for a limited duration, current deductibility for certain types of expenditures, or reduced import tariffs or customs"). Ireland and Belgium, which offer low rates for foreign investors, are exceptions (and a source of consternation to their OECD counterparts) to the general rule of tax base rather than tax rate concessions in developed countries. See, e.g., Avi-Yonah, supra note 164, at 1601.

Congress first provided a deduction for research and experimental expenditures in 1981, because it saw a decline in research activities it attributed to inadequacies in the I.R.C. § 174 deduction, which at that time only applied to investment in machinery and equipment employed in research or experimental activities. Congress concluded that “[i]n order to reverse this decline in research spending . . . a substantial tax credit for incremental research and experimental expenditures was needed.” STAFF OF THE J. COMM. ON TAX’N, 97TH CONG., GENERAL EXPLANATION OF THE ECONOMIC RECOVERY TAX ACT OF 1981, reprinted in INTERNAL REVENUE ACTS, 1980-1981, at 1369, 1494 (1982). In the same act, Congress provided for accelerated depreciation deduction allowances because the existing depreciation
Ghana also offers accelerated depreciation deductions and R&D credits similar to—but perhaps not as generous as—those of the U.S.\footnote{G.I.R.A., supra note 83, Third Schedule (depreciation allowance), § 19 (deductions for research and development expenditures).} However, most LDCs, including Ghana, also offer significantly more generous incentives in the form of low corporate tax rates and myriad tax exemptions.\footnote{For example, by 1998, over 100 countries had tax holidays. Avi-Yonah, supra note 164, at 1577. See, e.g., ZMARK SHALIZI, LESSONS OF TAX REFORM 23 (1991).} Ghana imposes only an 8% tax on income from the export of most goods, rates ranging from 16 to 25% for certain industries and businesses conducted in certain geographic areas, and complete exemption from taxation (tax holidays) for periods ranging from three to ten years for new activities conducted in certain industries or geographic areas.\footnote{G.I.R.A., supra note 83, §11 (Industry Concessions) & First Schedule, Part II (Rates of Income Tax Upon Companies). Although tax holidays are limited in duration, insufficient enforcement prevents the IRS from curbing instances in which companies facing expiring tax holidays simply dissolve and reincorporate under a different name to restart the clock. Interview with Kweku Akaah-Boafo, Esq. (Feb. 6, 2004) (Discussing Canadian Bogosu Resources, a mining company operating in Ghana which reincorporated as Billington Bogusu Gold Limited and again five years later as Bogusu Gold Limited, in order to avail itself of tax benefits that otherwise would have expired).} Many LDCs, including Ghana, have also set aside geographic areas as havens from the normal tax and regulatory regimes (free zones), specifically to host manufacturing and processing plants. In Ghana’s free zone, established in 1995, companies enjoy a ten-year tax holiday followed by tax rates never to exceed 8%.\footnote{G.I.R.A., supra note 83, First Schedule.}

International organizations such as the World Bank and the IMF currently decry the harm that tax holidays cause in

\textit{Internal Revenue Code, supra note 83, Third Schedule (depreciation allowance), § 19 (deductions for research and development expenditures).}

\textit{Avi-Yonah, supra note 164, at 1577. See, e.g., ZMARK SHALIZI, LESSONS OF TAX REFORM 23 (1991).}

\textit{G.I.R.A., supra note 83, §11 (Industry Concessions) & First Schedule, Part II (Rates of Income Tax Upon Companies). Although tax holidays are limited in duration, insufficient enforcement prevents the IRS from curbing instances in which companies facing expiring tax holidays simply dissolve and reincorporate under a different name to restart the clock. Interview with Kweku Akaah-Boafo, Esq. (Feb. 6, 2004) (Discussing Canadian Bogosu Resources, a mining company operating in Ghana which reincorporated as Billington Bogusu Gold Limited and again five years later as Bogusu Gold Limited, in order to avail itself of tax benefits that otherwise would have expired).}

\textit{G.I.R.A., supra note 83, First Schedule.}
depriving LDCs of much-needed revenue.\textsuperscript{197} The elimination of income taxation on corporate taxpayers, coupled with the pressure to reduce taxes on international trade, has created critical revenue shortfalls in many countries.\textsuperscript{198} Nevertheless, new tax incentives continue to be introduced in both developed and less developed countries around the world,\textsuperscript{199} often in response to private sector lobbying.\textsuperscript{200} Some recent examples include the introduction of a free zone in the United Arab Emirates,\textsuperscript{201} a five-year exemption period for audit, accounting, and law firms in Singapore,\textsuperscript{202} and a ten-year corporate tax holiday for income from investments of at least €150 million in Turkey.\textsuperscript{203}

As a result of these kinds of initiatives, U.S. multinationals may face little or no income taxation on income

\begin{itemize}
\item \textsuperscript{197} See, e.g., Janet Stotsky, \textit{Summary of IMF Tax Policy Advice, in TAX POLICY HANDBOOK} 279, 282 (Parthasarathi Shome, ed., International Monetary Fund 1995) (stating that tax incentives “have proved to be largely ineffective, while causing serious distortions and inequities in corporate taxation.”); SHALIZI, supra note 194, at 60 (“The use of so-called tax expenditures (tax preferences and exemptions to promote specific economic and social objectives) should, in general, be deemphasized.”). This is a reversal of position for the World Bank, which at one point encouraged LDCs to offer tax incentives to attract foreign investment and was concerned with the effect elimination of tax incentives might have on its assistance projects. Stewart, supra note 11 at 169; SHALIZI, supra note 194, at 68-69. The World Bank has since “recommended the removal or tightening of incentives in Argentina (1989), Bangladesh (1989), Brazil (1989), Ghana (1989), and Turkey (1987), among others.” SHALIZI, supra note 195, at 69. Tax incentives are also contrary to WTO rules prohibiting tax subsidies. See WTO Agreement on Subsidies and Countervailing Measures, Apr. 14, 1994, Annex 1A, Art. 1, ¶ 1.1. However, these provisions are rarely enforced with respect to LDCs. See Reuven S. Avi-Yonah & Martin B. Tittle, \textit{Foreign Direct Investment in Latin America: Overview and Current Status} 26-28 (2002), available at http://www.iadb.org/INT/Trade/1_english2/WhatWeDo/Documents/d_TaxDocs2002-2003/a_Foreign%20Direct%20Investment%20in%20Latin%20America.pdf.
\item \textsuperscript{198} See, e.g., Kwang-Yeol Yoo, \textit{Corporate Taxation of Foreign Direct Investment Income} 1991-2001 (Econ. Dep't, Working Paper No. 365, 2003), available at http://www.olis.oecd.org/olis/2003doc.nsf/43bb6130e5e6e5fc12569fa005d004c/48ae491b8e2db4a9c1256d8e003b5678$FILE/JT00148239.PDF.
\item \textsuperscript{199} See, e.g., David Roberto R. Soares da Silva, \textit{Tech Companies in Brazil Seek Tax Incentives to Promote R&D}, 2004 WTD 138-6 (Jul. 19, 2004) (domestic and multinational technology companies are currently lobbying for a three-year exemption from federal taxes for income from sales of “all new products that contain significant technological innovation”).
\item \textsuperscript{200} Under this new initiative, free-zone companies in Dubai will be exempt from income tax. See Cordia Scott, \textit{Dubai Woos Europe With Tax-Free Outsourcing Zone}, 2004 WTD 118-12 (June 17, 2004).
\item \textsuperscript{201} Lisa J. Bender, \textit{Singapore Launches Tax Incentives for Audit, Accounting, Law Firms}, 2004 WTD 66-5 (Apr. 5, 2004).
\item \textsuperscript{202} Mustafa Çumlica, \textit{Turkey Plans Tax Holidays for Large Investments}, 2004 WTD 82-8 (Apr. 28, 2004).
\end{itemize}
derived in LDCs. The impact of tax treaties on activities giving rise to such income is therefore minimized, as double taxation, and even single taxation, is avoided through unilateral tax rules. However, even if home or source countries nominally impose taxation on multinationals, widespread tax avoidance and evasion neutralizes these taxes. Tax treaties appear to have little effect in these circumstances.

3. Reduced Taxation Through Tax Avoidance and Evasion

In the event that deferral or tax incentives are not available, multinational companies manage their worldwide tax exposure by using tax planning techniques to shift income to low- or no-tax jurisdictions through earnings stripping, transfer pricing, thin capitalization, and similar means of tax avoidance and, in the extreme, tax evasion.²⁰⁴ For example, U.S. multinationals typically use over- and under-invoicing to assign foreign profits to subsidiaries in tax havens.²⁰⁵ As a result, firms can increasingly make physical location decisions that are largely independent of tax-related business decisions.

²⁰⁴ See Reuven S. Avi-Yonah, The Rise and Fall of Arm's Length: A Study in the Evolution of U.S. International Taxation, 15 VA. TAX REV. 89, 95 (1995) ("Transfer pricing manipulation is one of the simplest ways to avoid taxation."); David Harris, Randall Morck, Joel Slemrod & Bernard Yeung, Income Shifting in U.S. Multinational Corporations, in STUDIES IN INTERNATIONAL TAXATION 277, 301 (Giovannini et al. eds., 1993); James R. Hines, Jr., Tax Policy and the Activities of Multinational Corporations, in FISCAL POLICY: LESSONS FROM ECONOMIC RESEARCH 401, 414-15 (Alan J. Auerbach ed., 1997). The line between tax avoidance and tax evasion is murky. Tax avoidance generally refers to lawful attempts to minimize taxation, as Judge Learned Hand famously noted in Comm'r v. Newman, 159 F.2d 848, 850-51 (2d Cir. 1947) (Hand, J., dissenting) ("Over and over again courts have said that there is nothing sinister in so arranging one's affairs as to keep taxes as low as possible. Everybody does so, rich or poor; and all do right, for nobody owes any public duty to pay more than the law demands . . . ."). Tax evasion generally encompasses the unlawful and fraudulent avoidance of tax accomplished by hiding taxable income and assets from taxing authorities.

²⁰⁵ See Council of the European Union, Final Draft Report of the Ad hoc Working Party on Tax Fraud 16-17 (Brussels, April 27, 2000). Direct tax fraud is typically committed through false invoicing, under- and over-invoicing, non-declaration of income earned in foreign jurisdictions, and “use by taxpayers of a fictitious tax domicile, with the purpose to evade fulfilling their tax obligations in their country of domicile for tax purposes.” Id. at 4-5. See also Martin A. Sullivan, U.S. Multinationals Move More Profits to Tax Havens, 2004 WTD 31-4 (Feb. 9, 2004) (although they comprise just 13% of productive capacity and 9% of employment, subsidiaries of U.S. multinationals located in the top eleven tax havens were assigned 46.3% of foreign profits in 2001); HOOKE, supra note 124, at 86-87 (suggesting that to control costs, it is “sound operating procedure” for a foreign investor of an export platform in a LDC to interpose an offshore bank, and overcharge the foreign company for imported supplies and management fees to reduce income in the source country).
shifting profits to the most advantageous tax destination.\textsuperscript{206} Efforts by governments to curb such practices are abundant\textsuperscript{207} but largely ineffective\textsuperscript{208} in the face of efforts by taxpayers to engage in them.\textsuperscript{209}

In LDCs such as Ghana, where enforcement of the tax law has been relatively less of a focus than reform of the tax law, tax authorities are all but helpless against these practices.\textsuperscript{210} It is popularly said that Ghanaian companies keep three sets of books: one for the banks, showing large profits so as to secure financing; one for the Ghanaian Internal Revenue Service (IRS), showing large losses so as to avoid paying taxes; and one set, very closely-guarded by the owners, that contains the most accurate information.\textsuperscript{211} There is no official data available regarding whether, and to what extent, U.S.


\textsuperscript{207} Transfer pricing rules are a common feature in the tax systems of most countries, as are rules denying deductions for interest and royalties in certain cases and rules requiring a certain combination of debt and equity (thin capitalization rules).\textsuperscript{208} See \textit{Hugh J. Ault and Brian J. Arnold, Comparative Income Taxation: A Structural Analysis} 420-28 (1997).

\textsuperscript{208} In the U.S., the transfer pricing rules are long and complicated and constantly evolving, but still considered inadequate in preventing profit-shifting, as are U.S. earnings- and interest-stripping rules. See, e.g., I.R.C. § 163(j) (2005). These rules are essentially thin capitalization rules, each of which are similarly limited in their success in curbing avoidance of U.S. taxation. For an overview of U.S. efforts to control transfer pricing, see generally Avi-Yonah, \textit{supra} note 204. For a recent example of the failure of interest stripping rules, consider the growing use of Canadian Income Funds to avoid the application of I.R.C. § 163(j) (2000). See, e.g., Jack Bernstein & Barbara Worndl, \textit{Canadian-U.S. Cross-Border Income Trusts: New Variations}, 34 \textit{Tax Notes Int’l} 281, 283 (April 19, 2004).

\textsuperscript{209} See, e.g., Shay, \textit{Exploring Alternatives, supra} note 188, at 36 (“The drive on the part of taxpayers, multinational and others, to push down effective tax rates has accelerated in recent years.”).

\textsuperscript{210} See Stewart, \textit{supra} note 11, at 181.

\textsuperscript{211} Interview with Margaret K. Insaidoo, Justice, High Court of Ghana, in Ghana (Dec. 9, 2003) (on file with author); Interview with Bernard Ahafor, Attorney, Private Practice, in Ghana (Dec. 2, 2003) (on file with author); Interview with Sefah Ayebeng, Chief Inspector of Taxes, Internal Revenue Service, in Ghana (Dec. 11, 2003) (on file with author). The implication is that firms keep separate books in an attempt to defraud the government, rather than in the ordinary course of keeping separate tax and cost accounting books, for which there is generally no statutory prescription. See, e.g., \textit{Charles E. Hyde & Chongwoo Cho, Keeping Two Sets of Books: The Relationship Between Tax & Incentive Transfer Prices}, \url{http://ssrn.com/abstract=522623} (arguing that keeping two sets of books with respect to transfer pricing is “not only legal but also typically desirable” for many MNEs).
multinationals take advantage of enforcement weaknesses.\textsuperscript{212} Ghana recently introduced a Large Taxpayers Unit to curtail tax evasion, but the Ghanaian IRS relies on the good faith of company officials and their independent auditors because the resources are lacking to perform audits on all but a few companies.\textsuperscript{213} Given that the overall tax compliance rate is estimated to be less than 20\% in Ghana, good faith appears to be rather elusive.\textsuperscript{214}

As a consequence of tax avoidance and evasion strategies, income is often exempt from taxation even if tax nominally applies in the residence country, the source country, or both. In such a taxing environment there is little taxation, let alone double taxation, to be relieved by treaty. Governments are not unaware of the problem. Tax avoidance and evasion has typically been addressed in treaties through information sharing provisions, in which the respective taxing jurisdictions agree to assist each other in collecting revenues.\textsuperscript{215}

\textsuperscript{212} Anecdotal evidence that multinationals are thought to evade taxation where possible is not lacking, however. See, e.g., Sirena J. Scales, Venezuela Temporarily Closes McDonald's Nationwide, 2005 WTD 26-11 (Feb. 9, 2005) (“Venezuela’s Tax Agency (SENIAT) has temporarily closed all 80 McDonald’s restaurants in the nation, citing failure to comply with tax rules . . . .”).

\textsuperscript{213} Seth E. Terkper, Ghana Establishes Long-Awaited Large Taxpayer Unit, 2004 WTD 64-10 (Apr. 2, 2004). A mid-size taxpayers unit is also in the planning stages. Ayeubg, supra note 211. A more effective audit process may not be sufficient to induce increased compliance, however. A recent empirical study about Australian investors that were accused of engaging in abusive tax transactions argues that taxpayers’ level of trust regarding the fairness, neutrality, and respect accorded to them by the revenue authorities was correlated to their level of voluntary compliance, and that although trust alone should not be relied upon in enforcing a tax system, “a regulatory strategy that combines a preference for trust with an ability to switch to a policy of distrust is therefore likely to be the most effective.” Kristina Murphy, The Role of Trust in Nurturing Compliance: A Study of Accused Tax Avoiders, 28 LAW & HUM. BEHAV. 2, 187, 203 (2004). In an interesting twist, South Korea recently announced that domestic and foreign companies meeting target job creation goals will be free from audits in 2004 and 2005 under a new tax incentive program. James Lim, South Korea Offering Companies that Create Jobs Shield from Audits, 34 Daily Tax Rep. (BNA) G-3 (Feb. 23, 2004).

\textsuperscript{214} The compliance rate is an estimate of Ghanaian IRS officials and not an official government statistic. Ayeubg, supra note 211 (estimating compliance at less than 20\%); Interview with Fred Ajyarkwa, Official, Internal Revenue Service, in Ghana (Dec. 11, 2003) (estimating it at 17\%).

\textsuperscript{215} The U.S. Model requires contracting states to exchange all relevant information to carry out the provisions of the tax treaty or the domestic laws of the states concerning taxes covered by the treaty, including assessment, collection, enforcement, and prosecution regarding taxes covered by the Convention. See U.S. Model, supra note 56, art. 26, ¶ 1. It also calls for treaty override of domestic bank secrecy or privacy laws. The OECD Model does not include the assessment/collection language but extends the scope of taxes to “every kind and description imposed on behalf of the contracting states.” See OECD Model, supra note 21, art. 26, ¶1. It does not include an equivalent to the U.S. Model’s secrecy law override. The UN Model
These provisions have a perhaps unintended consequence, however. Introduction of a tax treaty may decrease investment, as investors seek to avoid the implementation of the information sharing provisions that have become standard in tax agreements.216

The intersection of the taxation of portfolio interest and U.S. interest reporting rules illustrates this tension. The U.S. is a potential tax haven for foreign investors because of its zero tax on portfolio interest and rules under which banks are generally not required to report interest payments made to nonresident aliens.217 Efforts to require interest payment reporting have consistently met strong resistance by the private sector, which argues that such rules would “hinder tax competition between nations” and “undermine [the] global shift to lower tax rates and international tax reform.”218 Several members of Congress echo these sentiments, arguing that expanded reporting rules “would likely result in the flight of hundreds of billions of dollars from U.S. financial institutions” and could cause “serious, irreparable harm to the U.S. economy.”219 The implication is that while the U.S. does not

limits assistance to taxes covered by the Convention as in the U.S. Model, and explicitly adds that information exchange is intended to prevent fraud or evasion of taxes. See UN MODEL, supra note 78, art. 26, ¶ 1.

216 Bruce A. Blonigen & Ronald B. Davies, The Effects of Bilateral Tax Treaties on U.S. FDI Activity (Nat'l Bureau of Econ. Research, Working Paper No. 8834, 2002), available at http://www.nber.org/papers/w8834 (showing a decrease in foreign investment upon the introduction of a tax treaty and suggesting that such decrease may be the result of the dampening effect tax treaties may have on tax evasion due to information sharing provisions); Ronald B. Davies, Tax Treaties, Renegotiations, and Foreign Direct Investment (University of Oregon Economics, Working Paper No. 2003-14, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=436502 (“[t]reaties have either a zero or even a negative effect on FDI" because they dampen the ability of businesses to engage in tax evasion activities, especially through transfer pricing).


219 Alison Bennett, House Lawmakers Ask Bush to Withdraw IRS Interest Reporting Rules for Aliens, 69 Daily Tax Rep. (BNA) G-8 (Apr. 10, 2002). See also Sen. Gordon Smith (R-Ore.), Letter on Proposed Nonresident Alien Interest Reporting Rules (REG-133254-02) to Treasury Secretary John Snow, TaxCore (BNA) (Feb. 20, 2003) (urging Treasury not to move forward with interest reporting rules because it “would drive the savings of foreigners out of bank accounts in the United States and into bank accounts in other nations,” and expressing the Senator's failure to understand "why we put the enforcement of other nations' tax laws as a priority at Treasury").
condone tax evasion, there has emerged no political will strong enough to counter the private interests benefiting from the rules as they currently exist. 220

Similar sentiments may exist in the context of tax treaties, especially when the partner country, as in the case of Ghana, has a very limited ability to enforce the tax laws prior to the introduction of a treaty. If foreign investors are able to avoid taxation in Ghana, for instance through aggressive tax planning, a tax treaty that requires or permits Ghana to provide tax information to the U.S. taxing authority may not be welcome. 221

4. Reduced Taxation Through Tax Sparing

The proliferation of tax incentives and tax holidays in LDCs, coupled with deferral in the U.S. and tax avoidance opportunities in both countries, limits the need for tax treaties to relieve double taxation. Since the 1950s, tax sparing has been promoted as a way to use tax treaties to increase investment to targeted LDCs, even in the absence of double taxation. 222 Tax sparing prevents residence-country taxation of income exempted from tax by source countries, 223 by providing

220 Perhaps recent efforts to create a multinational task force to combat abusive tax-avoidance can provide the pressure needed to reform this long standing impasse. See Sirena J. Scales, Multination Task Force Created to Combat Abusive Tax Avoidance, 2004 TNT 81-4 (Apr. 26, 2004).

221 Moreover, to the extent that a U.S. tax treaty coordinates transfer pricing rules, a treaty might increase the taxation of a multinational that could otherwise benefit from conflicting domestic standards.

222 See generally OECD, Tax Sparing: A Reconsideration (1998) [hereinafter Tax Sparing]. Recent literature on tax sparing includes Brown, supra note 7; Damian Laurey, Reexamining U.S. Tax Sparing Policy with Developing Countries: The Merits of Falling in Line with International Norms, 20 Va. Tax Rev. 467, 483 (2000) (arguing that LDCs “need tax holidays to attract foreign investment,” and therefore tax sparing is requisite to counter the effect of residual home country taxation under tax treaties). Tax sparing is also defended as justifiable on grounds of capital import neutrality, on the basis that it allows American multinationals to compete with companies from other exemption-providing countries in the global marketplace. See discussion infra notes 225-26 and accompanying text. However, tax sparing violates the concept of capital export neutrality, and has been consistently rejected by the Treasury Department on the grounds that tax treaties are supposed to relieve double taxation, not eliminate taxation altogether, and that tax treaties are not meant to provide benefits to U.S. persons.

223 Tax sparing was first introduced in the U.K. by the British Royal Commission, which prepared a report in 1953 recommending tax sparing as a means of “aiding British investment abroad.” Tax Sparing, supra note 222, at 15. Rejected by the U.K. in 1957 after several years of debate, tax sparing was enabled in U.K. tax treaties as a result of legislative action in 1961. Id. The purpose of the legislation was
that if a source country refrains from taxing income derived in its jurisdiction (usually pursuant to a tax holiday), the residence country nevertheless grants a tax credit for the nominally imposed tax.224

Thus, under tax sparing, two taxing jurisdictions cooperate to exempt multinational companies from income taxation in both countries. Although similar effects could be accomplished unilaterally by residence countries,225 tax sparing is generally seen as a mechanism that should be offered in the context of a tax treaty, as a measure to encourage foreign investment to selected LDCs.226 Tax sparing has particularly been promoted as a vehicle for investment and aid to the nations of Sub-Saharan Africa.227

There is little evidence, however, that tax sparing increases foreign investment.228 On the contrary, tax sparing could potentially decrease investment in LDCs, since it enables foreign investors to repatriate earnings that they would otherwise leave abroad under the protection of deferral.229 As

"enabling the UK to give relief to developing countries for taxes spared under foreign incentive programmes." Id.

224 Many examples and explanations of tax sparing exist. For an overview of tax sparing, see generally Richard D. Kuhn, United States Tax Policy with Respect to Less Developed Countries, 32 GEO. WASH. L. REV. 261 (1963).

225 For example, the U.S. could expand the definition of a creditable tax to include certain nominally-imposed taxes. See, e.g., Paul R. McDaniel, The U.S. Tax Treatment of Foreign Source Income Earned in Developing Countries: A Policy Analysis, 35 GEO. WASH. INT’L L. REV. 265, 268-69 (2003).

226 See, e.g., Brown, supra note 7; Laurey, supra note 222 (suggesting proposals regarding the use of tax treaties to implement foreign aid initiatives by encouraging foreign investment through tax sparing). See also J. Clifton Fleming, Jr., Robert J. Peroni & Stephen E. Shay, Fairness in International Taxation: The Ability-to-Pay Case for Taxing Worldwide Income, 5 FLA. TAX REV. 299, 347 (2001) (suggesting that limiting tax sparing to its use in tax treaties “would allow appropriate distinctions to be made among nations and would assist the United States in negotiating appropriate reciprocal tax concessions for its residents”).

227 Brown, supra note 7, at 83 (arguing for tax sparing in tax treaties specifically with Sub-Saharan Africa).

228 See McDaniel, supra note 225, at 284 (providing an overview of the conflicting economic literature regarding the interaction of tax sparing and FDI).

229 See, e.g., Peroni, supra note 67, at 469 (deferral encourages “[r]etention and reinvestment of earnings by [foreign companies]”); see also Laurey, supra note 222, at 484-85 (tax sparing would “allow U.S. multinationals to repatriate earnings based on business needs instead of on adverse tax consequences”). In a 2003 study of the annual filings of the companies in the S&P 500, it was found that such companies had accumulated over $500 billion in un-repatriated foreign earnings. ANNE SWOPE, BRUCE KASMAN & ROBERT MELLMAN, BRINGING IT ALL BACK HOME: REPATRIATION LEGISLATION’S FINAL LAP (2004), http://www.morganmarkets.com. This figure represents a trend of ever-increasing “trapped” foreign profits. Conversely, by acting as an incentive to repatriate capital, tax sparing may be advantageous to the U.S. economy even though it has long been rejected for policy reasons. For example, in the
such, tax sparing appears fundamentally inconsistent with the goal of using tax treaties to increase investment flows from developed to less developed countries.

Moreover, tax sparing increases tax competition by creating an additional disadvantage for countries that do not have tax holidays, while leaving countries that have a tax holiday in effect in the same or worse position as they were when only deferral was available. The OECD has initiated efforts to combat what it terms “harmful tax practices”—in essence, any tax regime that undermines residence-based taxation by providing tax breaks and refusing to cooperate in information sharing. Persisting in the allowance of deferral and tax holidays while promoting tax sparing seems equally inconsistent with the treaty-related goal of protecting residence-based tax bases.

Foreseeing that the ratification of any treaty with tax sparing would prompt a surge of lobbying by U.S. multinationals seeking the expansion of such provisions to other countries, the U.S. has been unequivocal in its rejection of these provisions. While the potentially negative impact on investment in LDCs is one valid reason why tax sparing should continue to be rejected, the primary position of the U.S. has been that tax sparing inappropriately allows the reduction of U.S. taxation of U.S. persons, a result specifically precluded by all U.S. treaties currently in force.

context of the repeal of I.R.C. § 114 (a tax exemption for certain foreign earnings that was found to be in violation of WTO standards), legislators enacted a temporary reduction in the rate of tax imposed on repatriated profits, citing in support the need to direct capital back to the U.S. in the quest to create jobs and boost the economy. See American Jobs Creation Act of 2004, P.L. 108-357, H.R. 4250, Sec. 101(a) (repealing I.R.C. § 114) and Sec. 965 (enacting temporary dividends-received deduction). See also STAFF OF THE COMM. ON WAYS AND MEANS, 108th CONG., Short Summary of Conference Report 108-755 2 (October 7, 2004), available at http://waysandmeans.house.gov/legis.asp?formmode=read&id=2117 (last visited Nov. 26, 2005) (Section 956 “[e]ncourages companies to reinvest foreign earnings in the United States”).

230 See, e.g., Margalioth, supra note 82, at 198.
232 Tax sparing was contemplated but ultimately rejected in tax treaties with Egypt, India, and Israel, largely due to the efforts of Stanley Surrey, who argued vigorously against the provision. See Laury, supra note 222, at 475-76. Tax sparing was also introduced in a tax treaty with Pakistan, but a subsequent change in Pakistan law rendered the provision obsolete and the treaty entered into force without it. STAFF OF S. FOREIGN RELATIONS COMM., 85th CONG., REPORT ON DOUBLE TAX CONVENTIONS, S. Exec. Rpt., No. 1, 85-2, ¶ 3 (1958).
233 This rule is enforced under the “saving clause” found in all U.S. tax treaties. See, e.g., U.S. MODEL, supra note 56, art. 1, ¶ 4.
Some LDCs, notably those in Latin America, have terminated tax treaty negotiations with the U.S. over the issue of tax sparing. Therefore, the U.S. position on tax sparing is only “one of several obstacles in the way of U.S.-developing country tax treaties.” In fact, tax sparing is largely unnecessary in the quest for complete non-taxation. As discussed above, tax holidays granted by LDCs to investors from deferral-granting countries, such as the U.S., are effective in providing double non-taxation so long as capital is reinvested rather than repatriated.

C. Domestic Tax Rates Equal to or Better Than Treaty Rates

In treaties between developed countries, domestic tax regimes are often significantly different than treaty-based tax regimes. This is especially the case with respect to tax rates on passive income paid to foreign persons, which are typically much higher under domestic statutes than under tax treaties. LDCs, however, increasingly impose tax rates that are much closer to, and in some cases are less than, the typical rates provided in treaties.

For example, dividends paid to foreign shareholders would normally be subject to a 10% tax in Ghana, unless the company paying the dividend operates in a free zone, in which case the tax rate may be zero. Thus, Ghana’s statutory tax rate is the same as or less than what would be expected under

---

234 Laurey, supra note 222, at 471, 493 (many LDCs have “refused to sign U.S. tax treaties that do not contain tax sparing clauses,” especially those in Latin America because this region “resents the U.S. [residence-based] tax policy”).

235 McDaniel, supra note 225, at 292.

236 Tillinghast, supra note 62, at 477.

237 Some countries have incorporated treaty concepts into their domestic laws. For example, permanent establishment thresholds that parallel or closely follow the OECD model treaty definition have long been the domestic rule in Japan, the Netherlands, Sweden, Germany, and France. Ault & Arnold, supra note 207, at 432-34 (1997).

238 OECD Model rates do not exceed 15% for dividends, 10% for interest, and 0% for royalties. OECD Model, supra note 21, arts. 10-12. In contrast, maximum statutory tax rates in OECD countries average 18%, 14%, and 16% on dividends, interest, and royalties, respectively. See generally Ernst & Young, supra note 35 (calculations on file with author).

239 Ghana currently imposes a 10% tax on most dividends paid to nonresidents, but provides tax incentives, including exemptions of taxation on passive income paid by domestic companies to foreign investors, as described above. See G.I.R.A., supra note 83, § 2, Schedule I, Part V (2000); see also supra, text accompanying notes 195-97.
the hypothetical U.S.-Ghana treaty outlined above. In addition, Ghana’s internal rate is lower than the 15% maximum provided in the U.S. Model for regular dividends. Nevertheless, it is higher with respect to direct dividends than the maximum 5% provided in the U.S. Model and the zero rate for dividends paid to foreign controlling company shareholders found in new treaties.

Because most dividends paid out of Ghana would likely constitute direct dividends, many of which would be paid to controlling shareholders, a treaty rate that followed the U.S. Model or recent U.S. treaty practice would reduce taxation on U.S. investors in Ghana from the internal rate of 10% (or zero) to 5% or zero. However, as discussed above, if U.S. tax treaty precedent is followed, it is unlikely that a U.S.-Ghana tax treaty would provide for these lower rates. In fact, if, pursuant to the U.S. Model, a U.S.-Ghana tax treaty provided for regular dividend taxation lower than 10%, direct dividend taxation at 5%, and no source-country taxation of interest and royalties, it would be the first and only U.S. tax treaty to do so with any country, developed or less developed.

If, as a “concession” to Ghana, the U.S. provided that instead of a maximum 5% rate for direct dividends, the maximum source-country rate would be 10%, the only result would be that Ghana’s statutory 10% rate would be maintained. No benefit in the form of reduced taxation would be realized under this agreement. In fact, if the recently concluded U.S.-Sri Lanka treaty serves as a model, a U.S.-

---

240 See supra Part III.B.
241 U.S. MODEL, supra note 56, art. 10.
242 See supra, text at note 189.
243 The rate depends on whether the payment derives from sources protected by a free zone or tax holiday regime.
244 The closest rates to these are found in the treaty with Russia, which provides for source-country tax rates of 10% on regular dividends, 5% on direct dividends, and 0% on interest and royalties. Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income and Capital, U.S.-Russ., arts. 10-12, June 17, 1992, K.A.V. 3315 [hereinafter U.S.-Russia Treaty]. See INTERNAL REVENUE SERVICE, U.S. DEP’T OF THE TREASURY, PUBL’N NO. 901, U.S. TAX TREATIES 33-34 (Rev. May, 2004) [hereinafter U.S. TAX TREATIES] (providing rate information in other treaties). Note that although the IRS published this document in May, 2004, it has no information regarding the U.S. tax treaty with Sri Lanka, which was signed on March 14, 1985, because it did not enter into force until June 13, 2004. See generally id. See also U.S.-Sri Lanka Treaty, supra note 4.
245 The treaty with Ghana would be one of six U.S. treaties with a top 10% rate for dividends. See U.S. TAX TREATIES, supra note 244, at 33-34 (providing 10% as the maximum tax rate on dividends in U.S. tax treaties with China, Japan, Mexico, Romania, and Russia).
Ghana treaty could even provide for maximum rates that are higher than Ghana’s internal rates, though again this could hardly benefit current or potential investors.246

Similarly, Ghana’s statutory rates of 5 to 10% on interest and 15% on rents and royalties comport with the average respective rates offered under other U.S. treaties, although the U.S. Model contemplates zero source taxation of both.248 Just as in the case of direct dividends, preserving a higher rate of tax would be likely under UN Model standards, but would generally be a neutral factor for investors.

Concessions that allow for higher source-country taxation of passive income items reflect the concerns addressed by the UN Model regarding the worldwide allocation of tax revenues. These concessions are meant to protect the taxing jurisdiction of capital importing nations like Ghana against the effects of the U.S. and OECD Model treaties, which allocate income away from source and towards residence countries.249 As the case of Ghana illustrates, however, preserving higher source-country taxation is a neutral measure at best. It is also contradictory to the notion otherwise promoted by U.S. policy makers that reducing tax rates will reduce tax barriers to direct investment and thereby increase capital flows between countries.

246 In the U.S. treaty with Sri Lanka, the Joint Committee queries whether this result is intended, and supposes that Sri Lanka could raise its rates up to the maximum 15% provided, thereby increasing its revenues from foreign investment. See EXPLANATION OF SRI LANKA TREATY, supra note 135, at 62-63. Yet in the same document, the Committee proclaims that the treaty will be good for the U.S. because it reduces Sri Lankan tax on U.S. investors and provides a clearer framework. Id. These two positions are difficult to reconcile, as the Joint Committee appears to recognize.

247 Ghana currently imposes a 10% tax on most interest payments, and a 15% tax on rents and royalties, with alternate rates ranging from 5 to 15% for certain payments, depending on the residence of the recipient and the payor. G.I.R.A., supra note 83, ch. I, Part I, §§ 2, 84; First Schedule, Part IV-VIII.

248 With respect to interest, see U.S. MODEL, supra note 56, art. 11. Thirty-one existing U.S. treaties, including several of the most recently signed treaties and protocols, reflect the goal of zero source-based taxation of interest, rents, and royalties. See, e.g., U.S.-Japan Treaty, supra note 155, art. 11; Australia Protocol, supra note 154, art. 7; U.S.-U.K. Treaty, supra note 156, art. 11. Interest tax rates range from 5 to 30% in the remaining treaties. U.S. TAX TREATIES, supra note 244. With respect to royalties, see U.S. MODEL, supra note 56, art. 12. Twenty-six existing U.S. treaties, including several of the most recently signed treaties and protocols, provide zero source-country tax on most royalties. See, e.g., U.S.-Japan Treaty, supra note 155, art. 12; U.S.-U.K. Treaty, supra note 156, art. 12. As in the case of interest, royalty tax rates range from 5 to 30% in the remaining treaties. U.S. TAX TREATIES, supra note 244, at 33-34.

249 See supra notes 135-36 and accompanying text.
To date there is no consensus regarding the appropriate balance of attracting investment through lower tax rates and preserving the allocation of revenue to source countries.\footnote{See, e.g., UN Model, supra note 78, art. X-XII (illustrating the lack of consensus through the omission of standard rates).} Preserving source-country revenues has been prioritized on the grounds that low taxation has a deleterious effect on infrastructure. In LDCs, providing adequate infrastructure to attract multinationals has been a continuous challenge that is further complicated by tax competition, a phenomenon that is not alleviated by tax treaties.

\section*{D. Inadequate Infrastructure and Non-Tax Barriers}

U.S. investors may be significantly influenced in their investment location decisions by broad infrastructure-related criteria such as the rule of law and the protection of property, as well as the immediate need for a suitable workforce and adequate physical infrastructure.\footnote{Hooke, supra note 124, at 47-49. For example, a stable macroeconomic environment and a well-educated workforce are two factors that correlate with greater foreign investment flowing into LDCs. UNCTAD, supra note 2, at 23.} The need for a suitable workforce in turn necessitates basic infrastructure including institutions such as schools and health care systems. In direct tension with these needs is the diminishing ability of LDCs to finance infrastructural development as they decrease taxes on business profits.

Many countries, including Ghana, offer tax incentives such as tax holidays and tax-free zones because attracting investment to sustain economic development is deemed of greater importance than protecting tax revenues.\footnote{Brian J. Arnold & Patrick Dibout, General Report, 55 Cahiers De Droit Fiscal International 25, 28 (2001) ("Certain countries . . . are more concerned with attracting activity and investment of the multinationals in order to sustain their economic development.").} However, there is little consensus regarding the effectiveness of tax incentives and tax holidays in actually attracting foreign investment. Anecdotal evidence from various countries suggests that providing tax incentives to attract foreign investment has failed to deliver the promised benefits.\footnote{See, e.g., Tamas Revesz, EU, Companies Urge Reform of Hungary’s Local Industry Tax, 2004 WTD 97-10 (May 14, 2004) ("Although Slovakia offered big investment subsidies and tax relief for foreign investors, its budget is in ruins, and the resulting forced cuts in government spending (especially transfers to households) have triggered serious hunger riots among the most seriously hit Roma population.").} Despite a plethora of tax holidays and other tax incentives, few
permanent employment opportunities have been created, and exports have failed to increase in the many free zones located throughout West Africa, including Ghana. According to John Atta-Mills, former Commissioner of the Ghanaian IRS, “experience shows that tax holidays and tax reductions are ranked very low in the priority of investors in their choice of location for their business,” and that product demand, a skilled workforce, and infrastructure are more important to businesses.

Economic evidence regarding the connection between taxation and foreign investment provides little additional certainty. A number of economic studies indicate that multinationals are very sensitive to tax considerations, and therefore corporate location decisions may be heavily influenced by tax regimes in source countries. However, conflicting studies indicate that taxation is not a significant factor in the location decisions of U.S. multinationals. Instead, these studies argue that “market size, labor cost, infrastructure quality . . . and stable international relations,” among other considerations, are the most important factors for location decisions. Studies focused particularly on foreign investment in Sub-Saharan Africa come to the same conclusion.

---

254 Papa Demba Thiam, Market Access and Trade Development: Key Actors, in TOWARDS A BETTER REGIONAL APPROACH TO DEVELOPMENT IN WEST AFRICA 97, 101 (John Igue & Sunhilt Schumacher eds., 1999). See also supra note 117 (stating that trade data indicates imports from Ghana to the U.S. are currently declining.).


257 See McDaniel, supra note 225, at 280 (providing an overview of some of this literature); see also G. Peter Wilson, The Role of Taxes in Location and Sourcing Decisions, in STUDIES IN INTERNATIONAL TAXATION, supra note 204, at 196-97, 229 (arguing that taxes are more influential in location decisions for administrative and distribution centers, but they “rarely dominate the decision process” in the case of manufacturing locations).

258 McDaniel, supra note 225, at 280.

259 See, e.g., Elizabeth Asiedu, On the Determinants of Foreign Direct Investment to Developing Countries: Is Africa Different? 1, 6 (2001), available at http://ssrn.com/abstract=280062 (arguing that location-specific factors such as natural resource availability may make infrastructure and stability of particular importance in the context of investment to Sub-Saharan Africa); World Bank, WORLD BUSINESS ENVIRONMENT SURVEY 2000, available at http://www.ifc.org/ifcext/economics.nsf/Content/ic-wbes (finding as a result of a survey
In contrast, recent literature suggests that past studies present an incomplete picture of the role of taxation because they have focused on source-country corporate income taxes, the burdens of which are relatively insignificant as compared to the burdens of non-income taxation in source countries.\(^{260}\) As a result, these past studies may have obscured the more significant influence of non-income taxation on foreign investment decisions.\(^{261}\) Since foreign non-income tax burdens significantly exceed income tax burdens, these taxes may strongly influence the behavior of U.S. multinationals.\(^{262}\) The main explanation given for this influence is that non-income taxation cannot be credited against U.S. residual taxation.\(^ {263}\)

The findings of this literature are consistent with earlier studies that suggest the relative importance of taxation in a particular country may be increasing with the availability of opportunities for avoiding taxation elsewhere.\(^ {264}\) However, these findings conflict with other studies demonstrating that multinationals can use debt financing and transfer pricing manipulation to achieve tax neutrality in investment location decisions,\(^ {265}\) and that despite earlier studies showing a connection between tax and foreign direct investment, non-tax

---

\(^{260}\) Mihir A. Desai, C. Fritz Foley & James R. Hines Jr., Foreign direct investment in a world of multiple taxes, 88 J. PUB. ECON. 2727, 2728 (2004) (“Foreign indirect tax obligations of American multinational firms are more than one and a half times their direct tax obligations.”). In previous studies, James Hines found a “small but significant” link between lower source-country taxes and foreign investment levels. See McDaniel, supra note 225, at 281; see also Avi-Yonah, supra note 164, at 1644.

\(^{261}\) See Desai, supra note 260, at 2728.

\(^{262}\) See id. at 2729.

\(^{263}\) Id. at 2728 (“The role of non-income taxes may be particularly important for FDI, since governments of many countries (including the United States) permit multinational firms to claim foreign tax credits for corporate income taxes paid to foreign governments but do not extend this privilege to taxes other than income taxes. As a result, taxes for which firms are ineligible to claim credits may well have greater impact on decision-making than do (creditable) income taxes.”). For an argument that the definition of creditable taxes should be broadened to encompass many non-income taxes, see generally Glenn E. Coven, International Comity and the Foreign Tax Credit: Crediting Nonconforming Taxes, 4 FLA. TAX REV. 83 (1999).

\(^{264}\) See Grubert, supra note 67, at 22, 28 (suggesting that tax rates are extremely important to U.S. multinationals in allocating their foreign direct investment, especially in the case of manufacturing, and that the relative importance of taxes may be increasing).

factors dominate the location decisions of multinational firms. 266

Given the possibility that taxation may not be an overriding factor in foreign investment location decisions, the influence of infrastructure cannot be ignored. To the extent infrastructure is important to potential investors, efforts to reduce taxation to attract foreign investment may be counterproductive, since raising sufficient revenues is integral to the level of infrastructure a country can offer. 267 As tax competition ensures less taxation of multinationals, the ability of LDCs to fund sufficient infrastructure to attract and sustain foreign investment relies more heavily on the ability to tax resident individuals, whether directly or indirectly. Historically, this has been a great challenge for LDCs. 268

Compliance rates for income and non-income taxation are typically very low in Ghana. It is estimated that 80% of business is conducted on the informal market—that is, not subject to regulation or taxation because it is conducted in the form of cash or barter. 269 Thus, only those who work for the government or for the few companies that comply with wage

---


267 See Nicholas Kaldor, Will Underdeveloped Countries Learn to Tax?, 41 FOREIGN AFF. 410, 410 (1963) (stating that “[t]he importance of public revenue to the underdeveloped countries can hardly be exaggerated if they are to achieve their hopes of accelerated economic progress.”). See also H. David Rosenbloom, Response to: “U.S. Tax Treatment of Foreign Source Income Earned in Developing Countries: Administration and Tax Treaty Issues,” 35 GEO. WASH. INT’L L. REV. 401, 406 (2003) (stating that “taxes are, by definition, involuntary exactions”). Thailand has recently taken a slightly different approach. In June, 2004, the Prime Minister, the Ministry of Education, and the Social and Human Development Services Ministry unveiled tax incentives for individuals and companies that make charitable donations to social development programs including education, museums, libraries, art galleries, recreational facilities, children’s playgrounds, public parks, and sports arenas. The government hopes that “[these incentives] will raise funds from the private sector to alleviate the poverty crisis in Thailand.” Sirena J. Scales, Thai Government Announces Tax Incentives for Charitable Contributions, 2004 WTD 129-10 (July 6, 2004).

268 Kaldor, supra note 267, at 410.

269 The agricultural industry contributes significantly to this number, since over 60% of Ghana’s population is employed in agriculture (a slightly lower percentage than the average of approximately 75% for LDCs in Sub-Saharan Africa). These percentages were compiled by averaging the stated percentage for each LDC in Sub-Saharan Africa from the World Factbook. (Spreadsheet containing data on file with author.) WORLD FACTBOOK, supra note 1, available at http://www.cia.gov/cia/publications/factbook/fields/2048.html. The informal economy also includes most professionals such as doctors and lawyers, other service providers, and shopkeepers and sellers of goods in local markets. Interview with Justice Insaidoo, supra note 211; Interview with Sheila Minta, Solicitor/Barrister, Addae & Twum Company, in Accra, Ghana (Dec. 9, 2003) (on file with author).
withholding obligations pay their income taxes. An appearance that the laws are not applied uniformly may in turn lead to increased tax avoidance and evasion. The situation is exasperated in an environment in which corruption or mismanagement of public funds also exists. While Ghana’s corruption factor is relatively modest in comparison to many of its neighbors in Sub-Saharan Africa, the notion persists that wealth can be acquired by becoming a government official. These perceptions plague the revenue collection efforts of tax agencies in LDCs such as Ghana.

The ability of LDCs to collect sufficient revenue to fund infrastructure is also challenged by international pressure to

---

270 Interview with Justice Insaidoo, supra note 211.
271 Murphy, supra note 213, at 201 (“perceptions of unfair treatment” appear to affect trust, and “taxpayer resistance could be sufficiently predicated by decreased levels of trust”).
272 See Transparency International, Global Corruption Report 2003, 215, 220, 225, 264, available at http://www.globalcorruptionreport.org/gcr2003.html (suggesting that although the government faces much criticism in failing to address corruption within the civil service, prompting President Kufuor to promise an increase in accountability, Ghana’s perceived corruption is much lower than that of many of its neighbors in Sub-Saharan Africa). In extreme comparison stand countries like the Congo, where corruption and bribery at all levels are openly acknowledged as requisite for survival. See Davan Maharaj, When the Push for Survival is a Full-Time Job, L.A. Times, July 11, 2004, at A1 [hereinafter Maharaj, Push] (explaining that while government employees are not paid a salary, they still show up for work every day to collect bribes ranging from “about $5 for a birth certificate to about $100 for an import license”). In Benin, a close neighbor to Ghana, bribes collected from traders trying to import illegal goods into Nigeria provide some 15% of the nation’s revenues. Davan Maharaj, For Sale—Cheap: ‘Dead White Men’s Clothing,’ L.A. Times, July 14, 2004, at A1.
273 The phenomenon appears to exist throughout Sub-Saharan Africa. See Transparency International, supra note 272, at 215. In the Congo, people say that “[t]he only ones who have ever gotten rich are the leaders and those with connections.” Maharaj, Push, supra note 272.
274 The perceptions of a few individuals cannot represent national sentiment, nor can such sentiment, even if widespread, indicate the accuracy of the charge. However, a perception of unfairness and corruption may undermine the efficacy of a tax regime. A study to quantify the effect of corruption on tax compliance is underway in Tanzania, but more research is needed in this area. A further issue that may be significant to the tax collection efforts of LDCs is the perceived misuse of funds by the government, whether as a result of corruption or the ineptitude of officials. Informally, this author heard many expressions of dissatisfaction with the ability of the government to provide necessary services to the citizenry. Since that is a common complaint in developed countries as well, I do not deal with it here, but only note its existence as an additional potential difficulty in raising sufficient revenues from individuals. Finally, the extent to which local conditions and attitudes regarding taxation affect the behavior of multinationals is not conclusively established. It may be that multinationals generally conduct their business operations fundamentally in compliance with the laws in force, regardless of the degree to which their compliance is monitored or enforced, simply because their global operations may be subject to scrutiny by other governments or the public. However, evidence proving (or disproving) this theory appears to be lacking in the economic literature.
open markets and reduce trade barriers.\textsuperscript{275} To the extent that Ghana continues to rely heavily on trade taxes for its revenue, recent developments in tariff reduction at the WTO may cause additional revenue shortfalls in the future. Ghana also faces difficulty in finding consistent resources to fund infrastructure because success in collecting revenues from excise taxes, royalties, dividends, and similar payments may depend on fluctuating global market prices for exported commodities.

Finally, Ghana’s ability to fund infrastructure is subject to uncertainty due to its reliance on assistance from foreign donors.\textsuperscript{276} In 2002, Ghana received large amounts of foreign aid, much of which was connected to the peaceful transition of power through the democratic process. But the amount of aid has fallen recently, and it is expected to continue to decline as finances are directed to other countries or fall off as a result of donor fatigue.\textsuperscript{277} The consequence is consistent budget shortfalls in Ghana.\textsuperscript{278} An increase in the overall level of funding by donor countries might alleviate the shortfall.\textsuperscript{279}

\textsuperscript{275} The transition of the U.S. from an agrarian society “rich in resources but lacking in capital investment” to an industrial one is credited in part to tariffs, without which the transition would have been much slower. \textit{See} Weisman, \textit{supra} note 41, at 14; \textit{see also} William A. Lovett, Alfred E. Eckes Jr. & Richard L. Brinkman, \textit{U.S. Trade Policy: History, Theory, and the WTO} 45 (2004) (finding the current association of free trade with rapid economic growth “incompatible with American economic history,” which shows that “[t]he most rapid growth occurred during periods of high protectionism”).

\textsuperscript{276} In Ghana, 17\% of total revenue derives from non-tax sources. \textit{State of the Ghanaian Economy, supra} note 170, at 26-31. Of this amount 86\% (or just under 15\% of total revenues) derives from grants. The other 14\% derives from receipts from various fees charged by the government for particular services, and from amounts received in divestiture of state-owned enterprises. In this respect, Ghana is somewhat better off than many of the other LDCs in Sub-Saharan Africa, which rely heavily on foreign aid to subsidize their expenditures. For example, 53\% of Uganda’s budget comes from external loans and grants. \textit{See} Gumisai Mutume, \textit{A New Anti-poverty Remedy for Africa?}, 16 Africa Recovery 12 (2003), available at http://www.un.org/ecosocdev/geninfo/afrec/vol16no4/16povty.htm.

\textsuperscript{277} \textit{See} \textit{State of the Ghanaian Economy, supra} note 170, at 30, 34.


\textsuperscript{279} For example, if developed countries follow through on their recent pledges to relieve existing debt and double aid efforts in Africa. \textit{See, e.g., A First Step on
However, a subsequent change of policies by the aid donor countries could cripple expectant aid recipients like Ghana, as foreign aid typically substitutes for—rather than supplements—domestic revenue raising efforts.280

Multinational companies may be expected to increase the government’s ability to collect revenues by creating a larger wage base for personal income tax. Wages in LDCs such as Ghana, however, average $1 per day, producing little for the government to share.281 If wages are raised through regulatory action, many multinationals may disengage to seek low wages elsewhere, since the low cost of labor is often a primary reason multinationals set up in LDCs.282 Although workers may benefit individually from employment created by foreign investment, even if wages are only minimally higher than that offered by other local employment, they are not necessarily placed in a better position with respect to paying taxes.283

Investment protection or insurance—whether made available through private or public institutions—may promote foreign investment despite a country’s infrastructural deficiencies. In the U.S., investment protection is provided to


280 Kaldor, _supra_ note 267, at 410.

281 Nearly 45% of the population of Ghana lives on less than $1 per day.


282 Hooke, _supra_ note 124, at 18-19.

283 See Nicholas D. Kristof, _Inviting All Democrats_, N.Y. TIMES, Jan. 14, 2004, at A19 (arguing that “the fundamental problem in the poor countries of Africa and Asia is not that sweatshops exploit too many workers; it’s that they don’t exploit enough,” as illustrated by the example of a young Cambodian woman who averages seventy-five cents a day from picking through a garbage dump and for whom “the idea of being exploited in a garment factory—working only six days a week, inside instead of in the broiling sun, for up to $2 a day—is a dream”).
U.S. investors through the United States Export-Import Bank ("Ex-Im Bank"), an independent federal government agency that “assume[s] credit and country risks the private sector is unable or unwilling to accept,” through export credit insurance, loan guarantees, and direct loans to U.S. businesses investing in foreign countries.\(^{284}\) For example, Ex-Im Bank insurance covers the risk of foreign buyers not paying bills owed to U.S. investors, the risk that a foreign government might restrict the U.S. company from converting foreign currency to U.S. currency, and even the risk of loss due to war.\(^{285}\) In effect, this kind of investment protection substitutes U.S. infrastructure for that existing in LDCs.\(^ {286}\)

The Ex-Im Bank has a Sub-Saharan Africa Advisory Committee devoted specifically to supporting U.S. investment activity in this region.\(^{287}\) With investment protection available as a substitute for prohibitive infrastructural shortcomings, investment in LDCs like Ghana may not be economically prohibitive. Yet, the persistently low level of foreign investment in Ghana and Sub-Saharan Africa as a whole suggests that investment protection is not enough to overcome the barriers perceived by potential investors.

### E. Entrenched Investor Perception

As tax treaties with LDCs may provide little commercial benefit to investors when little or no income tax is imposed in these countries, it is perhaps not surprising that they are correspondingly low on the list of U.S. treaty priorities.\(^{288}\)

---


\(^{286}\) The subsidy is not without controversy. See, e.g., Heather Bennett, *House OKs Measure to Block Loans to Companies Relocating in Tax Havens*, 2004 WTD 139-4 (reporting that as part of a foreign aid bill, U.S. Export-Import Bank loans would no longer be made to corporate entities chartered in one of several listed tax havens because, according to Representative Sanders, who offered the bill, “[c]ompanies that dodge U.S. taxes should not be rewarded with taxpayer handouts,” but should “go to the government” of the applicable tax haven for such privileges).


\(^{288}\) See Statement of Barbara Angus, *supra* note 5, at 10, stating that the United States generally does not:

conclude tax treaties with jurisdictions that do not impose significant income taxes, because there is little possibility of the double taxation of income in the
Nevertheless, tax treaties continue to be promoted for their ability to increase investment between developed and less-developed countries. One theory for their promotion is that increased investment can be expected due to the signaling effects of tax treaties. For example, it has been suggested that tax treaties may signal a stable investment and business climate in which treaty partners express their dedication to protecting and fostering foreign investment.

Proponents of this argument suggest that in the process of negotiating a tax treaty, governments of LDCs may subject their operations to increased transparency and accountability, thus providing additional benefits to potential investors (as well as domestic taxpayers) in the form of assurances regarding the proper management of public goods. Thus, bilateral tax treaties may

cross-border context that tax treaties are designed to address: with such jurisdictions, an agreement focused on the exchange of tax information can be very valuable in furthering the goal of reducing U.S. tax evasion.

289 Mutén, supra note 79, at 5.

290 The Secretary of the Treasury proclaimed the importance of signing a tax treaty with Honduras in 1956, stating that as the first treaty with any Latin American country,

[the agreement may . . . have a value far beyond its immediate impact on the economic relations between the United States and Honduras. It may generate among smaller countries an increased awareness of the need to create an economic atmosphere that will lend itself to increased private American investment and trade.]

Dulles, supra note 5, at 1444. Similar sentiment has been expressed in the context of many treaties, especially those with LDCs, over the years. See, e.g., STAFF OF S. FOREIGN RELATIONS COMM., 108TH CONG., TAXATION CONVENTION AND PROTOCOL WITH THE GOVERNMENT OF SRI LANKA 4 (S. Exec. Rpt. 108-11, Mar. 18, 2004) (“in countries where an unstable political climate may result in rapid and unforeseen changes in economic and fiscal policy, a tax treaty can be especially valuable to U.S. companies, as the tax treaty may restrain the government from taking actions that would adversely impact U.S. firms”); STAFF OF THE JOINT COMM. ON TAXATION, 106TH CONG., EXPLANATION OF PROPOSED INCOME TAX TREATY AND PROPOSED PROTOCOL BETWEEN THE UNITED STATES AND THE REPUBLIC OF VENEZUELA 61 (Comm. Print 1999) (“the proposed treaty would provide benefits (as well as certainty) to taxpayers”). These concepts are also reflected in commentary. See, e.g., ANDERSEN & BLESSING, supra note 10, at ¶ 1.02[3][b] (“[in the context of LDCs,] tax treaties provide foreign investors enhanced certainty about the taxation of the income from their investments.”); see also Davies, supra note 216, at 3 (“even a treaty that merely codifies the current practice reduces uncertainty for investors by lowering the likelihood that a government will unilaterally change its tax policy”).

serve largely to “signal that a country is willing to adopt the international norms” regarding trade and investment, and hence, that the country is a safe place to invest, especially “in light of the historical antipathy that many developing and transition countries have in the past exhibited to inward investment.”

Signaling is a slippery concept because it is difficult to measure whether signaling is occurring and, if so, whether and to what extent it is impacting investors. The potential for signaling a stable investment climate through tax treaties with LDCs in Sub-Saharan Africa is especially hampered by the persistence of negative perceptions about this region’s investment climate. Foreign investors in LDCs often take a regional, rather than national, approach to investment, attributing the negative aspects of one country to others in the vicinity. Since few Sub-Saharan African countries have tax treaties, and many countries in the region suffer from civil unrest and economic failure, Ghana’s ability to demonstrate stability and certainty may garner little individual attention from foreign investors unfamiliar with its particular situation.

In addition, the signaling effect is tied to a country’s reputation in upholding its international compacts. Short of terminating a treaty, there is no formal enforcement mechanism should a country proceed to ignore its treaty obligations. For example, it is difficult to imagine that a tax

---


293 See UNCTAD, supra note 2, at 1.

294 UNCTAD, supra note 2, at iv, (“[L]ittle attempt is often made to differentiate between the individual situations of more than 50 countries of the continent.”); Laura Hildebrandt, *Senegal Attracts Investors, But Slowly*, 17 AFRICA RECOVERY 2-15 (2003), available at http://www.un.org/ecosocdev/geninfo/afree/vol17no2/172sv3.htm (“[F]oreign investors tend to lump countries together in regions, without making much distinction among individual countries,” which might explain Senegal’s limited success in attracting foreign investment despite “relatively good infrastructure . . . a history of political stability and secular democracy, with decidedly pro-market leanings.”).

295 See, e.g., Hildebrandt, supra note 294, at 15 (“Senegal’s reputation for stability may be offset by conflicts elsewhere in the region, such as Côte d’Ivoire.”); *Thabo Mbeki: A Man of Two Faces*, THE ECONOMIST, Jan. 22, 2005, at 27 (“[A]ny . . . plan for Africa’s redemption, will work only if functioning states with reasonably good leaders (South Africa, Botswana, Senegal, Ghana, Mozambique) can be set apart from the awful ones . . . .”).

296 In the case of a treaty violation, a taxpayer would request the Competent Authority of its home country to negotiate with the Competent Authority in the treaty
treaty could independently create a sense of stability in a country that would otherwise be unattractive due to historical failure to protect property rights.

Finally, treaty proponents point to the certainty achieved in establishing rules consistent with international norms so that investors will know what to expect regarding the taxation of their investments in foreign countries. However, signaling certainty and stability is achieved more directly through agreements designed to provide these specific benefits. For example, delivering certainty and stability is the primary purpose of investment protection provisions in global and regional trade agreements. These goals are also encompassed in a global network of over 2,100 bilateral investment protection treaties (BITs). Ghana has seventeen such treaties currently in force. The U.S. has forty-seven in force and relies on these agreements to protect investment in source countries.

Investment protection provisions and treaties outline the applicable legal structure and regulatory framework of the signatory countries and provide settlement provisions in the partner country. For this reason, investors may desire a tax treaty to be in place so that assistance in negotiating disputes with a foreign country could be sought from the U.S. Competent Authority. However, treaties provide little recourse in the event the Competent Authorities fail to reach a resolution. See U.S. Model, supra note 56, art. 25.

297 See Stephen S. Golub, Measures of Restrictions on Inward Foreign Direct Investment for OECD Countries 6 (OECD Econ. Dep't, Working Paper No. 357, 2003). Most of the LDCs in Sub-Saharan Africa, including Ghana, have signed multilateral agreements dealing with the protection of foreign investment, such as the Convention establishing the Multilateral Investment Guarantee Agency and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States. See UNCTAD, supra note 2, at 7-8.

298 WIR 2003, supra note 118, at 89-91 (stating that BITs signal a country’s attitude towards and climate for foreign investment, and that investors “appear to regard BITs as part of a good investment framework”). Worldwide, there are 2,181 BITs currently in force, encompassing 176 countries. Id. at 89. As in the case of tax treaties, significantly more BITs would be required to achieve global coverage. See supra note 71 and accompanying text.


300 Hearing Before the S. Foreign Relations Comm. on Economic Treaties, 108th Cong. 9-10 (2004) (statement of Shaun Donnelly, Principal Deputy Assistant Secretary, Bureau of Economic and Business Affairs, State Dep’t) (“BITs have afforded important protections to U.S. investors”). The U.S. currently has four BITs with LDCs in Sub-Saharan Africa: Cameroon, Mozambique, Senegal, and the Democratic Republic of the Congo. For a list of U.S. BITs currently in force, see UNCTAD Bilateral Investment Treaty Database, supra note 299.
event of disputes between investors and source-country governments. Common features include guarantees of compensation in the event of expropriation, guarantees of free transfers of funds and repatriations of capital and profits, and dispute settlement provisions. \(^{301}\) The goal of these agreements is to promote transparency, stability, and predictability for regulatory frameworks in source countries, and therefore to reduce obstacles to the flow of foreign investment. \(^{302}\) BITs are further bolstered through subsidized loans, loan guarantees, and other financial assistance made available to foreign investors. \(^{303}\)

Even if the stability and certainty signaled by tax treaties could make a source country that has such agreements more attractive than one that does not, U.S. investors are unlikely to lobby for tax treaties if they do not have a direct financial interest at stake, namely, an exposure to taxation that could be alleviated by treaty. \(^{304}\)

The foreign investment patterns of U.S. businesses also imply that tax treaties may be an insufficient signal to investors. \(^{305}\) First, U.S. investors will pursue investments in a country with a sufficiently attractive business environment, even in the absence of a tax treaty. \(^{306}\) For example, although the U.S. has no treaty with Brazil, \(^{307}\) U.S. foreign direct investment in Brazil is significant. \(^{308}\) Second, the mere

\(^{301}\) WIR 2003, supra note 118, at 89.

\(^{302}\) Id. at 91.

\(^{303}\) See supra note 284 and accompanying text (discussing the role of the Ex-Im Bank in subsidizing U.S. investors to LDCs).

\(^{304}\) The lobbying efforts of U.S. businesses may not be the most appropriate means of establishing a list of priorities for new treaties, however, it is one of the primary factors considered by the office of International Tax Counsel in making such decisions. See Testimony of Barbara Angus, supra note 5, at 10.

\(^{305}\) See Mutén, supra note 79, at 4.

\(^{306}\) See, e.g., Jones, supra note 87, at 4-5 (arguing that tax treaties "make less difference to domestic taxpayers investing abroad," especially if taxes are low in source countries).

\(^{307}\) Brazil is one of the South American countries that refuses to negotiate with the U.S. due to the tax sparing controversy. See Laurey, supra note 222, at 491 n.155 (noting that due to the tax sparing controversy, Mexico was the first Latin American nation to sign a tax treaty with the U.S.); Mitchell, supra note 11, at 213; Guttentag, supra note 4, at 451-52. The latest U.S. discussions with Brazil were held in 1992. See Venuti et al., supra note 14. As Brazil continued to insist on tax sparing and the U.S. refuses to negotiate with countries that insist on including such a provision, no further meetings are planned. See id.

\(^{308}\) As valued at historical cost (book value of U.S. direct investors’ equity in and net outstanding loans to Brazilian affiliates), U.S. foreign direct investment in Brazil is currently valued at almost $30 billion. Borga & Yorgason, supra note 101, at 49. At 1.7% of total U.S. foreign direct investment, Brazil’s market for U.S. foreign
presence of a tax treaty will generally overcome neither an otherwise poor business climate, nor one that deteriorates after a treaty is in place. For example, the U.S. entered into a treaty with Venezuela in 1999, but the amount of U.S. capital flowing to Venezuela subsequently dropped sharply due to “concerns over regulations and political instability in the country.”

Finally, some investors may not necessarily want a tax treaty because such agreements usually include measures that prevent tax evasion, as discussed above. Thus while tax treaties may send positive signals to investors, they may as likely send negative signals to the extent they lead the way to stronger enforcement of tax laws. Supporting tax evasion is clearly indefensible as a policy for encouraging investment in LDCs, but the benefits of such opportunities to existing investors, and the cost of eliminating such opportunities, cannot be ignored.

Nevertheless, easing enforcement and administration of the tax laws of potential LDC treaty partners may be an alternative reason to continue expanding the U.S. tax treaty network. For example, the information-exchange provisions

direct investment is not far behind that of some developed countries, including Spain (with 2.1% of U.S. foreign direct investment) and Australia (with 2.3%). Id. at 42.


In the past, tax treaties may have contributed to tax evasion by creating opportunities for “treaty shopping” through the use of multi-country tiered structures such as the one shut down in Aiken Indus., Inc. v. Comm'r, 56 TC 925 (1971). In that case, the U.S.-Honduras treaty then in force was used to channel interest payments free of tax from the U.S. to the Bahamas. Id. at 929-31. The U.S.-Honduras treaty was terminated in 1966, before the case was decided but in connection with these kinds of structures, deemed to be void of any “economic or business purpose” by the Tax Court. Id. at 929, 934. Treaty shopping has since been curtailed in newer treaties and protocols by means of stronger limitation of benefits provisions. See Arnold & Dibout, supra note 252, at 73-74.

311 Just as in the cases of deferral and bank secrecy, the private sector can be expected to protect tax advantages regardless of whether they comport with a coherent tax policy.

312 Obtaining cooperation in tax enforcement through information sharing provisions is a major factor in the completion of treaties from the perspective of the U.S. For example, the newly-ratified tax treaty with Sri Lanka was originally negotiated almost twenty years ago but only entered into force this year. U.S-Sri Lanka Treaty, supra note 4; Treasury Press Rel. JS-1809, supra note 4. Ten years of the delay were due to Sri Lanka’s reluctance in accepting U.S. requests regarding information exchange. See Letter of Submittal from Colin L. Powell, U.S. Department of State, to the President (Aug. 26, 2003), reprinted in Protocol Amending Tax Convention with Sri Lanka, U.S-Sri Lanka, Sept. 20, 2002, S. TREATY DOC. NO. 108-9 (2003). The fact that, as in the case of Ghana, Sri Lanka’s statutory rates and tax incentive regimes indicate that the domestic tax regime is as or more favorable than that provided under the treaty, suggests that prevention of double taxation plays a much less significant role than prevention of tax evasion.
might enable Ghana to extend its current, basically territorial, regime to a worldwide regime. The benefit of such a regime would depend on the amount of savings shifted to the U.S. by Ghanaian persons before and after the treaty. This is presumably a relatively tiny amount by global standards, but it might be significant to the overall revenue picture in Ghana. However, Ghana’s limited tax treaty network significantly restricts its ability to enlarge its taxing jurisdiction, since Ghanaians could simply choose a location other than the U.S. for their offshore activities, avoiding Ghanaian tax even under a worldwide system.

Moreover, as in the case of investment protection, the benefits of information exchange are as readily—and more broadly—achieved through agreements specifically addressing this issue. Information exchange is comprehensively addressed in Tax Information Exchange Agreements (TIEAs), which are generally bilateral, and through multilateral agreements such as the OECD TIEA. Under U.S. TIEAs, assistance in tax enforcement and collection is extended not only to income taxes but to other taxes as well, making such agreements potentially more effective than tax treaties in fulfilling the goal of improved tax administration and enforcement.

313 See U.S. Model, supra note 56, art. 26. For example, when Venezuela entered into a tax treaty with the United States, its tax regime was territorial: Venezuela imposed no tax on the foreign income of its residents. Its tax treaty with the U.S. included the typical exchange-of-information provision, which would theoretically allow Venezuela to pursue its residents who engaged in activities outside of the country, and Venezuela subsequently expanded its jurisdiction to encompass residence-based taxes. U.S.-Venezuela Treaty, supra note 4, art. 27.

314 The U.S. Bureau of Economic Affairs compiles data regarding direct investment in the U.S., but Ghana is included only collectively with the rest of Africa, excluding South Africa. Borga & Yorgason, supra note 101, at 51. Inbound direct investment from this region is valued at $1.8 billion, which represents less than 0.2% of that from Europe. Id.

315 Ghana would not generally benefit from the larger U.S. tax treaty network since the exchange of information is only limited to that which is relevant to the two contracting states. U.S. Model, supra note 56, art. 26.

316 The OECD Agreement has been signed by the U.S. and Canada, among others. OECD Model, supra note 21, at 2.

317 The U.S. entered into tax treaties with many countries in Sub-Saharan Africa and the Caribbean simultaneously by territorial extension with their various colonial powers (from 1957-1958) and terminated most of these treaties simultaneously three decades later (in 1983-1984). See supra note 6. The U.S. subsequently entered into TIEAs only with the Caribbean nations. See, e.g., Bruce Zagaris, OECD Report on Harmful Tax Competition: Strategic Implications for Caribbean Offshore Jurisdictions, 17 Tax Notes Int’l 1507, 1510 (1998). The U.S. has trade agreements with countries in both the Caribbean and Sub-Saharan Africa, sends foreign aid to both regions, and has expressed a desire to increase investment, trade, and aid to both regions. See
Absent reduction of double taxation, the non-commercial benefits of tax treaties appear incapable of independently exerting a significant influence on U.S. foreign investment, and some of the aspects of tax treaties may tend to discourage such investment. Ultimately, the value of continued expansion of the U.S. tax treaty network to LDCs may therefore be extremely limited in the context of a global tax climate that reflects the circumstances illustrated in this case study.

V. CONCLUSION

The investment and aid goals of tax treaties are undermined by competing tax regimes, including domestic U.S. rules that provide relief of current U.S. tax burdens on foreign income earned by multinational companies. To the extent multinationals can escape U.S. taxation simply by investing abroad, the U.S. fosters tax competition throughout the world as foreign countries compete to attract the U.S. capital fleeing taxation at home. As a result of this international tax competition and a corresponding divergence in tax mix between developed and less developed countries, much of the tax ostensibly relieved under tax treaties no longer exists to a significant extent with respect to investment in many LDCs.

As a result, traditional tax treaties with these countries may offer few commercial benefits to investors. Tax treaties may provide non-commercial benefits to partner countries and investors by signaling stability or suitability or by providing certainty. However, these incidental benefits are likely insufficient to significantly impact investment in many LDCs, particularly those in Sub-Saharan Africa. Thus, as this case study of Ghana demonstrates, much of the conventional wisdom about the impact of tax treaties on the global flow of investment does not apply in the context of many of the LDCs most in need of realizing the benefits attributed to these agreements.

Tax treaties represent a significant opportunity cost for LDCs, diverting attention and resources away from the exploration of more direct ways to increase cross-border investment. Thus, every potential tax treaty relationship with LDCs should be approached critically. If a tax treaty cannot be expected to provide sufficient benefits to investors, it should

supra notes 2-3. Yet there is no agreement on tax matters with respect to the LDCs in Sub-Saharan Africa. See discussion supra Part I.
not be pursued simply to include the target country in the network of treaty countries in a myopic adherence to traditional notions about the international tax and business community. After decades of faithfulness to the promise of tax treaties, their inability to deliver in situations involving LDCs must be acknowledged. If the U.S. is truly committed to increasing trade and investment to the LDCs of Sub-Saharan Africa, it must pursue alternative means of achieving these goals.
A Second Amendment Moment

THE CONSTITUTIONAL POLITICS OF GUN CONTROL

Nicholas J. Johnson

I. INTRODUCTION

A. Constitutional Politics

Bruce Ackerman’s claim that America’s endorsement of Franklin Roosevelt’s New Deal policies actually changed the United States Constitution to affirm an activist regulatory state, advances the idea that higher lawmaker on the same order as Article Five amendment can be attained through and discerned by attention to our “constitutional politics.”1 Ackerman’s “Dualist” model requires that we distinguish between two types of politics.2 In normal politics, organized interest groups try to influence democratically elected representatives while regular citizens get on with life.3 In constitutional politics, the mass of citizens are energized to engage and debate matters of fundamental principle.4 Our history is dominated by normal politics. But our tradition places a higher value on mobilized efforts to gain the consent of

---

1 Professor of Law, Fordham University School of Law, J.D. Harvard Law School, 1984, B.S.B.A. West Virginia University, 1981 Magna Cum Laude. Thanks to Dan Richman, Bob Dowlett, Robert Cottrol, Don Kates, C. Kates and Dave Kopel for comments on this article.


We use the revised description of Reconstruction to gain a new perspective on the next great constitutional transformation: the struggle between the Roosevelt Presidency and the Old Court that culminated in the legitimation of the activist regulatory state . . . . Like the Reconstruction Republicans, the New Deal Democrats amended the Constitution by provoking a complex constitutional dialogue between the voters at large and institutions of the national government, a dialogue that ultimately substituted for the more federalistic processes of constitutional revision detailed in Article Five.

Id.

3 See id. at 461.

4 See id. at 462.
the people to new governing principles. Within Dualism, the rare triumphs of constitutional politics are transformative. These changes may be procedurally suspect. But when ultimately validated by the people, they become part of our higher law.

Formalists balk that our Constitution establishes a strict and quite clear amendment process. But Ackerman counters that important constitutional changes have not been procedurally pristine. The Constitution itself emerged in a procedurally suspect way out of a gathering to amend the Articles of Confederation.\(^5\) And the dramatic shift in national policy wrought by the Reconstruction Congress is equally problematic.\(^6\)

Constitutional change skirting the formalities of Article Five is, then, nothing new. And if we are attentive, we can discern important political moments that yield grand constitutional messages and signal substantive changes in our

\(^5\) Id. at 456 ("Almost all modern lawyers recognize that, in proposing a new Constitution in the name of We the People, the Philadelphia Convention was acting illegally under the terms established by America’s first formal constitution—the Articles of Confederation solemnly ratified by all thirteen states only a few years before.").

\(^6\) Id. at 496.

The then-existing Southern governments rejected the Fourteenth Amendment when it was proposed... Congress responded by destroying these dissenting governments and gaining the assent of new ones to the Fourteenth Amendment; when these new Southern governments sought to withdraw their predecessors' rejections, Secretary of State Seward first issued a Proclamation expressing "doubt and uncertainty" whether the Amendment had been ratified; and... it was only upon the express demand of Congress that Seward finally issued a second Proclamation unequivocally pronouncing the Amendment valid.

Id. Early on, the Court refused to affirm that the Reconstruction Republicans played by the rules. All the Court was willing to say was this:

This decision by the political departments of the Government as to the validity of the adoption of the Fourteenth Amendment has been accepted.

We think that in accordance with this historic precedent the question of the efficacy of ratifications by state legislatures, in the light of previous rejection or attempted withdrawal, should be regarded as a political question pertaining to the political departments, with the ultimate authority in the Congress in the exercise of its control over the promulgation of the adoption of the amendment.

Id. at 497 (quoting Coleman v. Miller, 307 U.S. 433, 449-50 (1939)).
Constitution, even while the text of the document remains the same.\(^7\)

Professor Ackerman tells an intriguing story of how the political conflict between the branches of government and the appeal to the people by the executive for support of its transformative agenda—the “Constitutional Politics” of the New Deal—signaled a moment of higher lawmaking. But it is possible to agree with Ackerman that these constitutional politics say something important about the Constitution and still reject his full basket of claims, particularly, the intricate formula of: Constitutional Impasse \(\rightarrow\) Triggering Election \(\rightarrow\) Challenge to Institutional Legitimacy \(\rightarrow\) Switch In Time, which he argues verifies a broad-based, democratically legitimate endorsement of baseline constitutional change.\(^8\)

Granting Ackerman’s characterization of the procedural flaws that afflict the Constitution and Reconstruction Amendments, it is still easy to conclude that the New Deal was different. It is the difference between a team that wins by cheating in the last inning and one that claims victory without ever showing up to play. Expanding the meeting agenda\(^9\) or rough-handling the Article Five process,\(^10\) is quite different from ignoring process altogether.\(^11\)

Then there is the pragmatic objection. Dramatic change ought to be hard. And when it happens we need a solid record that it has occurred, if for no other reason than our future debates about further change require a stable platform on which to hold those conversations.

But Pragmatists, unwilling to surrender this foundation, are still left to wrestle with the fact that some political moments do seem more important, more dramatic,

---

\(^7\) The New Deal validated constitutional change the same way that the otherwise procedurally suspect Fourteenth Amendment was validated. Ackerman, \textit{supra} note 1, at 459-60.

\(^8\) \textit{Id.} at 509-10:

It is this four part schema, more than the one sketched by the rules of Article Five, that structured the higher lawmaking process by which the American people defined, debated and ultimately legitimated the Republicans’ Fourteenth Amendment. . . . [T]he New Deal Democrats’ struggle to constitutionalize activist national government in the 1930’s tracked the four stage process through which Reconstruction Republicans constitutionalized the Fourteenth Amendment.

\(^9\) \textit{See supra} note 5.

\(^10\) \textit{See supra} note 6.

\(^11\) \textit{See supra} note 1.
than others. Certainly the New Deal was a bigger deal than some isolated piece of pork barrel legislation. And consequently, the Pragmatist is left to wonder, can we discern through Ackerman’s model something less dramatic than constitutional amendment, but still more important than the signals released by an obscure piece of legislative pork? And for the Formalist, is it simply more palatable to credit the existence of grand constitutional moments, but conclude that they just do less work than Ackerman posits; that their appearance and perhaps also their absence, signals important things, but still something less than fundamental constitutional change? Can we, through attention to constitutional politics, gain something important by reaching for less than Ackerman claims is possible?

Imagine the Court facing an issue that divides the nation. Imagine rights-claimants with plausible historical and textual support for a right that has been only glancingly or ambiguously recognized by the Court. Imagine the right protecting something Americans in many circles find abhorrent. And let us say that the text and history is ambiguous and distant enough that opponents have viable claims that no such right exists. Maybe here, most plausibly, constitutional politics should guide our decision.

Granted, this may seem quite artificial as a start. Our Constitution is mature, you say. Our debates and constitutional controversies no longer involve such basic questions. We debate what is protected speech, not whether speech is protected. We debate the scope of privacy or freedom of conscience. But not whether those rights exist. We are beyond binary choices . . . except of course that we are not.

B. Constitutional Politics and the Second Amendment Debate

If the Second Amendment were a weather system we would not know whether we are wet or dry. Imagine that the answer to the question, “Does the Constitution prohibit warrantless searches and seizures within some range?” was “Well, we just don’t know.” On the question, “Do individual Americans have a right to keep and bear arms?,” the Court's
efforts leave neutral observers not knowing whether it is night or day.\footnote{12 See discussion infra notes 331-36 of United States v. Miller, 307 U.S. 174 (1939).}

So we have our binary choice. And it is here that Ackerman’s constitutional politics does its most legitimate work. “We the people” most assuredly said something about arms in the Bill of Rights.\footnote{\textsuperscript{13} “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. CONST. amend. II.} But much time has passed since then and it is arguably difficult to decipher the message.\footnote{\textsuperscript{14} Eugene Volokh argues that prefatory language like the subordinate clause “A well regulated militia” was common in the language of state constitutions at the time and was never interpreted as a strict limitation on the independent clause. Eugene Volokh, \textit{The Commonplace Second Amendment}, 73 N.Y.U. L. REV. 793, 794-95 (1998).} Should we attempt to unravel it through some foundationalist exercise, studying the framers and their influences, the reams of scholarship on the importance of an armed citizenry, the make-up of the republican militia, or the perceived dangers of a state monopoly on the tools of violence? Is it better just to treat the matter as essentially political and leave the legislature free to implement whatever seems to be the will of the prevailing majority?

Both approaches are flawed according to Ackerman. It is by reference to these extremes that he builds the case for Dualism. He would criticize that, while leaving the issue to majority will would please the pure democrat (the “Burkean” in Ackerman’s description, who would cede the field to the governing majority), it is precisely this capitulation to temporary majorities that is the weakness of the Burkean approach. And the other extreme, a foundationalist determination made by reference to ancient texts, originalist political philosophies, or abstract normative speculations, is equally problematic, tethering us to ideas that simply might not work in our world.

It is here that Ackerman’s Dualism presents its strongest claim for legitimacy. Dualism gives the Court the tools to engage the gun question in a way that avoids both
Foundationalist and Burkean snares in a place where they are serious impediments.  

Dualism of course does not promise certainty. The constitutional politics of gun rights might yield nothing or just an inconclusive draw. But that is the question. Is there any message in our constitutional politics about a right to keep and bear arms? What should Justices engaging the first really serious consideration of the Second Amendment in the modern era take as the sense of “We the People” about whether our current armed state is an unfortunate anachronism or a peculiar but core part of our Americanism?

Some things can be said for certain. Over a wide range of controversies utilizing divergent constitutional models, we have erred in favor of rights and held rights reductionists to a higher burden. This suggests that as we scour our constitutional politics for signals about gun rights, the burden should fall on rights reductionists to show by some margin that America has embraced their agenda.

16 How does one perform the foundationalist exercise where there seems to be such wide variation by region and over time about the range of plausible foundational rights? How sure can we be that we have it right if the right we preserve seems mainly relevant to people who lived twenty-five generations ago, or where there are vast and different views about the right as we move from an Upper West Side apartment to a ridge top cabin on the western border of Virginia? The Court had a chance to clarify the Second Amendment in Quilici v. Morton Grove, 695 F.2d 261 (7th Cir. 1982), cert. denied, 464 U.S. 863 (1983). See the discussion in Don B. Kates, Jr., Handgun Prohibition and the Original Meaning of the Second Amendment, 82 MICH. L. REV. 204, 251 (1983). Perhaps the Court was waiting for the people to speak. And if 10,000 other communities had followed Morton Grove, we might say that they had.

17 A problematic thing about constitutional moments is that they are more loosely defined than formal constitutional amendments. They appear most clearly in the eye of the beholder. It is a bit too exclusive to say that only the constitutional priesthood can, or should be allowed to identify them. This view is elitist and undemocratic. But it is messy and unpredictable to permit just any old citizen to start mining for constitutional moments. That, however, appears to be an inevitable characteristic of the theory. Somewhere, someone will see it as a vehicle to do something its developers dislike. How the developers react is a test of whether we should take the theory seriously.

18 Judge Cummings makes the point in context, in an opinion that led the Fifth Circuit to break ranks and declare that the Second Amendment guarantees an individual right.

As Professor Ronald Dworkin has argued, what it means to take rights seriously is that one will honor them even when there is significant social cost in doing so. Protecting freedom of speech, the rights of criminal defendants, or any other part of the Bill of Rights has significant costs—criminals going free, oppressed groups having to hear viciously racist speech and so on—consequences which we take for granted in defending the Bill of Rights. This mind-set changes, however, when the Second Amendment is concerned. “Cost-benefit” analysis, rightly or wrongly, has become viewed as a “conservative” weapon to attack liberal rights. Yet the tables are strikingly
This of course ignores a complicated reality. Many of us reject the commitment to rights expansion when it comes to gun rights.\footnote{Former ACLU national board member Alan Dershowitz, who admits that he “hates” guns and wishes to see the Second Amendment repealed, nevertheless warns: Foolish liberals who are trying to read the Second Amendment out of the Constitution by claiming it’s not an individual right or that it’s too much of a public safety hazard don’t see the danger in the big picture. They’re courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don’t like.}

Many believe guns are just different; that their costs are too high and that the prefatory language in the Second Amendment makes it unique. But that is too simplistic.

Both the Framing and the Reconstruction offer more than plausible evidence that an individual right has been protected explicitly through the Second Amendment.\footnote{Dan Gifford, The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason, 62 Tenn. L. Rev. 759, 789 (1995) (quoting telephone interviews with Alan Dershowitz, Law Professor at Harvard University (May 3-4, 1994)).} These claims are not burdened by process objections and thus, while contestable, are still less controversial than Ackerman’s claim about the constitutional implications of the New Deal. A great deal of the “standard model”\footnote{Glenn Reynolds elaborates the “standard model” in Glenn Harlan Reynolds, A Critical Guide to the Second Amendment, 62 Tenn. L. Rev. 461, 464-88 (1995). See infra note 22.} scholarship on the Second Amendment is grounded on the evidence from these two periods.\footnote{See, e.g., Office of Legal Counsel, Dep’t of Justice, Memorandum Opinion for the Att’y Gen.: Whether the Second Amendment Secures an Individual Right 48, 99-101 (Aug. 24, 2004), http://www.usdoj.gov/olc/secondamendment2.pdf [hereinafter DOJ Memorandum].}

This scholarship has even convinced some longtime
skeptics\textsuperscript{23} that the Second Amendment was intended to protect an individual right. The United States Government, based substantially on this scholarship, also has concluded that the Second Amendment guarantees an individual right.\textsuperscript{24}

True, there is opposition to the standard model. The lower federal courts, with a few exceptions,\textsuperscript{25} have advanced collective rights views that basically ignore both sides of the scholarly debate.\textsuperscript{26} It is for exactly this reason that some will object it is error to place the burden of proof, so to speak, on the rights reductionists.

But before we get mired down over allocating the burden, let us consider for a moment what kind of story might satisfy it. Consider how Americans might speak in support of rights reduction.

Suppose Congress voted in a gun ban that was resisted by conservatives whose obstructionism got them voted out of office and caused them to lose control of the House. Suppose states started to amend their constitutions to permit legislation barring private possession of firearms. Suppose that state after state also started to enact legislation that banned the possession of the type of firearms most used in crime, handguns.\textsuperscript{27} Layer it with detail and have it proceed over a generation or so and this starts to compete with Ackerman’s


\textsuperscript{24} See DOJ Memorandum, supra note 22, at 105.

\textsuperscript{25} Silveira v. Lockyer, 312 F.3d 1052, 1065-66, 1068 nn.19-23, 1069 & n.24, 1070, 1071 & n.27, 1072 (9th Cir. 2002) (cert. denied, 540 U.S. 1046 (2003)) (using collective rights scholarship to reject the individual rights view); United States v. Emerson, 270 F.3d 203, 220-221, 220 n.12, 255-59 (5th Cir. 2001) (using standard model scholarship to endorse individual rights view).

\textsuperscript{26} See, e.g., Silveira, 312 F.3d at 1063-64.

Like the other courts, we reached our [earlier] conclusion regarding the Second Amendment’s scope largely on the basis of the rather cursory discussion in \textit{Miller}, and touched only briefly on the merits of the debate . . . . \textit{Miller}, like most other cases that address the Second Amendment, fails to provide much reasoning in support of its conclusion.

\textit{Id.}

\textsuperscript{27} This is the open agenda of the Coalition to Ban Handguns. The coalition includes numerous national organizations like the ACLU, numerous religious groups and the YWCA. See, e.g., MICHAEL K. BEARD & SAMUEL S. FIELDS, NAT’L COAL. TO BAN HANDGUNS, STATEMENT ON THE SECOND AMENDMENT, S. REP. NO. 88-618, at 27 (2d Sess. 1982), available at http://www.constitution.org/mil/rkba1982.htm.
story of a transformative New Deal. With this much done, many of us, and the Court especially might fairly say, that on the question of guns, America had said something important and perhaps decisive.

It turns out in any case, that the rights reductionists cannot satisfy this burden. What I have sketched here is the story of rights affirmation that I will elaborate in three parts. First, Section II will track the development of gun rights in forty-four state constitutions. Section III will present the recent wave of state legislation mandating nondiscretionary licenses to carry concealed firearms. Section IV will offer a short history of our modern debate about private firearms with attention to the rise and fall of the handgun prohibition movement.

II. STATE CONSTITUTIONS: A NATIONAL REFERENDUM ON THE INDIVIDUAL RIGHT TO ARMS?

Before it was uncovered that he fabricated some of his data, Michael Bellesiles won a Bancroft prize with a book that supported what many in the academy and elsewhere earnestly believe: that the whole notion of an individual right to arms is a recent creation of the NRA; that historically the connection between Americans and their guns is more fiction than fact. Bellesiles claimed Americans never really had a lot of private firearms and the ones they had didn't work very well. This implied no strong expectation of an individual right to have them. The theory stalled because some of the records Bellesiles claimed to have examined were destroyed.


30 Id. at 9. Sam McManis provides a quote from the New York Review of Books that reflects some of the sentiment. “Bellesiles will have done us all a service if his book reduces the credibility of the fanatics who endow the Founding Fathers with posthumous membership in what has become a cult of the gun.” McManis, supra note 28 (quoting Edmund S. Morgan, In Love with Guns, N.Y. REV. BOOKS, Oct. 19, 2000, at 30).

31 Bellesiles, supra note 29, at 5.

32 Id. at 10-14.
before he was born. But for a quick moment his claim resonated strongly.

If we were seeking a glimpse into the shadowy past, trying to shed light on some mysterious but long expired fever for private firearms, the fascination with Bellesiles would be easier to explain. But why put such stock in what seems missing from musty estate records (fabricated or not) in the face of a solid two centuries of state constitutional activity enshrining an individual right to arms in language that brooks no debate.

Our forty-four state constitutional arms guarantees have several implications. They say something about what the framers of the Second Amendment might have intended. Many state constitutions use language similar or identical to the federal Second Amendment, in a context where it is not plausible to say that the right of the people really means the right of the states. Eugene Volokh argues that the prefatory language of the Amendment, was a quite common form at the time of the Framing and shows how similar language appears in various state constitutions. But within Ackerman's Dualism, the state constitutions do something more. They answer the criticism that the Second Amendment is an anachronism at a level that transcends interminable policy debate.

I will examine four eras of state constitutional enactments. First, the era of the Framing. Second, the nineteenth century before the civil war—post revolutionary enactments that suggest something about the common understanding of the Second Amendment by citizens one or two generations removed from its drafting. Third, the nineteenth century post civil war. And last, the modern era from the turn of the twentieth century forward.

35 The fullest and most recent exposition of the states' rights view of the Second Amendment appears in Silveira, 312 F.3d at 1075-87.
One thing that distinguishes the state constitutions from Ackerman’s New Deal signals is they are not exigent acts. The New Deal may have been transformative. But was the affirmation of FDR’s policies an exercise of considered judgment by the polity? Or was it a floundering grasp by voters who were hungry, desperate and afraid? In contract law the concept of duress invalidates decisions made under such pressure. Politics is different naturally. But in a theory that openly dismisses the procedural safeguards of formalism, exigency is one more thing to worry about.

Constitutional politics in reaction to crisis defines Ackerman’s New Deal narrative. The state right to arms provisions stand in stark contrast. They offer the safeguards of formalism through compliance with the state amendment process and their span of implementation presents more or less continuous consideration of the private firearms question. A practical advantage is that the Court already has demonstrated its willingness to use state constitutional provisions to illuminate federal constitutional questions.38

Of the forty-four state constitutional provisions currently guaranteeing a right to arms of some sort, only three are products exclusively of the eighteenth century. From the beginning of the republic, continuously through to today, the right to arms has been affirmed in state constitutions. The counter trend, flat gun prohibition, is rare, appearing sporadically at the municipal level39 and in discrete ways mainly in the few states whose constitutions do not protect a right to private firearms.40

For the most part I will proceed chronologically. However, to start, I will present in some detail the most recent of the state guarantees: Wisconsin’s 1998 Constitutional Amendment declaring, “The people have the right to keep and bear arms for security, defense, hunting, recreation or any other lawful purpose.”41

---

39 See infra notes 365-66.
40 See infra notes 370-71.
41 Wis. Const. art. I, § 25.
A. The Case of Wisconsin

Maybe it is no surprise that on the threshold of the twenty-first century the wild and open state of Alaska adopted a state constitutional right to arms. The same insight might explain West Virginia’s enactment of a similar guarantee in 1986. More on these two later. But how to explain Wisconsin—home to some of the most liberal enclaves in America and a center of progressive politics, the college town of Madison?

Indeed it was in Madison that we find the catalyst for it all—a 1993 ballot referendum that asked voters whether handguns should be banned. It was the beginning of a story that might affirm the instincts of a Justice sitting in Washington, finding ambiguity in the Second Amendment, and wondering whether America has spoken loudly enough in favor of gun prohibition that arguments about an individual right to arms can be tossed confidently onto the scrap heap.

And what if it caught on? Madison times a thousand. “Madison” moving through the state legislatures—ten, twenty, forty and more states rejecting as arcane their dated right to arms guarantees and banning private ownership of some or all classes of firearms. It would be a powerful constitutional moment. And it might allow our pensive Justice to reject individual rights claims with the confidence that her decision reflected the values and tacit consent of a comfortable majority of Americans. Within Ackerman’s model, it would make her decision closer to being right.

So it is telling that the story of the Madison referendum spins out quite differently. Madison voters (yes even Madison voters) rejected the prohibitionists’ agenda. The handgun ban was voted down in one of the most “progressive” places in the country.

The people were obviously misguided, or so thought the Madison Common Council who within the next year enacted by a one vote margin, an ordinance that outlawed handguns with

42 ALASKA CONST. art. I, § 19.
43 W. VA. CONST. art. III, § 22.
45 Id. See also Jeffrey Monks, Comment, The End of Gun Control or Protection Against Tyranny?: The Impact of the New Wisconsin Constitutional Right to Bear Arms on State Gun Control Laws, 2001 Wis. L. REV. 249, 300 & n.276 (2001).
barrels of less than four inches and required all other guns to be locked-up in a way that eliminated their utility for self defense.\textsuperscript{46} Several other municipalities around the state proposed similar provisions.\textsuperscript{47} Referendum failure or not, the ball was rolling . . . right up to the crest of the first small hill and then swiftly back the other way.

The Madison-style restrictions touched off a firestorm of opposition. In 1994, “elections swept into the legislature numerous pro-gun candidates who were angered and emboldened by various cities' attempts to prohibit citizens from keeping or carrying handguns completely.”\textsuperscript{48} The next session saw the introduction of a constitutional amendment protecting the right to keep and bear arms.

Wisconsin constitutional amendments must be approved in two consecutive legislative sessions before being submitted to the electorate. In 1995 and 1997, the Wisconsin legislature twice approved an amendment protecting an individual right to bear arms.\textsuperscript{49} In 1998 Wisconsin voters were asked to adopt or reject a state constitutional protection of private firearms. On November 3, 1998, the people of Wisconsin expanded their Constitution’s Declaration of Rights—something they have done only three times before.\textsuperscript{50} Both in the legislature and the voting booth, support for the amendment was resounding.\textsuperscript{51} When the dust settled, seventy-four percent of Wisconsin voters had approved the Amendment establishing a constitutional right to keep and bear arms.\textsuperscript{52}

Prohibitionists failed to make their case in Wisconsin, indeed they suffered a bit of a setback. “We the people,” at least a clutch of them in the upper Midwest, voted to affirm

\textsuperscript{46} McFadden, supra note 44, at 714.
\textsuperscript{47} Id. (citing Keeping the Gun Lobby in Check, MILWAUKEE J. & SENTINEL, Nov. 14, 1994, at A6). Binding referenda banning handguns was defeated in Milwaukee and Kenosha. Id. at 714 n.26. An advisory referenda was approved in Shorwood. Id.
\textsuperscript{48} Id. at 709.
\textsuperscript{49} Monks, supra note 45, at 250 n.10.
\textsuperscript{50} Id. at 249.
\textsuperscript{51} See id. at 250 n.10. Jeffrey Monks gives the details:

In the first legislative session, the Assembly approved the proposal 79-19 and the Senate approved it 28-5. During the next session, the Assembly voted to approve the amendment 84-13 and the Senate voted 28-4 in favor. The voters similarly approved the amendment by a wide margin. The final vote on the amendment was: “YES” - 1,196,622 (74%); “NO” - 415,911 (26%).

Id. at 250 n.10 (citations omitted).

\textsuperscript{52} McFadden, supra note 44, at 709.
gun rights. Our tired old Justice sitting in Washington now has a bit of data. But there is more.

B. The Other Forty-Three

The message of Wisconsin is repeated again and again across the nation as Americans vote in every era, under every circumstance, against a government monopoly on arms and in favor (costs and all) of private firearms. Two revolutionary era constitutions are quite clear articulations of an individual right to arms. They tempt the conclusion that our modern debate about the meaning and mystery of the Second Amendment is merely an accident of semantics. Instead of prefatory language referencing the militia, followed by recognition of the right of the people, Madison would have saved us much trouble by offering something simple like Pennsylvania’s “The right of the citizens to bear arms in defence of themselves, and the State shall not be questioned.”

Least we conclude that Pennsylvanians of the era were confused or not seriously thinking about the whole militia/people/states-rights puzzle, there is the 1776 Pennsylvania Declaration of Rights that is less concise than the 1790 Constitution, but richer in detail.

That the people have a right to bear arms for the defence of themselves and the state; and as standing armies in the time of peace are dangerous to liberty, they ought not to be kept up; And that the military should be kept under strict subordination to, and governed by, the civil power.

This is less poetic, less intriguing than Madison’s language, but workman-like and clear about the people’s right to arms for defense of themselves.

Vermont’s Constitution tracks the Pennsylvania Declaration of Rights in all respects except punctuation.

That the people have a right to bear arms for the defence of themselves and the State—and as standing armies in time of peace

53 Two states, Massachusetts and Kansas fall out of the count. See infra notes 58-72 and accompanying text.
54 The Massachusetts and Kansas Constitutions discuss a right to arms, but their courts have concluded the right does not extend to individual citizens. See infra notes 58-72 and accompanying text.
55 PA. CONST. of 1790, art. IX, § 21.
56 PA. CONST. of 1776, Declaration of Rights, art. XIII.
are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to and governed by the civil power.\textsuperscript{57}

Massachusetts followed in 1780 with similar language and a notable change. Rather than a right to arms for defense of themselves and the state, Massachusetts declares,

The people have a right to keep and to bear arms for the common defence. And as, in time of peace, armies are dangerous to liberty, they ought not to be maintained without the consent of the legislature; and the military power shall always be held in an exact subordination to the civil authority, and be governed by it.\textsuperscript{58}

In the nineteenth century, this language was interpreted at least twice to guarantee an individual right.\textsuperscript{59} But in 1976, the Massachusetts Supreme Court took a different view, ruling that the language was basically superfluous, just an affirmation of the state’s militia powers.\textsuperscript{60} Of the forty-four state constitutional arms guarantees,\textsuperscript{61} Massachusetts joins one other state, Kansas, in construing its arms guarantee to protect less than an individual right.

The collective rights interpretation in Kansas is notable because many claim it is the first appearance of the “collective rights” interpretation in a judicial decision.\textsuperscript{62} The Kansas right to arms provision was adopted in 1859: “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.\textsuperscript{63}

In 1905 the Kansas Supreme court, in City of Salina v. Blaksley,\textsuperscript{64} rejected a challenge to an ordinance that punished

\begin{footnotes}
\item[57] VT. CONST. of 1777, ch. I, art. 15.
\item[58] MASS. CONST. of 1780, pt. 1, art. 17.
\item[59] Commonwealth v. Blanding, 20 Mass. (3 Pick.) 304, 314 (1825) (right to arms is individual); Commonwealth v. Murphy, 44 N.E. 138, 138 (Mass. 1896) (right applies to ordinary citizens but does not protect armed parades).
\item[60] Commonwealth v. Davis, 343 N.E. 2d 847, 889 (Mass. 1976). Outside the federal constitutional context, a collective rights interpretation posits the state’s protection of the state’s right to arms from the state. This seems like an absurdity but in Massachusetts it is a reality.
\item[61] NRA State Rights, supra note 34.
\item[63] KAN. CONST. Bill of Rights, § 4.
\item[64] 83 P. 619 (Kan. 1905); Robert Dowlut argues in detail that the reasoning of Blaksley is flawed and not supported by the cited sources. See Robert Dowlut & Janet
carrying of deadly weapons, ruling that the state right to arms “refers to the people as a collective body. . . . Individual rights are not considered in this section.”

Compared to Blaksley, the Massachusetts reinterpretation is easier to criticize. The Blaksley Court might well have been pulled away from an individual rights interpretation by an institutional memory of “Bleeding Kansas,” and in any case was not stepping on precedent. The Massachusetts Court, however, had to overrule prior individual rights interpretations that were rendered during the same era the constitutional language was passed.

Still, if the Massachusetts-style reinterpretation or the Kansas result had been achieved legislatively or by referendum and repeated in forty or so other states, in the midst of public outrage over the costs of an armed citizenry, it would be powerful evidence of a sea change in the constitutional politics of gun rights. Our Washington jurist with her ear to the ground might fairly detect that the people had said something decidedly unfriendly about private firearms. But within the Dualist model, without more, these two efforts suggest nothing more than the preferences of a few dozen old lawyers.

True the citizens of Kansas and Massachusetts did not rise up and clarify things as Mainers did in response to a similar attempt by some of their judges. And as we will see later, Massachusetts joins the handful of states without right to arms provisions, in enacting some of the most stringent gun control measures in the country. But even those efforts fall short of the program of prohibition to which a robust Second Amendment would be the only barrier and generally square with the sentiment of most Americans that they have a Constitutional right to keep and bear arms.

Kentucky addressed the gun question four times over the course of a century, starting with the 1792 declaration, “The rights of the citizens to bear arms in defense of themselves and the State shall not be questioned.”


65 Id. at 620.

66 See generally JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 145-69 (1988) (describing the bloodletting over whether Kansas would be slave or free).

67 See infra notes 111-14.

68 See infra note 394.

69 KY. CONST. of 1792, art. XII, § 23.
language was adopted again in 1799. By 1850 a provision was added permitting the General Assembly to enact laws to prevent carrying of concealed weapons. The current version reads:

All men are, by nature, free and equal, and have certain inherent and inalienable rights, among which may be reckoned: First: The right of enjoying and defending their lives and liberties. . . . Seventh: The right to bear arms in defense of themselves and of the State, subject to the power of the General Assembly to enact laws to prevent persons from carrying concealed weapons.

Tennessee closed the eighteenth century declaring in 1796, “That the freemen of this State have a right to keep and bear arms for their common defence.” The current provision, enacted in 1870 holds, “that the citizens of this State have a right to keep and bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” The “common defence” language was interpreted in 1840 to mean that the keeping of arms was for militia purposes. In later elaborations Tennessee courts held that the militia purpose was consistent with the right of citizens to have ordinary firearms for non-militia purposes. And in 1866 a statute permitting confiscation of individual firearms was deemed a violation of the Tennessee guarantee.

Enjoying both hindsight and firsthand knowledge of the founding era, citizens of the early nineteenth century began to fashion their state constitutions to guarantee an armed citizenry. Connecticut’s “[e]very citizen has a right to bear arms in defense of himself and the State,” leaves little room for the collective rights arguments that afflict the modern debate about the Second Amendment. Connecticut it seems,

---

70 KY. CONST. of 1799, art. X, § 23.
71 KY. CONST. of 1850, art. X, § 23.
72 KY. CONST. Bill of Rights, § 1.
73 TENN. CONST. of 1796, art. XI, § 26.
75 Aymette v. State, 21 Tenn. (2 Hum.) 154, 157 (1840).
76 See Andrews v. State, 50 Tenn. (3 Heisk.) 165, 178-79 (1871) (the right to arms includes the right to purchase and maintain them and thus carry to and from home; the right to keep includes the right to use for ordinary purposes “usual in the country . . . limited by the duties of a good citizen in times of peace;” specifically protecting “the rifle of all descriptions, the shot gun, the musket, and repeater”).
77 Smith v. Ishenhour, 43 Tenn. (3 Cold.) 214, 218 (1866).
78 CONN. CONST. art. I, § 15.
borrowed from Mississippi, which used duplicate language in its guarantee of an individual right to arms, first in 1817 and again in 1832. By 1868, it became an entirely individual right with the reference to “defense of the state” dropped. 79 The current version, enacted in 1890, declares: “The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.” 80

Indiana’s original provision was adopted in 1816. 81 The current version, enacted in 1851, proclaims, “The people shall have a right to bear arms, for the defense of themselves and the State.” 82 Alabama recognized a right to arms in 1819, declaring, “Every citizen has a right to bear arms in defence of himself and the State.” 83 Michigan is equally straightforward: “Every person has a right to bear arms for the defence of himself and the state.” 84 Missouri followed in 1820 with language that bundles a right to arms within the basic rights of citizenship.

That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of grievances, by petition or remonstrance; and that their right to bear arms, in defense of themselves and of the state, cannot be questioned. 85

Toward the middle of the nineteenth century, Rhode Island’s Constitution tracks almost exactly the parodied version of the federal Second Amendment. In a cartoon that periodically reappears, a bumpkin wearing an NRA cap is sitting on a stool at the eye doctor’s office. The full text of the

79 1817: “Every citizen has a right to bear arms in defence of himself and the State.” MISS. CONST. of 1817, art. I, § 23. 1832: “Every citizen has a right to bear arms in defence of himself and of the state.” MISS. CONST. of 1832, art. I, § 23. 1868: “All persons shall have a right to keep and bear arms for their defence.” MISS. CONST. of 1868, art. I, § 15.
80 MISS. CONST. art. III, § 12.
81 “That the people have a right to bear arms for the defence of themselves, and the state; and that the military shall be kept in strict subordination to the civil power.” IND. CONST. of 1816, art. I, § 20.
82 IND. CONST. art. I, § 32.
83 ALA. CONST. of 1819, art. I, § 23. The spelling of “defence” was changed to “defense” in 1901.
84 MICH. CONST. of 1835, art. I, § 6.
85 MO. CONST. of 1820, art. XIII, § 3.
Second Amendment is on the chart in front of him. Wide-eyed, he confesses to the doc, “I can only see the second part.” That second part reads exactly like Rhode Island’s 1842 guarantee: “The right of the people to keep and bear arms shall not be infringed.”

Now well beyond the hot-blooded revolutionary era, but on the cusp of the civil war, Americans continued to enshrine arms guarantees in their constitutions. Ohio in 1851, Oregon in 1857, Kansas in 1859 (interpreted as a collective right in 1901).

A bloody civil war, renegade rebel bands, dramatic changes in the federal Constitution and enduring bitterness prefigured America’s move into the modern era. The last third of the nineteenth century brought dramatic adjustment of the American social contract. Changes were made to the Constitution. New rights were established for freedmen. Federal power expanded. It was a prime opportunity to reassess the distribution of the machinery of violence. It was a period when legislators and commentators made clear their views that the federal Constitution guaranteed an individual right to arms. And one when states continued to establish,

86 “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” U.S. Const. amend. II.
87 Cartoon on file with author.
88 R.I. Const. art. I, § 22.
89 “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be kept up; and the military shall be in strict subordination to the civil power.” Ohio Const. of 1851, art. I, § 4.
90 “The people shall have the right to bear arms for the defence of themselves, and the State, but the Military shall be kept in strict subordination to the civil power.” Ohio Const. of 1802, art. VIII, § 20.
91 “The people have the right to bear arms for their defense and security; but standing armies, in time of peace, are dangerous to liberty, and shall not be tolerated, and the military shall be in strict subordination to the civil power.” Kan. Const. art. I, § 4 (adopted 1859).
reaffirm or strengthen their constitutional protections of an armed citizenry.

Arkansas stripped the racist and sexist limitations from its original guarantee and nominally extended the right to all citizens in 1868. In 1870 Tennessee reaffirmed a guarantee that originated in the eighteenth century. Texas considered the question four times in the nineteenth century, establishing its current provision in 1876. Colorado’s guarantee appeared the same year. Georgia’s current guarantee dates to 1877 and establishes an individual right using operative language that tracks exactly the federal Second Amendment. In 1890 Mississippi reaffirmed an arms guarantee that originated in the early nineteenth century. In 1895, South Carolina


94 “The citizens of this State shall have the right to keep and bear arms for their common defense.” ARK. CONST. of 1868, art. I, § 5. This replaced the commitment “that the free white men of this State shall have a right to keep and to bear arms for their common defense.” ARK. CONST. of 1836, art. II, § 21.

95 “That the citizens of this State have a right to keep and to bear arms for their common defense; but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime.” TENN. CONST. art. I, § 26.


96 “Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.” TEX. CONST. art. I, § 23. This was preceded by similar provisions in 1836, 1845 and 1868. TEX. CONST. of 1868, art. I, § 13, available at http://tarlton.law.utexas.edu/constitutions/text/hART01.html; TEX. CONST. of 1845, art. I, § 13, available at http://tarlton.law.utexas.edu/constitutions/text/DART01.html; TEX. CONST. of 1836, Declaration of Rights, art. XIV, available at http://tarlton.law.utexas.edu/constitutions/text/ccRights.html.

97 “The right of no person to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons.” COLO. CONST. art. II, § 13.

98 “The right of the people to keep and bear arms shall not be infringed, but the General Assembly shall have power to prescribe the manner in which arms may be borne.” GA. CONST. art. I, § 1, ¶ VIII. This was preceded by a provision in 1865 that is identical to the federal Second Amendment and another in 1868 that also tracks the Second Amendment but adds, “but the general assembly shall have power to prescribe by law the manner in which arms may be borne.” GA. CONST. of 1865, art. I, § 4, available at http://www.cviog.uga.edu/Projects/gainfo/con1865.htm; GA. CONST. of 1868, art. I, § 14, available at http://www.cviog.uga.edu/Projects/gainfo/con1868.htm.

99 “The right of every citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power when thereto legally summoned, shall not be called in question, but the legislature may regulate or forbid carrying concealed weapons.” MISS. CONST. art. 3, § 12. The earliest rendition of the Mississippi guarantee dates to 1817: “Every citizen has a right to bear arms in defence of himself
reaffirmed its reconstruction-era guarantee. Montana, South Dakota, Wyoming and Washington closed the century, all establishing arms guarantees in 1889.

It is not, then, from thin air that the United States Supreme Court in the 1890s found and delineated a constitutional privilege of self defense in twelve cases that centered on citizens using firearms to thwart attackers. The idea was all around them.

So far, we still are talking about constitutional enactments at least a century old. As we will see, their currency has been tested and their protections rendered vital in contemporary debates about concealed carry licensing. But there is more. The anachronism argument deflates entirely as we approach the state constitutional provisions guaranteeing an individual right to arms in the modern era.

But there is something to consider first. Notable by its absence is any state action the other way. If the individual arms guarantees mentioned so far were indeed considered arcane throwbacks, part of the cause of avoidable carnage, then...
we might expect modern states to begin removing these vestigial provisions or at least having serious conversations about it. State constitutional amendments removing outdated arms guarantees would suggest resolve to curtail individual access to firearms. And similarly, modern amendments plainly establishing and protecting an individual right to arms, appearing in state after state, more or less continuously since the beginning of the republic, show an affirmation of the right. Quite a long moment indeed.

We already have discussed Wisconsin’s 1998 constitutional amendment. 107 It replaced Alaska’s as the most recent of the modern arms guarantees. Alaska amended its original 1959 guarantee in 1994. The first sentence of Alaska’s 1959 enactment duplicated the federal guarantee. 108 The provision was amended in 1994 to add, “The individual right to keep and bear arms shall not be denied or infringed by the State or a political subdivision of the State.” 109 Preceding Alaska was Nebraska in 1988, with language that seems to anticipate and dispense with every possible collective rights interpretation:

All persons are by nature free and independent, and have certain inherent and inalienable rights; among these are life, liberty, the pursuit of happiness, and the right to keep and bear arms for security or defense of self, family, home, and others, and for lawful common defense, hunting, recreational use, and all other lawful purposes, and such rights shall not be denied or infringed by the state or any subdivision thereof. To secure these rights, and the protection of property, governments are instituted among people, deriving their just powers from the consent of the governed. 110

The over-engineered Nebraska provision perhaps anticipated the difficulty that prompted Mainers in 1987 to amend their constitution. Maine’s original guarantee, enacted in 1819, provided, “Every citizen has a right to keep and bear arms for the common defence; and this right shall never be questioned.” 111 In an environment where the “right of the people” is construed by lower federal courts as the right of

---

107 See supra text accompanying notes 44-52.
108 “A well-regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.” ALASKA CONST. art. I, § 19 (amended 1994).
109 ALASKA CONST. art. I, § 19.
110 NEB. CONST. art. I, § 1.
111 ME. CONST. art. I, § 16 (amended 1987).
it should not be surprising that judges in Maine interpreted the “for the common defense language” to connote a collective right and thus no right at all to anyone in particular. Mainers reacted with Yankee efficiency and in 1987 amended the language to read simply, “Every citizen has a right to keep and bear arms and this right shall never be questioned.”

Alaska, Nebraska and Maine. Not exactly centers of urban sophistication. There is the temptation to dismiss these modern guarantees as the work of rural, fly-over states whose wide horizons give them the flexibility to make such mistakes. This theory is confounded when we consider Delaware’s 1987 enactment. “A person has the right to keep and bear arms for the defense of self, family, home and State, and for hunting and recreational use.”

Introduce Florida, one of our fastest growing and most populous states, and the fly-over dismissal becomes impossible to sustain. Florida is instructive because it first granted constitutional protection of private firearms in 1838 and last visited the issue in 1990. In the interim Floridians amended their constitutional right to arms language four times.

The original provision was explicitly racist: “That free white men of this State, shall have a right to keep and bear arms, for their common defence.” We might argue in the abstract whether this was an individual rights guarantee. Recall how “common defense” language fueled a collective rights interpretation in Maine. But there was no similar judicial interpretation of Florida’s 1838 provision.

The arms provision dropped out of the Florida Constitution in 1865 and a new one was added in 1868 guaranteeing, “The people shall have the right to bear arms in defence of themselves and the lawful authority of the State.”

---

112 The Ninth Circuit decision in *Silveira v. Lockyer*, 312 F3d. 1052 (9th Cir. 2002) is emblematic of these decisions and one of the only such cases to offer a detailed analysis of the issue.

113 *State v. Friel*, 508 A.2d 123, 125 (Me. 1986).

114 *ME. CONST. art. I, § 16.*

115 *DEL. CONST. art. I, § 20.*

116 *FLA. CONST. of 1838, art. I, § 21.* The 1865 constitution removed the guarantee. *FLA. CONST. of 1865.* It reappears and is reaffirmed in 1868, 1885, and 1968. *FLA. CONST. art. I, § 8* (amended 1990); *FLA. CONST. of 1885, art. I, § 20*; *FLA. CONST. of 1868, art. I, § 22.* The basic right of the people “to bear arms in defence of themselves and of the lawful authority of the state” is established in 1868 with embellishment continuing through to the current form. *Id; FLA. CONST. art. I, § 8(a).*

117 *FLA. CONST. of 1868, art. I, § 22; FLA. CONST. of 1865.*
The next change clarified that the right was not absolute. “The right of the people to bear arms in defence of themselves and the lawful authority of the State, shall not be infringed, but the Legislature may proscribe the manner in which they may be borne.”\footnote{FLA. CONST. of 1885, art. I. § 20.} This language governed until 1968 when the qualifying language was changed slightly. “The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, except that the manner of bearing arms may be regulated by law.”\footnote{FLA. CONST. art. I, § 8 (amended 1990) (emphasis added).} In 1990 this language was carried forward as Section (a) and joined by three new sections dealing with handgun purchases and concealed weapons permits.\footnote{FLA. CONST. art. I, § 8.}

New Mexico has addressed the issue twice in the modern era. In 1986 it affirmed and supplemented its 1971 enactment, to add a second sentence. The full passage now provides:

No law shall abridge the right of the citizen to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes, but nothing herein shall be held to permit the carrying of concealed weapons. No municipality or county shall regulate, in any way, an incident of the right to keep and bear arms.\footnote{N.M. CONST. art. II, § 6. The 1971 enactment replaced the 1911 provision which read, “The people have the right to bear arms for their security and defense, but nothing herein shall be held to permit the carrying of concealed weapons.” City of Las Vegas v. Moberg, 485 P.2d 737, 738 (N.M. Ct. App. 1971); State v. Montoya, 572 P.2d 1270, 1273 (N.M. Ct. App. 1977).}

West Virginia’s 1986 provision is simple but clear. “A person has the right to keep and bear arms for the defense of self, family, home and state, and for lawful hunting and recreational use.”\footnote{W. VA. CONST. art. III, § 22.}

Then there is Utah two years earlier. Utah is doubly useful. Its original right to arms guarantee was enacted in 1896 in language that if read through the same lense many use to interpret the federal constitution might be deemed an ambiguous guarantee of individual rights. “The people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.”\footnote{UTAH CONST. art. I, § 6 (amended 1984).} Most federal courts are steadfast that “people” in the Second
Amendment actually means some sort of governmental unit. Utah’s original guarantee might be construed by similar alchemy as protecting less than an individual right. The 1984 amendment eliminates this possibility:

The individual right of the people to keep and bear arms for security and defense of self, family, others, property, or the state, as well as for other lawful purposes shall not be infringed; but nothing herein shall prevent the legislature from defining the lawful use of arms.

Also in 1984, North Dakotans enshrined an individual right to arms in language very similar to the elaborate articulation adopted by Nebraskans in 1988:

All individuals are by nature equally free and independent and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing and protecting property and reputation; pursuing and obtaining safety and happiness; and to keep and bear arms for the defense of their person, family property and the state, and for lawful hunting, recreational, and other lawful purposes, which shall not be infringed.

Completing the list of 1980s enactments, Nevada and New Hampshire both established right to arms provisions that unequivocally guaranteed individual rights. The Nevada constitution declares, “Every citizen has the right to keep and bear arms for security and defense, for lawful hunting and recreational use and for other lawful purposes.” New Hampshire makes the same point slightly differently. “All persons have the right to keep and bear arms in defense of themselves, their families, their property and the state.”

State constitutional enactments of the 1970s and earlier will strike different people differently. For newly minted adults, the seventies are part of that obscure period of pre-personal history. But anyone old enough and attentive enough in the 1970s witnessed firsthand an important development in the politics of gun rights.

By the mid-1970s gun prohibition was a bona fide political movement. Just a few years earlier, Democrat

---

124 See, e.g., Silveira v. Lockyer, 312 F.3d 1052, 1060-61 (9th Cir. 2002).
125 Utah Const. art. I, § 6.
127 N.D. Const. art. I, § 1.
129 N.H. Const. pt. 1, art. 2-a.
130 See infra Section IV.
candidates for president had joined the National Rifle Association. John F. Kennedy, maybe just for show, was a member.\footnote{131} In 1960 candidate Hubert Humphrey courted gun owners citing his personal commitment to the Second Amendment in *Guns* magazine:

Certainly one of the chief guarantees of freedom under any government, no matter how popular and respected, is the right of the citizens to keep and bear arms. This is not to say that firearms should not be very carefully used and that definite safety rules of precaution should not be taught and enforced. But the right of citizens to bear arms is just one more guarantee against arbitrary government, and one more safeguard against a tyranny which now appears remote in America, but which historically has proved to be always possible.\footnote{132}

We were on the threshold of conversations raising serious threats to gun possession.\footnote{133} We were about to endure race riots, the assassinations of two Kennedys and Martin Luther King, Jr. By 1970 we had suffered these collective traumas and had become smart enough to talk about root causes of crime and assign blame broadly.

And still, the 1970s gave us more state constitutional amendments guaranteeing an individual right to arms. The decade started with Illinois’ 1970 declaration that “[s]ubject only to the police power, the right of the individual citizen to keep and bear arms shall not be infringed.”\footnote{134}

In 1971 North Carolina reenacted language as old as the republic and tracking roughly its 1776 Bill of Rights provision.

A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies in time of peace are dangerous to liberty, they shall not be maintained, and the military shall be kept under strict subordination to, and governed by, the civil power. Nothing herein shall justify the practice of carrying concealed

\footnote{133} See infra Section IV.
\footnote{134} ILL. CONST. art I, § 22.
weapons, or prevent the General Assembly from enacting penal statutes against that practice.\textsuperscript{135}

A growing state with burgeoning urban centers, North Carolina again confounds the fly-over theory. But more than that, it suggests something about the interpretation of the Second Amendment in the Federal Constitution. Deadly weapons were at the center of North Carolina’s 1776 Bill of Rights Guarantee:

That the people have a right to bear arms, for defence of the State; and as standing armies in time of peace, are dangerous to liberty, they ought not to be kept up; and that the military should be kept under strict subordination to, and governed by, the civil power.\textsuperscript{136}

In 1868 this idea was enshrined into Article I of the state’s constitution using language obviously borrowed from the Federal Constitution:

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed; and, as standing armies, in time of peace, are dangerous to liberty, they ought not to be kept up, and the military should be kept under strict subordination to, and governed by, the civil power.\textsuperscript{137}

The familiar first clause, say many lower federal courts, is a recipe for protecting states rights.\textsuperscript{138} All of the talk about militia’s and standing armies suggests a peculiarly military connotation to bearing arms (keeping arms remains a mystery that we must just live with).\textsuperscript{139} It is instructive then that in 1875 (and carried through to 1971) North Carolina amended this language to add, “Nothing herein contained shall justify the practice of carrying concealed weapons, or prevent the Legislature from enacting penal statutes against said practice.”\textsuperscript{140} Important people evidently thought, even with the militia preface, “right of the people to keep and bear arms”

\begin{footnotesize}
\begin{itemize}

\item \textsuperscript{135} N.C. Const. art I, § 30. State v. Dawson, 159 S.E.2d 1, 9 (N.C. 1968) (discussing the history of the enactment).

\item \textsuperscript{136} N.C. Const. of 1776, A Declaration of Rights, art. XVII.

\item \textsuperscript{137} N.C. Const. of 1868, art. I, § 24.


\item \textsuperscript{139} Silveira v. Lockyer, 312 F.3d 1052, 1072-73 (9th Cir. 2002).

\item \textsuperscript{140} N.C. Const. of 1868, art. I, § 24 (1875). The only change wrought by the 1971 constitution was that “General Assembly” replaced “Legislature.” N.C. Const. art. I, § 30.

\end{itemize}
\end{footnotesize}
actually meant individual citizens with their own guns and decided that keeping and bearing should not automatically extend to toting guns concealed. Of course it is also harder at the state level even to suggest as the federal courts have that “people” really means “states.” Odd indeed for a state to protect itself from being disarmed by itself.

Virginia also guaranteed a right to arms in 1971. The guarantee was added to a provision originally enacted in 1776. The eighteenth century language echoed the federal Second Amendment theme, but did not contain an explicit right to arms:

That a well-regulated militia, composed of the body of the people, trained to arms, is the proper, natural, and safe defense of a free state; that standing armies, in time of peace, should be avoided, as dangerous to liberty; and that in all cases the military should be under strict subordination to, and governed by, the civil power.141

The Louisiana Constitution offers a lesson already familiar from our assessment of North Carolina. Its latest enactment was in 1974. “The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person.”142 This language amended the original provision, which tracked the federal guarantee and finished with a qualifier that the individual right did not prevent the legislature from criminalizing carrying of concealed weapons. “A well regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be abridged. This shall not prevent the passage of laws to punish those who carry weapons concealed.”143

Rounding out the 1970s is Idaho, home of Senator Larry Craig who also sits on the Board of the National Rifle Association. Idaho’s 1978 constitutional enactment (amending the 1889 version)144 is not surprisingly unambiguous in its protection of individual firearms and quite detailed regarding the legislature’s powers.

142 LA. CONST. art I, § 11.
143 LA. CONST. of 1879, art. III.
144 “The people have the right to bear arms for their security and defense; but the Legislature shall regulate the exercise of this right by law.” IDAHO CONST. art. I, §11 (amended 1978).
The people have the right to keep and bear arms, which right shall not be abridged; but this provision shall not prevent the passage of laws to govern the carrying of weapons concealed on the person nor prevent passage of legislation providing minimum sentences for crimes committed while in possession of a firearm, nor prevent the passage of legislation providing penalties for the possession of firearms by a convicted felon, nor prevent the passage of any legislation punishing the use of a firearm. No law shall impose licensure, registration or special taxation on the ownership or possession of firearms or ammunition. Nor shall any law permit the confiscation of firearms, except those actually used in the commission of a felony.145

The remaining guarantees span the period from 1907 through 1950. Oklahoma’s was the first twentieth century guarantee. Its 1907 enactment, still appearing before the first major federal gun regulation,146 and well before anyone had charged that the concept of an individual right to arms was a fabrication of the gun lobby.147 “The right of a citizen to keep and bear arms in defense of his home, person, or property, or in aid of the civil power, when thereunto legally summoned, shall never be prohibited; but nothing herein contained shall prevent the Legislature from regulating the carrying of weapons.”148

Arizona’s 1912 guarantee was long construed as authorizing open carry of sidearms, a practice that is less prevalent in the state now that concealed carry licenses are easily available.149 “The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain or employ an armed body of men.”150

Missouri last addressed the right to arms in 1945, after first establishing the right in 1820151 tinkering with the

145 IDAHO CONST. art. I, §11.
146 The National Firearms Act of 1934 is discussed infra Section IV.A.
147 Warren Burger’s charge that the individual rights view of the Second Amendment is a “fraud” on the American people perpetrated by the gun lobby is quoted in Silveira v. Lockyer, 312 F3d 1052, 1063 (9th Cir. 2002) (quoting Warren E. Burger, The Right to Bear Arms, PARADE MAGAZINE, Jan. 14, 1990, at 4).
149 See David B. Kopel, The Second Amendment in the Nineteenth Century, 1998 BYU L. REV. 1359, 1535-36 (1998); ARIZ. REV. STAT. ANN. § 13-3112 (2001) (“The department of public safety shall issue a permit to carry a concealed weapon to a person who is qualified under this section.”).
151 “That the people have the right peaceably to assemble for their common good, and to apply to those vested with the powers of government for redress of
language in 1865\textsuperscript{152} and again in 1875.\textsuperscript{153} The current guarantee reads: “That the right of every citizen to keep and bear arms in defense of his home, person and property, or when lawfully summoned in aid of the civil power, shall not be questioned; but this shall not justify wearing of concealed weapons.”\textsuperscript{154}

Finally, Hawaii, whose modern gun laws are relatively strict,\textsuperscript{155} models the federal guarantee: “A well regulated militia being necessary to the security of a free state, the right of the people to keep and bear arms shall not be infringed.”\textsuperscript{156} In \textit{State v. Mendoza}, the Hawaii Supreme Court explained that interpreting this as both an individual and a collective right would be consistent with other state constitutional provisions.\textsuperscript{157}

The modern era constitutions prevent us from dismissing the eighteenth century guarantees as archaic. They are also solid evidence of the currency of the right to arms.\textsuperscript{158} Constitutional amendment is hard. Easier of course at the state than at the federal level. But still one of the most difficult things to carry off in a democracy. Indeed, it may be the difficulty of constitutional amendment that fuels Ackerman’s effort to validate the modern regulatory state in the absence of an explicit amendment granting Congress

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{152} The only change in 1865 from the 1820 rendition is that “lawful authority of the State” replaced “State.” \textit{Mo. Const.} of 1865, art. I, § 8.
  \item \textsuperscript{153} “That the right of no citizen to keep and bear arms in defense of his home, person and property, or in aid of the civil power, when thereto legally summoned, shall be called into question; but nothing herein contained is intended to justify the practice of wearing concealed weapons.” \textit{Mo. Const.} of 1875, art. II, § 17.
  \item \textsuperscript{154} \textit{Mo. Const.} art. I, § 23.
  \item \textsuperscript{156} \textit{Haw. Const.} art. I, § 17.
  \item \textsuperscript{157} 920 P.2d 357, 363 n.9 (Haw. 1996).
  \item \textsuperscript{158} Over the years these state guarantees have been used to declare a variety of gun restrictions unconstitutional. \textit{See, e.g.}, David B. Kopel, Clayton E. Cramer & Schott G. Hatrup, \textit{A Tale of Three Cities and the Right to Bear Arms in State Courts}, 68 \textit{Temp. L. Rev.} 1177, 1180 n.12 (1995) (listing twenty cases from the 1820s until the 1980s where various gun control laws were struck down on state constitutional grounds).
\end{itemize}
\end{footnotesize}
authority that seems inconsistent with the idea of limited federal power still enshrined in the text.

Professor Ackerman tells a complex story of a transformative New Deal that ordinary citizens will find difficult to follow. His claim certainly would be stronger had there been some plain language validation of this transformation through state referenda or constitutional amendments in language comprehensible to those outside the constitutional priesthood. So what does it say to our modern Justice, looking honestly for constitutional moments, that seventeen states in the modern era have amended their constitutions to enshrine an individual right to arms in language beyond cavil?

Federal courts and commentators have emptied the corners raising doubts about a federal guarantee to private firearms. It is peculiar that so many work so hard to fashion and expand other individual liberties from the meager constitutional text and when it comes to this one, work just as hard to contract and eviscerate. Chief Justice Burger characterized the individual rights view as a “fraud,” and the popular support for it as testament to dishonest but successful lobbying. But declarations of rights in state constitutions take much more than lobbying. Most of these provisions were enacted long before the NRA came into existence and more of them were enacted before it morphed into a lobbying organization.

Warren Burger’s screed appeared in a Parade Magazine interview without citations. Did he truly believe Americans had been duped in to believing they had an individual right to arms? Did he realize they had been enshrining that very thing in their state constitutions more or less continuously since the beginning of the republic? And what of those scholars searching earnestly for constitutional moments. Is all of this state constitutional activity worthy of consideration? Or is it

\[
\text{\textsuperscript{159}} \text{See, e.g., Denning, supra note 138, at 998-1004; Carl T. Bogus, The History and Politics of Second Amendment Scholarship: A Primer, 76 CHI.-KENT L. REV. 3, 4-5 (2000).}
\]

\[
\text{\textsuperscript{160}} \text{Holding forth in Parade Magazine, Warren Burger claimed the individual rights view is a fraud. Silveira v. Lockyer, 312 F.3d 1052, 1063 (9th Cir. 2002) (quoting Burger, supra note 147).}
\]

\[
\text{\textsuperscript{161}} \text{See National Rifle Association, A Brief History of the NRA, http://www.nrahq.org/history.asp [hereinafter Brief History of NRA] (last visited Feb. 8, 2006).}
\]

\[
\text{\textsuperscript{162}} \text{See infra Section IV.}
\]
flawed in some way that only can be detected by the elders of Dualist theory?

Six states, Iowa, Maryland, New Jersey, New York, Minnesota and California, have no constitutional right to arms provisions (although New York has a statutory guarantee and as discussed below Minnesota has enacted the expansive “shall issue” style of license to carry concealed firearms, and Iowa has a liberally administered discretionary concealed carry scheme). Of these, California, Maryland, and New Jersey along with Massachusetts and the District of Columbia have enacted some of the toughest gun control measures in the country. And still these provisions are relatively benign. Washington D.C., Chicago and four of its suburbs, actually prohibit a broad class of firearms. California, Connecticut, Hawaii, Maryland, New Jersey, New York, and Massachusetts—have restrictions on “assault rifles” or “assault pistols” that have invited much tinkering and modification of these obscure machines to meet regulatory guidelines. But practically speaking, with the exception of Washington D.C. and a few Illinois municipalities, the right to arms thrives.

Through war, economic crisis, domestic upheaval, someplace in every generation, Americans have affirmed the right of citizens to keep and bear their private firearms. Franklin Roosevelt won four terms as President and changed the political landscape. But what is a stronger signal, votes for

---

163 See infra Section III. Iowa permits concealed carry but retains nominal discretion over whether the permit is issued. Id. Minnesota also recently added the right of “hunting and fishing” to its constitution. Minn. Const. art. 13, § 12. For New York’s statutory guarantee see N.Y. CIV. RIGHTS LAW § 4 (McKinney 2005).
165 D.C. CODE § 7-2502.02(4) (2001) (banning ownership or possession of handguns by any citizen who did not register a handgun by September 24, 1976).
172 See supra note 155.
173 See infra notes 369-70 (discussing municipal handgun bans in Chicago and its suburbs). See also supra note 165.
president or state constitutional amendments? What does it mean that these constitutional enactments have occurred continuously across the generations? And how to weigh them against the fact that infringements of the right to arms on the other hand have been meager, not really prohibitions at all.174

Ackerman offers no good protocol for weighing such things. All one really can hope is that serious people will ask these questions for themselves and unlatch from their preferences enough to answer honestly.

III. CONCEALED CARRY, STATE ACTION SIGNALS AND THE PROHIBITIONIST MOVEMENT

By 1987, ten states had granted ordinary citizens licenses to carry concealed firearms for self-defense.175 Since then twenty-eight more states have enacted laws permitting citizens to carry concealed firearms.176 Most Americans, by a margin of 64 to 36 percent live in Right to Carry (“RTC”) states.177

RTC laws differ by degree. Two states, Vermont and Alaska, provide the broadest right to carry, simply by not prohibiting it.178 Alaska has a statute that has been interpreted to mean that no permit is required.179 In Vermont,

---

174 With the exception of the Assault Weapons ban of 1994, whose story and aftermath add texture to our enduring Second Amendment moment, see infra text accompanying notes 375-89, actual gun prohibition has not appeared at the federal level.


176 Id.

177 See id. Compare the margin of victory Ackerman claims showed broad endorsement of constitutional transformation through the New Deal. A middle schooler serious enough about his coming duties as a citizen, grappling with the idea of unlisted constitutional amendments might go to http://www.spartacus.schoolnet.co.uk/USArooseveltF.htm (last visited Feb. 8, 2006) and learn that, “At Philadelphia in 1940 the Republican Party chose Wendell Willkie their presidential candidate. During the campaign Willkie attacked the New Deal as being inefficient and wasteful. Although he did better than expected, Franklin D. Roosevelt beat Willkie by 27,244,160 votes to 22,305,198,” or 55 - 45%. Our precocious teen might well conclude that 64 to 36% is a stronger signal.

178 NRA Fact Sheet, supra note 175.

179 ALASKA STAT. § 11.61.220 (2004); Alaska Department of Public Safety, Alaska Concealed Handgun Permits, http://www.dps.state.ak.us/PermitsLicensing/achp/ (last visited Feb. 8, 2006).
no permit is required to carry concealed weapons because no law prohibits it.\footnote{180}{Clayton E. Cramer & David B. Kopel, “Shall Issue”: The New Wave of Concealed Handgun Permit Laws, 62 TENN. L. REV. 679, 682 (1995).}

Alaska and Vermont are unusual. The dominant model of RTC legislation has been dubbed “shall issue.”\footnote{181}{NRA Fact Sheet, supra note 175.} Under shall issue legislation, a citizen must be granted a permit to carry unless the state can show a particular reason (e.g., criminal record or mental instability) why she should be denied.\footnote{182}{Cramer & Kopel, supra note 180, at 680, 690-91.} Thirty-five states have shall issue laws.\footnote{183}{NRA-ILA, GUIDE TO RIGHT-TO-CARRY RECIPROCITY AND RECOGNITION 2-18 (2006), http://www.nraila.org/recmap/recguide.pdf [hereinafter NRA RIGHT-TO-CARRY GUIDE].} Three states have liberally administered discretionary schemes that operate in effect like shall issue statutes.\footnote{184}{Id.; NRA Fact Sheet, supra note 174 (Alabama, Connecticut, and Iowa).} Eight other states administer restrictive schemes that give the state basically plenary discretion to deny a permit.\footnote{185}{See NRA RIGHT-TO-CARRY GUIDE, supra note 182; NRA Fact Sheet, supra note 174 (California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York, Rhode Island).} Some of these plenary discretion schemes have been afflicted with bias and cronyism—defects that prompted some of the movement toward shall issue laws.\footnote{186}{See Cramer & Kopel, supra note 180, at 682-85.}


The basic distinction for our purposes is states where an ordinary citizen can obtain a license to carry without any special showing other than a general interest in self-defense. Thirty-five state laws are explicitly non-discretionary (“shall issue”). NRA Fact Sheet, supra note 175. Alabama is technically discretionary, but is essentially shall issue in practice. Applicants denied a permit in Alabama would likely be denied one in a shall-issue state for the same reason. The NRA has called this “reasonable may issue.” See NRA-ILA, Issues, Interstate Reciprocity and Recognition, http://www.nraila.org/recmap/usrecmap.htm (last visited Feb. 8, 2006) [hereinafter NRA Right-to-Carry Map] (click on desired state to view summary of right-to-carry status). Connecticut and Iowa operate a similar liberal discretionary or “reasonable may issue” schemes. Id.

The NRA generally excludes states like New Jersey from the list of right to carry states, even though New Jersey for example grants a limited number (about 1,000 in 1995 mainly to security guards) of permits. See Abby Goodnough, N.J. Law; Concealed Weapons: A Senator Says Their Time has Come, N.Y. TIMES, May 19, 1996, §
Commentators have designed intricate arguments that even if the Second Amendment was intended to protect an individual right, modern conditions are such that it can be fairly dismissed as archaic.\textsuperscript{187} This reflects a commonplace objection that America has outgrown the armed citizenry. We have police now. The militia is moribund and never was terribly effective. Modern arms are way more dangerous than the eighteenth century flintlock. And so on.

So what are we to make of the fact that the concealed carry revolution, largely a phenomenon of the last twenty years, represents an \textit{expansion} of gun rights beyond what was typical during most of the last century?\textsuperscript{188} Even before the Civil War, the few states that addressed the issue of concealed carry, did so by prohibiting it.\textsuperscript{189} One explanation is that open carry was legal and socially common.\textsuperscript{190} But that is not the entire story.

\textsuperscript{13}NJ, at 8. The full list of states with restrictive permitting systems are California, Delaware, Hawaii, Maryland, Massachusetts, New Jersey, New York and Rhode Island. \textit{See supra} NRA Right-to Carry Map, \textit{supra}.

The four absolutely non issue states technically are Nebraska, Kansas, Illinois and Wisconsin. \textit{Id.} However, Wisconsin’s inclusion on this list is now controversial since the Wisconsin Supreme Court has ruled that in some circumstances, the statute barring concealed carry must yield to “reasonable exercise of the [vintage 1998] constitutional right to keep and bear arms for security.” \textit{State v. Hamdan}, 665 N.W.2d 785, 790 (Wis. 2003). In 2004, the Wisconsin legislature came within one vote of overriding the governor’s veto of a shall issue concealed carry bill. \textit{See infra} notes 277-79.

For purposes of our count, I will start with the classification used by the gun control group Join Together Online.

With the recent passage of a “shall issue” handgun law in Ohio, the number of states that have eased restrictions on concealed gun carrying has risen to 35 [shall issue states]. But in the face of this onslaught, four heartland states are holding fast to their long-time laws that prohibit the carrying of concealed guns by people other than police officers. [These four.] Illinois, Kansas, Nebraska, and Wisconsin . . . stand apart not only from the shall-issue states but from the 11 “may issue” states . . . .

\textbf{Dick Dahl, Four States Holding to ‘No Issue’ Handgun Laws, JOIN TOGETHER ONLINE, June 28, 2004,}\textit{ http://www.jointogether.org/z/0,2522,572284,00.html.}

\textbf{Adding the liberal, reasonable may issue/effectively shall issue states Alabama, Iowa and Connecticut yields the NRA’s thirty-eight right to carry states and the claim that “Sixty-four percent of Americans live in RTC states.” See NRA Fact Sheet, supra note 175.}


\textsuperscript{188} \textit{See infra} notes 313-14 (describing the commonplace restrictions on concealed carry at the turn of the twentieth century).

\textsuperscript{189} \textit{See} Cramer & Kopel, \textit{supra} note 180, at 681.

\textsuperscript{190} \textit{Id.} Other objections to concealed carry seem to have a more interesting source.
Beginning in the 1920s many states adopted model legislation based on the Uniform Revolver Act.\textsuperscript{191} Jeffrey Snyder details how the National Rifle Association endorsed the Revolver Act as an alternative to handgun regulations tracking New York’s more restrictive Sullivan Law.\textsuperscript{192} The Uniform Revolver Act prohibited concealed carry by unlicensed individuals.\textsuperscript{193} It was less restrictive than the Sullivan Law, which required a license for mere possession.\textsuperscript{194} Discretionary licensing schemes were built around the Revolver Act and that system explains a good deal about how we have thought about concealed carry historically.\textsuperscript{195}

The problem with discretionary licensing was that it fed cronyism, corruption, and class and race discrimination.\textsuperscript{196} Often permitees were limited to the rich, famous, politically connected and white, even though more common citizens seemed to have equally or more compelling needs for self protection.\textsuperscript{197}

Early endorsement of concealed carry appeared in Vermont in 1903. The source was not legislative but judicial. In \emph{State v. Rosenthal},\textsuperscript{198} the Vermont Supreme Court ruled that a Rutland ordinance barring concealed firearms was a violation  

\begin{footnotesize}
\begin{enumerate}
\item Snyder, \textit{supra} note 192, at 8.
\item \textit{See id.} at 6.
\item \textit{See id.} at 8.
\item \textit{See id.} at 9. Sometimes the courts were quite straightforward about the discriminatory intent of concealed carry restrictions. Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring specially):

\begin{quote}
[T]he Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides . . . and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population . . . . and there has never been, within my knowledge, any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested.
\end{quote}

\item See Cramer & Kopel, \textit{supra} note 180, at 682-85; Snyder, \textit{supra} note 192, at 13-14.
\item 55 A. 610 (Vt. 1903).
\end{enumerate}
\end{footnotesize}
of the state constitutional right to keep and bear arms. 199 This is the foundation for Vermont’s treatment of concealed carry today. 200 Vermont law does not prohibit concealed carry except “with the intent or avowed purpose of injuring a fellow man.” 201

Washington state was among the group of states that adopted the Revolver Act throughout the 1920s and 30s. 202 But in 1961 Washington switched to a shall issue structure. 203 Under Washington law, anyone who is allowed to own a handgun, also must be granted a permit to carry it. 204 By 1993 nearly a quarter of a million Washington residents held concealed carry licenses. 205

But it was not until the 1980s that the modern wave of concealed carry statutes appeared. Many trace the impulse to Florida where in 1987 a shall issue law was debated under national scrutiny. 206 The groundwork for the Florida legislation started in the early 1980s as gun rights activists and groups, including the Florida Chiefs of Police Association, pressed for legislation reforming Florida’s handgun laws. 207 One piece of the proposed change entitled citizens who passed a background check and gun safety classes to obtain a permit to carry concealed weapons. 208 Governor Bob Graham vetoed successive concealed carry bills. 209 Graham was succeeded by Bob Martinez who signed concealed carry into law in 1987. 210 Florida settled in the minds of many some of the most contentious issues in the RTC debate. 211 As a matter of theory one might concede how concealed carry could be basically

199 Id. at 610-11.
200 See Cramer & Kopel, supra note 180, at 682.
202 See Cramer & Kopel supra note 159, at 687.
203 Id.
205 See Cramer & Kopel, supra note 180, at 689.
207 Id. supra note 206.
208 Id.
209 Id.
210 Id.
211 Snyder, supra note 192, at 1; NRA Fact Sheet, supra note 175.
harmless in some rural state with a homogeneous population. But surely it is a bad idea for urban melting pot states.

In the abstract, this is sound speculation. But the experience in Florida proved it wrong. A high crime state, with an often tense mix of ethnic groups, Florida had “all the ingredients for concealed carry disaster.” Observers were alternately surprised, chagrined and gratified that concealed carry in Florida is at worst benign and if one is convinced by the work of John Lott and others, produces substantial net social and economic gains.

212 Cramer and Kopel supra note 159, at 690.


Some evidence on whether concealed-handgun laws will lead to increased crimes is readily available. Between October 1, 1987, when Florida’s “concealed-carry” law took effect, and the end of 1996, over 380,000 licenses had been issued, and only 72 had been revoked because of crimes committed by license holders (most of which did not involve the permitted gun). . . .

In Virginia, “[n]ot a single Virginia permit-holder has been involved in violent crime.” In the first year following the enactment of concealed-carry legislation in Texas, more than 114,000 licenses were issued, and only 17 have so far been revoked by the Department of Public Safety (reasons not specified). After Nevada’s first year, “Law enforcement officials throughout the state could not document one case of a fatality that resulted from irresponsible gun use by someone who obtained a permit under the new law.” Speaking for the Kentucky Chiefs of Police Association, Lt. Col. Bill Dorsey, Covington assistant police chief, concluded that after the law had been in effect for nine months, “We haven’t seen any cases where a [concealed-carry] permit holder has committed an offense with a firearm.” In North Carolina, “Permit-holding gun owners have not had a single permit revoked as a result of use of a gun in a crime.” Similarly, for South Carolina, “only one person who has received a pistol permit since 1989 has been indicted on a felony charge . . . .

During state legislative hearings on concealed-handgun laws, the most commonly raised concerns involved fears that armed citizens would attack each other in the heat of the moment following car accidents or accidentally shoot a police officer. The evidence shows that such fears are unfounded . . . .

Id. Lott goes on to make the more controversial claim that concealed handgun laws actually dramatically reduce crime:

The difference is quite striking: violent crimes are 81 percent higher in states without nondiscretionary laws. For murder, states that ban the concealed carrying of guns have murder rates 127 percent higher than states with the most liberal concealed-carry laws. For property crimes, the difference is much smaller: 24 percent. States with nondiscretionary laws have less crime, but the primary difference appears in terms of violent crimes.

. . . .

. . . Criminals respond to the threat of being shot while committing such crimes as robbery by choosing to commit less risky crimes that involve minimal contact with the victim.
More broadly, Florida challenged the basic tenets of the prohibitionists, testing and refuting the Zimring hypothesis (that more gun possession automatically leads to more crime). With Florida’s refutation of the standard objections to RTC laws, the list of states adopting right to carry swelled. Currently shall issue right to carry is governing law in Alaska, Alabama, Arizona, Arkansas, Connecticut, Colorado, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, etc.

Id. at 47, 54.

214 See Franklin E. Zimring & Gordon Hawkins, Crime Is Not the Problem: Lethal Violence in America, 122-23 (1997) (“Current evidence suggests that a combination of the ready availability of guns and the willingness to use maximum force in interpersonal conflict is the most important single contribution to the high U.S. death rate from violence”). The weakness of Zimring’s hypothesis also is illustrated by a simple chart that shows how gun crime in every category has declined even as the number of guns per 100,000 people has nearly tripled. See Gun Control and Gun Rights: A Reader’s and Guide 61-62 (Andrew J. McClurg et. al. eds., 2002) [hereinafter Gun Control and Gun Rights].

216 Ala. Code § 13A-11-75 (1994). In practice, Alabama’s RTC law works like the standard shall issue legislation. As explained supra at note 186, Alabama is more precisely described as liberal discretionary.
219 As explained supra at note 186, Connecticut is most accurately described as liberal discretionary.
225 Recall that Iowa is, strictly speaking, liberal discretionary, but arguably shall issue in practice. See supra note 186.
South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming.

It is fair to observe in all this that things might change. Just like preferences expressed through Article Five amendment, constitutional politics can shift. But the most recent enactments of RTC legislation show, that after nearly twenty years of debate and controversy, the trend is toward more concealed carry, not less.

Michigan enacted concealed carry in 2001 over sincere fears of blood in the streets. In practice, “it’s basically been a big ho-hum.”

[A] heated debate was raging about Michigan’s plan to make it easier to get concealed weapons permits. One side said more guns would make society safer from violent crime while the other said making concealed weapons permits easier to obtain was surely a recipe for disaster. Three years later, neither prediction has come true. Law enforcement officers and local officials say Michigan’s streets are not safer—or more dangerous—than they were three years ago when the law went into effect. But there have been no major incidents involving people with the permits. No accidental discharges. No murders. No anarchy.

[Prosecutor David Gorcyca said] “Generally speaking, I’m not an advocate for more guns being out on the streets . . . . [b]ut the statistics have shown there hasn’t been any more violence. People are, fortunately, acting responsibly.”

---

246 TEX. GOV’T CODE ANN. § 411.177 (Vernon 2005).
248 Vermont case law says concealed carry is protected by the state constitution. See supra text accompanying note 198.
249 VA. CODE ANN. § 18.2-308 (Supp. 2005).
252 WYO. STAT. ANN. § 6-8-104 (2005).
254 Id.
Because there have been no major incidents, many local officials are calling the law a success.255

New Mexico adopted a shall-issue law in 2001 that the New Mexico Supreme Court declared unconstitutional because large municipalities had the option to opt out.256 In 2003 the legislature tried again, this time eliminating the municipal opt out.257 Opponents of concealed carry, resisted to the end, filing suit to have the law declared unconstitutional.258 New Mexico’s arms guarantee includes a caveat that “the carrying of concealed weapons”259 is not a constitutional part of the right.260 Opponents claimed that this barred the new concealed carry law.261 The argument was frivolous and the Court unanimously upheld the legislation, explaining that the obvious impact of the constitutional caveat was to leave regulation of concealed carry to the legislature.262

Missourians debated RTC for years before the legislature overrode the Governor’s veto to pass the Concealed Carry Act on September 11, 2003.263 Senator Michael Gibbons released a statement explaining his vote to override, which captures the drama:

First, I need to address a rumor that the Republican Party and my future Senate colleagues have pressured me, threatening my leadership position or any further that I may have. These rumors are absolutely false.

. . . .

. . . Seven out of ten states have a shall-issue right-to-carry, a total of 44 states with some form of concealed carry. Looking at these 44 states, one finds some deterrent effect on violent crime with no

259 N.M. CONST. art. II, § 6.
260 State ex rel. N.M. Voices for Children, Inc., 90 F.3d at 459.
261 Id. at 460.
262 Id.
increase in violence, shootouts or harm to children because of permits.

How close has Missouri been to joining these other states and passing a less restrictive bill? In 2000, Governor Holden won by less than 1% of the vote. If Jim Talent had won, a less restrictive bill would already be law, and in 2004 we may have a new governor who would make signing such a bill a top priority.

Even closer, in less than two months, a pro-conceal carry candidate will be elected in the 11th Senate District to fill the vacancy caused by Senator DePasco’s recent death, guaranteeing a veto proof majority for a riskier bill.

The passage of a shall-issue right to carry is inevitable.264

As in New Mexico, the opposition’s last stand was a lawsuit claiming that the Missouri Constitution’s provision that the right to keep and bear arms did not guarantee a right to carry concealed weapons, actually barred the lawmakers from permitting concealed carry. That action was dispensed with quickly and Missourians joined the growing majority of Americans who can bear arms in public for self-defense without breaking the law.

Minnesota, home of Walter Mondale, the liberal standard-bearer who imprudently campaigned on the theme, “I will raise your taxes,” adopted a shall issue law in 2003,265 after coming close in 2001.266 Opponents of concealed carry made the familiar last stand in Unity Church of St. Paul v. Minnesota,267 challenging that enactment of the law violated a constitutional requirement that bills deal with a single subject (the right to carry law was appended to a Department of Natural Resources Bill).268 A county judge agreed,269 and the Minnesota Court of Appeals affirmed.270

265 MINN. STAT. § 624.714 (Supp. 2005).
268 Id. at *2.
In 2004, Ohio became the most recent state to enact a shall issue law after much debate and political maneuvering on all sides.\footnote{Ohio Rev. Code Ann. § 2923.125 (Supp. 2005).} What is different about Ohio is how the state constitutional right to arms forced the issue. The Ohio Supreme Court in \textit{Klein v. Leis}\footnote{Klein, 795 N.E.2d at 640 (O'Connor, J., dissenting).} had concluded that a state ban on concealed carry was not absolute since by statute carrying a firearm for self-defense was an affirmative defense to an arrest for carrying a concealed weapon.\footnote{Id. at 638; Ohio Rev. Code Ann. §§ 2923.12, 2923.16 (Supp. 2005).} Moreover, since the Ohio Constitution protects open carry of firearms, the restrictions on concealed carry were not a violation of the right to “bear” arms.\footnote{Klein, 795 N.E.2d at 640 (O'Connor, J., dissenting).}

Citizen activists, who had been pushing a shall issue law for several years, took \textit{Klein} at its word, and began carrying handguns openly in “Defense’ Walks.”\footnote{Buckeye Firearms Ass'n, “Defense' Walks Make History in Ohio, Grassroots Action Guide, at http://www.buckeyefirearms.org/modules.php?name=Content&pa=showpage&pid=60 (last updated Nov. 5, 2003).} By the end of 2004, a shall issue bill, backed by police, was signed by the Governor who “had long said he would only sign the bill if law enforcement supported it.”\footnote{Taft Signs Concealed Handgun Bill, NBC4I.com News, Jan. 8, 2004, at http://www.nbc4i.com/news/2751519/detail.html.}

Finally, and again, there is a lesson from Wisconsin. In 1993 the prohibitionist movement was pressing forward with handgun bans.\footnote{Wis. State Legislature Legislative Reference Bureau, \textit{Regulation of Firearms in Wisconsin}, WIS. BRIEFS NO. 00-11, at 1-2 (2000), available at http://www.legis.state.wi.us/lrb/pubs/wb/00wb11.pdf.} By 1998 Wisconsin had amended its constitution to block the gun bans.\footnote{Id. at 3.} And by 2004, the legislature came within one vote of overriding the Governor’s veto of a shall issue concealed carry bill.\footnote{See Dick Dahl, \textit{Four States Holding to 'No Issue' Handgun Laws}, JOIN TOGETHER ONLINE, June 28, 2004, http://www.jointogether.org/gv/news/features/reader/0,2061,572284,00.html.} The standard explanation for such a dramatic turnabout is NRA lobbying. But as the Wisconsin bill was nearing a vote, the \textit{Milwaukee Sentinel} checked neighboring states and offered a report suggesting why reasonable people might support concealed carry without being brainwashed by the NRA:
“I have never encountered a (threatening) event that involved an individual with a gun permit,” said Minnesota’s Hennepin County Sheriff Pat McGowan, whose county includes about 25% of the state’s population.

Likewise, Iowa has had “a relatively good experience,” said Doug Marek, deputy attorney general for criminal justice. “The system that we have in Iowa seems to be working well.” Iowa allows, but does not require, the state’s 99 sheriffs to issue concealed weapon permits—a so-called “may issue” provision that is law in 11 states.

“We have not seen in Michigan, that people get out their guns and start blasting each other.” said Matt Davis, of the Michigan Attorney General’s office. “It appears the new law is working.”

Wisconsin does not yet have concealed carry. But then, prior to 1998, it did not even have a constitutional right to arms. That Wisconsin came so close so quickly to joining the 38 other RTC states suggests that the idea of self-help against violent threats continues to resonate strongly across America. As this article goes to print, the press for concealed carry in Wisconsin has been renewed, with intense speculation over whether crossover Democrats will maintain their support of a new bill, allowing the override of Governor Doyle’s promised veto.

The objections to concealed carry legislation in Wisconsin and elsewhere, confirm that diehard opponents stand strongly against the idea (in 1940, Wendell Willkie got 45% of the vote criticizing the New Deal). But despite zealous opposition, in one state laboratory after another, RTC has become law and nowhere has the standard parade of horribles appeared. The near twenty year wave of RTC laws

---

280 Steve Walters, Weapons Laws Not Matching Hype; Concealed Carry Not Altering Crime, States Find, MILWAUKEE J. SENTINEL, Nov. 3, 2003, at A1, available at http://www.jsonline.com/news/state/Nov03/182381.asp. The NRA categorizes these may issue states as “reasonable may-issue” (meaning that permits generally are granted) and “restrictive” may issue (meaning that special circumstances are required for a permit). Iowa is considered a reasonable may issue state. NRA Right-to-Carry Map, supra note 186.


282 See, e.g., Dahl, supra note 279.

283 See supra note 177.

284 See, e.g., supra note 213.
and their salutary aftermath refute many of the gun prohibitionists’ core propositions: It is the gun, its easy availability, that will turn otherwise sensible and good citizens into murderers.\textsuperscript{285} You are 43 times more likely to be killed by your own gun than to use it in self-defense (84\% of the deaths in this count were suicides—still a tragedy, but it does not support the popular image of Ward Cleaver coming home late and being shot by June in a fit of rage or panic).\textsuperscript{286} If attacked,

\begin{itemize}
  \item The endlessly repeated argument for banning firearms is that “[M]ost murders are committed by previously law abiding citizens where the killer and the victim are related or acquainted”; “previously law abiding citizens [are] committing impulsive gun-murders while engaged in arguments with family members or acquaintances.” “That gun in the closet to protect against burglars will most likely be used to shoot a spouse in a moment of rage . . . . The problem is you and me—law-abiding folks.”
  \item But every local and national study of homicide shows that murderers are far from being “ordinary citizens” or “law abiding folks.” Rather, they are extreme aberrants, their life histories being characterized by felony records, psychopathology, alcohol and/or drug dependence, and often irrational violence against those around them.
  \item The data set out in [that chapter] show that—unlike ordinary gun owners—roughly 90 percent of adult murderers have prior adult crime records, with an average adult criminal career of six or more years, including four major adult felony arrests.
\end{itemize}

\textsuperscript{285} Don Kates has long argued that murderers typically have a long history of behavior that would bar them from legally owning guns and that those who seek permits for something that is quite easy to get away with absent a permit, present very little threat.

\textsuperscript{286} The 43 times more likely statement comes from Arthur L. Kellermann & Donald T. Reay, \textit{Protection or Peril? An Analysis of Firearm-Related Deaths in the Home}, 314 NEW ENG. J. MED. 1557, 1560 (1986). The claim is a result of Kellermann and Reay counting 743 gunshot deaths in King County in Washington, which includes Seattle, from 1978 to 1983. \textit{Id.} at 1558. For every case where a gun in the home was used in a justifiable killing, there were 4.6 criminal homicides, 37 suicides and 1.3 unintentional deaths. \textit{Id.} at 1559 tbl.3. See also Stevens H. Clarke, \textit{Firearms and Violence: Interpreting the Connection}, POPULAR GOV’T, Winter 2000, at 3, 9, available at http://www.iog.unc.edu/pubs/electronicversions/pg/pgwin00/article1.pdf. Gary Kleck argues that the real mistake in Kellermann’s claim is the failure to include the millions of yearly defensive gun uses where no one is shot and the gun is not even fired. See \textit{Gary Kleck, POINT BLANK GUNS AND VIOLENCE IN AMERICA} 114 (Aldine de Gruyter 1991); Gary Kleck \& Marc Gertz, \textit{Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun}, 86 J. CRIM. L. \& CRIMINOLOGY 150, 181 \& n.100 (1995).

Gun control advocate Andrew McClurg, who finds suicides still a compelling reason for strict gun control, makes a remarkable observation:

Most people are surprised to learn that annual firearm suicides routinely outpace firearm homicides. In 1996, . . . 18,166 Americans committed suicide with a firearm, substantially more than the 14,327 victims of homicide by firearm the same year. Firearm suicides have exceeded firearm homicides in
it is best to just give them what they want and run.\textsuperscript{287} Permitting anyone other than police to go armed in public will lead to blood in the streets, transforming fender benders and petty slights into deadly gunfights.\textsuperscript{288} It will be Dodge City in modern clothes.\textsuperscript{289}

The prohibitionists’ speculations, though not implausible in the abstract, simply have not turned out. In state after state, shall issue laws operate in tandem with decreased rates of violent crime. Even police officials concede readily that the nightmare scenario fortunately was just fiction.\textsuperscript{290}

The substitute war seems to be showing why John Lott, who famously contends that concealed carry laws actually have caused dramatic reductions in crime and billions of dollars in net social and economic gains, is wrong.\textsuperscript{291} This is remarkable given that the starting objection was that concealed carry laws are dangerous.\textsuperscript{292} As for the Ward Cleaver imagery, Gary Kleck finds “fewer than 2% of fatal gun accidents (FGAs) involve a person accidentally shooting someone mistaken for an intruder. With about 1400 FGAs in 1987, this implies that there were fewer than 28 incidents of this sort annually.” 293

Andrew J. McClurg, The Public Health Case for the Safe Storage of Firearms: Adolescent Suicides Add One More “Smoking Gun,” 51 Hastings L.J. 953, 960 (2000) (emphasis added) (quoting John Allen Paulos, Measuring American Society: A Better Chance You’ll Shoot Yourself Than Be Shot by Another, 6 PUB. PERSP. 17, 17 (1995)). As for the Ward Cleaver imagery, Gary Kleck finds “fewer than 2% of fatal gun accidents (FGAs) involve a person accidentally shooting someone mistaken for an intruder. With about 1400 FGAs in 1987, this implies that there were fewer than 28 incidents of this sort annually.” 293

287 See, e.g., PETE SHIELDS, GUNS DON’T DIE—PEOPLE DO 125 (1981) (writing as Chairman of Handgun Control, Inc: “The best defense against injury is to put up no defense—give them what they want, or run.”).

288 See, e.g., supra notes 213-14.

289 This imagery seems more myth than fact. The bad men who hung out in saloons shot one another at a fearsome rate but for ordinary citizens Dodge City and other frontier towns were pretty safe places to live compared to many modern urban centers. See DAVID B. KOPEL, THE SAMURAI, THE MOUNTIE, AND THE COWBOY 327-28 (1992).

290 See supra note 213.

would turn a slow checkout line at Wal-Mart into a shooting gallery. (A tangential but interesting comparative development is that after enacting a flat ban on handguns, the British are experiencing a wave of gun crime that is unprecedented in their history.)292

Of course within Ackerman’s model, the main thing is the two decades of debate and continuing votes for Right to Carry Laws. The salutary results are really just back story—practical endorsement of a wave of decisions that are important not because they are wise, but simply because they have been made. Ackerman’s constitutional politics is a mechanism for determining America has decided something. But it is no guarantee our decision is the best one or even wise.293

Still, if the prohibitionists’ speculations had held true, if a few experiments showed concealed carry to be a really bad idea, it would have gained little traction in other states. That RTC legislation continues to spring up across the nation suggests something about these constitutional politics growing up statewise that we cannot really say about the federal legislative signals in Ackerman’s story of a transformative New Deal.

Purely federal constitutional politics really does demand that we ignore whether constitutional moments produce wise or foolish change. The important thing is that “We the People” have decided on a particular course, and exhibited that decision in a way that is dramatic enough to be discernable to those looking for the right signals.

But where we can track constitutional politics through successive experiments in our laboratories of democracy—the

---


293 Once we are on the course set by a transformative New Deal, we have rejected alternative experiments. It is pure speculation how things would have turned out under alternate models.
same proposition working its way through a cumbersome legislative process state after state, year after year for decades—we have not only evidence of mounting democratic assent, we also can assess whether the proposition is sound. As each test proceeds, the remaining states operate as a control group, allowing us to see whether the debated measure is better or worse than doing nothing.

There is another slightly different advantage where constitutional politics grows up statewise. It permits competition between alternative schemes. So far I have discussed a dynamic where concealed carry bills either pass or fail. But it is incomplete to cast the RTC decision as binary.

Taking a slightly longer view of things, there was a third choice on the table. The RTC wave appeared just a few short years after arguments for a universal ban on handguns had been pressed by prohibitionists and considered and rejected by a majority of Americans. So in addition to deciding yes or no about concealed carry, we also have seriously considered the possibility of banning handguns entirely. With the exception of a handful of municipal ordinances, including famously Morton Grove, Illinois, and for the moment, the District of Columbia, this third choice has been rejected.


Senator Dianne Feinstein (D-CA), discussing the passage of the assault weapons ban that she authored, candidly admitted that the only reason she does not seek a ban and confiscation of all guns is that it is not yet politically feasible: “If it were up to me, I would tell Mr. and Mrs. America to turn them in.” See ‘Hand Them All In,’ LAS VEGAS REV. J., Oct. 13, 1997, http://www.reviewjournal.com/lvrj_home/1997/Oct-13-Mon-1997/opinion/6211250.html (quoting 60 Minutes: Interview by Lesley Stahl with United States Senator Dianne Feinstein (CBS television broadcast, Feb. 24, 1995)).

295 See infra Section III for discussion of the failure of handgun ban initiatives. While the city of Chicago and several suburbs have virtual handgun bans, the Illinois legislature recently enacted legislation that prevents a citizen from being convicted for violating the ban if he used the handgun for lawful self defense on his own property. 720 ILL. COMP. STAT. ANN. 5/24-10 (2005).


297 In 1982 for example, California’s Proposition 15, which would have prevented any new handguns from coming into California was rejected 63 to 37 percent. See infra text at note 367.
Handguns were a natural target for prohibition. Most gun crime is handgun crime. And while the gun death rate is generally dominated by suicides that might just as easily be committed with long guns, for the remaining deaths, it is fair to speculate that concealability of the handgun was an advantage to the attacker. The Supreme Court denied certiori in the Morton Grove case, extending an invitation to other municipalities to enact similar legislation and stirring a debate over whether the Court’s rationale was that the Second Amendment is not incorporated against the states, does not protect an individual right, or was just too hot to touch. Still gun bans were rejected even in highly progressive enclaves.

We already have seen that a referendum to ban handguns failed in Madison, Wisconsin. As discussed in detail in Part III, statewide handgun ban referenda also failed by large margins in Massachusetts (1976) and California (1982). By the late 1980s Josh Sugarman of the anti-gun Violence Policy Center lamented that Americans had lost interest in banning handguns and proposed a new strategy focusing on hitherto obscure category of guns he called “assault weapons” to breath life into the prohibitionists movement.

As discussed in the next section, Sugarman’s strategy had its own unintended consequences. For now it is sufficient to recognize that we have previously but are no longer talking seriously about banning handguns. The follow-up to that conversation has been a wave of state legislation enabling citizens not just to own handguns, but to easily obtain licenses to carry them concealed wherever they go.

Ackerman’s point is about process. But the extra confidence we gain from successive state experiments, about the soundness of permitting concealed carry, underscores that the higher lawmaking signals we garner from the concealed

---

298 See supra note 16.
300 See infra text accompanying notes 370-71.
carry revolution are in an important way better than those Ackerman uses to expand the implications of the New Deal.

IV. A CONVERSATION BETWEEN GENERATIONS

Professor Ackerman builds the case for his Dualist model by criticizing the alternatives. The Burkean, a pure democrat, worships at the alter of the present and would cede the field to whatever majority holds sway. The Foundationalist hopes to construct a principled constitutional platform and by pursuing this normative vision of the good, would freely restrain majority will. The Dualist incorporates both and is hindered by neither; tempering each with the type of understanding reached after “a good conversation. . . . between generations.”

We are today a nation where between 40 and 50 percent of households have at least one gun. Guns in private hands number about a quarter billion. We fire nearly four billion rounds downrange every year (most of those recreationally). We sustain around 30,000 firearms deaths per year. The majority of these are suicides. Gun control advocate Andrew McClurg reports, “Most people are surprised to learn that annual firearm suicides routinely outpace firearm homicides. In 1996 . . . 18,166 Americans committed suicide with a firearm, substantially more than the 14,327 victims of homicide by firearm the same year.”

Guns are used in over half of...
domestic homicides, resulting in about 1,800 murders annually.\footnote{308} Accidental deaths are typically the smallest fraction of American gun deaths and those where children are victims smaller still.\footnote{309} In 1993 for example, “119 children under the age of 13, including 30 under the age of 5 were killed in [firearms] accidents . . . .”\footnote{310} Depending on which studies we credit, Americans use guns defensively on the order of more than two million times per year, around 700,000 times a year, or around 75,000 times a year.\footnote{311} Fourteen million Americans routinely carry guns when they go out.\footnote{312}

This says something about the costs and character of our armed society, but in full context, the inter-generational conversation Ackerman solicits presents a bit of a problem. Looking across our history, America has spoken quite a lot and loudly about guns. But relatively little of that has been about gun prohibition. As we have seen, from the Framing through Reconstruction to the modern era, the principle work in the states has been about acknowledging the right of individuals to keep and bear private firearms. There is no equivalent, large-scale public decision-making from these periods that endorses the prohibitionist agenda.\footnote{313} The work of standard model

\footnote{308} Gun Control and Gun Rights, supra note 214, at 74.
\footnote{309} For 2002 the CDC reports 11,829 firearms homicides, and 17,108 firearms suicides. Center for Disease Control, National Center for Health Statistics, fast stats A to Z, http://www.cdc.gov/nchs/fastats (follow “Homicide/Assault” and “Suicide/Self-Inflicted Injury” hyperlink). This is in addition to accidental firearms deaths. During the same year 16,257 people died in unintentional falls and 17,550 died by accidental poisoning. Id. (follow “Accidents/Unintentional Injuries” hyperlink).
\footnote{310} Kleck, Targeting Guns, supra note 305, at 299. The highest number of accidental shooting deaths in one year was 3,014 in 1933. Id. at 323 tbl.9.2. Since 1973 (with 2,618 fatal gun accidents) the number has declined nearly every year. Id. In 1998 there were 900. National Safety Council, Injury Facts 9 (1999). In 80 of these the victim was age 5-14. Id. 30 victims were under the age of 5. Id.
\footnote{311} See Kleck, Targeting Guns, supra note 305, at 151-54 (reporting his findings and those of other studies).
\footnote{312} Philip J. Cook et al., The Gun Debate’s New Mythical Number: How Many Defensive Uses Per Year?, 16 J. POL’Y ANALYSIS AND MGMT. 463, 467 (1997) (“14 million people routinely carry a gun when they go out.”).
\footnote{313} See generally Bogus, supra note 159.
scholars parallels this argument.\textsuperscript{314} Even the opposition to the
standard model scholarship is basically reactive, limited to
alternative explanations of the evidence offered by standard
modelers.\textsuperscript{315}

\textsuperscript{314} After discussing the rich originalist support for the individual rights view, William Van Alstyne underscores the point this way:

In recent years it has been suggested that the Second Amendment protects the “collective” right of states to maintain militias, while it does not protect the right of “the people” to keep and bear arms. If anyone entertained this notion in the period during which the Constitution and Bill of Rights were debated and ratified, it remains one of the most closely guarded secrets of the eighteenth century, for no known writing surviving from the period between 1787 and 1791 states such a thesis.


For nineteenth century support of the individual right, see generally David B. Kopel, \textit{The Second Amendment in the Nineteenth Century}, 1998 BYU L. REV. 1359.

For support of the individual right during the Reconstruction Era see Stephen P. Halbrook, \textit{Personal Security, Personal Liberty, and “The Constitutional Right to Bear Arms”: Visions of the Framers of the Fourteenth Amendment}, 5 SETON HALL CONST. L.J. 341, 431-34 (1995) (providing a detailed account of debates confirming congressional intent to incorporate the individual rights view of the Second Amendment into the Fourteenth Amendment); Robert J. Cottrol & Raymond T. Diamond, \textit{The Second Amendment: Toward an Afro-Americanist Reconsideration}, 80 GEO. L.J. 309, 342-48 (1991) (discussing the influence that Southern attempts to disarm the newly freed slaves had on the adoption of the Fourteenth Amendment and subsequent Supreme Court cases); Akhil Reed Amar, \textit{The Bill of Rights and the Fourteenth Amendment}, 101 YALE L.J. 1193, 1260-62 (1992) (documenting through floor speeches that the framers of the Fourteenth Amendment intended to protect generally the freedoms in the Bill of Rights, including the right to keep and bear arms); Akhil Reed Amar, \textit{The Bill of Rights as a Constitution}, 100 YALE L.J. 1131, 1167-68 (1991) (explaining that key framers of the Fourteenth Amendment viewed the right to keep and bear arms, unlike other constitutional provisions, as a “privilege of national citizenship” that applied against the states). \textit{See also} Dred Scott v. Sandford, 60 U.S. 393, 417 (1857) (explaining that if free blacks were deemed citizens they would have commensurate rights including the right “to keep and carry arms wherever they went”).

It is not uncommon to find early municipal restrictions on carrying and use of handguns, some of which seemed to have racist motivations. But in terms of the broad public stirrings, decisions by the people on the order of state constitutional amendments or votes for a chief executive that Ackerman says are signals of higher lawmaking, there is really very little discussion about prohibition until quite late in the game.

The first major federal gun control law did not appear until more than fifty years after the founding of the National Rifle Association. Formed in 1871 by two Union officers who lamented the generally poor marksmanship of their Civil War troops, the National Rifle Association was established to “promote and encourage rifle shooting on a scientific basis.” Progress was plodding and the organization even suspended operations from 1892-1900.

In 1904, advancing the idea of America as a nation of riflemen, Congress established the Civilian Marksmanship Program (“CMP”) for the purpose of promoting shooting clubs, national shooting competitions, and encouraging civilian training and practice with military arms. Through a cooperative arrangement between the CMP and (for over fifty years) the NRA, citizens were able to purchase government surplus army rifles and handguns, including semiautomatic battle rifles that some would call assault rifles. Practical support for shooters remained the NRA’s central mission through the 1950s. The CMP though now detached from the NRA, continues its original mission, much to the chagrin of

---

316 David Hardy writes:

The first American handgun ban was enacted in 1837 [voided as a violation of the federal Second Amendment in Nunn v. State, 1 Ga. 243 (1846)], restrictions on sale or carrying of handguns were commonplace by the turn of the century, and the National Conference of Commissioners on Uniform State Laws spent seven years in the 1920s preparing a uniform state act on the subject.

Hardy, supra note 191, at 589 (internal citations omitted).


318 Hardy, supra note 191, at 589-90 (“[P]rior to 1934, the sole federal statute on the subject was a 1927 ban on the use of the mails to ship firearms concealable on the person.”).

319 See Brief History of NRA, supra note 161.

320 See SHERRILL, supra note 294, at 212.

some,\textsuperscript{322} and recently marked 100 years of providing Americans with surplus military arms and marksmanship training.\textsuperscript{323}

It was not until 1904, writes Robert Sherrill, with the creation of the CMP that the NRA really became viable. Sherrill, who is deeply critical of both the NRA and the CMP, writes this:

In 1903, under the heavy handed encouragement of Secretary Root and key generals, Congress was persuaded to permit the NRA to get its hands officially into the U.S. Treasury; this came about via the establishment of the National Board for the Promotion of Rifle Practice, which, at its very first meetings, voted to turn over literally every available military shooting installation plus all available surplus weapons to the promotion of the NRA.

By 1910 the War Department began supplying the NRA with cut-rate weapons. Having adopted the Model 1903 Springfield as the official infantry arm, the department declared the Model 1898 Krag as surplus and let NRA members have them for $10 each, plus costs. NRA officials concede that this “greatly advanced” the NRA because this was the first time that the government used the riflemen as its outlet for used weapons. Thereafter the NRA could advertise that it

\textsuperscript{322} See John Mintz, \textit{M-1 Rifle Giveaway Rifles Gun Control Proponents}, \textsc{Plain Dealer} (Cleveland), May 9, 1996, at A14. For a highly critical, often humorous, informative critique of the CMP, see Sherrill \textit{supra} note 294, at 221-22. Sherrill writes:

\begin{quote}

[F]inally [the National Defense Act of 1916] created the Office of the Director of Civilian Marksmanship under the National Board for the Promotion of Rifle Practice—a bureaucratic enclave that was to swell eventually into two dozen civilian employees and three colonels, supervised by the twenty-five-member Board itself (most of whose members belong to the NRA), and operating on a budget of $5 million. . . . There was considerable grousing among critics of the NRA when, at the height of the Vietnam War and the drafting of record numbers of men to fight an unpopular war, the Pentagon was assigning three thousand servicemen to provide housekeeping services at Camp Perry for the NRA devotees. The Perry matches alone cost taxpayers $2 million. . . . And did the federal support of this manly hobby pay off in a better-trained citizenry on which the military forces could draw? Alas, not exactly. In fact the [CMP] was of insignificant value [according to a 1965 study] at a cost of $100,000 to the taxpayer. In a sampling of 12,880 Army trainees . . . only 3.1 percent had been in the [CMP] before being inducted into the army. The study further showed that some gun club members had received no instruction at all and that some had never shot a gun. Perhaps the most embarrassing discovery was that fewer than half of the gun club members benefiting from the government program were of draftable age.
\end{quote}

\textit{Id.} Sherrill’s book is anything but an endorsement of an armed society. But his description of the CMP is useful. Remember that lots of people did not like the New Deal either. \textit{See supra} note 177.

\textsuperscript{323} In 1994 the program was transformed from one funded out of the federal budget to a federal corporation that must sustain itself financially. It still promotes marksmanship training and sells surplus semiautomatic battle rifles to qualified citizens. \textit{See} 36 U.S.C. § 40729 (2000).
paid to sign up. Only NRA members got the guns. Only NRA members got the free ammunition. Only NRA members got the free trips to shooting matches.

... [In 1916 the National Defense Act] authored primarily by Secretary of War Root... incorporated into government policy all the ad-hoc favoritism of previous years: $300,000 dollars—an enormous sum for 1916—was set aside to promote civilian marksmanship training; the War Department was authorized to keep handing out guns and ammo to civilian rifle clubs; military instructors were made available to the NRA hobbyist; all military rifle ranges were opened to civilian gunmen; finally it created the Office of the Directory of Civilian Marksmanship under the National Board for the Promotion of Rifle Practice....

Sherrill brings the disgust of a modern gun control advocate to his description of the NRA’s partnership with the federal government. But realize this is his disgust circa 1973. Nothing in his account and nothing I can find suggests any general sympathy at the turn of the century for Sherrill’s views. There was as yet, no Coalition to Ban Handguns, Violence Policy Center or Handgun Control, Inc.—no prohibitionist movement to speak of.

The first major federal firearms regulation was the National Firearms Act of 1934 which subjected destructive weapons—e.g., full automatic firearms, short barreled rifles and shotguns, and silencers—to a two hundred dollar tax and registration enabling the tax. These firearms remain available today under basically the same scheme of regulation.

The 1934 Act was limited to a narrow class of destructive weapons. Still under consideration was regulation of the trade in ordinary firearms. The Federal Firearms Act of 1938 established a system of licenses for firearms dealers. The one-dollar license was required only for dealers who traded firearms in interstate or foreign commerce. These dealers were required to keep a record of their sales and were prohibited from shipping guns across state

---

324 Sherrill, supra note 294, at 219-21.
327 National Firearms Act of 1934 § 1(a).
328 Hardy, supra note 191, at 594.
329 Id.
lines to violent felons or to anyone prohibited from receiving a firearm by the laws of the destination state.\textsuperscript{330}

This was the state of federal gun law when the Supreme Court took the case that stands as its only direct treatment of the Second Amendment. It was a violation of the 1934 Gun Control Act that set up the Court's decision in \textit{U.S. v. Miller}.\textsuperscript{331} Miller, a bootlegger, was arrested for possession of an unregistered sawed-off shotgun.\textsuperscript{332} He claimed that the 1934 Act was a violation of the Second Amendment.\textsuperscript{333} When the case finally reached the Supreme Court, Miller had disappeared. The government argued its case unopposed.\textsuperscript{334}

Part of the \textit{Miller} opinion focused on whether the gun had a reasonable relationship to preservation of a well regulated militia.\textsuperscript{335} Unable to conclude that it did, the Court ruled, “[W]e cannot say that the Second Amendment guarantees the right to keep and bear such an instrument.”\textsuperscript{336} This prompts claims that the right is a collective or state right. But then the Court explains that the “militia” consists of the general citizenry bearing “arms supplied by themselves and of the kind in common use at the time” and ignores that Miller was not part of any organized military unit. This part of the decision fuels individual rights claims.\textsuperscript{337} This duality in \textit{Miller} is underscored by the vacillating opinions of the executive branch about the meaning of the Second Amendment,\textsuperscript{338} and leaves us today unable to say conclusively whether the right is individual or not.

\begin{footnotes}
\item \textsuperscript{330} Id. at 594. For a rich description of the details and political maneuvering leading to passage of the bill, see id. at 585-827.
\item \textsuperscript{331} 307 U.S. 174 (1939).
\item \textsuperscript{332} Id. at 175.
\item \textsuperscript{333} Id. at 176.
\item \textsuperscript{334} ROBERT J. COTTROL, GUN CONTROL AND THE CONSTITUTION xxvii (Garland 1993).
\item \textsuperscript{335} Id. at 177.
\item \textsuperscript{336} Id. at 178.
\item \textsuperscript{337} Quickly after \textit{Miller} came circuit court opinions that basically ignored \textit{Miller} and created their own more stringent tests. Subsequent cases applied these more stringent tests, even while citing \textit{Miller}, resulting in our current situation where most lower federal courts have concluded that the Second Amendment does not guarantee an individual right. See Denning, supra note 138, at 963.
\end{footnotes}
Approaching the 1960s, what older gun collectors call the golden age neared its end. Up to then, war surplus guns were plentiful and firearms could be ordered by mail. But there was trouble ahead. The thriving culture of gun trading, collecting and shooting sports would be rocked by the next major federal gun control act.

The 1960s brought war, cultural revolution and assassination. It was also the decade where the first real threat to “the right to keep and bear arms” emerged. In 1973 Robert Sherrill wrote:

There had been gun-control bills eddying around the backwashes of Congress for years. The big emotional tidal wave that set them going was President Kennedy’s death; the momentum was perpetuated by the assassinations of Robert Kennedy and Martin Luther King, Jr., and by the massacre of fourteen people by Charles Whitman, shooting from the top of the University of Texas tower. Also, from Watts to Newark, rioters did a good job during the 1960s of suggesting that maybe everybody should disarm before a few nuts triggered a race war.

Sherrill makes another observation that is both ironic and remarkable. Tracking the efforts of the domestic gun industry to fend off competition from cheap military surplus imports, Sherrill shows that American gun manufacturers, their agenda promoted by Connecticut Senator Thomas Dodd, contributed a central piece to the modern gun control agenda:

[Importers were bringing in millions of military surplus guns and selling them through big mail order houses]. Interarmco was importing Colt and Smith & Wesson military revolvers that were identical in construction and quality to, and selling for half the price

---

339 See, e.g., John T. Amber, This Gun Collecting Game, in GUN DIGEST TREASURY 106 (Harold A. Mertz ed., 7th ed. 1994). In a salient condemnation of the mail order trade Robert Sherrill writes:

On March 12, 1963, Oswald tore out the coupon and sent along a postal money order for $21.45 to Klein’s Sporting Goods Co. in Chicago . . . . Klein’s was just one of many outlets for the Italian surplus military rifles . . . . on March 13 Klein’s cashed the money order, and seven days later the rifle, fully assembled, was on its way by parcel post . . . .

Sherrill, supra note 294, at 166.

340 Id. at 70. David Hardy puts the assassinations into legislative context:

In April 1968, while [the 1968 Act] was in Senate committee consideration, Rev. Martin Luther King was murdered by a sniper. The day before the House vote, Robert F. Kennedy was killed. The day of the House vote, President Johnson publicly denounced [this early weaker version of the 1968 act] as a “half-way measure” . . . .

Hardy, supra note 191, at 601-02.
of, the Colt and Smith & Wesson commercial revolvers peddled in the classiest retail stores.

It’s estimated that between 1959—about the time the New England manufacturers really began to get their anti-import propaganda going—and 1963, 7 million foreign weapons, mostly military surplus, were imported into the United States.

... 

Around the cheapness of these firearms was to whirl all sorts of erroneous claims in the years ahead. The big American gun manufacturers argued that the castoff military weapons were unsafe, unreliable, not worth even their cheap price... Most of the military rifles were manufactured to specifications that were higher and more rigid than those that apply to most sporting firearms... But the quality of the competing firearms was hardly an issue that would be sufficient to inflame Congress. If the New England gun manufacturers wanted to block the imports... they would have to fall back on something simpler and more easily understood by the layman.341

First they tried a “national security gimmick” claiming that imports caused American manufactures to layoff skilled labor leaving America vulnerable when the need arose to produce combat weapons for the army.342 This argument was underwhelming:

So they needed a new attack. And that’s when Dodd came up with crime in the streets. Yes, true, to be sure—crime in the streets already existed; but it is significant that the gunmakers of New England didn’t discover crime until they needed it. One can search the records of Congress and also the records of the bureaucracy from the mid-1950s until 1963 and find hardly a suggestion that easy gun access might be contributing to urban turmoil and crime.

...[T]he lightbulb went on over Dodd’s head and, lo, before him, illuminated in mystic fashion, was the new ploy: Imported Cheap Guns Equal Street Crime!

On this theme was to be launched the 1963 gun-control hearings... The restrictions that Dodd sought to impose on firearms would have little effect on the manufactures of America’s old-line guns but would, he hoped, cripple the importers of foreign-made weapons.

...
Just when it seemed that Dodd’s mail-order-guns show was going to die for lack of notoriety, president John Kennedy’s death came along and revived it. . . Whether he wanted to or not, Dodd now had to get in there and orate like he meant it, for he was caught by the wave of history.\footnote{343}

The tangible consequence of Dodd’s efforts was the Gun Control Act of 1968.\footnote{344} The Act expanded the definition of persons prohibited from purchasing firearms and made limitations that were applicable only to interstate sales under the 1938 Act, universal.\footnote{345} The 1968 Act expanded the provisions of the 1938 Act, now requiring not just interstate, but all dealers to obtain a federal license.\footnote{346} The Act also barred mail order sales entirely, and placed new restrictions on dealer and private party sales to out-of-state residents.\footnote{347}

The era of free transferability was over. It is in this environment that a plausible organized resistance to the right to keep and bear arms splashed onto the scene. In 1975 the advocacy gained prominence as Pete Shields, spurred by the loss of his son to a criminal with a gun, devoted himself full-time to the newly formed National Council to Control Handguns (renamed Handgun Control, Inc. in 1980).\footnote{348}

\footnote{343} Id. at 92-93, 157. David Hardy also provides interesting insight into the character and efforts of Dodd and his work for the establishment domestic gun manufacturers. See Hardy, \textit{supra} note 191, at 595-98. Hardy characterizes Dodd as a staunch conservative (from the state that hosted gun firms Colt, High Standard, Remington, Mossberg, Winchester-Western, Strum-Ruger and Marlin) who kept a pistol in his desk and tried to take it to Senate floor the day he was to be censured. \textit{Id.} at 595 nn.56-57.


\footnote{345} 18 U.S.C. §§ 921-927 (2004); Hardy \textit{supra} note 191, at 597-98. \textit{See also} United States v. Posnjak, 457 F.2d 1110, 1115 (2d Cir. 1972) (the act also enabled regulatory restrictions on importation of small cheap handguns deemed to have insufficient utility for sporting purposes).

\footnote{346} Hardy, \textit{supra} note 191, at 607.

\footnote{347} \textit{Id.} at 599.

\footnote{348} Brady Campaign, Brady Campaign United with the Million Mom March and the Brady Center to Prevent Gun Violence, A History of Working to Prevent Gun Violence, http://www.bradycampaign.org/press?page=history (last visited Feb. 8, 2006). The Brady organization’s description of the high points of the gun control movement is a useful counterpoint to the events I highlight in this section. It describes personal tragedies, discrete pieces of legislation, initiatives of the organization, advertisements in the New York Times and, prominently, the recent spate of litigation against the gun industry. But it does not suggest any evidence of grand constitutional moments endorsing gun prohibition. Indeed, some of the organization’s implicit claims seem a
on, Shields and others made it clear that our gun culture required radical change:

We’re going to have to take one step at a time, and the first step is necessarily—given the political realities—going to be very modest. . . . Our ultimate goal—total control of handguns in the United States—is going to take time. . . . The first problem is to slow down the increasing number of handguns being produced sold in this country. The second problem is to get handguns registered. And the final problem is to make the possession of all handguns and all handgun ammunition—except for the military, police, [security guards, licensed clubs and collectors]—totally illegal.349

Around the same time, the Coalition to Ban Handguns was formed.350 As the name promises, its goals were the same as HCI’s.

During this period the NRA was transformed as well. Historically it had been occupied with constituent service.351 The constituents were basically hobbyists.352 NRA’s focus had been support for national target matches, hunter education,
range development and preservation. But as gun prohibition loomed, the NRA adapted. By the early 1970s the NRA was considered even by critics,

Dollar for dollar . . . probably the most effective lobby in Washington. Its assets hardly put it in the same league with the oil lobby, and for a crash campaign it could not gather the kind of slush fund the American Medical Association raised to fight Medicare. But among grass-roots lobbying organizations who specialize in letter writing campaigns, the National Rifle Association is in a class by itself. Its officials have boasted that they can get their million members to hit Congress with at least half a million letters on seventy-two-hour notice. . . . [A]t the height of the Vietnam War, Senator Edward Kennedy of Massachusetts said he was regularly getting more mail on the pending gun-control legislation than on the war . . . .

In 1975, NRA established the Institute for Legislative Action (“ILA”) in response to growing prohibitionist advocacy. Today, when people lament or boast of the NRA’s lobbying power they are really talking about ILA. It is largely through ILA, its capacity to rally the tens of millions of NRA sympathetic gun owners to vote for gun rights candidates and pester those who are not, that NRA’s gun rights agenda has advanced.

One manifestation of this was the 1986 Firearms Owner’s Protection Act (FOPA). In the years immediately after the 1968 Act, participants in the old gun show culture—collectors without dealer’s licenses who still went to shows and bought and sold guns—were prosecuted for dealing firearms without a license. Prompted in part by complaints that these

---

354 SHERRILL, supra note 294, at 195.
355 NRA's Legislative Affairs Division had been around since 1934. It did not lobby, but did mailings about legislative issues to members. See Brief History of NRA, supra note 161.
356 See discussion accompanying infra note 421.
358 See Hardy, supra note 191, at 628-30. One response to this was quite a number of people obtaining easily available federal firearms licenses. With this license the old gun trading culture was revived somewhat. So much so that by 1994 the Clinton administration lamented the nearly 250,000 licensed gun dealers. Worried that these kitchen table dealers were a source of guns used in crime, the Clinton administration developed more stringent regulatory requirements that reduced the number of federal firearms licenses to about 58,000. See Press Release, Violence Policy Center, Eleventh-Hour NRA Amendment to Justice Department Appropriations Bill Would License Tens of Thousands of New “Kitchen-Table” Gun Dealers (July 21, 2003), http://www.vpc.org/press/0307ffl.htm.
prosecutions targeted harmless collectors with felony prosecution, FOPA was alternately described as “necessary to restore fundamental fairness and clarity to our Nation’s firearms laws,” and “a national disgrace.”

FOPA made substantial changes to the Gun Control Act of 1968. Among the most notable, it diminished the chance that a gun collector would be prosecuted for dealing firearms without a license, liberalized slightly the restrictions on dealer sales of long guns to nonresidents, gave gun owners the right to transport a legally possessed firearm through any state, notwithstanding contrary state law (so long as the gun is unloaded and not readily accessible) and strengthened the position of gun dealers against government enforcement actions in a variety of minor ways. It was a decided diminution of the regulatory apparatus affecting lawful possession and transfer of firearms, and represented a substantial win for the gun crowd.


360 Hardy, supra note 191, at 629, 630 & n.244. Under the 1968 Act, some gun collectors were prosecuted for dealing in firearms without a license (collector who sold three guns over a two-year period prosecuted for dealing guns without a license). Id. at 606 n.118. FOPA gave additional protections to hobbyists by defining more tightly what it means to engage in the business of firearms sales. Id. at 630. Before FOPA, the prudent thing for collectors to do was obtain a dealer license. These were relatively easy to get. Under the Clinton administration, it was deemed a risk to public safety to have so many licensed gun dealers, many of whom were the same class of hobbyists who faced prosecution under the 1968 Act for not having a dealer license. See supra note 358.

361 Hardy, supra note 191, at 634.

362 Id. at 677-78. A legally possessed gun is one the person is allowed to possess in the place he is traveling from and the place he is traveling to. Prohibitive state regulations he encounters en route are trumped by the FOPA. Id.

363 See id. at 643-53.

364 David Hardy concludes:

FOPA’s amendment of the Gun Control Act is both deep and wide ranging. . . . FOPA will require greatly increased sensitivity, efficiency and coordination on the part of the administering agency. Delays may run afoul of FOPA’s various limitation periods; unjustified administrative inspections may clash with its restrictions on searches . . . . FOPA confers both substantive and procedural rights upon citizens accused of Gun Control Act violations. Scienter requirements limit application of most of the Act’s sanctions to willful violators; a citizen who wins a criminal acquittal need not face civil sanctions based on the same allegation . . . and the unprecedented availability of attorneys’ fees awards ensures that the financial risks of a meritorious defense may well be shifted to the prosecuting agency.

Id. at 680-81.
But the prohibitionist movement was having success as well. And at points the threat to private ownership of firearms seemed quite real. Gun bans and stringent restrictions emerged in discrete spots. Washington, D.C. enacted a handgun ban in 1976 and mandated that long guns be kept disassembled.\footnote{D.C. CODE §§ 7-2502.02(4), 7-2507.02. \textit{See generally} Stephen P. Halbrook, \textit{Second-Class Citizenship and the Second Amendment in the District of Columbia}, 5 GEO. MASON U. CIV. RTS. L.J. 105, 105 (1994).} In 1981, the Illinois city of Morton Grove enacted a handgun ban whose validity was upheld by the Seventh Circuit Court of Appeals, and, in 1983, the Supreme Court declined to hear the case.\footnote{Quilici v. Village of Morton Grove, 532 F. Supp. 1169, 1169 (N.D. Ill. 1981), aff’d, 695 F.2d 261 (7th Cir. 1982). \textit{See generally} Don B. Kates, Jr., \textit{Handgun Prohibition and the Original Meaning of the Second Amendment}, 82 MICH. L. REV. 204, 250, 251 & n.198 (1983).} In 1982, San Francisco and Berkeley, California enacted similar ordinances but these were invalidated on state statutory grounds the same year.\footnote{Kates, Jr., \textit{supra} note 366, at 251 n.198 (citing Doe v. City and County of San Francisco, 186 Cal. Rptr. 380 (Cal. Ct. App. 1982)).} Around the same time, the city of Chicago\footnote{Section 8-20-010 of the Municipal Code of Chicago enacted a freeze on handgun ownership in 1982. Oak Park banned handgun sales in 1977 and ownership in 1984. OAK PARK VILLAGE, ILL., CODE §§ 27-1-1, 27-1-2, 27-2-1 (1994), available at http://www.sterlingcodifiers.com/IL/Oak%20Park/index.htm; NRA-ILA, Fact Sheets, The War Against Handguns (Feb. 15, 2001), http://www.nraila.org/Issues/FactSheets/Read.aspx?ID=17. Evanston implemented a ban in 1982. EVANSTON, ILL., CODE § 9-8-2 (2005), available at http://www.sterlingcodifiers.com/IL/Evanston/index.htm; NRA-ILA, \textit{supra}. In 1989, Wilmette became the fifth municipality nationwide to ban handguns. WILMETTE ILL., CODE § 12-24(b) (2005), available at http://www.amlegal.com/nxt/gateway.dll/Illinois/wilmette_il/villageofwilmetteillinoiscodeofordinance?r=templates&fn=default.htm$3.0$vid=amlegal:wilmette_il; Lisa Black, \textit{Wilmette Stands by Handgun Ban; Law Scrutinized After Intruder Shot}, CHI. TRIB., Jan. 14, 2004, Metro NW, at 1. Unlike many states, Illinois does not preempt municipal regulation of firearms. 430 ILL. COMP. STAT. 65/13.1 (2005). \textit{See also} City of Chicago v. Taylor, 774 N.E.2d 22, 28 (Ill. App. Ct. 2002).} and several of its suburbs enacted severe handgun restrictions that remain in place today.\footnote{Let me reemphasize the distinction I have made throughout. There is quite a lot going on in the gun debate. And it is not accurate to say that Americans have rejected gun control as distinguished from gun prohibition. Throughout this discussion I have said that the important contest here is between the “prohibitionist” agenda and a constitutional right to arms that would block it. My intent is to distinguish more between policies than people. There are baskets full of gun control measures at the state, local, and federal levels. The dispute here is not really about these various regulatory schemes. Rather it is between constitutional protection of an armed society and a structure where individual firearms survive purely at the will of the legislature.}

Between the late seventies and early eighties, we reached the crest of the prohibitionist movement.\footnote{Let me reemphasize the distinction I have made throughout. There is quite a lot going on in the gun debate. And it is not accurate to say that Americans have rejected gun control as distinguished from gun prohibition. Throughout this discussion I have said that the important contest here is between the “prohibitionist” agenda and a constitutional right to arms that would block it. My intent is to distinguish more between policies than people. There are baskets full of gun control measures at the state, local, and federal levels. The dispute here is not really about these various regulatory schemes. Rather it is between constitutional protection of an armed society and a structure where individual firearms survive purely at the will of the legislature.} Buoyed by
municipal ordinances banning handguns, but frustrated that statewide legislation seemed to have been thwarted (by the gun lobby or otherwise), prohibitionists bypassed the legislature and went straight to the people. The result was failed gun ban referenda in Massachusetts and California that are richly described by David Bordua.

In what was originally billed as a major step in the eventual national banning of private ownership of handguns, a ban proposition was placed before the people of Massachusetts at the time of the national election in November 1976. Advocates were highly optimistic. Massachusetts was the “most liberal” state in the union. Gun ownership rates were relatively low. Boston’s major newspaper, the Globe, favored the ban, as did the Christian Science Monitor, the Washington Post and the New York Times.

The pro-ban movement was led by a group called People vs. Handguns, which had been established in early 1974 under the primary leadership of John J. Buckley, Sheriff of Middlesex County. . . .

. . .

Gun control advocates in Massachusetts saw this as a golden opportunity to bypass the gun lobby and go directly to the people—the people whose will had so long been thwarted by the National Rifle Association. The closeness of the predicted result indicated that every effort should be made to “get out the vote.” As cited in Holmberg and Clancy (1977: 35),

Speaking for People vs. Handguns, Buckley said, “For many years the legislature has listened to the small but loud voice of the gun lobby” and he urged the legislature to “listen to the voice of the people.”

The outcome was defeat of the proposition by a vote of 1,669,945 to 743,014—a ration [sic] of 2.25 to 1. Put another way, the proposition to ban private ownership of handguns was opposed by 69.2% of the 2,412,959 votes cast on the proposition (Holmberg and Clancy, 1977: 156). Eighty-six percent of the eligible electorate went to the polls. A full 77% of the eligible Massachusetts voters voted on the handgun proposition.

. . .

The central element of [California] Proposition 15 was the requirement that all handguns be registered between November 3, 1982, and November 3, 1983, after which time registration would be frozen. The attempt was to freeze the number of handguns by freezing registrations.

. . . The size and greater difficulty of campaigning in such a large and diverse state and the feeling that events such as the attempted assassination of President Reagan and especially the murder of John
Lennon [led to predictions the proposition might come close to passing] . . . .

It is far too early to present a thorough analysis of the campaign and countercampaign over Proposition 15. The results, however, were quite like those in Massachusetts. Voter turnout was high—72% of eligible voters. The proposition was defeated by 63% to 37%—not as dramatic as the 69% to 31% defeat in Massachusetts, but decisive nonetheless.

Sheriff Buckley was wrong. When severe gun control is made salient and the public is approached directly, the gun lobby turns out to be more in tune with public opinion than do the civic disarmers. This conclusion is based on a national NRA-sponsored poll by a “conservative” firm; by a slightly populist sociologist’s survey in Illinois in 1977; and, with less analysis, by a gun-control-movement-sponsored poll conducted in Massachusetts in 1977 by a “liberal” firm.

The conclusions from survey data are confirmed by the overwhelming defeat of two strict gun control proposals: the Massachusetts handgun ban in 1976 and Proposition 15 in California in 1982. These gun lobby victories cannot be explained by richer campaign budgets, nor by superior lobbying frequency and skill, since both gun control defeats were by the electorate as a whole . . . .

In 1993, as a gun ban referendum was failing in Madison, Wisconsin, President Bill Clinton was asked whether he supported a ban on handguns. In an answer that has been construed as meaning Yes, eventually, he said, “I don’t think the American people are there right now. But with more than 200 million guns in circulation, we’ve got so much more to do on this issue before we even reach that.” And earlier, this: “We can’t be so fixated on our desire to preserve the rights of ordinary Americans to legitimately own handguns and rifles . . . that we are unable to think about [] reality.”

---

372 See McFadden, supra note 44, at 714.
Clinton was elected to two terms and by 2004 opined that his administration’s gun policies, particularly the now expired 1994 gun ban, cost Democrats control of Congress and that Al Gore’s carryover support for more stringent gun control contributed to Gore’s loss in 2000.375

And that part of the story deserves further attention. By the mid to late 1990s, with two statewide handgun ban referenda defeated, the public conversation was less about outright bans, and more about gun control as crime control. Proposals for waiting periods and background checks evolved into the instant check system in place today.376

Still, during this period there were serious proposals to restrict firearms possession by ordinary citizens. The ambitions of groups like the Coalition to Ban Handguns were being pressed, but gained little traction. The problem was, the same types of guns (handguns) preferred by criminals were also the tools preferred by good people interested in self-defense. The full details of the debate are a story yet to be told, but by the 1990s Americans seemed to have rejected handgun bans.

Undaunted, Josh Sugarman in a now famous memorandum summarized the problem and suggested an entirely new target for prohibition. Dave Kopel reports, “Josh Sugarman authored the November 1988 strategy memo suggesting that the press and the public had lost interest in handgun control. He counseled the anti-gun lobby to switch to the ‘assault weapon’ issue, which the lobby did with spectacular success in 1989.”377 In Sugarman’s words:

> Although handguns claim more than 20,000 lives a year, the issue of handgun restrictions consistently remains a non-issue with the vast majority of legislators, the press, and public. . . . Assault weapons . . . are a new topic. The weapons’ menacing looks, coupled with the public’s confusion over fully automatic machine guns versus semi-automatic assault weapons—anything that looks like a machine gun is assumed to be a machine gun—can only increase the chance of public support for restrictions on these weapons.378

375 See text at infra note 390 and accompanying text.
376 For information about the National Instant Criminal Background Check System (NICS), see NICS Information, http://www.fbi.gov/hq/cjisd/nics/index.htm (last visited Feb 8, 2006).
While it was true that these obscure guns were seldom used in crime, the rare instances where they were, turned out to be striking illustrations of the costs of an armed society. After a full court press by Clinton and his allies in Congress the assault weapons ban passed.

It turns out that the ban really wasn't much of a ban after all. The legislation focused not on functionality but on accoutrements that had no lethal function. Except for a few of the rarest examples, most of the “banned” guns remained on the market after simple modifications to remove the bayonet.


380 David Kopel writes:

The federal “assault weapon” ban could not have become law without the substantial, energetic assistance of President Clinton. In April and May of 1994, the president ordered the executive branch into a full-court press to pass the “assault weapon” prohibition in the House of Representatives. The ban lost by a single vote, but House Speaker Tom Foley violated the rules of the House, and delayed declaring the vote ended until House leaders could cajole after-the-fact vote switches, thereby giving the ban a 216-to-214 victory. The “assault weapon” ban was incorporated into a comprehensive federal crime bill several weeks later.

When the crime bill came to the floor of the House . . . in August 1994, [opponents] appeared to have killed the bill on a procedural vote. Senate Majority Leader George Mitchell and House Speaker Foley went to the White House, and told President Clinton that the crime bill could not pass if the “assault weapon” ban was included. Moreover, they warned that voting for a crime bill containing an “assault weapon” ban would hurt Democrats all over the country.

President Clinton’s pollster Stanley Greenberg disagreed. He produced data which he said showed that not a single Democrat would lose his seat over the “assault weapon” ban. White House strategists suggested that because the “assault weapon” issue had such high public visibility, the president would appear indecisive if he did not insist on retaining the gun ban. The president did insist, and, after weeks of hard-fought insider politicking, the House and the Senate both passed the crime bill with the full-strength version of the “assault weapon” ban.

A few weeks after the November 1994 elections, President Clinton telephoned one of the leading Democratic supporters of the . . . ban. After congratulating the Congressman on his reelection, the president opined that the . . . ban had cost the Democrats twenty-one seats in the House of Representatives. Clinton later told the Cleveland Plain-Dealer that the “assault weapon” issue and the NRA’s efforts had given the Republicans twenty additional seats.

lug and flash-hider and swap out the pistol grip and folding stocks.382

And something else happened. The ban, that was not a ban, gave these formerly obscure guns a higher profile. People who were never interested in them now wanted one . . . or two.383 After nearly ten years of being banned, these guns were more plentiful and cheaper than before the ban.384 Even most of the magazines (the ammunition feeding device), which truly were prohibited from further manufacture, were, judging by pricing, more plentiful than before the ban.385

Some people believed that Congress had quite properly banned machine guns.386 Those who were paying attention

---


383 See David B. Kopel, Editorial, More Guns, Less Gun Violence, WALL ST. J., Aug. 4, 2000, at A10, available at http://www.freerepublic.com/forum/a398a9e4c7569.htm (“Bill Clinton has been the best president the gun industry ever had. During the antigun panics that Mr. Clinton helped incite in 1993-94, and again in 1999, firearms sales skyrocketed, as consumers bought while they still could. For some months in 1993-94, manufacturers were running their plants on three shifts a day and still couldn’t keep up with demand.”).

384 Issues of The Shotgun News throughout the ten years of the ban show functionally identical guns available after the ban for lower prices than before it. (Collection of THE SHOTGUN NEWS on file with author.)

385 For example, tens of millions of magazines for the AR-15 type (semiautomatic version of the U.S.G.I. rifle) rifle were in circulation world wide. One evident exception was magazines for Glock pistols. These guns are of fairly recent design and thus relatively few of the magazines were in circulation. After the ban went into effect, Glock magazine prices escalated to over 150 dollars. After the ban expired they are back to the seventy-five dollar level. Deborah Sontag, Many Say End of Firearm Ban Changed Little, N.Y. TIMES, Apr. 24, 2005, at 1, available at http://www.galleryofguns.com/shootingtimes/Articles/DisplayArticles.asp?ID=7044.

During the ban, there was such a premium on pre-ban Glock magazines that dealers would trade police departments a new (law enforcement only) pistol for the departments’ used pre-ban pistols. With three pre-ban magazines selling for over 100 dollars, the old Glock (with its pre-ban magazines) was worth as much on the open market as a new one. (Interview notes of authors’ conversations with dealers on file with author.)

For commentary and criticism of lawsuits against the gun industry by the same municipalities that have been selling used police guns back onto the market in exchange for discounts on new ones see the sources cited infra note 418.

386 Over the past three years between seventy and ninety percent of the second and third year law students in my Gun Control seminar have believed that the Assault Weapons Ban was a ban on fully automatic machine guns. Conversations suggest that sloppy news reporting contributes to this perception. Whatever the cause, Josh Sugarman guessed right. It seems many people thought the legislation was about machine guns. See, e.g., Editorial, Republicans Hurt Themselves with Pro-gun Votes, ST. PETERSBURG TIMES (Florida), Mar. 28, 1996, at 15A.
appreciated that the law was mainly symbolic.\footnote{As the ban seemed ready to expire, Tom Diaz of the Violence Policy Center acknowledged in an interview on National Public Radio:} But the ban had potentially long term practical value. Congress had embraced the “bad gun formula” of gun prohibition. With that done, prohibition might advance by expanding the category. (Hunting rifles might become “sniper rifles,” thirty pound single shot .50 caliber rifles might become “terrorist weapons,” etc.).

Bill Clinton expended considerable political capital to pass the assault weapons ban. The political fallout was dramatic. In the next election Democrats lost the House and have yet to regain it. Clinton attributed Democrats’ loss of the House significantly to the wrath of gun owners.\footnote{Evelyn Theiss, \textit{Clinton Blames Losses on NRA}, \textit{Plain Dealer}, Jan. 14, 1995, at A1.} Even House Speaker Tom Foley (D-Wash.) was unseated. Descriptions of the fallout by Clinton and other Democrats are stories of a failure.\footnote{Theiss, \textit{supra} note 388 (“[T]he fight for the assault-weapons ban cost 20 members their seats in Congress . . . . The NRA is the reason the Republicans control the house.”); Departing California Congressman Anthony Beilenson said this: “We unnecessarily lost good Democratic members because of their votes on the Brady bill and semiautomatic assault weapon ban. . . . [T]hey will have but a modest effect out there in the real world. It was not worth it at all.” Greg Pierce, \textit{Inside Politics}, WASH. TIMES, Nov. 9, 1995, at A6.}

According to Clinton, the fallout continued into the 2000 presidential race. Presidential elections are complicated stories. But in a 2004 interview with Charlie Rose, Clinton said this about the defeat of Albert Gore in 2000:

The NRA beat him in Arkansas. The NRA and Ralph Nader stand right behind the Supreme Court in their ability to claim that they...
put George Bush in the White House. . . . I think the NRA had enough votes in New Hampshire, in Arkansas, maybe in Tennessee and in Missouri to beat us. And they nearly whipped us in two or three other places.390

After the Gore loss, the Democrats seemed less excited about the prohibitionist agenda, evidently concerned that the anti-gun stance had cost them. Writing for the New York Times in 2001, James Dao (after blaming the evident decline of the gun control movement on George W. Bush) says this:

[M]any centrist and conservative Democrats have also concluded that gun control has become their party’s albatross, costing it crucial votes among white, male, rural voters in key states across the South and Midwest. And their concerns have touched off a roiling debate within the party over whether to play down or even discard the issue.

“Gun control,” lamented Steve Cobble, director of Campaign for a Progressive Future, a liberal political action committee, “has become the shorthand for why Democrats don’t do well.”

Even President Clinton, a staunch advocate of gun control, offered what for gun control advocates was surely a dispiriting post-election assessment of the rifle association’s strength. “They probably had more to do than anyone else in the fact we didn’t win the House this time, and they hurt Al Gore,” he said.391

Leading up to the 2004 presidential election, the Democratic National Committee commissioned a study of how the party’s stance on guns has affected the election of Democrats.392 The study’s overall aim is to at least repackage

the message to make it more palatable to gun owners.\textsuperscript{393} This is understandable since the first two sentences of the study conclude: “Americans widely believe that there is a right to bear arms but many—gun owners in particular—do not believe Democrats share this belief. As gun owners represent almost four in ten Americans this perception impedes efforts to create a durable Democratic majority.”\textsuperscript{394}

Depending on who tells the story, this sentiment is roughly confirmed by another failed referendum. This one in Washington state. Initiative 676 was presented as a gun safety measure and focused on the powerful image of children killed in firearms accidents.\textsuperscript{395} Although in a typical year, these events are relatively rare—twice as many children ages five to fourteen die in bicycle accidents than in gun accidents\textsuperscript{396}—the image of a child dying because of a negligently stored gun is incredibly powerful and was the motivating theme of Washington Initiative 676.\textsuperscript{397}

Initiative 676 would have moved Washington toward the New York, Sullivan Law style of regulating handguns (recall our earlier discussion of Sullivan Law handgun regulations, requiring a permit for possession, spurring adoption of the Uniform Revolver Act that required a permit for concealed carry but not for mere possession).\textsuperscript{398} Possession of a handgun would require a license.\textsuperscript{399} It would be called a

\textsuperscript{393} Id.

\textsuperscript{394} Id. The survey found that seventy-four percent of Americans “believe there is a Constitutional right to own guns but it allows for laws intended to keep guns out of the hands of criminals.” Id.


\textsuperscript{397} A report by The News Hour is illustrative:

Washington State has introduced tough legislation in an attempt to reduce gun-related accidents. But will the legislation, called Initiative 676, really protect the innocent or does it infringe on the right to bear arms? Rod Minott . . . files this report.

Rod Minott: Two years ago a shooting accident took the life of 14-year-old Michael Hastings. It happened after a babysitter at a friend’s home played with a stolen handgun.


\textsuperscript{398} See supra text accompanying notes 191-92.

“handgun safety license.” Applicants for the license would have course work (eight hours minimum) and an examination to complete. 676 required all handguns to be sold with trigger locks, but had no other requirements for safe storage or penalties for unsafe storage. The teeth of 676 was the requirement of a license to own the gun.

When the votes were counted nearly seventy percent of voters said no to Initiative 676. Sarah Brady of Handgun Control, Inc. criticized that the result was warped by NRA money. Gun rights advocates charged that the initiative’s financial supporters numbered only 1,000 people from the Seattle area including Bill Gates (in for about $200,000). An in-depth study of the failure of 676 is yet to come. Undoubtedly there was lobbying on both sides. Sarah Brady suggested that NRA obfuscation is the only way to explain why Washingtonians would vote against a measure designed to reduce the tragedy of juvenile gun accidents. But it is just possible that voters were not convinced on the basic message.

The National Safety Council reported in 2002 that since 1993, firearm homicides are down 41 percent, and fatal firearm accidents have dropped 49 percent to the lowest levels since

---

400 Id.
401 Id. at § 10.
402 Id. at § 3.
404 The NRA came into the state using their multi-million-dollar bulldozer to squash this grassroots call for responsible gun ownership. Unable to defeat this reasonable and responsible Initiative with facts, the NRA blanketed the airwaves with apocalyptic rhetoric—which even included accusations that I 676 supporters had Satanic connections.


405 Billed as a “grassroots movement,” I-676 proponents had a contributor list of about 1000 individuals. 90+% of their money came from within a 20 mile radius of Seattle. WeCARE, . . . the PAC formed to oppose the initiative, had a contributor list of more than 11,000. Who had the grassroots movement?

406 See supra note 404.
record-keeping started in 1903.\footnote{\textsc{The National Safety Council, Injury Facts} (2003), available at www.nsc.org/library/report_injury_usa.htm.} To add some context, in 2002 there were 44,000 accidental automobile deaths, 15,700 accidental poisoning deaths, 14,500 accidental deaths caused by falls, 3,000 accidental drowning deaths, 2,900 accidental deaths caused by fires, flames, and smoke, 1,000 accidental deaths caused by natural heat or cold and 776 accidental firearms deaths.\footnote{Id.} In this context it is a bit easier to understand how voters might reject even an honestly packaged gun safety measure.\footnote{This year in my gun control seminar, I asked students to survey three of their classmates. The two questions were, “How many guns are owned by Americans” and “How many gun accidents are there each year?” One law student, who admitted she did not know the answer, speculated from what she had seen and read in the media that there were about 500,000 guns owned by Americans and that there were around 100,000 accidental firearms deaths each year.}

It is hard to find a facially objective source on the sense of Washington voters about Initiative 676\footnote{L. Brent Bozell III of the Media Research Center charged that 676 was consistently front page news in the run up to the vote, when there was some sense it would pass. The coverage was drastically muted after 676 was defeated: “Maybe we shouldn’t blame the national media for downplaying the [gun rights] victory. After all, after spending years labeling a group as ‘extreme,’ ‘radical’ and the like—how to explain its 71% landslide?” L. Brent Bozell, III & Tim Graham, Editorial, \textit{An NRA Victory? That’s Not Fit to Print}, \textsc{Wall St. J.}, Nov. 21, 1997, at A22.} but the University of Washington student newspaper may come close:

Initiative 676 is a cleverly crafted attempt to trick voters into giving gun-control proponents a real treat by turning a constitutionally protected right into a state regulated privilege.

\ldots

Depending on who you listen to, I-676 is about trigger locks, handgun safety courses, police confiscation, inflated bureaucracy, handgun databases and the influence of Satan.

\ldots

One section of Initiative 676 requires all handguns to be equipped with trigger locks when sold.\ldots \text{i}t doesn’t stop with trigger locks. It requires all handgun owners to take an eight-hour safety courses and obtain a gun license.

\ldots

\ldots The right-wing paranoids hint that the proposed database of handgun owners, one of I-676’s 26 provisions, is part of the black-helicopter conspiracy to disarm America. And there’s NRA Vice
President Charlton Heston, who thinks the measure should be designated “I-666.”

Demonic influence aside, it’s too bad poor arguments have clouded the I-676 debate. It’s a confusing bill that will create a gross expansion of state intrusion into private lives, and the voters of Washington state deserve to know the truth.411

Having only sporadic success in the legislatures, gun prohibitionists pursue a parallel strategy in the courts and regulatory agencies, with lawsuits aimed at manufacturers and distributors. The recipe included proposals to regulate firearms as defective consumer products and to sanction manufacturers for deceptive advertising.412 These initiatives have had some limited success, forcing some companies and brands to go out of business.413 Handgun manufacturer Smith & Wesson, attempting to ward off these lawsuits, entered into a settlement with the Clinton Administration.414 An immediate consequence was gun people boycotting Smith.415 Other manufactures declined to follow Smith’s lead.416 Some state


415 See McCURG ET. AL, supra note 214, at 347-55.

legislatures enacted statutes blocking their municipalities from bringing these suits.\textsuperscript{417}

With the passing of the Clinton administration, the Smith & Wesson initiative lost steam. Smith & Wesson’s British management team sauntered off. New owners stepped in and Smith & Wesson chased after its lost goodwill with gun owners. The lawsuits continued, some of them tinged with irony because many of the municipalities that have sued gun companies on the negligent marketing theory of dumping guns also sell large lots of their old police guns back into the market at bargain basement prices.\textsuperscript{418}

In search of constitutional moments we are after something approximating democratic assent. Is it a concession of defeat at the ballot box that one of the prohibitionists’ central strategies at this stage of the game is to bypass democracy and pursue litigation? As the wave of creative lawsuits against gun manufacturers was building, \textit{The Economist} criticized:

\begin{quote}
American public officials have usurped democratic debate on both tobacco and handguns by launching a wave of lawsuits designed to win through legal threats what they have been unable to win in Congress and state legislatures...
\end{quote}

\ldots

If gun-control advocates achieve their goals by legal threats, rather than through properly enacted legislation, it will be a Pyrrhic victory. With good reason, gun-owners will never accept their defeat as legitimate.

Far from standing up for voters against powerful entrenched interests, America’s mayors and state attorneys-general—and the anti-tobacco and anti-gun campaigners egging them on—are


\textsuperscript{418} One of the claims is negligent or intentional market dumping (below market price sales). The irony is that for decades, municipal police departments have traded in their used side arms for newer weapons. The trade-ins have been some of the best bargains in the gun market.

themselves ramming down the throats of voters polices which they have not endorsed.\textsuperscript{419}

This sort of comment is perhaps easy to dismiss coming from \textit{The Economist}. But Robert Reich, former member of the Clinton cabinet and seemingly more sympathetic to restrictive gun control measures, says basically the same thing:

If I had my way, there’d be laws restricting cigarettes and handguns. But this Congress won’t even pass halfway measures. . . . Almost makes you lose faith in democracy, doesn’t it?

The goal of [recent litigation] efforts is to threaten the industries with the risk of such large penalties that they’ll agree to a deal—for the gunmakers, to limit bulk purchases and put more safety devices on guns to prevent accidental shootings.

But the way to fix everything isn’t to turn our backs on the democratic process and pursue litigation as the [Clinton] administration is doing. It’s to campaign for people who promise to take action against cigarettes and guns, and against the re-election of House and Senate members who won’t. . . . In short, the answer is to make democracy work better, not give upon [sic] it.\textsuperscript{420}

It is plausible to respond that NRA money has skewed the democratic process, leaving the Courts as the best fair alternative. But this ignores the fact that the NRA’s power is not money but votes. George Will writes:

The NRA is a coast to coast nation within a nation . . . . The NRA has only 4 million adult members . . . . About 95 percent of NRA members vote.

Each of the 4 million pays $35 in annual dues. Polls indicate that another 14 million Americans think they are NRA members and an additional 28 million think they are affiliated in some way with the NRA because of their membership in one or more of the 35,000 shooting and hunting clubs.\textsuperscript{421}

For all the talk about NRA power, there is an even simpler explanation for the general failure of the prohibitionists’ movement: It is very hard to push an agenda

\textsuperscript{419} \textit{When Lawsuits Make Policy}, \textit{ECONOMIST}, Nov. 21, 1998, at 17.
that conflicts with the choice of roughly half of American households to own guns.

Approaching the 2004 presidential election, Congress considered legislation immunizing the gun industry from lawsuits brought by victims of firearms crimes. It was burdened by a Democrat amendment requiring extension of the Assault Weapons Ban and thus stalled.\textsuperscript{422} In the midst all of this, there is a revolution underway. Josh Sugarman was correct that Americans had lost interest in handgun bans.\textsuperscript{423} But his lament does not capture the full story. Something much more dramatic is afoot. State by state, Americans are embracing the idea of armed self-defense through state statutes liberalizing the concealed carry of handguns.\textsuperscript{424}

By 2004, thirty-eight states had liberal concealed carry legislation (another eight have a restrictive form).\textsuperscript{425} As the 2004 presidential campaign wound to a close, John Kerry was working the gun issue by cozying up to hunters. Whether duded up and tramping through an Ohio cornfield toting a semiautomatic shotgun that (with a different stock configuration) would be a contraband assault weapon under the 1994 law, or telling stories about crawling around on his belly hunting deer with his trusty double-barrel shotgun,\textsuperscript{426}

\textsuperscript{422} See Steven Harras, \textit{Gun Manufacturer Protection Bill Surprisingly Defeated in U.S. Senate}, 32 PROD. SAFETY & LIAB. REP. 221, 221 (2004) (describing how S. 1805, immunizing gun manufacturers and dealers from suits by victims of gun crime, seemed destined for easy passage until it was killed by an amendment extending the ban on so called assault weapons).

\textsuperscript{423} See supra note 289 and accompanying text.

\textsuperscript{424} The antigun Brady organization has compiled a list of states with the most citizens per capita licensed to carry concealed firearms.


\textsuperscript{425} See NRA Fact Sheet, \textit{supra} note 175.

\textsuperscript{426} Kerry got a pass from the mainstream media, but the web is filled with incredulity and ribald comments about Kerry’s claim. One of the less inflammatory writers observes:

Apparently hoping to outdo Hillary Clinton’s improbable attempt to reinvent herself as a duck hunter, John Kerry has tried to avoid alienating supporters of gun rights by depicting himself as a deer hunter. Mark Steyn will have none of it. Steyn wrote in the London Telegraph yesterday: “He was in Wisconsin the other day, pretending to be a regular guy, and was asked what kind of hunting he preferred. ‘I’d have to say deer,’ said the senator. ‘I go out with my trusty 12-gauge double-barrel, crawl around on my
Kerry showed that gun prohibition—the handgun ban Bill Clinton speculated about in 1993—was not even on the table in America in 2004. About the same time, the Assault Weapons Ban, so much the political touchstone in 1994, expired with a whimper—though not without some dishonest media effort to invigorate it.427

    stomach . . . . That's hunting.’ This caused huge hilarity among my New Hampshire neighbours. None of us has ever heard of anybody deer hunting by crawling around on his stomach, even in Massachusetts.”


427 As the ban was set to expire, CNN Miami Bureau chief aired a report about the ban that CNN quickly had to apologize for and correct. The CNN report gave the impression that the ban was about machine guns and then staged a shooting demonstration that suggested the banned guns also were much more powerful than similar but legal ones. World Net Daily reports:

    In two broadcasts last Thursday, CNN incorrectly reported that fully automatic weapons are currently banned under the Violent Crime Control and Law Enforcement Act of 1994. The CNN broadcasts included firing demonstrations by the Broward County, Fla., Sheriff's Department that implied currently banned weapons are much more powerful than similar but legal one, when in fact that is not the case.

    As reported by the Washington Times, during one of the demonstrations Broward County Sheriff Ken Jenne introduced a detective who fired an old Chinese AK-47.

    “That is one of the 19 currently banned weapons,” said Jon Zarella, CNN's Miami bureau chief. In fact, that firearm was not one of those banned under the 1994 act. The detective fired six shots, after which Zarella said, “Ok. Now that was semiautomatic.”

    Jenne then responded, “Now this is automatic.”

    The detective fired a burst at a cinder-block target, after which Zarella declared: “Wow! That obliterated those blocks . . . . Absolutely obliterated it. And you can tell the difference,” according to the Times report.

    Machine guns, AK-47s and other fully automatic weapons are regulated by the National Firearms Act of 1934. The 1994 law banned some semiautomatic, military-style rifles and will expire in September 2004 if Congress does not renew it. Semiautomatic guns fire one shot each time the trigger is pulled.

    . . . .

    Yesterday, CNN clarified which firearms are banned under the 1994 law and told viewers the ban is based on external features such as whether the weapon has a pistol grip or a flash suppressor.

    A CNN anchor introduced yesterday’s broadcast by saying: “On this program on Thursday, we aired a live demonstration CNN set up with law-enforcement officials of a banned semiautomatic rifle and its legal counterpart. We reviewed that demonstration . . . and decided that a more detailed report would better explain this complex issue.”

    . . . .
By the end of November, Republicans had won the House, Senate and the White House and Democratic strategists were headed back to the drawing board to figure how to sell the politics of Manhattan’s Upper West Side to red America.428 By early 2005 the Department of Justice had released a memorandum reflecting the position of the United States that the individual rights view of the Second Amendment (the “standard model”)429 is correct.430 In early 2005 the National Academy of Sciences published a 328 page report evaluating eighty different gun control measures.431 This exhaustive treatment concludes that we cannot say with any confidence that gun control has had any effect on crime432 and recommends

On Thursday, the camera showed bullets hitting a cinder-block target as the Broward County detective fired an AK-47 in [automatic] mode. When the detective fired a legal semiautomatic firearm, the camera showed an undamaged cinder-block target.

On Friday, CNN admitted the detective had not been firing at the cinder block.

“In fact, if you fire the same caliber and type bullets from the two guns, you get the same impact,” Zarella said in yesterday’s broadcast.


428 See supra note 380.
430 DOJ Memorandum, supra note 22.

The conclusion is thus inescapable that the history, concept, and wording of the second amendment to the Constitution of the United States, as well as its interpretation by every major commentator and court in the first half-century after its ratification, indicates that what is protected is an individual right of a private citizen to own and carry firearms in a peaceful manner.


432 “These programs are widely viewed as effective, but in fact knowledge of whether and how they reduce crime is limited. Without a stronger research base, policy makers considering adoption of similar programs in other settings must make decisions without knowing the true benefits and costs of these policing and sentencing interventions.” Id. at 10.
further study.\footnote{\textit{Id.} For criticism that the evidence supports the unqualified conclusion that the laws studied simply do not reduce crime, see John R. Lott, Jr., \textit{Shooting Blanks}, N.Y. POST, Dec. 29, 2004, available at http://www.tsra.com/Lott119.htm.} Similarly, a panel consisting mainly of gun control supporters commissioned by the Centers for Disease Control and Prevention to evaluate the effectiveness of existing gun control measures found that there is no conclusive evidence that gun control has had any impact on crime.\footnote{\textit{TASK FORCE ON CMTY. PREVENTIVE SERVS., First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws (2003), http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5214a2.htm.}} By the fall of 2005, the contentious question of gun manufacturers’ liability for illegal use of their products was resolved democratically.\footnote{The \textit{New York Times} editorial page, perhaps reflecting the views that prompted the lawsuits in the first place, rejected the idea that this was democracy at work. \textit{See The Gun Industry Rolls Congress}, N.Y. TIMES, Oct. 18, 2005, at A26. Query though how one is to tell whether Congress is serving the people (in this case the gun people) or has gotten rolled.} On October 26, 2005, President Bush signed the Protection of Lawful Commerce in Arms Act.\footnote{Pub. L. No. 109-92, 119 Stat. 2095 (2005).} The legislation passed 65-31 in the Senate and 283-144 in the House.\footnote{GovTrack.us, S. 397: Protection of Lawful Commerce in Arms Act, http://www.govtrack.us/congress/bill.xpd?bill=s109-397 (last visited Feb. 8, 2006).}

Much of the factional dispute over gun rights results from fear that any particular measure is just a step toward much more severe restrictions. The avowed agenda of the prohibitionists makes this fear, on the long view of things, understandable. Verifying that the prohibitionists’ movement is alive and well is San Francisco’s newly enacted Proposition “H.” Approved by fifty-eight percent of voters, Proposition H bans possession of handguns within city limits. This reinstates San Francisco onto the short list of municipalities that have banned handguns. Current owners have until April 2006 to surrender their guns. Predictably, the measure was applauded by the Brady organization and decried by the NRA, which has commenced litigation challenging the constitutionality of the ban.\footnote{\textit{See Susan Jones, NRA Challenges San Francisco Gun Ban}, CNSNEWS.COM, Nov. 10, 2005, http://www.cnsnews.com/ViewNation.asp?Page=5Nation%5CArchive%5C200511%5CNA%7F20051110b.html; San Francisco, NRA Make Deal on Handgun Ban, ASSOCIATED PRESS, Dec. 28, 2005, http://www.forbes.com/home/feeds/ap/2005/12/28/ap2418176.html.}

For now, at least, the constitutional politics of gun control supports two conclusions. First, under any standard, prohibitionists have not marshaled the support to sustain the
claim that “We the People” have spoken against an individual right to arms. Second, the very opposite has happened. America has endorsed the right to arms through signals that, compared to Ackerman’s complex theory of a transformative New Deal, are more legitimate because they are easier for the citizenry at large to detect and understand.

V. CONCLUSION

Speaking critically of efforts to marginalize the Second Amendment, Justice Antonin Scalia mused that perhaps few tears will be shed if the Court finally concludes that there is no constitutional right to arms. 439 A captive of the beltway, Justice Scalia can be forgiven for this impression. If the job took him out more often to the forty plus states with explicit right to arms guarantees, the thirty-eight with strong right to carry laws or pressed him into conversation with some of the common folks who make up the seventy-six percent of Americans who think they have a constitutional right to own firearms, he might express a different sentiment. And odd as it may seem, it is Professor Ackerman who, if true to his principles, would be the first to tell the good Justice that these signals are some of the best reasons for the Court to raise up an individual right to arms from the disputed Second Amendment.

There is a final practical point. It is obvious that many of us weight the costs of guns differently. Some people viscerally hate guns, see no utility in them and think it is insane to talk about balancing factors like the benefits of defensive gun use and the political value of an armed citizenry. These benefits though are for a second group, core points in a thoughtful approach to the gun question. And there is a third group that is just as visceral about gun rights as the first is about gun control.

The single thing all three groups agree on is that there are some people who should not have guns—criminals, the insane, etc. Beyond that there seems little common ground. Because many in the first group have acknowledged that their ultimate aim is prohibition but also have said it will have to be achieved incrementally, those in the second and third group

439 See Antonin Scalia, Vigilante Justices: The Dying Constitution, 49 Nat’l Rev. 32, 32-33 (1997) (“We may like . . . the elimination of the right to bear arms; but let us not pretend that these are not reductions of rights.”).
tend to view many gun control proposals as another scoot down the slippery slope. If the Court finally takes prohibition off the table by affirming that the Second Amendment protects an individual right, the central barrier to consensus on measures that would further restrict the untrustworthy from accessing guns would dissolve. That would be good for all of us.
Appendix A

DEFENDANTS BY JURISDICTION

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Death-Sentenced</th>
<th>Sentencer-Spared</th>
<th>Prosecutor-Spared</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>AL</td>
<td>7</td>
<td>1</td>
<td>1</td>
<td>9</td>
</tr>
<tr>
<td>AZ</td>
<td>7</td>
<td>2</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>AR</td>
<td>2</td>
<td>1</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>CA</td>
<td>12</td>
<td>7</td>
<td>19</td>
<td>38</td>
</tr>
<tr>
<td>CO</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>CT</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>DE</td>
<td>2</td>
<td>8</td>
<td>2</td>
<td>12</td>
</tr>
<tr>
<td>FL</td>
<td>11</td>
<td>18</td>
<td>25</td>
<td>54</td>
</tr>
<tr>
<td>GA</td>
<td>4</td>
<td>2</td>
<td>11</td>
<td>17</td>
</tr>
<tr>
<td>ID</td>
<td>-</td>
<td>-</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>IL</td>
<td>4</td>
<td>6</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td>IN</td>
<td>-</td>
<td>-</td>
<td>8</td>
<td>8</td>
</tr>
<tr>
<td>KS</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>KY</td>
<td>2</td>
<td>2</td>
<td>6</td>
<td>10</td>
</tr>
<tr>
<td>LA</td>
<td>7</td>
<td>3</td>
<td>11</td>
<td>21</td>
</tr>
<tr>
<td>MD</td>
<td>1</td>
<td>2</td>
<td>9</td>
<td>12</td>
</tr>
<tr>
<td>MS</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>MO</td>
<td>3</td>
<td>-</td>
<td>6</td>
<td>9</td>
</tr>
<tr>
<td>NE</td>
<td>2</td>
<td>1</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>NV</td>
<td>1</td>
<td>1</td>
<td>9</td>
<td>11</td>
</tr>
<tr>
<td>NJ</td>
<td>1</td>
<td>1</td>
<td>7</td>
<td>9</td>
</tr>
<tr>
<td>NM</td>
<td>-</td>
<td>-</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>NC</td>
<td>4</td>
<td>5</td>
<td>22</td>
<td>31</td>
</tr>
<tr>
<td>OH</td>
<td>5</td>
<td>14</td>
<td>12</td>
<td>31</td>
</tr>
<tr>
<td>OK</td>
<td>8</td>
<td>3</td>
<td>9</td>
<td>20</td>
</tr>
<tr>
<td>OR</td>
<td>2</td>
<td>2</td>
<td>9</td>
<td>13</td>
</tr>
<tr>
<td>PA</td>
<td>5</td>
<td>12</td>
<td>21</td>
<td>38</td>
</tr>
<tr>
<td>SC</td>
<td>5</td>
<td>1</td>
<td>8</td>
<td>14</td>
</tr>
<tr>
<td>TN</td>
<td>6</td>
<td>2</td>
<td>4</td>
<td>12</td>
</tr>
</tbody>
</table>

* In December, 2004, the Kansas death penalty statute was declared unconstitutional by the Kansas Supreme Court. The ruling was stayed during further appeals. Thus, the four Kansas cases remain in the database.
<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Death-Sentenced</th>
<th>Sentencer-Spared</th>
<th>Prosecutor-Spared</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>TX</td>
<td>24</td>
<td>8</td>
<td>40</td>
<td>72</td>
</tr>
<tr>
<td>UT</td>
<td>-</td>
<td>1</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>VA</td>
<td>2</td>
<td>3</td>
<td>15</td>
<td>20</td>
</tr>
<tr>
<td>WA</td>
<td>-</td>
<td>-</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>WY</td>
<td>1</td>
<td>-</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Fed.</td>
<td>7</td>
<td>10</td>
<td>12</td>
<td>29</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>140</strong></td>
<td><strong>120</strong></td>
<td><strong>323</strong></td>
<td><strong>583</strong></td>
</tr>
</tbody>
</table>

Note: No cases in the database from MT, NH, NY,** and SD.

** During 2004 New York’s death penalty was inactive because it had been ruled unconstitutional by the New York Court of Appeals.
### Appendix B

#### YEARS OF OFFENSES

<table>
<thead>
<tr>
<th>Years</th>
<th>Death-Sentenced</th>
<th>Sentencer-Spared</th>
<th>Prosecutor-Spared</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before 1980</td>
<td>3</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>1980-89</td>
<td>3</td>
<td>2</td>
<td>13</td>
</tr>
<tr>
<td>1990-94</td>
<td>6</td>
<td>-</td>
<td>8</td>
</tr>
<tr>
<td>1995-99</td>
<td>22</td>
<td>22</td>
<td>26</td>
</tr>
<tr>
<td>2000</td>
<td>11</td>
<td>11</td>
<td>17</td>
</tr>
<tr>
<td>2001</td>
<td>32</td>
<td>18</td>
<td>38</td>
</tr>
<tr>
<td>2002</td>
<td>38</td>
<td>38</td>
<td>89</td>
</tr>
<tr>
<td>2003</td>
<td>24</td>
<td>28</td>
<td>101</td>
</tr>
<tr>
<td>2004</td>
<td>1</td>
<td>1</td>
<td>30</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>140</strong></td>
<td><strong>120</strong></td>
<td><strong>323</strong></td>
</tr>
</tbody>
</table>

Note: When offenses occurred in several years, the most recent year is used.
## Appendix C

**DEFENDANTS’ AGES AT TIMES OF CRIMES AND SENTENCING RESULTS**

<table>
<thead>
<tr>
<th>Ages</th>
<th>Death-Sentenced</th>
<th>Sentencer-Spared</th>
<th>Prosecutor-Spared</th>
<th>Sentencer Death Rate</th>
<th>Overall Death Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>16-17</td>
<td>2</td>
<td>3</td>
<td>6</td>
<td>40%</td>
<td>18%</td>
</tr>
<tr>
<td>18-19</td>
<td>14</td>
<td>13</td>
<td>46</td>
<td>52%</td>
<td>19%</td>
</tr>
<tr>
<td>20-21</td>
<td>12</td>
<td>19</td>
<td>41</td>
<td>39%</td>
<td>16%</td>
</tr>
<tr>
<td>22-25</td>
<td>25</td>
<td>23</td>
<td>65</td>
<td>52%</td>
<td>22%</td>
</tr>
<tr>
<td>26-29</td>
<td>15</td>
<td>18</td>
<td>36</td>
<td>45%</td>
<td>22%</td>
</tr>
<tr>
<td>30-39</td>
<td>45</td>
<td>29</td>
<td>73</td>
<td>61%</td>
<td>31%</td>
</tr>
<tr>
<td>40-49</td>
<td>15</td>
<td>6</td>
<td>22</td>
<td>71%</td>
<td>35%</td>
</tr>
<tr>
<td>50-59</td>
<td>6</td>
<td>-</td>
<td>9</td>
<td>100%</td>
<td>40%</td>
</tr>
<tr>
<td>60+</td>
<td>1</td>
<td>-</td>
<td>3</td>
<td>100%</td>
<td>25%</td>
</tr>
<tr>
<td>Unknown</td>
<td>5</td>
<td>9</td>
<td>22</td>
<td>36%</td>
<td>14%</td>
</tr>
<tr>
<td>Total</td>
<td>140</td>
<td>120</td>
<td>323</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Appendix D

DEFENDANTS SENTENCED TO DEATH

Defendants are in order from highest number of Depravity Points to lowest (and if Depravity Points are equal, then in alphabetical order by defendants' surnames). Defendants are numbered with the prefix “DS” denoting “Death Sentence.” The number in parentheses following the name is the Depravity Point Total. The abbreviation after the Depravity Point Calculation denotes the state or federal district in which the death sentence was imposed. Because Westlaw recently changed news service providers, many of the original sources relied upon for this Article are no longer available via Westlaw; these sources remain on file with the author.

30 OR MORE DEPRAVITY POINTS


**20-29 Depravity Points**


**15-19 DEPRAVITY POINTS**


**DS 50. Angelina Rodriguez (16) CA** Sources: LOS ANGELES TIMES 11/13/2003 (LEXIS, USPAPR File), 1/13/2004 (LEXIS, USPAPR File); CONTRA COSTA TIMES 1/13/2004 (on file with author).

**DS 51. John Troy (16) FL** Sources: SARASOTA HERALD-TRIBUNE 8/19/2003 (LEXIS, USPAPR File), 8/21/2003 (LEXIS, USPAPR File), 8/26/2003 (LEXIS, USPAPR File),
2005] LIGHTNING STILL STRIKES: APPENDICES 881


DS 53. Tracy Beatty (15) TX Sources: TYLER MORNING TELEGRAPH (TX) 8/11/2004 (on file with author); Telephone Interview with Prosecutor Harrison (Oct. 29, 2004).


10-14 DEPRAVITY POINTS

DS 57. Robert Acuna (14) TX Sources: HOUSTON CHRONICLE 8/12/2004 (on file with author) (defendant was 17 at time of murders and thus became ineligible for death sentence under new United States Supreme Court precedent in 2005; sentence consequently reduced to imprisonment).


DS 60. Fred Furnish (14) KY (resentencing after appellate reversal) Sources: THE CINCINNATI POST (on file with


**DS 65. Jamelle Armstrong (13) CA** Sources: LOS ANGELES TIMES 1/8/1999 (LEXIS, USPAPR File); Trial of Jamille Armstrong (http://home.earthlink.net/~squeebertj/id18.html (a site run by an individual, but which contains a report from the LONG BEACH PRESS TELEGRAM)).


DS 70. Troy Merck, Jr. (13) FL (resentencing after appellate reversal) Sources: ST. PETERSBURG TIMES 3/20/2004 (LEXIS, USPAPR File), 8/7/2004 (LEXIS, USPAPR File); THE TAMPA TRIBUNE 8/7/2004 (LEXIS, USPAPR File); Florida Department of Corrections (http://www.dc.state.fl.us/).


DS 79. Donnie Lee Roberts, Jr. (12) TX Sources: Telephone Interview with Prosecutor Hon (Feb. 14, 2005); THE TOWN TALK (Alexandria, LA) 6/25/2004 (LEXIS, USPAPR File);


DS 89. Allen “Gary” Zweigart (11) OR Sources: THE OREGONIAN (Portland, OR) 1/11/2002 (LEXIS, USPAPR File),


**DS 91. Barney Ronald Fuller, Jr. (10) TX** Sources: FORT WORTH STAR-TELEGRAM 7/22/2004 (2004 WLNR 1822949); AUSTIN AMERICAN-STATESMAN 7/22/2004 (LEXIS, USPAPR File); HOUSTON CHRONICLE 5/16/2003 (LEXIS, USPAPR File); HOUSTON COUNTY COURIER 7/18/2004 (on file with author), 8/2/2004 (on file with author); Telephone Interview with Prosecutor Session (Oct. 25, 2004).

**DS 92. Marvin Johnson (10) OH** Sources: TIMES RECORDER (Zanesville, OH) 6/2/2004 (on file with author), 6/5/2004 (2004 WLNR 16471980); Ohio Department of Corrections (http://www.drc.state.oh.us/).


### 7-9 DEPRAVITY POINTS


DS 114. LaDerick Campbell (7) LA Sources: THE TIMES (Shreveport, LA) 9/23/2004 (LEXIS, USPAPR File); THE ADVOCATE (Baton Rouge, LA) 9/26/2004 (LEXIS, USPAPR File).


6 OR FEWER DEPRAVITY POINTS

An asterisk (*) denotes a defendant with 5 or fewer Depravity Points who accrued a 3-Depravity Point factor, which would make him death-eligible under the criteria used in this Article.


**DS 126. Richard Johnson (6) FL** Sources: SUN-SENTINEL (Ft. Lauderdale, FL) 6/12/2004 (on file with author), 6/22/2004 (on file with author); Florida Department of Corrections (http://www.dc.state.fl.us/activeinmates/deathrowroster.asp).

**DS 127. Juan Jose Reynosa (6) TX** Sources: HOUSTON CHRONICLE 3/9/2003 (LEXIS, USPAPR File),


DS 132. Donald Lee Leger (5) LA Sources: Associated Press Newswire 12/11/2001 (on file with author); Telephone Interview with Vanessa Prichett, Managing Editor, ST. MARY AND FRANKLIN BANNER-TRIBUNE (Franklin, LA) (Sept. 27, 2004).


DS 137. Junious Diggs (4) PA  Sources: PHILADELPHIA INQUIRER 3/18/2002 (on file with author); Telephone Interview with Defense Attorney Daniel Conner (Sept. 29, 2004); Telephone Interview with Susan Mills Tarrington, Office Manager (Sept. 27, 2004).


DS 140. Cory Maye (2) MS  Sources: SUN HERALD (Biloxi, MS) 12/28/2001 (2001 WLNR 2920872), 12/30/2001 (2001 WLNR 6211828); THE CLARION-LEDGER (Jackson, MS) 2/22/2002 (LEXIS, USPAPR File); Telephone Interview with Prosecutor Miller (Sept. 27, 2004).

[The following two defendants were belatedly discovered and were not integrated into the numerical scheme of this Appendix, nor used in the Article’s analysis. They are, however, incorporated as DS 78A (Leroy Dean McGill) and DS 89A (Michael Lee Brown) in online Appendix D.]


Appendix E

DEFENDANTS SPARED FROM DEATH SENTENCES BY SENTENCERS

Defendants are in order from highest number of Depravity Points to lowest (and if Depravity Points are equal, then in alphabetical order by defendants’ surnames). Defendants are numbered with the prefix “SS” denoting “Sentencer-Spared.” The number in parentheses following the name is the Depravity Point Calculation. The abbreviation after the Depravity Point Calculation denotes the state or federal district in which the death sentence would have been imposed. Because Westlaw recently changed news service providers, many of the original sources relied upon for this Article are no longer available via Westlaw; these sources remain on file with the author.

30 OR MORE DEPRAVITY POINTS


20-29 DEPRAVITY POINTS


15-19 DEPRAVITY POINTS


10-14 DEPRAVITY POINTS


SS 41, SS 42. Shawn A. Breeden & Michael A. Carpenter (11) Fed-NC Sources: RICHMOND-TIMES


7-9 DEPRAVITY POINTS


SS 74. Fernando Nunez (7) PA Sources: TIMES LEADER (Wilkes-Barre, PA) 8/7/2004 (on file with author).


6 OR FEWER DEPRAVITY POINTS

An asterisk (*) denotes a 5 or fewer Depravity Point defendant who accrued a 3-Depravity Point factor, which would make him death-eligible under the criteria used in this Article.


**SS 83. Xenia Morgan (6) VA** Sources: RICHMOND TIMES DISPATCH 7/13/2004 (LEXIS, USPAPR File), 7/15/2004 (LEXIS, USPAPR File).


**SS 89. Dennis Scott (6) IL** Sources: CHICAGO TRIBUNE 10/16/2004 (LEXIS, USPAPR File), 11/24/2004 (LEXIS, USPAPR File).


SS 111. Felicia Pelzel (4) TX Sources: COX NEWS SERVICE 12/24/2004 (on file with author).


Appendix F

DEFENDANTS SPARED FROM DEATH SENTENCES
BY PROSECUTORS

Defendants are in order from highest number of Depravity Points to lowest (and if Depravity Points are equal, then in alphabetical order by defendants' surnames). Defendants are numbered with the prefix “PS” denoting "Prosecutor-Spared.” The number in parentheses following the name is the Depravity Point Calculation. The abbreviation after the Depravity Point Calculation denotes the state or federal district in which the death sentence would have been imposed. Because Westlaw recently changed news service providers, many of the original sources relied upon for this Article are no longer available via Westlaw; these sources remain on file with the author.

30 OR MORE DEPRAVITY POINTS


PS 6, PS 7. Edward Herrera & Michael Sandoval (43) CO Sources: THE DENVER POST 3/30/2004 (LEXIS,
USPAPR File), 9/30/2004 (LEXIS, USPAPR File); ROCKY MOUNTAIN NEWS 10/2/2004 (LEXIS, USPAPR File).

**PS 8. Stephen Flemmi (33) OK** Source: TULSA WORLD 10/1/2004 (LEXIS, USPAPR File).


**20-29 DEPRAVITY POINTS**


15-19 DEPRAVITY POINTS


PS 46, PS 47.  Glen Sebastian Burns & Atif Rafay (15) WA  Sources:  THE SEATTLE TIMES 10/23/2004 (LEXIS, USPAPR File);  THE RECORD (Kitchener-Waterloo, Canada) 10/23/2004 (LEXIS, USPAPR File);  NATIONAL POST (Canada) 11/13/2004 (on file with author).


10-14 DEPRAVITY POINTS


PS 77. Darrel Miller (12) OK Source: TULSA WORLD 10/2/2004 (on file with author).


PS 89. Ronrico Jozan Hatch (11) IN  Sources: THE JOURNAL GAZETTE (Fort Wayne, IN) 2/12/2004 (2004 WLNR 15056967); SOUTH BEND TRIBUNE 2/13/2004 (on file with author).


7-9 DEPRAVITY POINTS


PS 135. Anthony Troxler (9) NC Source: NEWS & RECORD (Greensboro, NC) 1/30/2004 (LEXIS, USPAPR File).


PS 162. Alex Wilson, Jr. (8) TX Sources: THE HOUSTON CHRONICLE 7/13/2004 (LEXIS, USPAPR File); THE DALLAS MORNING NEWS 7/13/2004 (LEXIS, USPAPR File).


PS 177. Preston Allen Crisp (7) NC  Sources: THE HERALD-SUN (Durham, NC) 3/3/2004 (LEXIS, USPAPR File),


**PS 179. Aaron Daniels (7) NV** Sources: LAS VEGAS SUN 7/30/2004 (on file with author); LAS VEGAS REVIEW-JOURNAL 7/30/2004 (2004 WLN 856352).


**PS 183. Thomas Johnson (7) VA** Sources: THE VIRGINIAN-PILOT 7/7/2004 (LEXIS, USPAPR File), 9/24/2004 (LEXIS, USPAPR File).


**PS 187. Kenneth Robinson (7) OH** Source: THE PLAIN DEALER (Cleveland, OH) 5/18/2004 (LEXIS, USPAPR File).

**PS 188. Raymond Saunders (7) MD** (See also Jovan House, SS 96, Appendix E) Source: THE BALTIMORE SUN 10/20/2004 (2004 WLN 1472199).


**PS 191. Kimberly Williams (7) FL** Sources: THE LEDGER (Lakeland, FL) 10/9/2003 (LEXIS, USPAPR File),


### 6 OR FEWER DEPRAVITY POINTS

An asterisk (*) denotes a 5 or fewer Depravity Point defendant who accrued a 3-Depravity Point factor, which would make him death-eligible under the criteria used in this Article.


**PS 196. Ricky Dale Bailey (6) NC** Source: **ROCKY MOUNT TELEGRAM** (NC) 10/1/2004 (on file with author).

**PS 197. Ivery Barnes (6) TX** Source: **THE HOUSTON CHRONICLE** 2/3/2004 (LEXIS, USPAPR File).


**PS 201. Aaron Dishon (6) OH** Source: **THE ENQUIRER** (Cincinnati, OH) 8/3/2004 (LEXIS, USPAPR File).


**PS 204. Nathan Hogan (6) MS** Source: **THE SUN HERALD** (Biloxi, MS) 12/1/2004 (on file with author).


PS 210. Lloyd Mollett (6) OK Source: THE DAILY OKLAHOMAN (Oklahoma City, OK) 12/18/2004 (LEXIS, USPAPR File).


*PS 251, PS 252. Daniel Lopez & Joe Rodriguez (5) CA (See also Julian Mendez, DS 69, Appendix D) Source: THE PRESS ENTERPRISE (Riverside, CA) 8/27/2004 (LEXIS, USPAPR File).


PS 274. Mark Fox (4) OR Source: THE OREGONIAN (Portland, OR) 7/16/2004 (LEXIS, USPAPR File).


PS 279. James Head (4) FL Source: ST. PETERSBURG TIMES 1/31/2004 (LEXIS, USPAPR File).


PS 284. Randy Liebich (4) IL Sources: CHICAGO TRIBUNE 7/3/2004 (LEXIS, USPAPR File), 9/10/2004 (LEXIS, USPAPR File); DAILY HERALD (Chicago, IL) 7/17/2004 (LEXIS, USPAPR File).


PS 288. Tobias Morgan (4) VA Sources: THE VIRGINIAN PILOT (Norfolk, VA) 7/11/2003 (LEXIS, USPAPR


**PS 290. Donald Scanlon (4) NC** (resentencing after appellate reversal) Source: THE NEWS & OBSERVER (Raleigh, NC) 8/24/2004 (LEXIS, USPAPR File).


**PS 302. Elbert Holder (3) AR** Source: ARKANSAS DEMOCRAT GAZETTE 12/1/2004 (LEXIS, USPAPR File).


*PS 309. Tindall Jason Williams (3) FL Source: Orlando Sentinel 4/7/2004 (LEXIS, USPAPR File).


PS 312. Dorian Eady (2) PA Source: York Daily Record (PA) 10/19/2004 (on file with author).


PS 318, PS 319. Wilson Perez & Joel Vasquez (2) FL Sources: Palm Beach Post 11/25/2003 (LEXIS, USPAPR


Appendix G

INFERABLE REASONS FOR PROSECUTORS NOT PURSUING DEATH SENTENCES*

**Inferable**

**Guilt/innocence**
- Evidence questionable 2
- Multiple perpetrators 149
- Deal given for testimony -
- Prior hung jury, etc. 4

**Penalty phase**
- Not aggravated enough -
- Mitigation significant -
- Mental problems 3
- Intoxication 1
- Rotten background -
- Youthful age 1
- Older age 3
- No prior record -
- Prior hung jury, etc. 3

**Non-merits**
- Victim’s relatives’ wishes 7
- Case is old 12
- Cost 2
- Defendant to name other victims 1
- Waiver for extradition -
- Prosecutor opposed to -
- Prosecutor doubts appellate -
- Prosecutor doubts juries -

*David McCord, Uncondensed Appendices to *Lightning Still Strikes*, (Feb. 26, 2006) (on file with author) (indicating when these inferable reasons are present for each defendant), available at [http://facstaff.law.duke.edu/david.mccord/brooklynAppendices.pdf](http://facstaff.law.duke.edu/david.mccord/brooklynAppendices.pdf).
Appendix H

TOP TEN REMARKABLE MOMENTS IN DEATH PENALTY CASES FROM NEWS REPORTS REVIEWED IN THE COURSE OF WRITING THIS ARTICLE

Death penalty cases create their fair share of odd, remarkable moments. Here are ten of them:

10. Judge Stanley Sacks in Illinois spared Ronald Pollard (SS 55, Appendix E) from a death sentence because he didn’t want Pollard to become a “cult hero” like another defendant Judge Sacks had sentenced to death in 2000, who spawned over 400 websites. CHICAGO TRIBUNE 10/5/2004 (on file with author).

9. A juror in Thomas Johnson’s case (PS 183, Appendix F) in Virginia brought her own Bible and asked if she could give it to him because “the trial has not been going well for him.” THE VIRGINIAN-PILOT 7/7/2004 (LEXIS, USPAPR File).

8. In a Tennessee case, Robert Joe Hood (DS 26, Appendix D), who killed three people in separate incidents, which included two robberies, a kidnapping, a home-invasion burglary, and the killing of a mother in the presence of her children and then the locking of the children in the apartment with the body, told the court that he was “not a bad person.” THE COMMERCIAL APPEAL (Memphis, TN) 4/11/2003 (2003 WLNR 8909080).

7. Many defendants claim horrible upbringings, but none attained the pure emotional simplicity and self-pity of Georgia defendant Donnie Hulett, Jr. (DS 68, Appendix D): “My mother don’t want me. My dad don’t want me. The only people that have ever cared for me are either dead or can’t help me.” PrisonTalk.com, A Walker County Superior Court Judge on Thursday Sentenced Convicted Murderer Donnie Allen “D.J.” Hulett to Death, http://www.prisonstatlalk.com/forums/archive/index.php/t-58770.html (last visited Feb. 21, 2006).
6. Defendants in capital cases often have colorful nicknames/street names. Perhaps the one a defense attorney would least like to have mentioned in front of a jury is that of New Mexico defendant Jorge “Little Mad Man” Serrano (PS 218, Appendix F)—unless an insanity defense was in order. ALBUQUERQUE JOURNAL 9/24/2004 (LEXIS, USPAPR File).

5. A small percentage of victims’ relatives make statements that exemplify “amazing grace.” A particularly poignant one is from the case of Derrick Jenkins (PS 148, Appendix F) in Texas, where the victim’s mother told Jenkins: “You tore a perfect family apart. Every night I fall on my knees and pray that God will help me forgive you. I also pray that he will keep you safe in prison.” COX NEWS SERVICE 10/5/2004 (on file with author).


3. Or this one, to the victim’s mother, by Marvin Johnson (DS 92, Appendix D) in Ohio, who beat her thirteen-year-old son to death: “The beating was justified. I remember him from his cries and his last words. I care about your son’s cries like a fish cares about a raincoat.” TIMES RECORDER (Zanesville, OH) 6/5/2004 (2004 WLNR 16471980).

2. Judge Stephen B. Lieberman, in the Pennsylvania case of Richard Boxley (DS 138, Appendix D) wished he had been in the Old West at the sentencing: “I wish I had the authority of a sentencing judge in those times. I would have the circle rebuilt at Fifth and Penn Streets, not just to have a place for a Christmas tree, but as an excellent place to construct a gallows for your speedy and public hanging. Perhaps then the gun-toting, drug-dealing scum that has moved in to take your place will get the point.” THE PATRIOT-NEWS (Harrisburg, PA) 10/29/2000 (on file with author) (This statement was made at Boxley’s original sentencing in 2000, not at his resentencing in 2004.).
1. The attorney for Dwight McLean (SS 117, Appendix E) in North Carolina, who presented McLean's lack of a viable father figure as mitigation, closed his summation by playing country singer George Strait's song, “Love Without End, Amen,” about a father's love for his son. The song reduced several jurors to tears, and one had to leave the jury box. McLean was spared a death sentence. THE NEWS & OBSERVER (Raleigh, NC) 10/15/2004 (2004 WLNR 17545075).
Lightning Still Strikes

EVIDENCE FROM THE POPULAR PRESS THAT DEATH SENTENCING CONTINUES TO BE UNCONSTITUTIONALLY ARBITRARY MORE THAN THREE DECADES AFTER FURMAN

David McCord†

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of . . . murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.

Justice Potter Stewart, concurring in Furman v. Georgia, 1972

I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Justice Byron White, concurring in Furman v. Georgia, 1972

† Professor of Law, Drake University Law School, and Director of the National Jury Center of the American Judicature Society. The views expressed herein are those of the author, and do not reflect the views of the American Judicature Society. The author thanks his long-suffering secretary Karla Westberg; his diligent corps of research assistants Jennifer Bennett, Brooke Burrage, Richard Mortenson, and Clarissa Rodriguez; and his colleagues who astutely commented on the piece, Professor Kristi Bowman of Drake University Law School, Professor Rachel Paine Caufield of Drake University’s Department of Politics and International Relations, Timothy S. Eckley, Esq., of the American Judicature Society, Professor Michael Heise of Cornell Law School, and Professor Gregory C. Sisk of the University of St. Thomas School of Law (Minneapolis).

1 Furman v. Georgia, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring).

2 Id. at 313 (White, J., concurring).
When the punishment of death is inflicted in a trivial number of cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. It is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.


People do worse crimes than this and they’re still alive.

Defendant Michael Rush, primary participant in a death-eligible murder, 2004

**INTRODUCTION**

This Article began not as a law journal piece, but as a modest project for posting information about death-sentenced defendants on a website. The expansion of the project into this Article is a tale of startling, not to mention humbling, discoveries. As a law professor who has taught a death penalty course for over a decade, read hundreds of death penalty appellate opinions, and written several articles on aspects of the topic, I am an expert in the field. One of the things I imagined I could do as an expert was “handicap” death-eligible cases—predict which cases were likely to result in death sentences, and which ones were not. In retrospect, it is evident to me that this conceit was based on a biased sample—almost all the cases I read were ones in which defendants were sentenced to death. Rarely did I read a case in which the sentencer chose a non-death sentence, or a prosecutor did not pursue a death sentence. Since most defendants who receive death sentences are good candidates for them (at least based on aggravating circumstances), assessing the likelihood of death sentences in death-sentenced cases is in the nature of a self-fulfilling prophecy. Once I began reading about death-eligible cases that resulted in non-death sentences, however, I realized that I had no capacity whatsoever to handicap death-eligible cases.

---

3 Id. at 293-94 (Brennan, J., concurring).
4 Jason Trahan, *Suspect in Slaying Says He Hit but Didn’t Kill; Plano Man Fingers Other Roommate; Officer Says Shifting Blame Is Common*, DALLAS MORNING NEWS, May 21, 2004, at 3B.
Of course, if this insight were simply about my deficiency, it would not warrant your reading this Article. This insight can be broadened: nobody else can handicap death-eligible cases, either. In turn, this can be even further broadened into a crucial, legally-significant point: death sentencing in 2004 was so unpredictable that the 1972 Furman quotations above, from Justices Stewart, White, and Brennan, still exactly describe the death penalty system more than three decades later; and the street-level insight of defendant Michael Rush neatly captures the essence of the current system. Could I prove to the satisfaction of the Supreme Court that the current system is arbitrary?6 Probably not—I only know what I read in the newspapers. What the newspapers disclose, however, is a pattern so apparently arbitrary that it raises a strong inference that the current system is just as unconstitutional as the pre-Furman system.

An obvious question is: Why rely on newspaper reports—can we do better than that? The answer is “no,” we cannot do better than that, at least not without a national homicide reporting system that is much more complete and detailed than we have now.7 There is simply no system in effect anywhere in the country (other than in New Jersey8) to keep track of the occurrence of death-eligible cases, their factual details, and their resolutions. Indeed, before the recent development of searchable online newspaper databases, there was no way to even attempt the task this Article sets for itself: to analyze through press reports as many death-eligible cases resolved in 2004 as possible. While the newspaper results are

6 I could have chosen “capricious” or “unpredictable” as the key descriptor, but decided on “arbitrary” as the most legally descriptive adjective.

7 The federal government collects a great deal of information on homicides nationwide, but the information is not collected specifically for death-sentencing purposes. Thus, the information is not detailed enough to be very helpful in making the kinds of subtle distinctions on which death sentencing hinges. For an overview of the homicide data available through federal databases, see the Uniform Crime Reporting Program Resource Guide, http://www.icpsr.umich.edu/NACJD/ucr.html (last visited Jan. 27, 2006) (follow the “Agency-Level Data” hyperlink).

8 At the direction of the New Jersey Supreme Court, the Administrative Office of the New Jersey Courts has been collecting detailed data on all death-eligible murders in the state since 1989, primarily to attempt to ascertain whether race influences death sentencing. For a description of this project, see David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia, 83 CORNELL L. REV. 1638, 1662-64 (1998) (explaining the study and its purposes, and adapting the methodology for use in a study in Philadelphia). The details of this New Jersey data, however, are not available to the general public.
imperfect, they are still valuable; and for the time being, they constitute the best available data upon which to apply a renewed *Furman* analysis.

My odyssey of discovery began when I undertook a second job as the inaugural Director of the National Jury Center of the American Judicature Society in 2004. One of my first tasks was to create a website for the Center. Given my interest in capital punishment and the Supreme Court’s recent affirmation of the importance of juries in death sentencing in the *Ring* decision, I decided to devote one section of the website to brief summaries of the cases of all defendants who were sentenced to death in the United States in 2004. One might imagine that such a compilation already existed—it did not. Nor was it easy to create. As part of this task, I began searching a broad query—“death /s [in the same sentence as] sentence”—in the enormous Westlaw “USNEWS” and the Lexis “USNEWSPAPERS” databases (which together constitute a compilation of articles from several hundred newspapers). This search turned up news reports on three types of cases: where death sentences were imposed, where sentencers declined to impose death sentences, and where prosecutors chose not to pursue death sentences.

Curiosity got the best of me. I began reading reports about the cases that did not result in death sentences. I quickly felt my handicapping confidence severely shaken. Soon, it evaporated entirely. Often I would read a news report and ask myself, “How could the jury *not* have imposed a death sentence in that case?” or “Why in the world did the prosecutor bargain away a death sentence in *that* case?” On the other hand, occasionally I would find myself asking, “What induced a prosecutor to seek, and a jury to impose, a death sentence in *that* case?” Those questions prompted further investigation and analysis that led to this Article.

The Article proceeds in three Parts. Part I analyzes the legal forces that have formed the current death penalty system. The analysis cuts through the jungle of Supreme Court

---

9 See infra text accompanying note 107.
11 See infra pp. 826-828.
12 As well as a multitude of inapt references, such as: “The two early defeats do not necessarily constitute a death sentence for the Ravens’ season.”
doctrine to the Court’s core goal in regulating capital punishment: achieving a non-arbitrary system. Because the Court has never described what a non-arbitrary system would look like, Part I proposes a four-part litmus test for non-arbitrariness. The test asks whether the system 1) selects for death only the most aggravated, “worst of the worst” defendants; 2) imposes death sentences on a robust proportion of them; 3) achieves a death-sentencing rate that increases with aggravation level; and 4) excludes the “worst of the worst” from death sentences only for merits-based reasons. Part I

13 There is some agreement across the philosophical spectrum that if we are to have a death penalty system, it should select only the “worst of the worst” for execution. See, e.g., James S. Liebman et al., Executive Summary: A Broken System, Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It, www2.law.columbia.edu/brokensystem2/index2.html (2002) (follow “Executive Summary” hyperlink) (“Our main finding indicates that if we are going to have the death penalty, it should be reserved for the worst of the worst . . . .”); Symposium, Rethinking the Death Penalty: Can We Define Who Deserves Death?, 24 PACER L. REV. 107, 123-24 (2003) (Statement of death penalty proponent Professor Robert Blecker) (“[T]hese comments today are about the ‘worst of the worst.’ This is the substance of death penalty law. . . . We search for bad character, for evil, for the ‘worst of the worst’ criminal and not merely the ‘worst of the worst’ crime.” (emphasis in original)); id. at 133 (death penalty opponent Professor Jeffrey Kirchmeier) (“[The system is set up now try to get the ‘worst of the worst,’ but it does not achieve that. . . . Throughout history, the goal always has been to get ‘the worst of the worst.’”); id. at 148 (death penalty researcher Professor Jeffrey Fagan) (“The ‘worst of the worst’ argument is a policy prescription that would minimize error rates. . . . It would be preferable to define the ‘worst of the worst’ and confine the use of the death penalty to those individuals. . . .”). See also David Baldus, When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences, 26 SETON HALL L. REV. 1582, 1605 (1996) (urging that death eligibility be limited to “multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror”); Alex Kozinski & Sean Gallagher, Death: The Ultimate Run-On Sentence, 46 CASE W. RES. L. REV. 1, 31 (1995) (quoting pro-death penalty Ninth Circuit Judge Kozinski: “[W]e would ensure that the few who suffer the death penalty really are the worst of the very bad—mass murderers, hired killers, terrorists. This is surely better than the current system, where we load our death rows with many more than we can possibly execute, and then pick those who will actually die essentially at random.” (footnote omitted)).

The “worst of the worst” idea has worked its way down into “the trenches” of working lawyers. See, e.g., James Merriweather, Penalty Phase Begins for Keyser, NEWS JOURNAL (Del.), Nov. 18, 2004, at B1 (asking the jury to consider his client’s alleged retardation, defense counsel said, “The death penalty, ladies and gentlemen, is for the worst of the worst.”); Vic Ryckaert, Details Revealed in Girl’s Death, INDIANAPOLIS STAR, Jan. 5, 2005, at B2 (quoting local prosecutor saying as to girl’s murderer: “Capital punishment ought to be reserved for the worst of the worst, and he is a prime candidate for the ultimate sanction.”); Andrea F. Siegel, Murderer Sorry for Everyone’s Losses: Family of 2 Slain Victims not Convinced of Remorse; Judge Considers Death Penalty, BALTIMORE SUN, Dec. 15, 2004, at 1B (arguing for his client’s life, defense counsel stated that “as a human being, he . . . is not the worst of the worst.”); Diana Walsh et al., Jury Recommends Death for Scott Peterson, SAN FRANCISCO CHRON., Dec. 13, 2004, at A1 (addressing jury, prosecutor in highly publicized Scott Peterson trial argued during the penalty phase, “Scott Peterson is the worst of the worst because he’s the kind of person that no one ever sees coming.”).
then analyzes the Court’s capital jurisprudence, along with other structural elements of the system, and shows how the potential for arbitrariness is built into the system in many ways.

Part II, along with the Appendices, presents and analyzes factual evidence from the popular press. This Part collects the most complete roster of death-eligible cases resulting in sentences during calendar year 2004, together with the richest factual summaries that could be compiled from online news sources. The cases are divided into three groups: those in which death sentences were imposed, those in which sentencers rejected death sentences, and those in which prosecutors chose not to pursue death sentences. Part II develops a “Depravity Point Calculator” that analyzes and ranks defendants in all three groups along a continuum from most depraved to least depraved. The analysis also considers mitigation evidence. This Part then compares the three sets of cases using the four-part litmus test from Part I. This comparison leads to the Article’s key conclusion: the news reports raise a strong inference that more than three decades after Furman, death sentences are still being imposed on a “capriciously selected random handful”; and Justice White’s description of the system’s operation is just as apt today as it was in 1972: “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”

Part III considers whether a renewed Furman argument stands any realistic prospect of acceptance by the Court. The

---

14 According to official government figures, the year 2004 is typical, at least in the sense that it had approximately the same number of death sentences as the three years immediately preceding it: 2004—125, 2003—144, 2002—168, and 2001—164. See Thomas P. Bonczar and Tracy L. Snell, U.S. Dept of Just., Bureau of Just. Statistics Bull., Capital Punishment, 2003 14 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf. The number of death sentences each year for 1994-2000 was significantly higher, ranging from a high of 327 in both 1994 and 1995, down to 234 in 2000. Id. at 8. The trend was generally downward, although with slight up-ticks in 1998 and 1999 over 1997. Id. It is impossible to determine whether 2004 was typical in terms of the kinds of murders that resulted in resolutions of the death penalty issue because no database, such as has been compiled in this Article, has been compiled for earlier years. But there is no reason to believe that 2004 was atypical, and this Article will proceed on the premise that 2004 is fairly representative of the way the capital punishment system in the United States has operated, at least over about the last four years.


16 Id. at 313 (White, J., concurring).
conclusion is that the odds of acceptance are long—but where there’s life, there’s hope.

I. The Legal Landscape

A. Furman Re-examined

Before Furman, all but six American death penalty jurisdictions had a one-stage procedure for determining whether death sentences should be imposed—evidence of the crime was presented at trial, and the sentencer then retired to deliberate whether the defendant was guilty, and if he was, whether he should be sentenced to death. Sentencers received little or no guidance on how to decide the death sentence issue. The other six jurisdictions (California, Connecticut, Georgia, New York, Pennsylvania, and Texas) had two-stage processes where the issue of punishment was considered in a separate proceeding after the guilt determination, but still with little or no guidance given to the sentencer. The Furman Court held both one-stage and two-stage systems unconstitutional. The rationale for doing so was murky, however, because there was no majority opinion. Rather, each of the five Justices in the majority wrote a separate opinion, with some overlapping rationales, and some rationales peculiar to particular Justices. The most commonly asserted rationale, partially relied upon by Justices Douglas and Brennan, and largely relied upon by Justices Stewart and White, was that lack of standards to guide sentencers resulted in an unconstitutionally arbitrary distribution of death sentences. Justice Brennan summarized the nature of the unconstitutional arbitrariness:

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily . . . . When the rate of infliction is at this low level, it is highly implausible that only the

---

17 See McGautha v. California, 402 U.S. 183 (1971) (noting that those six states had two-stage processes, id. at 208 n.19, but that under all then-existing procedures “the decision whether the defendant should live or die was left to the absolute discretion of the jury,” id. at 185, and that such standardless death penalty procedures challenged by the two petitioners “are those by which most capital trials in this country are conducted.” Id. at 221).

18 Furman, 408 U.S. at 255-57 (Douglas, J., concurring).
19 Id. at 293 (Brennan, J., concurring).
20 Id. at 309-10 (Stewart, J., concurring).
21 Id. at 313 (White, J., concurring).
worst criminals or the criminals who commit the worst crimes are selected for this punishment.\textsuperscript{22}

Justice Brennan thus identified arbitrariness as resulting from five components: 1) broadly drafted statutes rendering many defendants death-eligible; 2) a low rate of death sentencing; 3) “over-inclusion”—imposition of death sentences on defendants who were not among the worst offenders; 4) “under-inclusion”—imposition of non-death sentences on many defendants who were among the worst offenders; and 5) implicitly, lack of procedures to minimize over- and under-inclusion. This has become the well-known \textit{Furman} holding: a system that dispenses death sentences to only a relative handful among a large universe of death-eligible defendants, without guiding standards, in a manner that does not sufficiently correlate with culpability of the defendants, is constitutionally deficient.\textsuperscript{23}

There was, however, another holding of \textit{Furman} that has faded into relative obscurity in light of the Court’s later capital jurisprudence: the Court has the power to make a nationwide assessment of whether the death penalty system produces an unconstitutionally arbitrary pattern of results. In order to do this, the Court can consider the death penalty system to be \textit{one national system} and examine the \textit{pattern of outcomes}, rather than consider the system by jurisdiction and examine only particular case outcomes. Both the one-national-system and pattern-of-outcomes ideas deserve further explanation.

As to the one-national-system aspect of the holding, \textit{Furman} was a case from Georgia, and it arrived with two companion cases, one from Georgia and the other from Texas.\textsuperscript{24} The Court’s decision, though, was based on the Justices’ perceptions of how the death penalty system was operating throughout \textit{all} of the country’s death penalty jurisdictions, not on a jurisdiction-by-jurisdiction basis. Justice White’s opinion most clearly demonstrated the Court’s nationwide concern—his

---

\textsuperscript{22} Id. at 293-94 (Brennan, J., concurring).

\textsuperscript{23} \textit{See, e.g.}, Gregg v. Georgia, 428 U.S. 153, 188-89 (1976) (“[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”).

analysis was “based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases,” and this same perspective was shared by the other majority Justices. Further, not only did the Court’s language exhibit this nationwide perspective, so did its behavior: the Court simultaneously entered death sentence reversals in all of the more than one hundred cases on its docket from death-sentencing jurisdictions across the country. As a result, all then-existing death penalty jurisdictions—not just Georgia and Texas—immediately recognized that their systems were invalid, both prospectively and retroactively.

As to the pattern-of-outcomes aspect of the holding, the Court implicitly realized that if it always focused on a particular case, there would always be arguably valid explanations for the result. Even in the pre- era, it is hard to imagine that prosecutors and sentencers believed they were acting arbitrarily in any particular death-eligible case. Accordingly, arbitrariness could only be identified through patterns of results. This Article will refer to the one-national-system/pattern-of-outcomes approach as the nationwide outcomes” holding.

Since , the Court has never re-employed the nationwide outcomes holding; indeed, the Court has only rarely decided cases that involved even a whole-state-system perspective. Rather, as will be explained shortly, the Court’s post- capital jurisprudence has largely focused on attempting to remedy over-inclusion on an issue-by-issue basis. Yet the Court has never suggested that the nationwide outcomes holding of is no longer good law. should compel the Court at suitable intervals to step back,

25 , 408 U.S. at 313 (White, J., concurring).
26 Id. See also id. at 255 (Douglas, J., concurring) (stating death sentences are much more likely to be imposed against a defendant who is “poor and despised, and lacking in political clout, or if he is a member of a suspect or unpopular minority, [rather than] those who by social position may be in a more protected position.”). Justice Douglas did not limit these remarks to the systems of Georgia and Texas that presented the issue in .
28 The one major case calling on the Court to use a whole-state-system perspective was , 481 U.S. 279, 282-83 (1987). The defendant presented statistical evidence of how Georgia’s system had operated over a large number of cases over a several-year time span. Id. at 286. The Court declined to take a whole-system perspective, instead concluding that arbitrariness had to be assessed on a case-by-case basis. Id. at 319.
29 See infra notes 45-57 and accompanying text.
apply the nationwide outcomes approach, and determine whether “tinker[ing] with the machinery of death”\(^\text{30}\) has produced a system that delivers a non-arbitrary pattern of outcomes. This Article will argue that the best available evidence shows that arbitrariness still runs rampant more than three decades after \(\text{Furman}\).

This is an appropriate moment for the Court to apply a renewed \(\text{Furman}\) analysis. Adjusted for increased national population since 1972, the infrequency with which death sentences have been handed down recently—an average of 152 per year for the last four years\(^\text{31}\)—closely parallels the infrequency with which death sentences were handed down in the four years preceding \(\text{Furman}\)—an average of 103 per year.\(^\text{32}\) During the last four years the death sentence rate per 100,000

\(^30\) This memorable phrase was coined by Justice Blackmun in his late-career jeremiad against capital punishment. See \(\text{Collins v. Collins, 510 U.S. 1141, 1145 (1994)}\) (Blackmun, J., dissenting).

\(^31\) See \(\text{Thomas P. Bonczar and Tracy L. Snell, U.S. Dept of Just., Bureau of Just. Statistics Bull., Capital Punishment, 2004 14 (2005), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp04.pdf. The number of death sentences per year since 1994 are as follows: 1994—314, 1995—317, 1996—317, 1997—277, 1998—300, 1999—276, 2000—232, 2001—163, 2002—168, 2003—152, 2004—125. The Bureau of Justice Statistics (hereinafter “BJS”) figure of 125 death sentences in 2004 is lower than the number found by this Article. The reason is that BJS researchers do not use the “Death Row USA” reports to compile their figures. Rather, BJS sends out a once-a-year questionnaire to corrections departments and compiles the responses. Thus, the BJS figures are subject to reporting oversights, and, in particular, are prone to missing resentences. BJS compiles a list of names of the persons comprising its 125 death sentences figure, but will not share this list with the public, including myself. Telephone Interview with Tracy L. Snell, Statistician, U.S. Dept of Just., Bureau of Just. Statistics (Nov. 30, 2005). Thus, it is impossible to compare the BJS list with my list to see who is missing from the BJS list. It is clear, though, that the BJS list missed several death sentences in 2004, because each of the death sentences found by this Article are documented to have been imposed in 2004. Probably the BJS figures from earlier years are consistently understated, as well. But even if they are understated by fifteen or twenty sentences per year, the death sentence rate per 100,000 over the last four years would not significantly increase above 0.053. Experts have assayed various explanations for the decline since 2000. See, e.g., Mike Tolson, \(\text{Fewer Killers Getting Sentenced to Death, Houston Chron., May 22, 2005, at A1 (suggesting increased availability of life-without-parole sentences, better trained and funded capital defense lawyers, skittish juries due to publicized exonerations, reduced pool of death-eligible defendants due to U. S. Supreme Court decisions, prosecutorial frustration with costs and appellate reversals, and greater prosecutorial selectivity). Still, Richard Dieter of the Death Penalty Information Center sums up the state of knowledge: “Something’s been going on in the last four or five years, but it’s hard to say precisely what. . . . You wouldn’t have thought a few years ago this is the way things were going to go.” Id.}\)

population was 0.053; the rate in the four years before Furman was a virtually indistinguishable 0.051. 33

B. Toward a Non-Arbitrary System?

1. Envisioning a Non-Arbitrary System

Despite the Court’s disapproval of the then-existing death penalty system in Furman, and its voluminous capital jurisprudence in the ensuing three-plus decades, the Court has never specifically articulated its own vision of what a non-arbitrary death-sentencing system would look like. This is understandable for at least two reasons. First, the Court is not a legislature—it does not have the institutional authority to specify a complete, best-practices death penalty system. Rather, the Court normally responds to challenges regarding particular aspects of particular death penalty schemes on an issue-by-issue basis; that is, it does not opine concerning what the best practice is, but only whether the challenged practice is so bad as to be unconstitutional. Second, even if the Court had felt institutionally competent to articulate a fully-developed vision of a non-arbitrary system since Furman, such a formulation would have been difficult because the Court has been comprised of justices with widely divergent philosophies—ranging from those who have thought any attempt by the Court to regulate this area was unjustified,34 to others who have believed capital punishment was inherently unconstitutional and unsalvageable.35 Even a moderately coherent doctrine is a lot to expect under these conditions.


34 These include current Justices Scalia and Thomas: “In my view, that line of decisions [beginning in Furman] had no proper foundation in the Constitution.” Ring v. Arizona, 536 U.S. 584, 610 (2002) (Scalia, J., concurring, Thomas, J., joining). Also, Chief Justice Rehnquist: “[J]udicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court’s holding in these cases has been reached, I believe, in complete disregard of that implied condition.” Furman, 408 U.S. at 470 (Rehnquist, J., dissenting). And, Chief Justice Burger, Justice Powell, and Justice Blackmun were skeptical of the legitimacy of the Court’s efforts to regulate capital punishment. See id. at 375-76 (Burger, C.J., dissenting); id. at 418 (Powell, J., dissenting); id. at 408-14 (Blackmun, J., dissenting).

35 These included Justices Brennan and Marshall, who wrote in every one of their capital punishment opinions that they would find the penalty inherently
Yet a vision of a non-arbitrary system is imperative. How can the arbitrariness of the system be assessed without an aspirational standard with which to compare it? This Article asks the following question: Does the system sentence to death only, and a robust proportion of, the “worst of the worst” in a fairly calibrated way; and when it excludes the “worst of the worst,” does it do so for valid, merits-related reasons? This question can be broken down into a litmus test that consists of four sub-questions:

1. Are all insufficiently aggravated criminals—those who are not the “worst of the worst”—excluded from death sentences?

2. Is the death-sentencing rate robust among those who are arguably the “worst of the worst”? As will be explained later, this Article will consider a 33 1/3% death-sentencing rate among the “worst of the worst” to be the minimum acceptable rate.37

3. Does the death-sentencing rate increase as the level of aggravation increases?

4. When those who are arguably among the “worst of the worst” do not receive death sentences, are the reasons rationally related to the merits of the cases?

unconstitutional. See Michael Mello, Adhering to Our Views: Justices Brennan and Marshall and the Relentless Dissent to Death as a Punishment, 22 FLA. ST. U. L. REV. 591, 593 (1995). Justice Douglas was probably in this category. And Justice Blackmun became a convert toward the end of his tenure on the Court: “From this day forward, I no longer shall tinker with the machinery of death. . . . I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.” Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

Some supporters of capital punishment contend that the only relevant question is the first one, namely, does the system sentence to death only the “worst of the worst”? These supporters believe that if a particular defendant is worthy of death, the fact that others who are death-worthy escape death sentences cannot make that particular defendant’s death sentence unjust. See, e.g., Ernest van den Haag, The Ultimate Punishment: A Defense, 99 HARV. L. REV. 1662, 1662 (1986) (“If capital punishment is immoral in se, no distribution of it among the guilty could make it moral. If capital punishment is moral, no distribution would make it immoral.”). For most people, however, the idea that the distribution of punishment has no comparative or procedural aspects is disproven by a thought experiment involving a death penalty lottery: imagining the names of all death-worthy defendants for the year inscribed on lottery balls, placed in a lottery hopper, and a specified percentage drawn at random receive death sentences, while the others receive non-death sentences.

37 See infra p. 819.
Not only does this test comport with common sense, it is also consistent with the most important themes of Supreme Court death penalty jurisprudence. First, it is consistent with *Furman*: a system that met this litmus test would not employ unlimited discretion to impose death on a “capriciously selected random handful,” nor would it impose death “with great infrequency even for the most atrocious crimes [with] no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”

Second, this litmus test is consistent with the Court’s emphasis that death sentences must be proportionate to the offense. This sensitivity to scale is apparent in the Court’s unequivocal requirement that death sentences only be imposed for offenses including at least one murder. The litmus test takes proportionality into account in several ways, most fundamentally through its requirements that death only be imposed upon the “worst of the worst” and be positively correlated to aggravation.

Third, it is consistent with the principle that death sentences must be “reliable.” The Court has stated that death sentences must be “reliable,” but has never comprehensively defined what reliability means in this context. It surely means at least two things, though: that the punishment of death is only proportionate to the worst crimes; and that a death sentence is not reliable unless the defendant has been afforded the opportunity to present mitigating evidence. As was mentioned just above, the litmus test takes the degree of aggravation into account. Further, the litmus test takes

---

38 *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring).
39 *Id.* at 313 (White, J., concurring).
41 See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (holding there is particularly strong constitutional interest “in the need for reliability in the determination that death is the appropriate punishment in a specific case”); see also *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (holding due process interest in reliability requires defendant to be able to inform sentencer of parole ineligibility when prosecution contends defendant will constitute future threat).
42 See *supra* note 40.
43 See *Woodson*, 428 U.S. at 304 (establishing principle that constitutionally acceptable death penalty system must provide defendant with opportunity to present mitigating evidence concerning character, record, or circumstances of offense); see also *Lockett v. Ohio*, 438 U.S. 586, 606 (1978) (reaffirming *Woodson* principle).
mitigation into account in sub-question one—an inquiry into whether the defendant is one of the “worst of the worst” entails a consideration of mitigating evidence.

Finally, it is consistent with the principle that there are constitutionally impermissible non-merits-based reasons for imposing or not imposing death sentences. Sub-question four of the litmus test explicitly inquires whether the imposition or non-imposition of death sentences rests on proper merits-based reasons concerning the aggravation levels of the crimes and the defendants, or instead on improper factors such as prosecutorial budgets, wishes of the victims’ relatives, and perceived appellate hostility to death sentences.

While this litmus test is consistent with the themes of the Court’s capital jurisprudence, there are crucial ways in which the Court’s issue-by-issue case holdings do not consistently require a non-arbitrary system, and in key respects, affirmatively undermine non-arbitrariness. It is necessary to examine the Court’s precedents as to each of the litmus test’s four sub-questions in order to see how these holdings have contributed to the maintenance of an arbitrary system.

2. Does the Court’s Capital Jurisprudence Conduce to a Non-Arbitrary System?

In the following four subsections, this Article will examine whether the Court’s capital jurisprudence conduces to or cuts against the four parts of the litmus test for a non-arbitrary system.

44 See, e.g., Turner v. Murray, 476 U.S. 28, 36 (1986) (holding that race is impermissible consideration in death sentencing). Presumably, at least two other bases that are impermissible in jury selection in all cases—including capital cases—are impermissible death-sentencing factors: gender (see J.E.B. v. Alabama ex rel T.B., 511 U.S. 127, 129 (1994) (prohibiting exercise of peremptory challenges based on gender)), and ethnicity (see Hernandez v. New York, 500 U.S. 352, 371 (1991) (prohibiting exercise of peremptory challenges based on ethnicity)). Also, it is impermissible for a sentencer to be influenced by mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling. See California v. Brown, 479 U.S. 538, 542-43 (1987) (upholding jury instruction so worded, characterizing it as “a catalog of the kind of factors that could improperly influence a juror’s decision to vote for or against the death penalty”).
a. Does the Court’s Doctrine Assure that All Insufficiently Aggravated Criminals Are Excluded from Death Sentences?

Assuring that insufficiently aggravated criminals are not sentenced to death has been the most consistent force animating the Court’s death penalty jurisprudence. Most of the Court’s key precedents bear directly on this goal. The Court has sought to achieve the goal of minimizing over-inclusion\(^{45}\) in several ways, five of which are listed below.

First, the Court has sought to decrease the likelihood that sentencers will tend toward over-inclusion. The Court has required a special process designed to focus the sentencer on the monumental nature of the death-sentencing decision—the bifurcated trial with its separated guilt/innocence and penalty phases is now standard.\(^{46}\) Additionally, sentencers cannot be otherwise deflected from believing they bear full responsibility for the weighty decision to impose death.\(^{47}\)

Second, the Court has limited the universe of death-eligible crimes in order to minimize over-inclusion. At first cut, that universe is limited to one: murder.\(^{48}\) Beyond that, the doctrine makes clear that not all murders are death-eligible; instead, the definitions “genuinely narrow the class of persons eligible for the death penalty”\(^{49}\) in such a manner as to

---

\(^{45}\) For an extensive discussion of over-inclusion, see Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 366-69 (1995) (identifying minimizing over-inclusion as one of Court’s four goals). See also David McCord, *Judging the Effectiveness of the Supreme Court’s Death Penalty Jurisprudence According to the Court’s Own Goals: Mild Success or Major Disaster?* 24 FLA. ST. U. L. REV. 545, 573-75 (1997) (arguing minimizing over-inclusion has been Court’s primary goal).

\(^{46}\) Technically, the Court has never opined that this is the only system that is constitutionally acceptable, but after the Court approved three such systems in its first post-\(Furman\) death penalty pronouncements in Gregg v. Georgia, 428 U.S. 153, 195 (1976); Proffitt v. Florida, 428 U.S. 242, 248 (1976); and Jurek v. Texas, 428 U.S. 262, 276 (1976), no jurisdiction has experimented with any other set-up.

\(^{47}\) See *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985) (holding unconstitutional jury instructions that could lead jurors to believe propriety of death sentence is determined not by jury, but by appellate court).

\(^{48}\) See *McCleskey v. Kemp*, 481 U.S. 279, 303-06 (1987). There is, however, still a possibility that sexual assault of a child may be a death-eligible offense. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (stating a death sentence is disproportionate to rape of “an adult woman”). Further, treason could possibly support a death sentence. See George P. Fletcher, *Ambivalence About Treason*, 82 N.C. L. REV. 1611, 1612 (2004) (“Treason still carries the death penalty, but that sanction is of dubious constitutionality.”).

reasonably justify the imposition of a more severe [i.e., death] sentence on the defendant compared to others found guilty of murder. This is typically accomplished through the requirement of “aggravating circumstances.”

Third, the Court has minimized over-inclusion by requiring that potential jurors who are overly zealous proponents of the death penalty not be allowed to serve.

Fourth, the Court has minimized over-inclusion by identifying classes of offenders who are insufficiently aggravated murderers as a matter of law: those who are too young or too mentally compromised to be morally responsible enough to warrant execution cannot be sentenced to death.

Finally, the Court has minimized sentencers’ tendency toward over-inclusion by requiring individualized sentencing. Mandatory death sentences are impermissible for any kind of murder. Rather, each defendant must have the opportunity to show that he is actually not among the “worst of the worst”

50 Id.; see also Tuilaepa v. California, 512 U.S. 967, 972 (1994) (narrowing “must apply only to a subclass of defendants convicted of murder”).

51 Alternatively called “special circumstances” in some jurisdictions. See, e.g., CAL. PENAL CODE § 190.2 (West 1999 & Supp. 2005). Also, some jurisdictions perform the narrowing by defining only certain categories of murder as death-eligible, rather than defining murder rather broadly and then making death-eligibility turn on whether aggravating or special circumstances exist. TEX. PENAL CODE ANN. Art. 19.03(a) (Vernon Supp. 2004-2005) (defining nine kinds of “capital murder”).

52 See Morgan v. Illinois, 504 U.S. 719, 729 (1992) (“A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.”). The acceptable capital juror is one whose views would not “prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.” Wainwright v. Witt, 469 U.S. 412, 424 (1985).

53 See Roper v. Simmons, 125 S. Ct. 1183 (2005) (finding it unconstitutional to sentence to death offender who was less than eighteen years old at time of murder).

54 See Atkins v. Virginia, 536 U.S. 304, 318 (2002) (holding it unconstitutional to sentence to death offenders who were mentally retarded at time of murder); Ford v. Wainwright, 477 U.S. 399, 407-08 (1986) (holding it unconstitutional to execute an inmate who is insane at time of proposed execution).


56 I choose to use the male-gendered pronouns because capital murder is such a male-dominated activity. For example, only five of the death sentences in 2004 were imposed on women. See App. D, DS 31, 50, 99, 106, 124. Only five of the defendants spared by sentencers in 2004 were women. See App. E, SS 15, 28, 32, 83, 111. The highest depravity point score for a woman was 23 (PS 17), a score that was exceeded by thirty-nine men and equaled by four men.
because of mitigating factors relating to the defendant’s “character, record, or the circumstances of the offense.”

Despite these five doctrines designed to decrease over-inclusion, the Court’s record regarding minimizing over-inclusion is actually quite spotty. The Court has established at least eight lines of authority that undermine the goal of minimizing over-inclusion.

First, the Court failed to act upon compelling evidence that many defendants were over-included due to racial bias.

Second, the Court failed to require that death penalty defense counsel meet any higher standard of effective assistance of counsel than defense lawyers in other cases, ignoring the obvious fact that one of the major causes of over-inclusion is ineffective lawyering in the very arcane arena of death penalty litigation.

Third, the Court failed to require any clear guidance to sentencers about how to decide whether to impose a death sentence, thereby raising the specter of over-inclusion (as well as arbitrary under-inclusion).


58 See McCleskey v. Kemp, 481 U.S. 279, 313 (1987) (finding that a huge, unimpeached statistical study showing victim’s being white substantially increased odds of death sentence, all other things being equal (particularly if defendant was black), was insufficient to establish equal protection or cruel and unusual punishment violation). Research on racial bias has continued to find disparities that seem to be race-based. See, e.g., Regina Brett, Death penalty not colorblind, PLAIN DEALER (Cleveland), May 15, 2005, at B1 (summarizing a massive Associated Press study of almost 2,000 murder indictments in Ohio from 1981-2002 as follows: “Kill a white person, and you’re twice as likely to end up on death row as you are if you kill a black person.”).

59 See Strickland v. Washington, 466 U.S. 668, 668-69 (1984) (establishing two-prong test applicable to all criminal cases, including death penalty cases, under which defendant must prove: (1) lack of reasonably effective assistance; and (2) reasonable probability that effective assistance would have resulted in a more defendant-favorable outcome).

60 See, e.g., Liebman et al., supra note 13, at www2.law.columbia.edu/brokensystem2/sectionVIII.html (“Egregiously incompetent lawyering . . . is responsible for about 40% of reversals at the state post-conviction phase of capital review and between a quarter and a third of the reversals at the federal habeas stage.”).

For more on the prevalence of ineffective assistance in capital cases, see Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L. J. 1835 (1994). As to ineffective assistance generally, see William S. Geimer, A Decade of Strickland’s Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL RTS. J. 91 (1996).

61 See California v. Ramos, 463 U.S. 992, 1001 (1983) (noting that, with few specified exceptions, “the Court has deferred to the State’s choice of substantive factors relevant to the penalty determination”). Not only has the Court deferred on the substantive factors, it has also largely deferred on what procedure the sentencer can
Fourth, the Court has never undertaken a quantitative analysis to check whether the long lists of aggravators generated by most legislatures in fact render too great a percentage of murderers death-eligible.62

Fifth, the Court has only considered whether a specified aggravator is qualitatively bad enough to support death sentences in two contexts. The Court has struggled with the ubiquitous “heinous, atrocious, and cruel” aggravator and its variants,63 hardly requiring its over-inclusive potential to be narrowed much. The Court has also weighed in on the culpable mental state required of felony-murderers,64 again with a result that is only partially designed to minimize over-inclusion.

---

use in reaching the death or non-death decision. Most notably, the Court approved the Georgia scheme in Gregg v. Georgia, 428 U.S. 153, 201 (1976), a scheme that left the jury entirely to its own devices in making that determination once it found an aggravating circumstance. On the other hand, the Court also approved the Pennsylvania scheme that required imposition of a death sentence when at least one aggravator was found, but no mitigators. See Blystone v. Pennsylvania, 494 U.S. 299, 301 (1990). The Court's only real regulation of the death-sentencing decisional process is that it is unconstitutional to require jurors to unanimously agree that evidence is mitigating before the jurors are authorized to consider it in determining the sentence. See McKoy v. North Carolina, 494 U.S. 433, 442-43 (1990).

62 For example, detailed research on California first-degree murder cases for the five-year period 1988-1992 found that eighty-seven percent of defendants were death-eligible under a scheme with thirty-two death-qualifying “special circumstances.” Steven F. Shatz & Nina Rivkind, The California Death Penalty Scheme: Requiem for Furman?, 72 N.Y.U. L. REV. 1283, 1327, 1331 (1997); see also David C. Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis 268 n.31 (1990) (finding eighty-six percent of murder cases death-eligible under Georgia law).

63 Such verbal formulations are unconstitutionally vague without a narrowing interpretation being imparted to the jury. See Arave v. Creech, 507 U.S. 463, 471-72 (1993) (holding aggravating circumstance of killing with “utter disregard for human life” sufficiently narrowed by construction of “killer who kills without feeling or sympathy”); Walton v. Arizona, 497 U.S. 639, 654-55 (1990) (finding “especially heinous, cruel or depraved” aggravating circumstance sufficiently narrowed by construction that murderer “relishes the murder, evidencing debasement or perversion,” or “shows an indifference to the suffering of the victim and evidences a sense of pleasure in killing” (internal citation and quotations omitted)); Profitt v. Florida, 428 U.S. 242, 255 (1976) (finding “especially heinous, atrocious, or cruel” aggravating circumstance sufficiently narrowed by construction of “the conscienceless or pitiless crime which is unnecessarily torturous to the victim” (internal citation and quotations omitted)). The Court could, instead, have required legislatures to specify more narrow, objective aggravators.

64 See Tison v. Arizona, 481 U.S. 137, 158 (1987) (holding major participation in dangerous felony combined with reckless indifference to human life sufficient for death-eligibility). Instead, the Court could have required that the defendant either did the killing, intended for another cohort to kill, or knew well in advance that another cohort planned to kill. See David McCord, State Death Sentencing for Felony Murder Accomplices Under the Enmund and Tison Standards, 32 Ariz. St. L.J. 843, 884 (2000).
Sixth, the Court has permitted death-eligibility criteria to duplicate aggravating circumstances, thereby perhaps inducing the sentencer to over-include defendants for death sentences by counting an aggravating factor twice when it should only be counted once.

Seventh, the Court has approved death-sentencing schemes (few in number, but mighty in importance because they include Texas and Virginia) in which mitigating evidence can only be considered by the sentencer in an artificial manner that may constrict the ability to give the evidence its full mitigating weight.

Finally, the Court has failed to require appellate courts to engage in proportionality review to identify defendants who are comparatively over-included.

As demonstrated above, the Court has repeatedly emphasized the importance of a non-arbitrary system in the years since *Furman*; nonetheless, many of its specific holdings have actually cut against these themes and conduced to the creation and maintenance of a system that does not exclude insufficiently aggravated offenders. The bottom line is this: the Court’s jurisprudence incompletely and haphazardly seeks to

65. See Lowenfield v. Phelps, 484 U.S. 231, 246 (1988) (holding acceptable that statute defining a category of death-eligible murder as “a specific intent to kill or inflict great bodily harm upon more than one person” virtually duplicated that language as aggravating circumstance in death-worthiness determination).


67. The Court has held that evidence of the defendant’s youthful age can be given full mitigating effect even though the jury’s consideration of it is strictly channeled through the future dangerousness inquiry. See Johnson v. Texas, 509 U.S. 350, 368 (1993). Prior to the ruling in *Atkins v. Virginia*, 536 U.S. 304, 318 (2002), that mentally retarded persons are not death-eligible, even mental retardation could be primarily funneled through the future dangerousness inquiry. See Penry v. Lynaugh, 492 U.S. 320, 322 (1989).

assure that only the “worst of the worst” are subject to death sentences.

b. Does the Court’s Doctrine Assure that a Robust Proportion of the “Worst of the Worst” Criminals Will be Sentenced to Death?

It is controversial to assert that sentencing a robust proportion of the “worst of the worst” defendants to death is more desirable than sentencing an anemic proportion to death. The argument from the traditional criminal law perspective for a robust rate is straightforward and powerful: a robust rate is necessary for retributive, denunciatory, and general deterrent efficacy. The three identifiable arguments for an anemic rate are not persuasive.

The first argument for an anemic rate is that it is impossible to determine the “worst of the worst” defendants. It looks only at the crimes and the past criminal history of defendants, that is, at aggravation, and asserts that it is impossible to describe the “worst of the worst.” This argument is fallacious because it is quite possible to rank the aggravation level; while the cut-off between the “worst of the worst” and the “very bad” is gray, most cases fall outside the gray area.

The second argument against a robust rate is a slightly scaled-back version of the first: the “worst of the worst” category is actually much smaller than it appears at first blush because the proportion of persons committing highly aggravated crimes who are morally blameworthy enough to be executed is very small due to the prevalence of wretched

---

69 The abolitionist position that no proportion should be death-sentenced is beside the point because the issue is whether the death penalty system is working non-arbitrarily in thirty-eight states and in the federal system. In the interest of disclosure, the reader should know that the author subscribes to this position, but has set it aside for purposes of this Article. The non-death penalty states form two clusters and three individual states. The New England cluster includes Maine, Massachusetts, Rhode Island, and Vermont. The upper Midwest cluster includes Iowa, Michigan, Minnesota, North Dakota, and Wisconsin. The three other states are Alaska, Hawaii, and West Virginia.

70 A well-known statement of this position comes from McGautha v. California, 402 U.S. 183, 204 (1971): “To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.” Id.

71 See infra pp. 833-840, and Chart 1 on p. 847.
upbringings, mental illness or retardation, drug or alcohol impairment, or similar mitigating circumstances or conditions among this group.\textsuperscript{72} Essentially, this argument is that mitigation will trump aggravation most of the time, no matter how aggravated the crimes. How persuasive this is depends on how committed one is to a belief in free will. After subtracting out young and mentally retarded offenders—as the Court has correctly done\textsuperscript{73}—the argument for free will/just deserts has seemed compelling to the American public, as the widespread and tenacious existence of capital punishment demonstrates. Thus, this second argument against a robust death-sentencing rate is actually a thinly disguised abolition argument that does not effectively demonstrate any advantages of an anemic over a robust rate.

The third argument for an anemic death-sentencing rate among the “worst of the worst” was articulated more than twenty years ago by Professor Robert Weisberg:

There may never be a social consensus on the role of capital punishment, but a social engineer might try to identify a sort of culturally optimal number of executions that would best compromise among the competing demands made by the different constituencies of the criminal justice system.

The most obvious approach is to have some executions, but not very many. A small number of executions offers a logical, if crude, compromise between the extreme groups who want either no executions or as many as possible. It would also satisfy those who believe that execution is appropriate only for a small number of especially blameworthy killers, at least if the right ones are selected. It might further satisfy those who do not believe there is a discernible and small category of most blameworthy killers, but who believe that a small number of executions might adequately serve general deterrence and make a necessary political statement about society’s attitude toward crime. But our hypothetical social engineer would want to consider other points of view or factors as well in designing his culturally optimal number. Too many executions would inure the populace to the fact of state killing and thereby deprive the death penalty of its value as a social symbol. Or too many executions might have the opposite effect of morally offending people with the spectacle of a bloodbath. On the other hand, if the number were too low in comparison with the number of murders,

\textsuperscript{72} See, e.g., Craig Haney, The Social Context of Capital Murder: Social Histories and the Logic of Mitigation, 35 SANTA CLARA L. REV. 547, 608 (1995) (“These, then, are some of the elements of the social histories that produce capital violence: Family poverty and deprivation, childhood neglect, emotional and physical abuse, institutional failure and mistreatment in the juvenile and adult correctional system.”).

\textsuperscript{73} See supra notes 53-54 and accompanying text.
capital punishment might not serve general deterrence. Or if we execute too few people, we may not produce a big enough statistical sample to prove that the death penalty meets any tests of rationality or nondiscrimination.

Viewing the statistics of the last decade, one might imagine that in a rough, systemic way, judges have indeed manipulated death penalty doctrine to achieve a culturally optimal number of executions. That number is very close to zero, but it must be viewed in light of a very different number—the number of death sentences.

If we somewhat fancifully treat the judiciary as a single and calculating mind, we could say that it has conceived a fiendishly clever way of satisfying the competing demands on the death penalty: We will sentence vast numbers of murderers to death, but execute virtually none of them.74

Twenty-plus years after this excerpt was penned, it only needs slight amendment—vast numbers of murderers are not sentenced to death, but the turtle’s pace of executions has caused a vast pile-up on death row (more than 3400 at last count).75 Professor Weisberg’s reasoning may more closely approximate the Court’s actual agenda than this Article’s assertion that the Court has pursued a non-arbitrary system. Since several Justices were abolitionists, and “some, if not most, of the Justices of the Supreme Court—past and present—are or have been ambivalent about capital punishment, at least when confronted with actual death row inmates in real cases,”76 the Court’s actual goal may simply have been to create a strict filtration system that permits only a few cases to make it to execution (the system would be even stricter if the more conservative Justices were not able to regularly muster a majority). Under this view, the Court has not sought to achieve a system that selects a robust proportion of the “worst of the worst” in increasing ratio as the level of aggravation rises, but rather to achieve a system in which the smallest possible number of the “worst of the worst” are executed without the Court having to stick its neck out by ruling capital punishment irreparably unconstitutional. But one hopes the Court has been acting in a more principled fashion. All in all,

arguments that only an anemic proportion of the “worst of the worst” should be sentenced to death are unpersuasive.

The Furman Court seemed committed to the proposition that one of the hallmarks of a non-arbitrary system would be that it imposed death sentences on a robust proportion of those who were eligible:

In Furman, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. . . . In Gregg, the plurality reiterated this understanding. . . . While the Court did not indicate in Furman and Gregg what death sentence ratio (actual death sentences per convicted death-eligible murderers) a state scheme would have to produce to satisfy Furman, plainly any scheme producing a ratio of less than 20% would not.77

If 20% was deemed woefully inadequate by the Court, this Article will assume that a ratio would need to be at least one-third—33 1/3%—to withstand constitutional scrutiny under Furman. This figure is significantly greater than 20%, yet still leaves the system a large margin for mercy and imperfect operation.

The Court’s emphasis in Furman on a robust death-sentencing ratio was very prominent.78 Despite this supportive beginning for a robust ratio, four years later Gregg made it apparent that the Court’s concern for a robust ratio had been misread. There are two decision-makers who can influence the death penalty ratio among the “worst of the worst”: prosecutors, who can exclude defendants from death-eligibility; and sentencers, who can exclude defendants from death-worthiness. The Furman Court focused on the ratio of death sentences among convicted murderers who were death-eligible, thereby possibly indicating that the Court was concerned with arbitrariness among both prosecutors and sentencers.79 The

77 Shatz & Rivkind, supra note 62, at 1288-89 (1997).

78 Indeed, it was so prominent that some states were convinced that it was the Court’s primary concern, and redrafted their statutes to make death sentences mandatory within the death-eligible groups—only to have those statutes struck down for failing to anticipate the individualized sentencing principle. See Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (striking down mandatory death-sentencing scheme); Roberts v. Louisiana, 428 U.S. 325, 335-36 (1976) (doing the same).

79 See Shatz & Rivkind, supra note 62, at 1288:

In Furman, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15-20% of convicted murderers who were death-eligible were being sentenced to death. Chief Justice Burger, writing for the four dissenters, adopted that statistic, citing
Court in Gregg, however, flatly rejected the idea that any constitutional oversight was due prosecutorial decisions regarding whether to pursue death sentences: “The existence of [this] discretionary [stage of prosecutorial decision-making] is not determinative of the issues before us. . . . Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution.” This holding is short-sighted in two respects: 1) “mercy” is not the only reason that prosecutors could decide not to pursue death sentences—other less noble reasons are not hard to imagine; and 2) as noble as the idea of “mercy” sounds, if it is dispensed on the basis of nothing more than sympathy, or illicit concerns like race, “mercy” is itself arbitrary. The Court nonetheless wrote an admiring testimonial to prosecutorial discretion a decade later, and has not revisited the issue. The Court’s refusal to oversee prosecutorial decision-making is a heavy blow to robust death sentence ratios because significantly more defendants are shielded from death sentences by prosecutorial decisions than by sentencer decisions. Thus, prosecutorial decision-making has always been, and remains today, the unopened black box of possible death-sentencing arbitrariness.

Even as to sentencer discretion, the Court’s concern was short-lived. Post-Gregg the Court has never entertained a challenge to a death-sentencing system based on an insufficiently robust death-sentencing ratio, despite

to four sources. Justice Stewart, in turn, cited to the Chief Justice’s statement as support for his conclusion that the imposition of death was “unusual.”

Id. Since the decisions of prosecutors not to seek death sentences for death-eligible convicted murderers is one of the two factors—together with sentencer decisions not to impose death sentences—affecting this ratio, there was reason to believe the Court was concerned with the exercise of prosecutorial discretion.

Discretion in the criminal justice system offers substantial benefits to a criminal defendant. . . . As we have noted, a prosecutor can decline to charge, offer a plea bargain, or decline to seek a death sentence in any particular case. Of course, “the power to be lenient [also] is the power to discriminate,” but a capital punishment system that did not allow for discretionary acts of leniency “would be totally alien to our notions of criminal justice.”

Id.

82 See App. E (120 defendants spared by sentencers); App. F (323 defendants spared by prosecutors).
opportunities to do so. In fact, the Court struck a blow against the possibility of a robust death-sentencing ratio when it ruled that each juror is free to come to that juror’s own conclusion that evidence is mitigating, without convincing any other juror to accept this way of thinking. The Court’s failure to enforce a robust death-sentencing rate means that more of the “worst of the worst” will escape death sentences, which adds to the arbitrariness of the system.

c. Does the Court’s Doctrine Consider Whether the Death Sentence Rate Increases with the Aggravation Level?

The Court has never considered whether the death sentence ratio increases with aggravation level. One of the best possible indicators that the system is fairly calibrated and non-arbitrary, however, would be that the more aggravated a criminal, the more likely that criminal is to receive a death sentence. (This assumes that mitigation does not tend to increase along with aggravation, a proposition that will be established later.) Thus, while there should be a robust death-sentencing ratio for all sufficiently aggravated criminals, one would expect that ratio to increase with the aggravation level in a fairly calibrated system. The Court’s failure to articulate this ideal allows legislatures and lower courts to avoid shaping systems to reflect this feature of a non-arbitrary system and thereby adds further to the system’s arbitrariness nationwide.

83 See Shatz & Rivkind, supra note 62, at 1296-99 (noting that no quantitative narrowing challenges have reached the Court). Certiorari was sought and denied in at least one case, litigated by Professor Rivkind herself. See People v. Sanchez, 906 P.2d 1129 (Cal. 1995), cert. denied, Sanchez v. California, 519 U.S. 835 (1996). Of course, it goes against the grain of capital defense lawyers to argue that the system is unconstitutional because too few death sentences are being imposed. Occasionally, though, a lawyer overcomes this mental hurdle. See, e.g., Lynne Tuohy, Some Heinous Killers Given Life Sentences, HARTFORD COURANT, Jan. 16, 2005, at A1 (lawyer for condemned killer argued in a 142-page brief that the client was arbitrarily selected for death in view of the fact that so many other heinous killers had received life sentences).

84 The Court’s doctrine is narrower than this, holding only that it is unconstitutional for a death-sentencing scheme to require the jurors to unanimously find evidence to be mitigating before it can be considered in the sentencing balance. See McKoy v. North Carolina, 494 U.S. 433, 443-44 (1990); Mills v. Maryland, 486 U.S. 367, 384 (1988). But extant death-sentencing schemes do not require any sort of concurrence among jurors concerning whether evidence is mitigating, effectively leaving each juror to decide this individually.

85 See infra p. 841-42.
d. Does The Court’s Doctrine Assure that When the “Worst of the Worst” Are Spared Death Sentences, It Is for Valid, Merits-Based Reasons?

The only non-arbitrary reason for sparing an offender arguably within the “worst of the worst” category is that he is not provably one of the “worst of the worst.” There will often be close issues about whether a defendant belongs in that category, and sparing the defendant is appropriate when the decision-maker’s best analysis, based on the merits of the case, is that the defendant is not one of the “worst of the worst.” The key, however, is that to be non-arbitrary such a decision must be based on the merits of the case, either in terms of the ability to prove the case, or of the weight of the aggravators against the mitigators. The decision should not be based on extraneous factors such as prosecutorial budgets, wishes of the victim’s survivors, or a whole host of other possible factors discussed in more detail later. Because the Court has declined to oversee prosecutorial death sentence decision-making, or to put many constraints on sentencer decision-making, the possibility of arbitrariness is very real.

3. Additional Structural Factors Conducing to Arbitrariness

In addition to the Court’s fragmented doctrine, there are four additional structural factors, not of the Court’s making, built into the death penalty system that conduce to arbitrariness.

First, local county-level prosecutorial decision-making authority concerning whether to pursue death sentences contributes to arbitrariness. In only two jurisdictions does an official with jurisdiction-wide authority make death penalty decisions: Delaware, which gives the power to the Delaware

---

86 See infra pp. 856-863. Race, of course, looms large as an issue in capital punishment. Unfortunately, no analysis based on either race-of-defendant or race-of-victim, or interaction of the two, is possible from these data. The only racial data known is the race-of-defendant information from the NAACP “Death Row USA” reports, see http://www.naacpldf.org (follow “Publications” hyperlink; then follow “Death Row USA” hyperlink); infra text at page 826, for the defendants in Appendix D who were sentenced to death. The race-of-defendant information is not available for the defendants who were spared by sentencers or by prosecutors in Appendices E and F. Race-of-victim information is not available for any of the three sets of defendants.

87 See DEL. CODE ANN. tit. 29, § 29-2504(6) (Michie 2009).
Attorney General, and the federal system, which gives the power to the U.S. Attorney General.\textsuperscript{88} Obviously, dispersed decision-making authority leads to wide disparities in decisions about whether to seek death sentences in similar cases. These disparities are exacerbated by the fact that funding of prosecutors' offices is also largely at the county level, which puts severe constraints on some counties' abilities to fund expensive death prosecutions.\textsuperscript{89} Likewise, funding for indigent defense in death cases is also often at the county level, again causing financial implications to loom large, or defenses to be under-funded.

Second, lack of any legislative regulation of the power of local prosecutors to pursue or not pursue death penalty sentences is problematic. When prosecutors have unfettered discretion to pursue death sentences, one would expect some death sentences to be pursued when death is \textit{not} warranted, and some \textit{not} to be pursued when death \textit{is} warranted. Just as there are no judicial constraints on prosecutors' powers, there are likewise no legislative constraints. The Indiana House of Representatives recently made news by proposing such a constraint—a bill mandating that county prosecutors seek a death sentence for child murderers under some circumstances—and predictably, prosecutors have objected.\textsuperscript{90}

The requirement of a unanimous jury verdict for a death sentence also conduces to arbitrariness of the current system. Of the thirty-nine death penalty jurisdictions (thirty-eight states and the federal government), all but five rely on juries to determine death sentences.\textsuperscript{91} All jury-sentencing jurisdictions


\textsuperscript{89} \textit{See infra} notes 189-190 and accompanying text for further discussion.


\textsuperscript{91} The Court in \textit{Ring v. Arizona}, 536 U.S. 584, 608 n.6 (2002), identified the sentencers in the thirty-eight death penalty states as follows: twenty-nine used jury sentencing; four used systems in which the jury rendered an advisory verdict, with the judge making the ultimate sentencing recommendation (Alabama, Delaware, Florida, and Indiana); and five had systems in which both aggravating circumstance fact-finding and death sentence decision-making was left to a judge (Arizona, Colorado (three-judge panel), Idaho, Montana, and Nebraska). \textit{Id. Ring} held the latter five systems unconstitutional because they denied defendants the right to a jury trial on the existence of aggravating circumstances, \textit{id.} at 609, although apparently it is still constitutional for a judge to make the sentencing decision after a jury has found
require a unanimous jury verdict for death, and in most of those jurisdictions a hung jury results in an automatic non-death sentence with no opportunity for the prosecution to retry the penalty phase. This puts veto power over a death sentence in the hands of each individual member of the jury, and hung juries are quite common in penalty phase decisions, often with counts of eleven to one or ten to two for death. Clearly, this allocation of power cannot be expected to produce non-arbitrary results.

Finally, arbitrariness is further supported by the wildly varying state appellate and federal habeas corpus reversal rates of death sentences. Higher court reversals of death sentences have a huge impact on death-sentencing rates because usually when a death sentence is reversed, it is not reimposed. Further, the fear of reversal undoubtedly causes many prosecutors to forego seeking death sentences in many death-eligible cases. Reversal rates are high overall, but manifest huge variations from state to state. It seems that aggravating circumstances. In the wake of Ring, Arizona, Colorado, and Idaho switched to jury sentencing (as did Indiana), while Montana and Nebraska adhered to judge sentencing, but only after a jury has found aggravating circumstance(s). Alabama, Delaware, and Florida adhered to their systems of a jury recommendation of sentence, followed by a judge’s sentencing decision. Thus, Alabama, Delaware, Florida, Montana, and Nebraska are the five states that do not rely on jury sentencing. See Jeffrey Abramson, Death-Is-Different Jurisprudence and the Role of the Capital Jury, 2 OH. St. J. CRIM. L. 117, 148 (2004) (explaining how affected states changed capital sentencing procedures in the wake of Ring).

Arizona, California, and Kentucky permit the retrial of a penalty phase that ends in a hung jury. See ARIZ. REV. STAT. § 13-703.01 (2005); CAL. PENAL CODE § 190.4(b) (West 1999); KY. REV. STAT. ANN. § 532.025 (West 2004); Skaggs v. Commonwealth, 694 S.W.2d 672, 681 (Ky. 1985) (interpreting statute to allow retrial of penalty phase when first jury deadlocks).

See 28 U.S.C. § 2254(a) (providing for federal courts to entertain habeas corpus applications from state prisoners who allege they are being held “in custody in violation of the Constitution or laws or treaties of the United States”). In this context, all federal habeas courts are considered “higher” than any state court.


some higher courts are so philosophically opposed to capital punishment that virtually no capital appeal will be permitted to pass appellate muster, \(^{98}\) while other appellate courts display such a hands-off attitude that even egregious errors will not constitute cause for reversal. \(^{99}\) Although it is hard to see how either the Supreme Court or legislatures can remedy these disparities, perhaps a more consistent pattern of results at the trial level would result in greater appellate consistency.

This overview of the legal landscape created by the Court’s capital jurisprudence and other systemic factors does not give much cause for optimism that the factual evidence will show the system to be operating non-arbitrarily. It is to that factual evidence that we now turn our attention.

II. EVIDENCE OF ARBITRARINESS FROM POPULAR PRESS REPORTS

A. Collecting the Data for 2004

Perhaps surprisingly, no mechanism exists—either governmental or non-governmental—for collecting data on all

---


I am a career prosecutor, but I am personally opposed to the death penalty . . . because I believe it is too expensive to administer. Death penalty cases receive the most stringent and far-reaching appellate review, and appellate courts (especially the Ninth Circuit) strain at gnats and swallow camels seeking reversible error in every death penalty case. And, of course, what they so assiduously seek, they usually find. This process leads to reversals, which leads to costly retrials and often reconvictions . . . . The entire death penalty process consumes valuable judicial resources that, in my opinion, would be better spent in making the entire criminal justice process more efficient.

*Id.*

\(^{99}\) The Texas Court of Criminal Appeals is most often mentioned. See, e.g., Andrew Hammell, *Effective Performance Guarantees for Capital State Post-Conviction Counsel: Cutting the Gordian Knot*, 5 J. APP. PRAC. & PROCESS 347, 375 (2003) (“News coverage of problems with capital habeas review in Texas . . . resulted in a torrent of criticism of the Court of Criminal Appeals. . . . The Texas Lawyer published a lengthy article detailing allegations of the Court of Criminal Appeals’s lax oversight of the list of qualified habeas counsel.”); Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court’s Patience*, N. Y. TIMES, Dec. 5, 2004, at A1 (explaining the U. S. Supreme Court’s battles to force the Texas Court of Criminal Appeals to be more receptive to claims of error in capital cases).
death-eligible murders in the United States. To gain a nationwide perspective on the operation of capital punishment, one must piece together data from many sources. Set forth below are the steps undertaken to compile as complete a database as possible of death-eligible offenses with a sentence outcome in 2004. Ultimately, primary reliance was placed on news reports appearing in searchable online databases.

To begin, from the invaluable quarterly report “Death Row USA” published by the NAACP Legal Defense Fund, one can identify with complete accuracy the defendants who were sentenced to death in 2004.\textsuperscript{100} The “Death Row USA” reports cover calendar-quarters of the year and are published two to three months after that quarter has closed. These reports do not explicitly attempt to identify defendants who have been newly added to death row. To generate such a list one must painstakingly compare the list from one quarter to the list from the next quarter to see which of the approximately 3400 names are new entries.\textsuperscript{101} The research for this Article compared the last quarter 2003 report with the first quarter 2004, the first quarter 2004 with the second quarter 2004, the second quarter 2004 with the third quarter 2004, and the third quarter 2004 with the fourth quarter 2004. These comparisons revealed 142 defendants who were sentenced to death in calendar year 2004. The figures throughout the rest of the Article are based on 140 death-sentenced defendants, rather than the correct total of 142, and a total of 583 cases rather than 585, because just as this Article was going to press the author found two defendants he missed in the initial “Death Row USA” comparisons. The inclusion of these two defendants would have no significant effect on the Article’s analyses. More information about these two defendants are included at the end of Appendix D. Of the 140 death-sentenced defendants, 126 were first-time death sentences and fourteen were ressentences after appellate

\textsuperscript{100}See http://www.naacpldf.org (follow “Publications” hyperlink; then follow “Death Row USA” hyperlink).

\textsuperscript{101}There are actually three tasks. One is to identify names making their first appearance from one report to the next—those who are death-sentenced for the first time. The second is to identify which names have become “unbracketed” from one report to the next—a name in brackets indicates a death-sentenced inmate whose sentence has been overturned and further legal action is pending, so a name becoming unbracketed means the death sentence has again been imposed. The third task is to track down each unbracketed name to see whether it is unbracketed because the defendant was ressentenced to death at the trial level (in which case it should be included in our database), or whether an overturned death sentence was reinstated by an appellate court (not to be included in our database).
reversals. Early in 2005, however, the Supreme Court ruled the death penalty unconstitutional for offenders who were less than eighteen years of age at the time of the murder.\footnote{See Roper v. Simmons, 543 U.S. 551, 578 (2005).} There were two death sentences of seventeen-year-olds in 2004.\footnote{See App. D, DS 57, 134. The database searches also revealed three seventeen-year-olds who were spared by sentencers, see App. E, SS 50, 68, 117, and six sixteen or seventeen-year-olds who were spared by prosecutors. See App. F, PS 2, 96, 111, 239, 258, 311. See also David McCord, Uncondensed Appendices to Lightning Still Strikes, (Feb. 26, 2006) (on file with author), available at http://facstaff.law.drake.edu/david.mccord/brooklynAppendices.pdf [hereinafter Uncondensed Appendices].} These defendants were left in the database because they indicate how the capital punishment system was working at the time the sentences were imposed. The two death sentences that will be reversed are simply the first of many of these sentences that will ultimately not withstand appellate review.

The next step after finding the names of the death-sentenced defendants was to search on the Web for details about each defendant. Factual information was found for about 80% percent of the defendants through newspaper databases on Westlaw and Lexis. For the remaining cases general Web searches were undertaken. These occasionally yielded no results—for those few cases facts were developed through telephone calls to prosecutors, defense lawyers, or newspaper reporters.\footnote{See Uncondensed Appendices, supra note 103, at App. D, DS 48, 21, 63, 91, 79, 81, 85, 132, 135, 140.}

Two other sets of defendants needed to be examined to be compared with the death sentence cases: those whose sentencer (usually a jury) spared them from death, and those who were spared from death by prosecutorial decisions not to seek or to bargain away the death penalty. There is nothing in existence like “Death Row USA” to collect these two sets of cases. The recent burgeoning of searchable online databases of newspapers, however, combined with the fact that death-eligible cases are highly newsworthy, enabled compilation of large numbers of cases in both these sets (although compiling such sets of cases is a laborious, time-consuming task). Date restricted searches of “death /s sentence” and a couple of more specific searches\footnote{I also used “death /s sentence /s jury /s spared” and “death /s sentence /s plea /s avoid.” These searches generated only a few additional cases. Of course, the simple “death /s sentence” generated an enormous number of irrelevant hits, but experimentation showed that any more restrictive search excluded too many relevant articles.} identified 120 defendants in 2004 who were
spared a death sentence by a sentencer, and 323 defendants who were spared from death sentences by prosecutors. The three sets of defendants will be referred to as “Death-Sentenced” defendants (numbered with the prefix “DS” in Appendix D), “Sentencer-Spared” defendants (numbered with the prefix “SS” in Appendix E), and “Prosecutor-Spared” defendants (numbered with the prefix “PS” in Appendix F).

B. The Strengths and Weaknesses of the News Reports as Research Tools

Using news reports as the primary data source to analyze the death penalty system is not the traditional research approach. The traditional technique, pioneered by Professor David Baldus and his colleagues, is to choose a discrete time period in the past in a particular jurisdiction, identify as many homicides as possible during that period, develop rubrics for coding the pertinent facts, train researchers (often law students) to recognize those facts, and then send those researchers to mine the court files and other available documentation (including news reports) to complete the rubrics. Once the data is mined, statistician members of the team apply their methods (often some form of multiple regression analysis) to attempt to determine what facts seem to have important effects on the outcomes of the cases.\(^{106}\)

The “Baldus technique” generates wonderfully rich and complete data, and well-supported and illuminating results. The news report approach used in this Article is not an equivalent of the Baldus technique. The Baldus technique does, though, have three drawbacks. First, it is quite labor-intensive and expensive, even when limited to a particular time frame in a specific jurisdiction, and thus has never been attempted on a nationwide basis. By contrast, a news report

\(^{106}\) The most famous study, by Professor Baldus and his colleagues, concerned about 1,000 homicides in Georgia over a seven-year period in the 1970’s. See David C. Baldus et al., Charging and Sentencing of Murder and Voluntary Manslaughter Cases in Georgia, 1973-1979 (1981), available at http://webapp.icpsr.umich.edu/cocoon/NACJD-STUDY/09264.xml. This study is famous because it underlay the nearly-successful challenge to capital punishment on the basis of racial discrimination in McCleskey v. Kemp, 481 U.S. 279 (1987), which held in a five to four decision that statistical evidence of racial discrimination is insufficient to demonstrate an unconstitutionally racially-motivated death sentence in a particular case. For another example of the Baldus technique, see Baldus, et al., Racial Discrimination, supra note 8, at 1662-1710, which describes the methodology and analysis of 524 death-eligible cases in Philadelphia from three time periods—1983-85, 1986-89, and 1990-93—for racial effects.
approach is relatively inexpensive and can attain a nationwide overview, albeit with much less detail and completeness. Second, the Baldus technique’s thoroughness means that by the time its results are compiled and analyzed, they are at least a couple of years old. By contrast, the approach in this Article enables study of a very recent set of cases. The third drawback of the Baldus technique is that the statistical analysis, while very illuminating, is also quite difficult for the non-statistically-inclined to understand. By contrast, this Article uses simple arithmetic to compile its results and is therefore in some ways more accessible. Thus, while the Baldus technique constitutes state-of-the-art research, it is hoped that this Article’s approach provides a different and valuable perspective.

This Article’s approach will be useful, though, only to the extent it is based on reliable data. Three questions must be asked: 1) Which defendants are present in, and missing from, the three sets? 2) How complete is the information that can be gleaned from the news reports about the defendants that were found? 3) How confident should we be that the facts were correctly reported?

As to which defendants are included, the three sets of cases are asymmetric: every single Death-Sentenced defendant is included because of their availability through the “Death Row USA” reports, but defendants in Sentencer-Spared and Prosecutor-Spared sets were only found if intensive online searching turned up at least one news report relating to their cases. While an estimate can be assayed concerning the minimum number of defendants missing from the Sentencer-Spared and Prosecutor-Spared sets, the missing defendants

---

107 It is possible to do a very rough calculation of the percentage of murder convictions in death penalty states that is represented by this Article’s sample of 583 defendants. As of the most recent year for which data is available—2002—the Bureau of Justice Statistics estimated there were 8,990 murder and non-negligent manslaughter convictions nationwide. U.S. DEP’T OF JUST., BUREAU OF JUST. STATISTICS, STATE COURT SENTENCING OF CONVICTED FELONS 2002 tbl.4.1 (2005), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf. Let’s assume that figure held about steady for 2004. Next, according to the most recent census—2004—about 13% of the U.S. population resides in non-death-penalty states. See U.S. DEP’T OF COM., BUREAU OF THE CENSUS, STATE AND COUNTY QUICK FACTS, http://quickfacts.census.gov/qfd/states/00000.html (last visited Jan. 27, 2006). The estimated population of the United States was 293,655,404 as of July 1, 2004. Approximately 38,175,203, or about 13%, resided in the twelve non-death penalty states: Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin. Let’s assume that percentage held about steady also. Finally, let’s assume that the percentage of murder
are problematic because they derogate from the ideal condition of a complete database of all death-eligible defendants whose cases were resolved in 2004. The silver lining in this cloud, however, is that the missing defendants could only strengthen the Article’s case for arbitrariness: additional Sentencer-Spared and Prosecutor-Spared defendants would decrease the robustness of the death-sentencing rate, perhaps dramatically.

Second, how completely are the facts of each case reported? The most complete reporting is of factors that make the defendant more blameworthy—what this Article will later describe as “depravity points.” Since it is primarily these factors that make the cases newsworthy to begin with, reporters are quite good about highlighting them. Reporters focus on mitigating factors less often. One reason may be that those factors are deemed to be of less interest to the public. Another reason is that in the Prosecutor-Spared set of defendants, often the mitigating factors are unknown because the penalty phase was not litigated. Nonetheless, there is sufficient reporting of mitigating factors to derive very definite patterns.108

Third, how confident should we be that the reporters correctly reported the information? This Article relies on media self-policing—presumably reporters who get things wrong consistently will not be reporting long enough to bias the sample. Internal checks also help validate the reporting of the facts, because almost every defendant generated multiple news articles, and it was rare to find discrepancies among the facts reported in the different articles.

Thus, while recognizing that the sample of cases is imperfect, this Article will proceed on the premise that the data are qualitatively and quantitatively sufficient to permit comparison between the set of defendants who received death sentences, and the sets of those who were eligible to, but did not. Whatever the flaws in these data, they are certainly

108 See infra notes 126-30 and accompanying text.
better than anything on which the Court relied in Furman.\textsuperscript{109} The Furman majority’s conclusion of arbitrariness could be more accurately described as impressionistic than empirical. Finally, at a bare minimum, the news reports contain several odd, startling, and remarkable moments, ten of which are set forth in Appendix H.

\textbf{C. Overview of the Three Sets of Defendants}

\textit{Jurisdictions:} The number of defendants in each of the three sets is detailed by jurisdiction in Appendix A. The jurisdictions with the most total defendants from all three sets are not surprising—they are several of the populous and active (at least in terms of litigating death-sentencings, although not necessarily in terms of carrying them out) death penalty jurisdictions: Texas (72),\textsuperscript{110} Florida (54), California (38), Pennsylvania (38), North Carolina (31), Ohio (31), and the federal government (29). The next tier down in terms of activity is comprised of Louisiana (21), Oklahoma (20), and Virginia (20) and Illinois (19).

\textit{Years of the crimes:} Appendix B sets forth the years of the crimes for which the defendants were being prosecuted. A relatively small number of the crimes date from before 1995, and several of those that do, date back to the 1970’s and 1980’s. Most of the pre-1995 crimes involved resentencings after appellate reversals (sometimes more than one in a case), although a smattering were newly solved due to DNA technology. A fair number of crimes occurred between 1995 and 1999. These also often involved resentencings or newly solved cases, although a couple experienced long delays in the original proceeding due to legal maneuvering. The bulk of the

\textsuperscript{109} The members of the majority relied primarily on their personal experiences in dealing with death cases while on the Court, most explicitly in Justice White’s reliance on his “10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty.” Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring). The opinions are conspicuously lacking any empirical analysis, or any citation of empirical research, except for raw figures on numbers of death sentences in various years, and some additional raw figures about racial distribution of death sentences.

\textsuperscript{110} Contrary to popular belief, however, Texas is not the most gung-ho state for the death penalty. See Maro Robbins, Texas Not Really Executioners’ Mecca, SAN ANTONIO EXPRESS-NEWS, Mar. 13, 2004, at 1A (citing statistics showing that Texas imposed death sentences at a rate just below the national average, and that while Texas is swifter than most states in carrying out death sentences, it is not the swiftest; there is, though, great variation among Texas’s 254 counties).
crimes—76% of Death-Sentenced defendants, 78% of Sentence-Spared defendants, and 85% of Prosecutor-Spared defendants—were recent, that is, from the four-year period between 2000 and 2004.

**Ages of defendants:** The ages of defendants within a year of the times of the crimes are set forth in Appendix C. In creating the age categories, those categories toward the low end of the age range were formulated to encompass fewer years (16-17, 18-19, and 20-21) than the ones toward the higher end of the range (22-25, 26-29, 30-39, 40-49, 50-59, and 60+). This method was based on the theory that youthful age can count as a mitigating factor, but that any age above twenty-one is unlikely to be considered particularly mitigating by a sentencer. The primary conclusion that can be drawn from Appendix C is that the proportion of defendants in each age group does not vary significantly among the Death-Sentenced, Sentencer-Spared, and Prosecutor-Spared groups. Of the 547 defendants whose ages were revealed by the news reports, 517 were between eighteen and forty-nine years of age. Only eleven defendants were sixteen to seventeen years of age (and they would not even be eligible for death sentences as of March 2005). On the other end of the spectrum, only four defendants were sixty or older, and only fifteen were between fifty and fifty-nine years of age. While the death sentence rates do not progress in linear fashion, there is an overall trend of slightly higher rates with increasing age after age twenty-nine, presumably because sentencers believe that the older a person becomes, the more likely they are to know better than to murder someone. The only seeming anomaly is that while one might expect the death-sentencing rate to be less in the eighteen to nineteen age group than in the older age groups, sentencers levied death sentences in the eighteen to nineteen age group at a higher rate than in the twenty to twenty-one and twenty-six to twenty-nine age groups.

---

111 Sometimes a defendant’s age at the time of the crime is clear because a news report contemporaneous with the crime gives the defendant’s name. For many defendants, though, the news articles date from a later year after the case has progressed through the system. For these defendants, the news reports commonly give the defendant’s age at the time the article is written. Thus, for example, if the crime was committed in 2001, and the news report comes from 2002 and gives the defendant’s age as twenty-two at that time, the defendant might have been twenty-one at the time of the crime, or, depending on his birthday, might have been twenty-two.

112 See _Roper v. Simmons_, 543 U.S. 551, 578-79 (2005) (holding persons who were under age eighteen at the time of commission of an otherwise death-eligible crime are ineligible to receive a death sentence due to youthful age).
Appendices B and C demonstrate that the Death-Sentenced, Sentencer-Spared, and Prosecutor-Spared sets of defendants are suitable for direct comparison: there are sufficient numbers of each, and the sets are not skewed relevant to when the crimes were committed or the ages at which defendants committed them.

D. The Depravity Point Calculator: A Method for Determining the “Worst” Murderers

There are two steps in determining the “worst of the worst” murderers. The first step is to determine which murderers are the “worst” based on aggravation level. The second step asks whether, considering the mitigating evidence, these “worst” murderers seem like the “worst of the worst.” The purpose of this sub-part is to explain the Depravity Point Calculator—a method used for performing the first step of the analysis, that is, for determining the “worst” murderers in terms of aggravation.113

The Depravity Point Calculator is a means for comparing the aggravation levels of defendants.114 The Depravity Point Calculator has two aspects. First, it lists most of the factors that can make a case more aggravated. These factors were generated by reading hundreds of news reports, on the theory that reporters have a good idea of what matters to the public. Most of the factors are based on common sense, and many track the aggravating circumstances in death penalty statutes.115 The second aspect of the Depravity Point Calculator is that it assigns a weight to each factor; it may assign a weight of ‘3’ (most aggravating), ‘2’ (next-most aggravating), or ‘1’ (least aggravating).116 This section lists each aggravating factor, categorized by weight.

---

113 Consideration of the effects of mitigation evidence will be undertaken later. See infra notes 126-30 and accompanying text.
114 I make no claim that this system always comes up with precisely the right rank order of cases. Many other, and possibly better, systems could be conceived. I do believe, though, that any rational system of ranking the aggravation level of the cases would come out with results that do not differ much.
116 The Depravity Point Calculator 3-weight factors closely track the analysis of factors that could increase the likelihood of a death sentence, as identified in a study by noted researchers examining a large sample of Georgia homicides a couple of decades ago. See David C. Baldus, et al., Law and Statistics in Conflict: Reflections on McCleskey v. Kemp, in HANDBOOK OF PSYCHOLOGY AND LAW 251 (D. K. Kagehiro & W.S. Laufer eds., 1992). Seven of the nine most aggravating factors found in that
3-weight factors. These nine factors are the most aggravating; indeed, the presence of any one of them is sufficient to put a defendant within the category of the “worst” murderers:

Additional murder. Since every death-eligible case involves at least one murder, the first murder is a given and does not add depravity points—thus, only a multiple murderer would accrue depravity points on this factor. But, as is true with most of the factors, a defendant can accrue the factor more than once; for example, a triple murderer would accrue this factor once for each additional murder beyond the first (2 additional murders times 3 depravity points, for a total of 6 depravity points). Further, murder of a visibly pregnant woman (or one known by the defendant to be pregnant even though the pregnancy is not visible) counts as an additional murder for the killing of the fetus.

Sexual assault.

Avenge official acts. The murder was committed to avenge the actions of a governmental official, like a judge, prosecutor, or police officer. This does not include a spur-of-the-moment killing of a police officer, which is a 2-weight factor. The “avenge official acts” factor was rare in 2004, present in only one case.117

Insurance, etc. motive. The murder was committed with great premeditation for crassly pecuniary reasons. (This does not include murder committed during an armed robbery, which is a 2-weight factor.)

Torture. The victim was subjected to prolonged physical torture before death. (Relatively short suffering, no matter how appalling the defendant’s actions, does not qualify; instead, it would qualify for one of the 2-weight factors.)

Prisoner/escapee. The defendant was a prisoner or escapee at the time of the murder, which strongly indicates that the defendant needs to be wholly incapacitated through death so that he cannot kill again while imprisoned or after an escape.

Incarceration violence. While imprisoned the defendant committed serious acts of violence against correctional officers or other inmates. Again, the incapacitation argument is obvious.

study comprise seven of the nine of the Depravity Point Calculator 3-weight factors: avenge official acts; torture (physical); insurance, etc. motive; sexual assault; additional murder; prisoner/escapee; and murder for hire. Id. at 260. I excluded “mental torture involved” as being too nebulous, and included incarceration violence and terrorist motive. Admittedly, limiting the aggravation weight to three levels is simplistic, but some concessions had to be made for ease of use.

117 See Jovan House (SS 96, App. E) and Raymond Saunders (PS 188, App. F). These culprits and a cohort ambushed a Baltimore police detective as revenge for testimony the detective had given against Saunders’s half brother.
Murder for hire. Like the “Insurance, etc. motive,” this shows great deliberation, and a crassly pecuniary way of thinking about the value of human life.

Terrorist motive. Murder was committed to make a political statement.

2-weight factors. These twenty-five factors are very serious:

Attempted murder.

Robbery. This is a very frequently occurring factor, and some argue that it results in a great deal of over-inclusion.\textsuperscript{118} Robbery, however, is an extremely serious contemporaneous felony, and cannot be ignored—indeed, it correctly matters greatly to both prosecutors and sentencers.\textsuperscript{119} Although an armed robbery where the victim is killed should not in-and-of-itself qualify for death-eligibility, there are plenty of robber-murderers who are among the worst criminals because they accrue additional depravity points for other factors. There is one limiting principle—no matter how many robberies a defendant committed, he could accrue this factor a maximum of two times. This was necessary because as to a very few defendants who committed numerous robberies in which the victims were not physically injured, counting 2 depravity points for each robbery seemed to overstate their relative culpability.

Kidnapping.

Arson.

Serious assault. This is something short of attempted murder, but still showing a great propensity for violence. This factor appears most often in aggravated domestic violence cases.

Escape or escape attempt. A prior escape, or escape attempt by a defendant shows a possible need for the ultimate in incapacitation. (If the defendant committed a

\textsuperscript{118} Even one of the few academics to strongly support capital punishment, Professor Robert Blecker, has said, “But, the majority of people on death row are robber-murderers, who did not commit the kind of killings that qualify them as ‘the worst of the worst.'” Symposium, \textit{supra} note 13, at 176. I have not checked Professor Blecker’s assertion that the “majority” of death row inmates are robber-murderers, nor his implication that they are robber-murderers without any additional aggravating factors. In fact, I doubt that either assertion is empirically correct. For example, of the 140 defendants sentenced to death in 2004, slightly less than half of them (sixty-eight) had robbery as part of the reason they were sentenced to death (for most, the robbery conviction was one of the reasons for a death sentence). Further, for many of the sixty-eight, there were additional aggravating factors beyond the robbery.

\textsuperscript{119} Thus Recommendation 28 of the Illinois Commission on Capital Punishment, Report of the Governor’s Commission on Capital Punishment (2002), \textit{available at} \url{http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/complete_report.pdf}, arguing for \textit{not} counting contemporaneous felonies (including robbery) to make murderers death-eligible is completely contrary to justice and common sense.
murder while an escapee, this would not be counted here, but as a 3-weight factor).

**Gang involvement or drug dealing.** This refers either to serious gang involvement, or major drug dealing. These activities often overlap; to avoid over-counting, a defendant involved in gang-related drug dealing only accrues these depravity points once.

**Other substantial record.** A criminal record indicating long-running antisocial behavior (but not including any of the other crimes already listed—sexual assault, attempted murder, robbery, kidnapping, arson, or serious assault—which would be counted in those categories).

**Police officer victim.** Police and prosecutors seem to view this as one of the worst factors and would surely argue that it should be classified as a 3-weight factor. But considered dispassionately, killing an officer, which usually occurs spontaneously, does not seem to be a *sine qua non* of the worst criminals. In any event, many killers of police officers accrue depravity points in other ways that clearly put them among the worst criminals.

**Victim 12 or younger.** Our hearts go out to victims who seem less able to protect themselves; the image of the promise of a young life cut short haunts us. A murderer who kills a child seems particularly heartless.

**Multiple stab/bludgeon.** This factor, and the remaining 2-weight factors, all involve particularly gruesome ways of committing the murder, or acts evidencing particularly evil mind-sets. Multiple stabbing or bludgeoning illustrates a great capacity for violence.

**Poisoning/starvation.** This is indicative of great premeditation.

**Strangulation, etc.** There are several means of killing that involve disabling the respiratory system: strangulation, suffocation, cutting the throat, and drowning. These all inflict severe suffering on the victim, and indicate premeditation on the part of the killer.

**Burning to death.** Causing death by burns or by smoke inhalation obviously involves severe pain to the victim and premeditation by the killer.

**Execution-style/rifle/shotgun.** This includes infliction of a wound to the head at close range when the victim is at the defendant's mercy. This also includes any murder committed with a rifle or shotgun, which requires more planning than handgun murders.

**Three or more shots with a handgun.** This is indicative of a serious bent toward violence.

**Multiple violence.** This refers to situations in which the victim was subjected to more than one type of physical injury by the killer. This is a fallback category—if the multiple forms of violence are any of the ones listed above, they would be included there. Thus, this category consists
mostly of cases where the killer beat the victim, but not in a way that is severe enough to be multiple bludgeoning to cause death, and then killed the victim by another means. Multiple forms of violence indicate a particular propensity for violence.

**Victim bound.** The killer bound the victim before the murder, thus indicating that the victim is particularly vulnerable, and the crime particularly premeditated.

**Victim begged.** There is evidence that the victim begged for life, thus indicating the defendant’s premeditation and callousness in killing the victim anyway.

**In presence of child.** Killing the victim in the presence of a child is heinous because of the trauma inflicted on the child, particularly when—as is true in many cases—when the victim is the child’s relative.\(^{120}\)

**In the presence of a parent.** Killing a minor child in front of the child’s parent is very depraved.\(^{121}\)

**Hate crime.** Murder of a victim for reasons of race, ethnicity, religious belief, or sexual orientation shows a particularly warped mind.

**Violated court order.** This factor arises in domestic violence situations where a woman has obtained a protective order against a man, but he violates it and kills her. Such a killer exhibits particular contempt for the rule of law.

**Relish killing.** This refers to actions before or during the murder indicating that the defendant enjoyed the killing.\(^{122}\)

**Mutilate corpse.** Dismembering a corpse, carving words into it, burning it, or the like, illustrates a particularly evil state of mind.

**1-weight factors.** These eight factors are heinous, but not to the degree of the 2 and 3-weight factors:

**Home burglary.** This is a particularly frightening factor, and would warrant a 2-weighting except for the fact that

---

\(^{120}\) The defendant does not accrue these depravity points if he also kills the child, but, of course, he would then accrue other depravity points for multiple victims and for a child aged 12 or younger.

\(^{121}\) If the parent is also killed, these depravity points are not accrued, but rather the defendant accrues depravity points for an additional murder.

\(^{122}\) See DS 37 (App. D) (defendant wrote on wall of murder scene in lipstick: “Killing is my business now”); DS 43 (App. D) (defendant, a prisoner, wrote in letter before murder of another inmate that he was waiting for cops to “mess up” and leave him around another inmate “so I can test my hand”); DS 70 (App. D) (defendant, who knew victim was celebrating birthday, yelled “Happy birthday!” as he stabbed victim thirteen times in neck in parking lot); DS 119 (App. D) (defendant shot and killed one victim and taunted second victim between gunshots); PS 9 (App. F) (defendant chose to kill eight-month pregnant woman by stabbing her rather than shooting her so she would suffer more); PS 61 (App. F) (defendant forced victim to strip and walk into grave before he shot her, boasting afterward about watching her head explode).
invariably a defendant who commits a home-invasion burglary does so to commit one of the crimes that is a 3-weight (sexual assault) or 2-weight (most often robbery) factor. As a result, counting the home invasion as a separate 2-weight factor would be over-counting.

**Luring victim.** For a defendant to lure the victim to the site of the murder indicates premeditation.

**Grave risk to others.** This factor is narrowly construed to limit it to use of an assault rifle in a public locale outdoors, use of an explosive device, or firing multiple shots indoors in a crowded room.

**Callous attitude after.** Actions such as eating the victim's food after the murder, watching television in the room with the victim's body, and the like, indicate that the defendant is so heartless that the murder seems like a relatively normal life event to him.

**Victim complied with robbery.** This refers to instances of robbery in which the victim complied with the robbery demand, or was shot before the victim was even given a chance to comply. Such behavior indicates the defendant's hardness of heart in killing the victim when the murder was unnecessary to accomplish the underlying felony.

**Victim 70 or older/frail.** Elderly victims tug at our hearts in terms of their relative vulnerability (although less so than children because the promise of a long life is less), as do disabled victims.

**Motive eliminate witness.** This factor is narrowly construed to limit it to situations where the defendant killed to eliminate a witness not contemporaneous with another felony.123

**Dumping/burying body.** These actions, like mutilating the corpse (although in a less perverse way) indicate callousness of heart.

A tally sheet of all aggravating factors divided by category was used to rate the aggravation level of each case. The tally sheet was transformed into individual depravity point grids for each defendant by deletion of irrelevant aggravating factors. These grids allowed for the calculation of the depravity point totals for each defendant; these are the totals that appear in Appendices D, E, and F.

123 As to contemporaneous killing during felonies like sexual assault, robbery, and kidnapping, it can always be argued that the purpose of the murder was to eliminate the victim as a witness; however, this aspect of those felonies is already factored into the higher weight assigned to them. There are, however, quite a few cases where defendants, with premeditation, set out to eliminate witnesses to crimes in the past. These are separate incidents that should accrue a separate depravity point.
The Depravity Point Calculator provides not only a means to analyze the relative level of aggravation of murders, but also a means of determining which murderers are not aggravated enough to be death-worthy. Clearly, a murderer who accrues no depravity points is not among the “worst” (which is not to downplay the fact that every murder is horrible—but the task here is to determine which murderers are the “worst”). Who, then, are these no-depravity-point, “normal” murderers? Typically, they fall into one of four categories: they are those who kill an adult in a domestic context (usually husband/wife, boyfriend/girlfriend) relatively spontaneously; kill an acquaintance during a disagreement, often when both parties are intoxicated; kill a relative stranger at a bar or nightclub, again often when both parties are intoxicated; or kill in a dispute over illegal drugs. Almost invariably these murders are accomplished with one or two handgun or knife wounds. These “normal” murders in fact account for the bulk of wrongful homicides, making murders that have aggravating factors stand out as being worse than normal murders.

If, however, we are seeking the “worst” murderers, it is not sufficient to exclude only murderers who accrue no depravity points. There are also some low-depravity-point murderers who are “very bad,” but not among the “worst.” Specifically, the intuitive cut-off point for the “worst” seems to fall at the level of 6 depravity points, unless a lower-depravity point case includes a 3-weight factor. Put differently, any murderer with a 3-weight factor, or any murderer with 6 or more depravity points, falls into the “worst” category; any murderer with a 1 or 2 depravity point score, or a 3-to-5 score that does not include a 3-weight factor, does not. The reader, of course, is free to peruse the online detailed versions of Appendices D, E, and F and to draw the line elsewhere. But it is hard to dispute that a murderer with any of the 3-weight

---

124 See David Simon, Homicide: A Year on the Killing Streets 164 (1991) (reporter who spent a year with Baltimore homicide detectives comments that there are only “rare victims for whom death is not the inevitable consequence of a long-running domestic feud or a stunted pharmaceutical career”); David McCord, A Year in the Life of Death: Murders and Capital Sentences in South Carolina, 1998, 53 S.C. L. Rev. 249, 271-72 (2002) (finding that of the 153 homicides in South Carolina in 1998 about which information was available, twenty were spontaneous killings among persons with close relationships, twenty-nine were acquaintance disputes, nine arose at a bar or nightclub between strangers, and fourteen arose out of drug disputes—for a total of 72 of 153).

125 See Uncondensed Appendices, supra note 103.
factors is among the “worst” in terms of aggravation. It is also hard to see how a murderer with a depravity point total above 6 would avoid being classified as one of the “worst,” given that to attain that status a defendant would have to accrue either two 3-weight factors, a 3-weight factor and two other factors, or no 3-weight factors but at least three other factors. On the other hand, murderers with 5 or fewer depravity points that do not include a 3-weight factor just do not seem to measure up to the appellation of the “worst.” They are very bad criminals, but not the “worst” when one sees how many more aggravated murders exist.

Appendix D summarizes, analyzes, and calculates the depravity points for each of the 140 Death-Sentenced defendants, and arranges the cases in order from most to least depraved. Appendices E and F do the same for the 120 Sentencer-Spared defendants and the 323 Prosecutor-Spared defendants, respectively.

E. Mitigation and the “Worst of the Worst”

The first step in determining the “worst of the worst,” as we have just seen, is to create a means for identifying the “worst” based on aggravation. We now move to the second step—factoring in mitigation to eliminate some defendants from the “worst of the worst,” leaving those who truly are the “worst of the worst.” This step of the analysis is much trickier. While most people will agree on what factors aggravate a murder, and on roughly how much those factors count in aggravation, there are bound to be great differences of opinion about what factors are mitigating and how much weight to accord them. For example, does the fact that the defendant became dangerous due to a traumatic childhood strongly mitigate, or does it actually aggravate because it shows a future propensity for violence? Does the fact that the defendant was high on illegal drugs at the time of the murder mitigate the crime, or have no effect because the defendant chose to ingest the substance? And if a traumatic childhood or an illegal high counts as mitigation, how does a sentencer balance such a factor against the aggravation, for example, of a triple homicide? These perplexities are so profound that it was impossible to devise a “mitigation point” system equivalent to the Depravity Point Calculator.

Despite the inability to quantify mitigation, the news reports provide helpful information in figuring out a way to
factor in the effects of mitigation. The reports show three things. First, mitigating evidence predictably falls into one of six categories: 1) horrific upbringing, 2) mental problems (retardation, insanity, or diagnosable and serious mental problems short of insanity), 3) intoxication or an illegal drug habit, 4) relative youthful age, 5) higher culpability of another culprit in a multiple perpetrator scenario, and 6) positive character traits of the defendants. For each of the 260 Death-Sentenced and Sentencer-Spared defendants in Appendices D and E, the types of mitigation evidence that were offered, as gleaned from the news reports, are charted below the depravity point grids. This mitigation evidence offered and noted in the news sources was analyzed and can be accessed on the online database.

The second thing the news reports show about mitigating evidence is that it sometimes causes sentencers to refuse to impose, and prosecutors to forego, seeking a death sentence. Mitigation is surely one of the primary factors that decrease the robustness of the death-sentencing rate. It is important to bear in mind, however, that the effect of mitigating evidence in any particular case on either sentencers or prosecutors is wholly unpredictable.

The third thing the news reports show about mitigation is not intuitively obvious: the kinds of mitigation evidence are, on average, about the same in prevalence and degree anywhere along the depravity point scale—the mitigation evidence presented by a defendant with a 5 point depravity score is likely to be very similar to that presented by a defendant with a 30+ point depravity score. That is because the types of mitigation that can be offered fall into the limited number of categories listed above, and, as will be discussed below, end up sounding quite similar across the range of defendants.

As to the prevalence of mitigation evidence, Appendix G shows a breakdown of the types of mitigation offered in the Death-Sentenced and Sentencer-Spared cases (although a fair proportion of cases—sixty-seven out of 260—fall into the “unknown” mitigation category because reporters are not as

---

126 Indeed, one suspects that it is the primary factor for sentencers, since the only other possible factors are that the murder is simply not depraved enough (unlikely, since almost any aggravated murder seems very depraved to most jurors), or that a juror gets cold feet and cannot “pull the trigger” on a death sentence (something that probably happens with some regularity). As to prosecutors, potential mitigation is certainly a significant factor in foregoing seeking death sentences, but not the only one, and often not the most important one—as we will see later. See infra pp. 856-864.
assiduous in reporting mitigation evidence as in reporting the facts of the crimes). The primary finding is that defense lawyers have learned the value of “human frailty” mitigation—the first four categories listed above (horrific upbringing, mental problems, drug habit/intoxication, and youthful age). Below is a chart that shows the proportion of cases in each of six depravity point ranges in which the defendants offered human frailty mitigation, where mitigation was mentioned in the news reports:

<table>
<thead>
<tr>
<th>Depravity Point Level</th>
<th>Death-Sentenced</th>
<th>Sentencer-Spared</th>
</tr>
</thead>
<tbody>
<tr>
<td>30+</td>
<td>7/8</td>
<td>3/4</td>
</tr>
<tr>
<td>20-29</td>
<td>7/7</td>
<td>6/6</td>
</tr>
<tr>
<td>15-19</td>
<td>13/14</td>
<td>5/5</td>
</tr>
<tr>
<td>10-14</td>
<td>23/31</td>
<td>13/14</td>
</tr>
<tr>
<td>7-9</td>
<td>18/21</td>
<td>13/16</td>
</tr>
<tr>
<td>6 or less</td>
<td>14/17</td>
<td>11/15</td>
</tr>
</tbody>
</table>

The rates in each category are very high, and are comparable between the Death-Sentenced and Sentencer-Spared defendants. Even in the few cases where human frailty evidence was not reported, one or both of the other two types of mitigation evidence (not primary culprit, positive character) was almost always presented. In fact, according to the news reports, only eight defendants punted on mitigation, either by refusing to permit their attorneys to present evidence or argument on mitigation, or by trying to undermine the case for a non-death sentence by requesting death from the sentencer.127

As to the degree of the mitigation evidence, there is no way to quantify it. But there is a state-of-the-art method of discovering and presenting mitigating evidence that good capital defense lawyers have learned that includes extensive background research and psychological testing (assuming the lawyers are good, and that they have the resources to do the investigation).128

---

127 See DS 4, 6, 16, 24, 48, 61, 71, and 92 (App. D). But see SS 45, 37, and 98 (App. E) (defendants requested a death sentence, but the sentencer declined to impose it).

Once such investigations are undertaken, they tend to turn up an eerily similar pattern for most capital defendants: a horribly neglected/abused upbringing that results in mental problems that lead to drug and alcohol abuse, and eventually to a depraved murder. While it is certainly true that there are better and worse ways of presenting this evidence, and that good lawyering can make a huge difference, the basic core of mitigating evidence concerning capital defendants sounds about the same, no matter how depraved the crime.

It bears repeating that mitigation evidence is not factored in via the Depravity Point Calculator, and the effect of mitigation in any particular case is unpredictable. Even though the effect of mitigation in any particular case is wholly unpredictable, the effect over the run of cases in a non-arbitrary system should be that the death-sentencing rate goes up as the depravity point level increases. On the other hand, if the death-sentencing rate does not go up as the depravity point level rises, that would be good evidence that the effects of mitigation are so unpredictable as to pervade the system with arbitrariness (although there would be other culprits for arbitrariness, as well). We will examine whether the death-sentencing rate increases with depravity level shortly.

10, 2005, at A6 (explaining the techniques and unlikely successes of mitigation specialist Margy Erickson). Another resource is the annual “Life in the Balance” Conference sponsored by the National Legal Aid and Defender Association, one of many such capital defense training opportunities. According to the promotional material:

NLADA’s Life in the Balance conference brings together mitigation specialists, defense investigators, and capital defense attorneys from around the nation to improve their skills and techniques in all aspects of death penalty defense. Seminars are offered on the latest scientific, medical and psychiatric developments in capital cases; on the most recent developments in the law; and on a wide range of creative trial strategies and tactics.


129 See supra note 72 and accompanying text.
130 See infra note 179 and accompanying text.
F. Two Crucial Charts

Charts 1 and 2, below, will be crucial in answering the first three sub-questions concerning whether the death penalty system is arbitrary. Chart 1 collects information from the Death-Sentenced, Sentencer-Spared, and Prosecutor-Spared defendants in Appendices D, E, and F. The defendants are divided into seven depravity point ranges. The Chart is designed to identify cases that are of roughly equal levels of aggravation, in descending order, to enable analysis of the first three sub-questions. Chart 2 collects information on “poster boys” for the death penalty to provide an alternative analysis of the first three sub-questions.

Before presenting Chart 1, it will be useful to set forth examples of defendants who fall within each of the seven ranges. (Information on all 583 defendants is available online.) Three examples will be presented from each range, one from the Death-Sentenced database, one from the Sentencer-Spared database, and one from the Prosecutor-Spared database. Each case will be briefly summarized in order to impart a flavor for the kind of defendants who fall into each category.

The top category is 30+ depravity points, which could be considered ridiculously aggravated:

Death-Sentenced: Andrew Urdiales (DS 1)
This serial killer shot Cassandra Corum and dumped her body in a river. Urdiales confessed to killing seven other women between 1988 and 1996, two in the Chicago area and five in California. These murders involved kidnappings and sexual assaults, and death by both shooting and stabbing.

Sentencer-Spared: Terry Nichols (SS 1)
Nichols helped Timothy McVeigh create the bomb that exploded at the Oklahoma City federal building, killing over 160 people. Nichols...
was convicted of 161 counts of first-degree murder as well as one count each of first-degree arson and conspiracy.

Prosecutor-Spared: Charles Cullen (PS 1)
He admitted to killing at least thirty-three of his patients by injecting them with drugs during his sixteen months as a critical care nurse in several hospitals in New Jersey and Pennsylvania.

In the next-most depraved category, defendants in the 20-29 range could be called enormously aggravated:

Death-Sentenced: Douglas Belt (DS 13)
Belt beheaded Lucille Gallegos at an apartment complex where she worked as a housekeeper. After the murder, Belt set the apartment on fire to destroy the evidence of the murder. DNA evidence also tied Belt to six rapes.

Sentencer-Spared: Ronald Hinton (SS 3)
A serial killer who burglarized, sexually assaulted, and strangled three women in separate attacks.

Prosecutor-Spared: William Floyd Zamastil (PS 22)
He picked up two teenage hitchhikers—a brother and sister—then bound and bludgeoned them to death. He pleaded guilty and received two sentences of twenty-five to life; he was already serving a life sentence in Wisconsin for another murder.

Further down the scale, defendants in the 15-19 range could be termed extremely aggravated:

Death-Sentenced: Curtis Flowers (DS 29)
Flowers shot four people to death execution-style during the robbery of a store where he used to work.

Sentencer-Spared: Cody Nielson (SS 12)
Nielson kidnapped, sexually assaulted, and killed a fifteen-year-old girl, dismembered her body and buried it, and months later returned to burn what was left of the body.

Prosecutor-Spared: Michael Bechtel (PS 26)
Bechtel shot and killed his estranged wife who had a protective order against him, as well as their three-year-old son and two of his wife’s friends.

The next step down the depravity point scale encompasses defendants in the 10-14 range, who could be characterized as highly aggravated:

Death-Sentenced: Robert Acuna (DS 57)
He committed a home invasion burglary and robbery of his neighbors James Carroll (age seventy-five) and Joyce Carroll (age seventy-four), and shot each of them in the head at close range. He was arrested five days later at a motel in possession of their car, some jewelry, and the murder weapon. Several months earlier he
had been charged with aggravated assault for pulling a knife on an elderly man in a mall parking lot.

Sentencer-Spared: Coy Evans (SS 23)
He was convicted of murder, burglary, armed kidnapping, armed robbery and fleeing and eluding law enforcement in the shooting death of Tallahassee police Sgt. Dale Green. The officer had arrived to help two women who reported a home-invasion robbery. Evans shot Green six times, once in the back of the head.

Prosecutor-Spared: Richard Dwight Bernard (PS 52)
He killed three victims. Police found the body of Tasha Robinson in her home. She had been shot in the head execution-style. The body of Anthony Rankin, Robinson's boyfriend, was later found in a rented van; he had also been shot in the head. Two weeks later, the remains of thirteen-year-old Marquis Anton Jobes were located in a field.

At the next level on the spectrum, defendants in the 7-9 range could be described as very aggravated:

Death-Sentenced: Robert Arrington (DS 98)
He robbed and beat to death his girlfriend, Kathy Hutchens, in her home (and also beat her German Shepherd to death). Arrington had served five years in prison for strangling his wife in 1986 after he pleaded guilty to voluntary manslaughter.

Sentencer-Spared: James Coleman (SS 51)
Coleman strangled his live-in girlfriend in their apartment, then suffocated her ten-week-old baby and put the baby's body in the freezer.

Prosecutor-Spared: Brian Bahr (PS 111)
Bahr lured a twelve-year-old girl into the woods where he raped her, beat her, and choked her to death, then put her body in a creek.

Defendants in the 3w-6 range ("3w" denotes those cases of 3, 4, and 5 depravity points that include a 3-weight factor that makes them death-eligible) could be called moderately aggravated:

Death-Sentenced: Brenda Andrew (DS 124)
Andrew conspired with her lover to kill her husband for the proceeds of an $800,000 insurance policy. Andrew and the lover ambushed her husband with a shotgun in the garage of the Andrew home. Andrew then claimed that her husband was the victim of a robbery by two masked men.

Sentencer-Spared: Francisco Cabrialez (SS 80)
Cabrialez burglarized a home to commit a robbery and killed the homeowner in the process. Cabrialez attacked deputies while in jail on two occasions.
Prosecutor-Spared: Jonathon Appley (PS 194)
Appley and a cohort robbed and strangled and beat with a tree branch a camper at a lake.

Defendants in the 2-5 no3w range (“no3w” denotes cases that of 3, 4, or 5 depravity points that do not include a 3-weight factor) could be called not aggravated enough because they should not be death-eligible:

Death-Sentenced: James Edward Barber (DS 129)
Barber was a handyman who had been doing work for seventy-five year-old Dorothy Epps. During a robbery, he beat her to death with a hammer.

Sentencer-Spared: Francisco Carrion (SS 94)
Carrion burglarized the home of an elderly woman and when she confronted him with a knife, wrestled it away from her and stabbed her to death.

Prosecutor-Spared: Allan Abruzzino (PS 223)
Abruzzino and an accomplice invaded the Velazquez home and attempted a robbery. Abruzzino threatened Velazquez's six-year-old daughter with a gun to her throat. When Velazquez realized it was a BB gun, he turned it toward Abruzzino, who in turn pulled out a knife and stabbed Velazquez.

After this survey of what defendants at various levels of depravity look like, here is crucial Chart 1:

<table>
<thead>
<tr>
<th>Depravity Points</th>
<th>Total Defs.</th>
<th>DS</th>
<th>SS</th>
<th>PS</th>
<th>Sentencer Death Rate</th>
<th>Overall Death Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>30+</td>
<td>23</td>
<td>12</td>
<td>2</td>
<td>9</td>
<td>86%</td>
<td>52%</td>
</tr>
<tr>
<td>20-29</td>
<td>41</td>
<td>16</td>
<td>9</td>
<td>16</td>
<td>64%</td>
<td>39%</td>
</tr>
<tr>
<td>15-19</td>
<td>64</td>
<td>28</td>
<td>10</td>
<td>26</td>
<td>74%</td>
<td>44%</td>
</tr>
<tr>
<td>10-14</td>
<td>128</td>
<td>41</td>
<td>29</td>
<td>58</td>
<td>59%</td>
<td>32%</td>
</tr>
<tr>
<td>7-9</td>
<td>139</td>
<td>26</td>
<td>29</td>
<td>84</td>
<td>47%</td>
<td>19%</td>
</tr>
<tr>
<td>3w-6</td>
<td>71</td>
<td>5</td>
<td>17</td>
<td>49</td>
<td>23%</td>
<td>7%</td>
</tr>
<tr>
<td>2-5 no3w</td>
<td>117</td>
<td>12</td>
<td>24</td>
<td>81</td>
<td>33%</td>
<td>10%</td>
</tr>
<tr>
<td>Total</td>
<td>583</td>
<td>140</td>
<td>120</td>
<td>323</td>
<td>54%</td>
<td>24%</td>
</tr>
</tbody>
</table>

The “Sentencer Death Rate” calculates the percentage of defendants at a given depravity point level who were sentenced to death in cases decided by sentencers; the “Overall Death Rate” calculates the percentage of defendants at a given depravity point level who were sentenced to death out of all death-eligible defendants identified, including the Prosecutor-Spared defendants. The Chart is crucial because it allows
analysis of the first three of the four sub-questions of arbitrariness.

G. Answering the Four Sub-Questions of Arbitrariness

1. Does the System Exclude All Those Who Are Not the “Worst of the Worst” from Death Sentences?

The system does exclude almost all those who are not the “worst of the worst” from death sentences. The bottom number (the defendants with depravity point totals between 2 and 5 without any 3-weight factors) in the Death-Sentenced category, however, shows that there were twelve defendants sentenced to death who were not aggravated enough to deserve it according to the Depravity Point Calculator: 135 six robbers who killed, without much further depravity; 136 two defendants who spontaneously killed a police officer, without much further depravity; 137 two who killed out of jealousy, without much further depravity; 138 and two who killed out of gang motives, without much further depravity. 139 If the news reports included all the depravity point factors, then these defendants, while deserving very severe punishment, were not among the “worst” murderers. It is possible, of course, that more intensive mining of the case files of these defendants would turn up additional depravity points not reported in the media that would be sufficient to boost these defendants over the threshold of death-worthiness.

If no additional depravity points exist, however, these twelve represent slightly less than 10% of the 140 Death-Sentenced defendants. This is not a high percentage, but neither is it negligible—particularly to those twelve defendants. This percentage would be especially discouraging because it would further support the conclusion that the Court

---

135 Actually, these defendants were not even among the “worst” murderers, even without considering mitigating factors that may have taken them out of the “worst of the worst” category. One of them did have powerful evidence that he was deranged, which should have doubly exempted him from death-worthiness. See App. D, DS 135.
137 See App. D, DS 135, 140.
138 See App. D, DS 132, 137.
has failed in its primary goal since Furman of eliminating over-inclusion.\footnote{See supra notes 46-57 and accompanying text.}

2a. Does the System Sentence a Robust Percentage of the “Worst of the Worst” to Death?

The death sentence rate was 24% among all the defendants in the sample (140/583). That is well below the 33 1/3% rate this Article uses as a benchmark for robustness. Further, at only one depravity point level does the overall death rate even reach 50% (30+). Also, the overall death rate within the five highest depravity point categories (7-9 through 30+) is 31%, under the 33 1/3% benchmark for robustness among all death-eligible cases, as is the 27% death rate within all the categories the depravity point system rates as aggravated enough to be death-worthy (3w-6 through 30+). Beyond that, the 24% death-sentencing rate is skewed toward the high side because all 2004 death sentences are included, while an undetermined number of non-death resolutions in death-eligible cases were undoubtedly missed by the database searches.\footnote{While it is impossible to tell how many such cases are missing, a minimum guess can be calculated as follows. I tried to anticipate the death-sentence cases by finding them through database searches for each quarter before the “Death Row USA” reports were made public. For each quarter, the database searches missed about eight of the thirty to thirty-five death sentences—roughly 25%. It is fair to assume that the database searches for Sentencer-Spared and Prosecutor-Spared defendants missed at least 25% of those cases (and probably more because Death-Sentenced defendants are more likely to generate news reports than Sentencer-Spared or Prosecutor-Spared defendants). Using the 25% missing assumption, the searches missed about 111 Sentencer-Spared or Prosecutor-Spared defendants (25% of the combined total of 443 Sentencer-Spared and Prosecutor-Spared defendants). Adding these to the 583 defendants in the three sets, the death sentence rate falls to 20% (140/694). Of course, the number of cases missing from the Sentencer-Spared and Prosecutor-Spared databases could be far greater than these calculations suggest: if the database searches missed 92%, see supra note 107, of the murder case resolutions in 2004, and a relatively high percentage of murders in many death penalty jurisdictions are death-eligible, then there could be scores of additional case resolutions that would lower the death-sentencing rate dramatically.} The addition of these missing defendants would only serve to decrease the robustness of the death-sentencing ratio, perhaps by many percentage points.

Yet another fact significantly decreases the effective death-sentencing rate: if we were to examine the 140 death sentences imposed in 2004 ten years from now, we would almost certainly find that at least half of them were reversed.
Using a 2004 death-sentencing rate of 24%, the real death-sentencing rate after the dust of reversals has settled years from now is likely to be about 12%—below the 15-20% condemned by Furman.

2b. Another Perspective: “Poster Boy” Death-Sentencing Rates

There is an alternative way of analyzing the robustness of the death-sentencing rate. The alternative focuses on specific kinds of defendants who have been suggested as being particularly death-worthy—sometimes colloquially referred to as “poster boys for the death penalty.” A starting point for defining “poster boy” categories is a list proposed by Professor Baldus: “multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror,” with some revisions to more fully account for the most notorious types of murderers. Specifically, we will sub-

---

142 See supra note 96 and accompanying text. See also THOMAS P. BONCZAR AND TRACY L. SNELL, U.S. DEP’T OF JUST., BUREAU OF JUST. STATISTICS BULL., CAPITAL PUNISHMENT, 2003 9 (2004), http://www.ojp.usdoj.gov/bjs/pub/pdf/cp03.pdf (reporting that there were ninety-three appellate reversals in capital cases in 2003, the most recent year for which data had been collected. Of these appellate reversals, fifteen were reversals of conviction and sentence, and seventy-eight were reversals of sentence only. Most of the conviction reversals (eleven of fifteen) were awaiting retrial, but only twelve of the seventy-eight sentence reversals were awaiting resentencing. This means that the other sixty-five cases were not pursued for death sentences again, and those defendants, as the Bulletin states, “were serving a reduced sentence,” apparently due to plea bargaining.). Additionally, in the case sample in this Article, of all the scores of reversed sentences that must have been ripe for a resentencing proceeding in 2004, only sixteen resentencing proceedings were found: twelve that resulted in new death sentences, see App. D, DS 8, 16, 18, 30, 40, 45, 60, 70, 100, 118, 126, 138, and four that did not. See App. E, SS 8, 13, 68, 112.


144 See Baldus, When Symbols Clash, supra note 13, at 1605.
divide multiple murders into a) serial killings,\textsuperscript{145} b) double murders (not serial), and c) three or more murders (not serial); 2) expand “contract killings” to include all homicides for pecuniary gain that evidence long premeditation even if there was no hired killer; 3) add the category of killing a victim who is twelve years of age or younger; 4) add the category that the defendant was a prisoner or escapee at the time of the murder; and 5) add the category of terrorist motive. Do defendants in these “poster boy” categories meet even the modest 33 1/3\% death-sentencing rate?

What Appendices D, E, and F reveal about these “poster boy” categories is set forth in Chart 2 (note that the same case can meet the criteria for more than one category):

<table>
<thead>
<tr>
<th>Poster Boy Category</th>
<th>Total Defs.</th>
<th>DS \textsuperscript{146}</th>
<th>SS \textsuperscript{147}</th>
<th>PS \textsuperscript{148}</th>
<th>Sentencer Death Rate</th>
<th>Overall Death Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Serial killer</td>
<td>11</td>
<td>5\textsuperscript{146}</td>
<td>1\textsuperscript{147}</td>
<td>5\textsuperscript{148}</td>
<td>83%</td>
<td>45%</td>
</tr>
<tr>
<td>2 victims</td>
<td>132</td>
<td>44\textsuperscript{149}</td>
<td>31\textsuperscript{150}</td>
<td>57\textsuperscript{151}</td>
<td>59%</td>
<td>33%</td>
</tr>
</tbody>
</table>

\textsuperscript{145} There is a “lack of a standard definition of serial murder . . . . In general, previous efforts to define serial murder have included criteria relative to the number of victims, time elapsed between crimes, motivation, geographical mobility, and victim selection.” FED. BUREAU OF INVESTIGATION, U.S. DEPT OF JUST., F.B.I. LAW ENFORCEMENT BULL. 27 (Jan. 2005). For an extensive discussion of the various attempts to define “serial murder,” see Edward W. Mitchell, The Aetiology of Serial Murder: Towards an Integrated Model 3-6 (1997) (M.Phil. thesis, U. of Cambridge, UK), available at http://users.ox.ac.uk/~zool0380/masters.htm. I will employ a two-part, popular-understanding definition: (a) multiple sexually-motivated murders or attempted murders, separated in time, against strangers; and (b) multiple murders, separated in time, by a health care worker. Ten cases fall into the first definition. See App. D, DS 1, 3, 4, 5, 6; App. E, SS 3; App. F, PS 5, 14, 24, 48. One case falls into the second definition. See App. F, PS 1.

\textsuperscript{146} See App. D, DS 1, 3, 4, 5, 6.

\textsuperscript{147} See App. E, SS 3.

\textsuperscript{148} See App. F, PS 1, 5, 14, 24, 48.


\textsuperscript{150} See App. E, SS 17, 18, 19, 20, 21, 22, 26, 27, 28, 30, 31, 32, 33, 40, 44, 48, 49, 51, 54, 55, 58, 59, 60, 68, 75, 76, 77, 78, 84, 88, 102.

<table>
<thead>
<tr>
<th>Category</th>
<th>Count</th>
<th>Corrected</th>
<th>Percent</th>
<th>Inflation</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 or more victims</td>
<td>88</td>
<td>26</td>
<td>15</td>
<td>47</td>
</tr>
<tr>
<td>Prior murder conv.</td>
<td>12</td>
<td>8</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>Pecuniary prem.</td>
<td>45</td>
<td>10</td>
<td>5</td>
<td>30</td>
</tr>
<tr>
<td>Police victim</td>
<td>20</td>
<td>6</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>Child victim</td>
<td>81</td>
<td>25</td>
<td>15</td>
<td>41</td>
</tr>
<tr>
<td>Torture</td>
<td>31</td>
<td>11</td>
<td>5</td>
<td>15</td>
</tr>
<tr>
<td>Sexual assault</td>
<td>86</td>
<td>38</td>
<td>16</td>
<td>32</td>
</tr>
<tr>
<td>Prisoner/escapee</td>
<td>10</td>
<td>6</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Terrorist motive</td>
<td>3</td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

Bearing in mind that all these percentages are inflated by the non-inclusion of cases missed by the database searches,
Chart 2 nonetheless illustrates a robust sentencer death rate of at least 33 1/3% in all eleven “poster boy” categories. The overall death rate figures after including Prosecutor-Spared defendants, however, are robust in only seven categories; further, three of those categories barely achieve robust levels (exactly 33 1/3% for “2 victims,” 35% for “Torture,” and exactly 33 1/3% for “Terrorist motive”). Two other categories, although exhibiting robust death-sentencing rates, are not as high as one would expect from “poster boys”: particularly startling is the mere 45% overall death rate for “Serial killers,” the most “poster-boyish” of the “poster boys.” Also remarkable in its modest overall death rate is the 44% for “Sexual assault” defendants. And perhaps most surprising are four categories that fail to achieve an overall robust death sentencing rate: 30% for “3 or more victims” (three percentage points lower than for “2 victims”), 22% for “Pecuniary premeditation,” and 30% for “Police victim.” Indeed, the only two categories with really robust rates are 67% for “Prior murder conviction,” and 60% for “Prisoner/escapee” (both of which have a limited number of defendants).

In summary, Chart 1 illustrates that the overall death-sentencing rate of 24% hardly qualifies as robust among all the 583 death-eligible defendants; Chart 2 illustrates that this lack of robustness is not uncommon even among the intuitively most depraved, “poster boy” defendants.

3. Does the Death-Sentencing Rate Increase with Aggravation Level?

Recall that Chart 1 is as follows:

<table>
<thead>
<tr>
<th>Depravity Points</th>
<th>Total Defs.</th>
<th>DS</th>
<th>SS</th>
<th>PS</th>
<th>Sentencer Death Rate</th>
<th>Overall Death Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>30+</td>
<td>23</td>
<td>12</td>
<td>2</td>
<td>9</td>
<td>86%</td>
<td>52%</td>
</tr>
<tr>
<td>20-29</td>
<td>41</td>
<td>16</td>
<td>9</td>
<td>16</td>
<td>64%</td>
<td>39%</td>
</tr>
<tr>
<td>15-19</td>
<td>64</td>
<td>28</td>
<td>10</td>
<td>26</td>
<td>74%</td>
<td>44%</td>
</tr>
<tr>
<td>10-14</td>
<td>128</td>
<td>41</td>
<td>29</td>
<td>58</td>
<td>59%</td>
<td>32%</td>
</tr>
<tr>
<td>7-9</td>
<td>139</td>
<td>26</td>
<td>29</td>
<td>84</td>
<td>47%</td>
<td>19%</td>
</tr>
<tr>
<td>3w-6</td>
<td>71</td>
<td>5</td>
<td>17</td>
<td>49</td>
<td>23%</td>
<td>7%</td>
</tr>
<tr>
<td>2-5 no3w</td>
<td>117</td>
<td>12</td>
<td>24</td>
<td>81</td>
<td>33%</td>
<td>10%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>583</strong></td>
<td><strong>140</strong></td>
<td><strong>120</strong></td>
<td><strong>323</strong></td>
<td><strong>54%</strong></td>
<td><strong>24%</strong></td>
</tr>
</tbody>
</table>

Chart 1 demonstrates that the death-sentencing rate does increase overall with aggravation level, but not in an entirely linear fashion. The death-sentencing rates at the two
lowest depravity levels are certainly significantly lower than at the higher levels. But the rates at the two lowest levels are reversed from what a non-arbitrary system would project: the rate with sentencers in the non-death-eligible 2-5no3w category is 33%, compared with 23% for death-eligible 3w-6 defendants, and the overall rates in those categories are 10% and 7%, respectively. Moving to the higher levels, there is an expected progression moving from 7-9 to 10-14 to 15-19: 47% to 59% to 74% with sentencers, and 19% to 32% to 44% overall. The progression falters, however, at two of the upper levels. With sentencers, the rate in the 20-29 category is 10 percentage points less than in the 15-19 category (64% vs. 74%).

Arguably, the increase in death-sentencing rate with aggravation level is close enough to what rationality would suggest that the current system should not be deemed arbitrary on this basis alone; but neither does this data present a compelling case for non-arbitrariness.

4. Are the Reasons for Sparing Defendants from Death Sentences Merits-Based?

a. Sentencer Reasons

There are too few indications in the news reports about why sentencers (almost always juries) spared defendants to draw any empirical conclusions based on what jurors said after the fact. Jurors mostly remained mum about why they spared defendants; and even when the occasional juror gave a reason to the press, there is no guarantee that the juror was stating

---

179 There is an alternative way to view these statistics that could refute the contention that the death-sentencing rate should rise as the depravity point level goes up. It could be argued that the figures show that juries “max out” in their feelings about how depraved a defendant is at about depravity point level 7; that is, that a defendant with a depravity point level of 7 already seems to jurors to be so bad that they are simply unable to feel that a higher level of depravity points makes a defendant significantly more death-worthy. If we imagine a ten-point scale of death-worthiness, with 10 as highest, then a 7-depravity-point defendant rates about a 9.5 for most jurors, leaving little room for increasing levels of death-sentencing as the depravity point level goes up even further. But even if this is true, it has only marginal effects in making the figures in Chart 1 seem less arbitrary: the “Overall death rate” among the 390 defendants with 7 or more depravity points is 36% (140/390), still less robust than one would expect from a non-arbitrary system among the very worst defendants (and recall that the actual rate is less than 36% because of cases missing from the Sentencer-Spared and Prosecutor-Spared categories). Further, Chart 2 for death penalty “poster boys” changes little, because virtually every one of these defendants accrued 7 or more depravity points, yet the “Overall Death Rate[s]” within the subcategories are all over the board.
something with which the other jurors would agree. Thus, as is true with most jury outcomes, we can judge performance almost exclusively by the results.

There is, however, one factor that can be characterized as regularly recurring: deadlocked juries. In almost every jury-sentencing jurisdiction, the vote for death must be unanimous, and if it is not, the sentence defaults to a non-death sentence. Whether deadlocks result from the holdouts’ views of the merits is impossible to determine. Another distinct possibility is that holdouts think they can return a death verdict during jury selection, but find that they cannot do so when actually faced with the prospect of imposing a death sentence, even if on the merits they think a death sentence is warranted.

Of course, the unanimity requirement furthers the goal of imposing death sentences on only the “worst of the worst,” because if all twelve jurors can be convinced, one would hope the defendant falls into the “worst of the worst” category. But the unanimity rule simultaneously arbitrarily spares some of the “worst of the worst” from death sentences—it works as a one-way ratchet of leniency placed in the hands of a small minority of jurors. It seems likely that defendants who avoid death sentences because the jury deadlocks eleven to one or ten to two for death have been spared not because they were not among the “worst of the worst,” but because they are among

---

180 Of the 120 Sentencer-Spared cases, in eighteen Florida cases, eight Delaware cases, and one Alabama case, there could not be a deadlock because the jurors merely tallied their votes and reported their tally as a recommendation to the judge, who imposed the sentence (giving great deference to the jury's recommendation). Of the remaining 93 cases, juries were deadlocked as to twenty-four defendants, see App. E, SS 1, 2, 14, 16, 17, 18, 20, 33, 34, 37, 38, 43, 53, 64, 65, 74, 77, 88, 91, 93, 97, 100, 111, 118, or about one-quarter of the time. This undoubtedly understates the proportion of deadlocked juries, because one suspects that, relatively often, a jury was non-unanimous, but may have nonetheless reported a unanimous verdict for a non-death sentence in order to resolve the case.

181 See supra note 92 and accompanying text.

182 See, e.g., Misti Crane, Killer of 3 Escapes Death Sentence, THE COLUMBUS DISPATCH, July 24, 2005, at 01C. (“But while they were considering the death penalty, some argued that life in prison would be a stiffer punishment, and one said that he or she simply could not sign off on the death penalty.”); Jury Prayed about Nielsen, DESERET MORNING NEWS (Salt Lake City, UT), Feb. 6, 2004, at B03 (quoting jury member in Cody Nielsen case, see App. E, SS 12, “The one person who wanted life without parole made a statement that they knew in their head that the death penalty was appropriate, but in their heart they couldn’t do it.”).

183 There are twelve defendants in 2004 for whom this hope was in vain. See supra at notes 136-39 and accompanying text, setting forth the twelve 2004 death-sentenced defendants who were not death-worthy according to the Depravity Point Calculator based on the information available in the news reports.
the “luckiest of the lucky” to have gotten a stubborn, aberrational juror or two on their panels. Among the 120 Sentencer-Spared Defendants, at least eight of them were spared death sentences because the jury deadlocked eleven to one or ten to two for death. Further, this was likely true in additional cases, because there were eight reported deadlocks without reports of how many jurors were on each side. Further, one suspects that there were additional cases where juries reported back unanimous non-death verdicts when the jury was irrevocably deadlocked due to one or two anti-death holdouts, and the pro-death jurors gave in so that a verdict could be returned.

b. Prosecutorial Reasons

According to the information in the news reports, prosecutors did not pursue death sentences in death-eligible cases for both merits-based and non-merits based reasons. This section describes reasons prosecutors did not pursue death sentences in death-eligible cases, as gleaned from news reports and organized by category.

The first category of merits-based reasons is “Guilt/innocence”: the prosecutor believed there were significant obstacles to proving the defendant’s guilt. This category is subdivided into four sub-categories: 1) generic “Evidence questionable”; 2) a specific problem of questionable evidence due to “Multiple perpetrators,” which often makes it difficult to prove the degree of culpability of a particular

---

184 There were eight such reported deadlocks. See App. E, SS 2 (10-2), SS 14 (10-2), SS 17 (11-1), SS 18 (11-1), SS 20 (10-2), SS 65 (10-2), SS 93 (10-2), and SS 111 (11-1). The jury performs a distinctly different function in capital sentencing than in normal guilt or non-guilt determinations. Requiring unanimity for guilt certainly furthers the system’s goal of minimizing wrongful convictions. But in capital sentencing, the goal should not be minimizing death sentences, but imposing death sentences on only, and a robust proportion of, the “worst of the worst,” without excluding the “worst of the worst” for non-merits-based reasons. As the Court has noted, the jury’s function in capital sentencing is to act as “the conscience of the community.” See Jones v. United States, 527 U.S. 373, 382 (1999) (approving strong governmental interest in having a jury express conscience of community in death-sentencing determinations). If a jury is split eleven to one or ten to two for death, who is more representatively expressing the “conscience of the community”: the eleven and ten, or the one and two? Even votes of nine to three and eight to four for death show that the conscience of the community strongly favors death. It is only when the vote reaches seven jurors or fewer for death that there seems to be a substantial case for the conscience of the community not favoring death.

185 See App. E, SS 2, 14, 17, 18, 20, 65, 93, 111.

186 See App. E, SS 43, 33, 64, 74, 88, 91, 97, 118.
perpetrator; 3) a specific resolution of the uncertainty in a multiple perpetrator case through “Deal given for testimony” to one of the perpetrators; and 4) “Prior hung jury,” which relates to perceived weakness in the evidence indicated by a prior deadlocked jury at the guilt/innocence phase of the defendant’s or a co-perpetrator’s trial.

The second category of merits-based reasons is “Penalty Phase”: the prosecutor believed that the potential mitigating evidence was so strong that the chances of getting a death sentence were not good. The sub-categories here are: 1) the defendant was “Not aggravated enough”; 2) a generic belief that the “Mitigation [was] significant,” followed by a list of these specific types of mitigation: 3) “Mental problems”; 4) “Intoxication”; 5) “Rotten background”; 6) “Youthful age”; 7) “Older age/bad health”; 8) “No prior record”; and finally 9) that a “Prior hung jury” at the penalty phase of the defendant’s or a co-perpetrator’s trial gave reason to doubt a successful death sentence outcome.

The third category pertains to non-merits—and therefore arbitrary—reasons prosecutors forego death sentences. The first is “Victim’s relatives’ wishes.” The news reports show that relatives’ wishes fell into one of three patterns: relatives were 1) zealous for a death sentence; 2) primarily wanted the case resolved, whatever the sentence; and 3) did not want a death sentence. These wishes represent an arbitrary factor because they do not relate to the aggravation or mitigation in a case. It is entirely unpredictable which pattern will prevail, and sometimes the relatives are not all of one mind, particularly if there is more than one set of relatives because there were multiple victims.

The second non-merits reason relates to the age of the case. When a “case is old,” it is usually because of an appellate reversal or several, although sometimes the age of the case is due to a long delay in solving the case or to very long pre-trial maneuvering. In theory, the age of the case could be considered a merits-based reason, because evidence can become unavailable or less powerful over time. But given that most of these cases are old due to appellate reversals, there is no technical evidentiary problem because the new sentencer will be instructed that the finding of guilt should be taken as a
given, and the aggravation for penalty-phase purposes is either inherent in the finding of guilt or can be proven by reconstituted evidence. Further, the very fact that reversible error was committed when the case was litigated earlier is arbitrary in and of itself.

The third non-merits reason for a prosecutor to forego a death sentence is that it would be too costly for the county to prosecute a death penalty case. A death penalty case costs much more than the same case litigated as a non-death-penalty case, both in dollar costs, and in the drain on person-power from the prosecutor's staff. Some counties simply cannot afford to prosecute a death penalty case, while other counties can afford the tab (at least for some of their death-eligible cases). The ability of the county to pay for such a case is as arbitrary as a factor can be.

188 Id. at 233-40 (explaining law).
189 See Charles S. Lanier & James R. Acker, Capital Punishment, the Moratorium Movement, and Empirical Questions, 10 PSYCHOL. PUB. POLY & L. 577, 588 (2004), suggesting that:

[C]apital trials in California are six times more expensive to conduct than other murder trials, and that taxpayers in that state could save $90 million a year by abolishing the death penalty. Capital trials are so taxing on county budgets that they have brought some localities to the verge of bankruptcy. There are many reasons why capital punishment is so costly. . . . Both the prosecution and defense must prepare for two hearings in capital cases—the guilt-innocence trial and then a separate penalty hearing. Readying for dual proceedings compounds the investigation time, the number of experts consulted, and attorneys' preparation time. Many jurisdictions require the appointment of two defense attorneys for capital trials. Jury selection is especially protracted in capital cases, as voir dire is extended because jurors must be "death qualified" before being impaneled. Individualized voir dire also is required in some jurisdictions. If a capital conviction is secured, the penalty trial involves the presentation of new evidence and arguments and can be quite time-consuming. (citations omitted).

See also Theodore Eisenberg, Death Sentenced Rates and County Demographics: An Empirical Study, 90 CORNELL L. REV. 347, 358 (2005) ("[T]he legal system [has] limited capacity to process capital cases. Researchers suggest that the expense of capital cases and other factors limit the absolute number of death sentence cases a jurisdiction can prosecute. . . . At the margin, therefore, the prosecution of one capital case likely preclude[s] the prosecution of another."). See id. at n.40, (citing a news report that Harris County, Texas (Houston), tries an abnormally high number of capital cases per year owing to a thirty-million dollar budget).

190 Apropos of the citation in the preceding footnote, top-level prosecutor Lyn McClellan in Harris County said: "[W]hy are the other counties in Texas not seeking the death penalty as often [as Harris County]? It is likely economic reasons. Smaller counties have to make decisions based on their budgets. We do not have to make those decisions based on economics in Harris County." McCord, Switching Juries, supra note
A prosecutor may also forego a death sentence in exchange for the defendant's revealing information about either the identity of the victims or location of the bodies. This reason is not only non-merits based and completely arbitrary, it is perverse. It rewards a defendant with a non-death sentence for having killed additional victims or having carefully hidden the bodies.\textsuperscript{191}

The fifth non-merits reason for a prosecutor to forego a death sentence is that the prosecutor had to waive the possibility of seeking death in exchange for extradition of the defendant from an anti-death-penalty foreign country. There are many countries where this is a necessary condition for extradition.\textsuperscript{192} The 2004 defendants included three for whom an agreement was necessary to obtain extradition from

\textsuperscript{191} One cannot let pass the opportunity to mention here a defendant who barely missed being in the 2004 database: "Green River" serial murderer Gary Leon Ridgway. Ridgway admitted to killing forty-eight women in the Seattle area. He was spared a death sentence by the King County prosecutor's office in exchange for helping to locate some of his victims' bodies. Ridgway was sentenced in December 2003 to forty-eight terms of life-without-parole. See Gene Johnson, Ridgway Says He's Sorry for Killings, THE COLUMBIAN (Vancouver, WA), Dec. 19, 2003, at A1. Another appalling set of murders out of which no death sentences resulted that barely missed qualifying for the 2004 database was the federal prosecution of gang members in "Murder, Inc." in the District of Columbia. The gang was responsible for at least thirty-one murders over about a decade in an attempt to corner the illegal drug market in areas of the District. Death sentences were sought for the two kingpins, Kevin Gray and Rodney Moore, but the jury deadlocked in 2003 at the penalty phase. See Neely Tucker, D.C. Killers Get Life after Stalemate on Death Penalty, THE WASH. POST, Mar. 14, 2003, at B01. Six other members of the gang were convicted in 2004, but the prosecutorial decisions not to seek death sentences against them apparently had been made before 2004, so they were not eligible to be included in this article's database. See Carol D. Leonnig, Trial of D.C. Drug Gang Ends with Six Convicted, THE WASH. POST, May 11, 2004, at B03.

Canada,\textsuperscript{193} and three from Mexico.\textsuperscript{194} This is an arbitrary factor because it makes the defendant’s death eligibility turn on whether he can get across the border before being arrested.\textsuperscript{195}

The sixth non-merits reason for a prosecutor’s not seeking a death sentence is that the prosecutor is personally philosophically opposed to capital punishment.\textsuperscript{196} It is completely arbitrary whether a defendant happens to commit a death-eligible crime in a county where he is effectively immune from a death sentence due to the prosecutor’s personal ideological stance.

The seventh non-merits reason for foregoing a death sentence is a prosecutor’s belief that it will be fruitless to try to obtain a death sentence because even if the prosecutor is successful, the state’s supreme court is so philosophically opposed to capital punishment that it will never permit an execution.\textsuperscript{197} This belief may be entirely rational, but the effect

\textsuperscript{193} See App. F, PS 46, 47, 300.


\textsuperscript{195} For example, compare the three defendants in the preceding footnote, who made it across the border into Canada before being arrested, and who were only extradited after American prosecutors agreed not to seek a death sentence, with DS 93 in App. D, where the defendant was arrested on the American side of the border and ultimately sentenced to death.

\textsuperscript{196} The sample provides only one case in which a prosecutor publicly stated that she would not seek a death sentence because she was philosophically opposed to capital punishment. See Harriet Chiang, D.A. Defends Decision Not to Seek Execution; Her Position has been Clear Since Campaign, She Says, S.F. CHRON., Apr. 25, 2004, at B1 (“I have been very clear about not seeking the death penalty,’ [Kamala] Harris said, reminding others of the campaign pledge that she made.” [referring to PS 125 in App. F]). Local variations based on prosecutors’ ideas about the moral acceptability of capital punishment are well known. See, e.g., John Gleeson, Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty, 89 VA. L. REV. 1697, 1718 (2003).

Within New York State, where the district attorneys are elected, some district attorneys, particularly in New York City, rarely or never seek the death penalty despite numerous death-eligible cases. Some district attorneys in upstate counties seek it often. . . . On the same set of facts, the District Attorney in Monroe County in upstate New York will be far more confident that the death penalty is appropriate—and that the jury will impose it—than the District Attorney in the Bronx, who has never sought the death penalty and has publicly stated that he never will.

\textsuperscript{197} Prosecutors in four cases in the sample had the temerity to make such statements about appellate courts, although two of the four were oblique references. See Keith Herbert, Man, 25, Makes Deal in Murder; He was Obsessed with his Co-worker, Authorities Said. By Pleading Guilty in the ’02 Case, He Avoids the Death
is arbitrary—the defendant’s death-eligibility turns not on the merits of the case, but on a judicial attitude of disapproval toward a legitimate state law (or a prosecutor’s perception of that attitude).

The final non-merits reason for a prosecutor not to pursue a death sentence is the prosecutor’s belief that juries in the jurisdiction are death-averse, and that it will likely be fruitless to try for a death sentence.\footnote{A prosecutor made such a statement in only one case in the sample. See Tuohy, \textit{supra} note 190 (“With the tenor of juries these days, I think they are less likely to enforce death penalties,” [the prosecutor] said.” [referring to PS 217 in App. F]).} This could conceivably be characterized as a merits-based reason that simply recognizes legitimate local variation in appetites for death sentences. But there are two responsive arguments: 1) local variation is not a virtue to be cherished when it results in arbitrary imposition or non-imposition of death sentences;\footnote{For a well-argued rendition of the argument that many variations in death-sentencing ratios are legitimate products of local sentiments, as reflected by the decisions of local prosecutors, see Gleeson, \textit{supra} note 196, at 1713-15 (“U.S. Attorneys know the strengths and weaknesses of their cases, the likelihood that juries will convict, the particular resource allocation issues in their districts, and how the communities they serve and protect perceive crimes and evaluate punishments.”). This argument has similar force as to county attorneys within a state system.} and 2) prosecutors do not think they can impanel a jury that will \textit{unanimously} vote for death—the problems of arbitrariness when even one juror can veto a death sentence have already been discussed.\footnote{See \textit{supra} notes 184-86 and accompanying text.}

In the expanded Appendix F,\footnote{Uncondensed Appendices, \textit{supra} note 103, at App. F.} after each Prosecutor-Spared defendant is a grid identifying the discernable reasons (if any) a prosecutor did not pursue a death sentence. A reason \textit{stated} by a prosecutor is indicated by an “s,” and a reason not

\begin{quote}
\textit{Penalty, Phil. Inquirer,} July 27, 2004, at B01 (“The death penalty isn’t carried out in Pennsylvania as often as in Texas or Virginia, which was another factor in accepting Vample’s plea, [prosecutor Kevin] Steele said.” [referring to PS 161 in App. F]); Jim O’Neill, \textit{Man, 21, Admits Killing his Uncle, 59, Avoids Death Penalty by Pleading Guilty,} STAR-LEDGER (Newark, N.J.), Jan. 14, 2004, at 29 (“In all likelihood, the [state] Supreme Court will never allow anyone to be executed in New Jersey,” said prosecutor Thomas Kapsak. [referring to PS 102 in App. F]); Byron Rohrig, \textit{Man Pleads Guilty in Librarian’s Death,} EVANSVILLE COURIER PRESS (Ind.), Nov. 2, 2004, at A5 (“Posey County Prosecutor Jodi Uebelhack announced she wouldn’t pursue the death penalty. ‘If there was some guarantee he’d actually get executed if sentenced to the death penalty, maybe it would make it worth it.’” [referring to PS 49 in App. F]); Michelle Sahn, \textit{Prosecutor: Justices Won’t Abide Punishment; Defense Wins Ruling on Testimony. Second Death Penalty Falls; State Supreme Court Upholds Conviction,} HOME NEWS TRIB. (N.J.), Mar. 26, 2004, at A1 (Prosecutor Thomas Kapsak again: “No matter how heinous the crime, this [state] Supreme Court will never allow a defendant to receive the maximum penalty provided by law . . . .” [referring to PS 170 in App. F]).
\end{quote}
stated but reasonably inferable is indicated by an “i.” The summaries of prosecutorial reasons, below, will focus on the stated reasons.

Prosecutors were rather close-mouthed to the press about their reasons for foregoing death sentences. Prosecutors stated reasons as to only less than one-third of the Prosecutor-Spared defendants (94/323 (although sometimes they stated more than one reason). In fifteen additional defendants’ cases, prosecutors’ giving one defendant in a multiple perpetrator case a deal in exchange for testimony against one of the other perpetrators was tantamount to a statement of a reason; and in another six defendants’ cases, prosecutors were obliged to waive death-sentencing in return for an agreement by Canadian or Mexican authorities to extradite the defendants. Thus, as to less than half of the Prosecutor-Spared cases (115/323) there are prosecutorial reasons on record explaining why a death sentence was not pursued. Here is Chart 3, which presents a summary of the stated reasons prosecutors spared those 115 defendants (the reasons total more than 115 because sometimes prosecutors state multiple reasons):

Chart 3: Prosecutorial Reasons for Not Pursuing Death Sentence

<table>
<thead>
<tr>
<th>Guilt/Innocence</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Evidence questionable</td>
<td>12</td>
</tr>
<tr>
<td>Multiple perpetrators</td>
<td>15</td>
</tr>
<tr>
<td>Deal given for testimony</td>
<td>15</td>
</tr>
<tr>
<td>Prior hung jury, etc.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Penalty phase</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Not aggravated enough</td>
<td>3</td>
</tr>
<tr>
<td>Mitigation significant</td>
<td>3</td>
</tr>
<tr>
<td>Mental problems</td>
<td>7</td>
</tr>
<tr>
<td>Intoxication</td>
<td></td>
</tr>
<tr>
<td>Rotten background</td>
<td>2</td>
</tr>
<tr>
<td>Youthful age</td>
<td>5</td>
</tr>
<tr>
<td>Older age</td>
<td>2</td>
</tr>
<tr>
<td>No prior record</td>
<td>6</td>
</tr>
<tr>
<td>Prior hung jury, etc.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Non-merits</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Victim’s relatives’ wishes</td>
<td>38</td>
</tr>
<tr>
<td>Case is old</td>
<td>5</td>
</tr>
<tr>
<td>Cost</td>
<td>3</td>
</tr>
<tr>
<td>Defendant to name other victims</td>
<td>5</td>
</tr>
<tr>
<td>Waiver for extradition</td>
<td>6</td>
</tr>
</tbody>
</table>

---

202 Usually a prosecutor spares a defendant through a plea bargain, but occasionally the prosecutor announces the intent not to pursue a death sentence even without a plea bargain.
Chart 3 shows almost an equal number of merits-based and non-merits-based reasons: seventy to sixty-four. Thus, almost half the reasons on record for not pursuing death sentences were unrelated to the merits of the cases.

Of particular significance is that the single most-cited reason, by far, was the non-merits-based “Victims’ relatives wishes.” This is disturbing enough in itself, but there is something deeper buried here. Even though “Cost,” “Prosecutor doubts appellate [courts],” and “Prosecutor doubts juries” were rarely mentioned, from a real-world standpoint there is surely a close, unstated connection among these four reasons. There must certainly be cases involving the cost-minded, gun-shy prosecutor who persuades/manipulates/hides behind the victim’s relatives. One may imagine a prosecutor’s thought process: “This is a terrible crime, one that really ought to be pursued as a death penalty case. But my office’s budget can’t afford it, nor can we spare the lawyer and staff resources to do it right. Even if we pursue a death sentence, there’s a good chance of ending up with at least one hold-out juror. And even if we get a death sentence, our state supreme court is eager to find any reason to overturn a death sentence (or if the state supreme court doesn’t, some federal court probably will during the habeas corpus litigation)—then the case will be right back in our laps again, looking like we bungled it the first time. Now, if I explain all this to the victim’s relatives, and exert a little pressure by playing up how long they will be in limbo, they might agree to a non-death plea. Then I can look honorable in the media by saying that I bargained the case out of consideration for the victim’s relatives.” This line of reasoning spares defendants from death sentences for a potpourri of non-merits reasons.

Appendix G sets forth a summary of the reasons prosecutors do not pursue death sentences that can be inferred from the news reports, even though prosecutors did not state them as reasons. Appendix G illustrates that the two most common inferable reasons for prosecutors to forego pursuing death sentences are the evidentiary problems presented by multiple perpetrators (a merits-based factor), and the age of the cases (usually a non-merits-based factor). The remainder of the reasons primarily relate to human frailty mitigation.
that, as discussed above, is indistinguishable as between evidence from Death-Sentenced and Sentencer-Spared cases.

H. A Summary Based on the Empirical Data: An Inference of an Arbitrary System

The analysis of the news reports raises a strong inference that the death penalty system fails the four-part litmus test for non-arbitrariness: the system may persist in over-including defendants who are not among the “worst of the worst” murderers, does not generate sufficiently robust death-sentencing rates among the “worst of the worst,” does not produce a death sentencing rate that increases entirely predictably with the aggravation level of the offenses, and does not assure merits-based reasons for defendants being spared death sentences. Here are some facts to ponder that support this inference:

Death sentences were imposed on fewer than half (28/64) of the defendants who accrued 20 or more depravity points—murderers who were so ridiculously or enormously aggravated that it boggles the mind;

272 murderers who did not receive death sentences were more depraved than the 17 least depraved defendants who did;

159 murderers who did not receive death sentences were more depraved than about the bottom one-third of those who did (43);

Terrorist bomber Terry Nichols, convicted of killing 161 people, was spared a death sentence by a jury, probably because he “found Jesus” in the Bible Belt,203 serial killers Charles Cullen and Richard White were spared death sentences by prosecutors in return for identifying their victims or the whereabouts of their remains,204 yet Cory Maye, who was minding his own business in his bedroom when the police launched a raid and he shot one of them with a bullet that just missed hitting the officer's bulletproof vest, was death-sentenced by a jury.205

A system that produces such arbitrary results should be subject to serious attack under a renewed Furman analysis. Echoing Justice White in Furman, there is a strong inference that in the existing system: “[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few

203 See App. E, SS 1.
204 See App. F, PS 1, 5.
205 See App. D, DS 140.
cases in which it is imposed from the many cases in which it is not.206 It seems likely that death penalty lightning has been striking ever since Furman.

III. DOES THIS ARGUMENT HAVE ANY PROSPECT OF SUCCESS?

From a practical litigation standpoint, there is a maddening conundrum in trying to invoke Furman’s nationwide outcomes holding: only the U. S. Supreme Court is in a position to utilize it, yet an issue can only arrive at the Court after being properly presented during lower court proceedings. Let’s imagine litigation scenarios for trying to raise a renewed Furman challenge, first through a state system, and then through the federal system.

A. Practical Challenges

Through a state system: To concretely illustrate the conundrum, imagine a death-eligible litigant—let’s call him Doe—who is charged in a particular state—let’s say Pennsylvania. Suppose Doe’s attorney wants to make a Furman-based Eighth Amendment challenge. Doe’s attorney cannot argue to a Pennsylvania court that the nationwide death penalty system should be declared unconstitutional for arbitrariness. A Pennsylvania court has no power to make rulings about the constitutionality of any other jurisdiction’s death penalty system. Pennsylvania courts would properly insist on evidence that Pennsylvania’s system is operating arbitrarily. At most, a Pennsylvania court might be willing to consider nationwide evidence as secondary support for a finding of arbitrariness in the Pennsylvania system.

Through the federal system: A federal habeas challenge to a state death sentence cannot accommodate a nationwide Furman challenge. Imagine that Doe failed in his challenge to the Pennsylvania system and has now filed a habeas petition in federal court in Pennsylvania. Under prevailing rules, only issues that were raised in state court proceedings can be litigated in a federal habeas proceeding.207 As we just saw, Doe could not effectively raise a nationwide arbitrariness challenge

207 See Wainwright v. Sykes, 433 U.S. 72, 90-91 (1977) (establishing that, in order for a claim not to be waived for purposes of federal habeas review, the applicant must have litigated it correctly in state system, subject to very narrow exception).
in the Pennsylvania courts. Neither can a federal death penalty defendant effectively raise a renewed Furman challenge. Imagine litigant Roe, who is battling the prospect of a death sentence in federal court. Roe is in no different position than Doe: Roe can only challenge the constitutionality of the system in which he is charged—in his case, the federal death penalty system.

B. A Potentially Workable Challenge

Is there no prospect, then, of ever successfully raising, let alone prevailing on, a renewed Furman challenge? While hope is slim, it is not nonexistent. Here is a possible scenario. First, the best states in which to raise the challenge should be determined by a legal strategy team. The best states would have the following combination of factors: a bad factual record for arbitrary results,208 a state supreme court that is skeptical of capital punishment, and, as a fallback in case certiorari is not granted on direct review, at least one federal district court habeas judge who is likewise skeptical. Since the argument will have to focus on the specific state system, relying on news report data from one year would not be ideal—preferably, data from several prior years would be unearthed and analyzed using the Baldus technique. Once the argument is crafted at its best, death penalty defense lawyers with cases in the early stages of litigation should be recruited to file a pre-trial motion arguing that the state’s death penalty system is unconstitutional on a renewed Furman basis. Eventually, at

---

208 Pennsylvania would be a good candidate. That state had thirty-eight defendants in the database. As to the eleven most depraved defendants, Pennsylvania had two death sentences (in App. D, DS 21 (23 points) and DS 38 (17 points)); three spared by sentencers (in App. E, SS 7 (24 points), SS 33 (12 points), and SS 38 (12 points)); and six spared by prosecutors (in App. F, PS 1 (198 points), PS 11 (26 points), PS 12 (26 points), PS 23 (20 points), PS 44 (16 points), and PS 45 (15 points)). Thus, the four most depraved defendants escaped death sentences, as did six of the top eight, and nine of the top eleven. On the other hand, two of the five death sentences (DS 137 (4 points) and DS 138 (3 points)), were not death-eligible according to the Depravity Point Calculator (see supra notes 138-39 and accompanying text). Ohio would be another good candidate. A great deal of data is available about the Ohio system due to a massive study of statewide murder cases over a twenty-year period from 1981-2002 undertaken by the Associated Press under the direction of reporter Andrew Welsh-Huggins. For reports of the results of this effort, see Andrew Welsh-Huggins, Killers Avoid Death Penalty, CINCINNATI POST, June 6, 2005, at A1 (noting seemingly irrational disparities based on number of victims and other factors); Andrew Welsh-Huggins, Death Row Odds Vary, AKRON BEACON J., May 7, 2005, at A1 (detailing seeming anomalies throughout the state where some defendants who avoided death sentences looked worse than some defendants who received death sentences).
least one of those defendants would be sentenced to death, and would be able to litigate the issue in a state appeal and in a federal habeas proceeding. This, in turn, could lead to a successful certiorari petition to the Court.

Envision now that the Court has chosen to review this issue—what could allow a renewed Furman argument to prevail? Resorting to the catch phrase from an old movie, at least five members of the Court would have to feel like screaming about the death penalty: “I’m mad as hell, and I’m not going to take it anymore!” That was the mindset of the five Justices in the majority in Furman—they had seen enough of the arbitrary operation of the death penalty over the years that they were willing to abandon their usual case-by-case, issue-by-issue approach, and stop the whole system in its tracks. And that was the position at which Justice Blackmun later arrived. While there is no explicit indication that five

209 This is the catchphrase from the 1976 Academy Award nominated film “Network,” originally uttered by the character of disillusioned news broadcaster Howard Beale (played by Peter Finch) that becomes a national slogan. It ranks as number nineteen in a list of the 100 greatest movie lines in a recent poll by the American Film Institute. American Film Institute, AFI's 100 Years...100 Movie Quotes, http://www.afi.com/tvevents/100years/quotes.aspx#list (last visited Jan. 28, 2006). A version of this slogan could be inferred from the following comment in a state bar publication about the Oregon death penalty system:

By keeping the death penalty in Oregon we show that we continue to be “tough on crime,” but on whom are we tough? Certainly not the worst. We will kill the junkie who happens to murder a person who didn’t pay his “bills”; a person high on methamphetamine who killed a hitchhiker he picked up; a drunken person who killed someone chasing him. But, we can’t kill a man who sawed seven women to death, another who killed his family, or one who sexually assaulted and then murdered two of his own daughter’s friends and then conducted media interviews on the slab under which one was buried.

Maintaining the Oregon death penalty in the face of these new realities is the acme of hypocrisy.

William R. Long, The Odyssey of Oregon’s Death Penalty, 65 OR. ST. B. BULL 70 (Nov. 2004). See also Editorial, Death Penalty in N.J. is a Farce, OCEAN COUNTY OBSERVER (Toms River, N.J.), Apr. 11, 2004, at A16 (“It is a farce, mere show, New Jersey’s death penalty law...No one, least of all [death-sentenced killer Robert Marshall, whose death sentence was reversed twenty-two years after the crime] believes he or anyone else will be executed for murder in New Jersey.”); Five Murders, Life Term; So Scrap Death Penalty, PALM BEACH POST, Dec. 16, 2004, at 22A (“If anyone deserved the death penalty, it was Michael Roman. He killed five members of a Lake Worth family two years ago. The murders were calculated. One victim was a pregnant woman. Even after all this time, he shows no remorse...[Prosecutor] Krischer says this case is ‘unique.’ But when a pro-death penalty prosecutor who says he doesn’t use the punishment as a bargaining chip is satisfied to sign off on a deal that spares the life of a mass murderer, those ‘unique’ circumstances indict every death case in Florida.”).

210 Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting) (“Rather than continue to coddle the Court’s delusion that the desired level of fairness [in administering the death penalty] has been achieved and the need for regulation...
current Justices have lost their stomach for the existing system of capital punishment, there are some indications that majorities of the Court have not been thrilled in recent years with some aspects of the system’s operation.211

The difficulty in inducing the Court to declare the existing system unconstitutionally arbitrary, however, should not be underestimated. The Furman Court had no hand in creating the pre-Furman system, and did not have to admit any mistakes of its own in overturning that system. By contrast, the current Court and its predecessors going back to Furman have played a large role (along with state legislatures and lower courts) in creating the current system. If it were to rule the current system unconstitutional, the Court would have to acknowledge that much of its capital jurisprudence over the last three decades has been a colossal mistake.212 While it
eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed.”). Justice Scalia also thinks the existing system of capital punishment is arbitrary. See Walton v. Arizona, 497 U.S. 639, 664 (1990) (Scalia, J., concurring) (arguing that to speak of guided discretion and individualized sentencing is “rather like referring to the twin objectives of good and evil”). Justice Scalia’s solution, though, would be to abandon the individualized sentencing principle as a constitutional requirement. Id. at 673. Likewise, Justice Thomas has serious qualms about the rationality of the existing system. See Graham v. Collins, 506 U.S. 461, 494 (1993) (Thomas, J., concurring) (“When our review of death penalty procedures turns on whether jurors can give ‘full mitigating effect’ to a defendant’s background and character, and on whether jurors are free to disregard the State’s chosen sentencing criteria and return a verdict that a majority of this Court will label ‘moral,’ we have thrown open the back door to arbitrary and irrational sentencing.”). Justice Thomas’s solution is to substantially deregulate the constitutional requirement for sentencers’ consideration of mitigating evidence, allowing jurisdictions to “channel the sentencer’s consideration of a defendant’s arguably mitigating evidence so as to limit the relevance of that evidence in any reasonable manner, so long as the State does not deny a defendant a full and fair opportunity to apprise the sentencer of all constitutionally relevant circumstances.” Id. at 498-99.

211 See, e.g., Rompilla v. Beard, 125 S.Ct. 2456 (2005) (reversing death sentence for ineffective assistance of counsel); Miller-El v. Dretke, 125 S.Ct. 2317 (2005) (reversing capital conviction because prosecutor unconstitutionally exercised peremptory challenges on the basis of race); Deck v. Missouri, 125 S.Ct. 2007 (2005) (reversing death sentence because defendant was shackled in the jury’s presence without any special indicia of dangerousness); Roper v. Simmons, 543 U.S. 551 (2005) (holding death sentence unconstitutional for offenders who were less than eighteen years of age at the time of the murder); Banks v. Dretke, 540 U.S. 668, 703-05 (2004) (holding that death-sentenced Texas defendant could raise claim in federal habeas case that exculpatory evidence regarding witness’s government informant status had been wrongly withheld, having established cause and prejudice to avoid procedural default); Wiggins v. Smith, 539 U.S. 510, 537-38 (2003) (finding inadequate investigation of possible mitigation evidence constituted ineffective assistance of counsel); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (holding death sentence unconstitutional for defendant who was mentally retarded at the time of the murder).

212 In an earlier article, I argued that the Court’s death penalty jurisprudence had achieved mild success in decreasing over-inclusion. See McCord, Judging the Effectiveness, supra note 45, at 595. I stand by that conclusion. But a modest decrease
would be extremely difficult for a Justice to admit this colossal mistake, it is not impossible, as is evidenced by Justice Blackmun’s end-of-career turnabout.\textsuperscript{213}

Suppose five Justices made similar turnabouts. What would that mean for more than 3400 other death row inmates? One would hope for a decision that would be equally damning to all states’ systems, as was the decision in \textit{Furman}. Recall that in \textit{Furman} the commonality of all the state systems in allowing unfettered discretion to the sentencer meant all those systems were doomed. The common failings one would hope the Court would find in current systems include:

- Lack of state-level oversight to assure consistent decision making across all counties in seeking or not seeking death sentences;\textsuperscript{214}
- Lack of state-level funding to assure that county-level resource shortfalls are not the cause of foregoing seeking death sentences; and to assure well-trained and compensated capital defenders and support services;
- Lack of any controls over prosecutorial discretion to pursue/not pursue death sentences;
- Lack of sufficiently tightly drawn standards of death-eligibility to screen out all insufficiently aggravated murderers.
- Arbitrariness from requiring unanimous jury verdicts for death.\textsuperscript{215}

\textsuperscript{213} See supra note 210 and accompanying text.

\textsuperscript{214} The federal system, in which there is centralized oversight for decisions to seek or forego death sentences, does a fairly good job of selecting only highly aggravated cases to take to sentencers. Here are the federal cases in the databases, with the number of depravity points for each in parentheses: in App. D, DS 12 (30 points), 20 (23 points), 22 (22 points), 43 (16 points), 54 (15 points), 82 (11 points), 93 (10 points); and in App. E, SS 4 (29 points), 5 (29 points), 41 (11 points), 42 (11 points), 46 (11 points), 47 (11 points), 64 (8 points), 86 (6 points), 109 (4 points), 114 (4 points). The federal system does not select all of the most aggravated defendants, though, nor did it achieve a particularly impressive death-sentencing rate with sentencers, thereby demonstrating the difficulty in creating a non-arbitrary system. Yet the results—a marginally robust 41% death-sentencing rate in cases that went to a death penalty decision by a sentencer—underscores the difficulty of creating a non-arbitrary system.

\textsuperscript{215} The Court has permitted the use of non-unanimous verdicts in criminal cases. See Apodoca v. Oregon, 406 U.S. 404, 406 (1972) (guilty verdict by nine of twelve jurors is constitutionally acceptable). But it would require standing history and
One would then hope for one thing further from the Court—for it to simultaneously vacate all the death sentences on its docket, just as it did in conjunction with *Furman*. This would send two necessary messages. First, it would indicate that individual states do not have the chance to argue that their systems are not arbitrary. Second, it would indicate that the decision is for the benefit of all currently death-sentenced inmates, regardless of whether they have a direct appeal pending; that is, that the decision has complete retroactive effect. This would empty death rows of their over 3400 inmates, just as *Furman* emptied death rows of over 600 inmates.

Such a result would be extraordinary, just as *Furman* was. The Court does, however, have an oft-affirmed doctrinal device that can be used to justify radical departures from constitutional doctrines that prevail as to non-death cases: “Death is different.”

**CONCLUSION: WHAT IF . . .**

If the Court accepted a renewed *Furman* argument, and stopped the current death-sentencing system dead in its tracks—what would happen then? Undoubtedly, just what happened after *Furman*—the committed death penalty states would go back to the drawing boards and create new systems. There are, admittedly, rational approaches to attempt to construct a non-arbitrary system. But can any system operate non-arbitrarily? We have tried for over three hundred years to create a non-arbitrary system in the United States. Nobody believes we have succeeded at any point along the way. After such extensive failed experimentation, is there any persuasive reason to believe that a non-arbitrary death penalty system, even if theoretically imaginable, is practically attainable?

---

216 The whole of the Court’s death penalty jurisprudence is premised on the proposition that death is so different from any other punishment that it requires special constitutional safeguards. See Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OH. ST. J. CRIM. L. 117, 117 n.1 (2004) (collecting cases citing this proposition).

Cognitive Processes Shaped by the Impulse to Blame

Joshua Knobe†

In his incisive and thought-provoking paper “Cognitive Foundations of the Impulse to Blame,” Lawrence Solan points to a surprising fact about the cognitive processes underlying attributions of blame.1 This surprising fact is that almost all of the processes that we use when trying to determine whether or not a person is blameworthy are also ones that we sometimes use even when we are not even considering the issue of blame.2 Only a very small amount of processing is used exclusively when we are interested in questions of blame.

This point can be made vivid with a simple example. Suppose that we witness a terrible accident and then assign an investigator to answer the question: “Why did this accident occur?” This investigator spends many months gathering evidence, formulating hypotheses, and considering arguments of various types. Finally, he comes back with a definite answer. And now suppose we tell him that we also want an answer to a second question, namely: “Was anyone to blame for this accident?” The investigator probably won’t have to spend another few months answering this new question. It appears that almost all of the work has already been done; the investigator can simply take the results he has already obtained, do a little extra thinking, and come up with an answer.

† Princeton University. I am grateful to Lawrence Solan and Gilbert Harman for helpful comments on an earlier draft.


2 Id. at 1004.
Solan provides support for this initial intuition through a sophisticated analysis of the cognitive processes that underlie attributions of blame. Specifically, he shows that attributions of blame rely in a crucial way on judgments about mental states and about causal relations. He then shows that we would have made these very judgments anyway, even if we had not been concerned with questions of blame.

Solan also offers a tentative hypothesis about why the cognitive processes that underlie attributions of blame overlap in this way with the cognitive processes used in other contexts. He suggests that perhaps human beings first began using these processes for some entirely separate purpose—e.g., because they served a useful role in predicting and explaining behavior—and that these processes then came to be used in blame attributions as well.

Solan is calling our attention to a very important phenomenon here, but I want to suggest that we ought to draw almost exactly the opposite conclusion about it from the one he has drawn. The phenomenon is that nearly all of the cognitive processes that we use when assessing blame are also processes that we use when the question of blame does not even arise. Solan’s conclusion is that blame has had a relatively small impact on the capacities that underlie our cognitive processes. I would draw the opposite conclusion: blame has had such a pervasive influence on our cognitive capacities that, even when we are not specifically interested in questions of blame, we often end up using cognitive processes that arose chiefly because of their role in making blame attributions.

To bring out the contrast between these two conclusions, we can return to the example of the accident and the investigator. Turning back to our example, once the investigator has finished figuring out why the accident occurred, he needs very little extra effort to figure out whether anyone is to blame. Solan believes that almost all of the processing needed to assess blame might already have been needed simply to figure out why the event occurred, with only a little bit of extra processing at the end being required.

---

3 Id. at 1009 (arguing that blame is triggered by a combination of the thought that an event occurred because of a person’s action and that the person should have known better).

4 Id. at 1004 (arguing that the impulse to blame is largely a ‘by-product’ of cognitive capacities we needed for other purposes); id. at 1012 (prescinding from any strong conclusions about the evolutionary basis of this outcome).

5 Id. at 1004, 1012.
exclusively for the purpose of assessing blame. 6 By contrast, my conclusion is that the whole course of the investigator's work – even when he was only being asked to determine why the accident occurred – was shaped by a concern with issues of blame. The reason why so little additional processing is needed at the end is that, from the very beginning, his cognitive processes were shaped by a need to facilitate blame assessments.

In arguing for this conclusion, I focus on the two kinds of judgments that Solan discusses in his paper – judgments about mental states and judgments about causal relations. 7 My claim is that the way in which people make these judgments, even when they are not specifically being confronted with questions about blame, is deeply influenced by a concern with blame attributions. 8

I. BLAME AND INTENTIONAL ACTION

Attributions of blame depend in a fundamental way on judgments about the agent’s mental states. 9 Thus, our decision as to whether or not the agent is blameworthy will often depend on our judgments about that agent’s goals, about the extent to which she foresaw certain outcomes, and about whether or not she performed the relevant behavior intentionally. But as Solan points out, we make these kinds of judgments all the time – even when we are not at all concerned with questions of blame – and it therefore appears that we use relatively little of the processing for which we detect mental states exclusively for the purpose of making blame assessments. 10

A question then arises as to why we make these judgments in the way we do. One possible view would be that our capacity to detect and classify people’s mental states arose, most fundamentally, from a need to predict and explain behavior. Then, given that we already had this capacity in place, we began using it in blame assessments as well.

---

6 Id. at 1004.
7 Solan, supra note 1, at 1014-20.
8 Id. at 1018-20 (on mental states); id. at 1014-17 (on causal relations).
10 Solan, supra note 1, at 1003.
But there is another possibility. Perhaps our capacity to detect and classify mental states has itself been shaped in certain ways by a need to assess blame. In other words, it might turn out that our capacity to detect mental states was not shaped only by a need for predictions and explanations, but also (at least in certain respects) by a need to determine whether or not particular agents are blameworthy.\textsuperscript{11}

Take the distinction between behaviors that are performed “intentionally” and those that are performed “unintentionally.” One hypothesis would be that this distinction was shaped primarily by a need for prediction and explanation. An alternative hypothesis would be that the distinction itself was shaped in part by a need for assessments of blame.

The best way to decide between these two hypotheses would be to look in detail at the criteria that people use when they are trying to figure out whether a given behavior was performed intentionally or unintentionally. Then we could see whether these criteria make better sense (a) as part of an attempt to predict and explain behavior or (b) as part of an attempt to assess blame. I have addressed this issue in a number of recent publications;\textsuperscript{12} here we only have space for a highly compressed version of the argument.

When we want to investigate the criteria that people use in determining whether or not a behavior was performed intentionally, one of the most helpful methods is to look at people’s intuitions regarding particular cases. For example, let us consider the following story:

A lieutenant was talking with a sergeant. The lieutenant gave the order: ‘Send your squad to the top of Thompson Hill.’

The sergeant said: ‘But if I send my squad to the top of Thompson Hill, we’ll be moving the men directly into the enemy’s line of fire. Some of them will surely be killed!’

The lieutenant answered: ‘Look, I know that they’ll be in the line of fire, and I know that some of them will be killed. But I don’t care at

\textsuperscript{11} For a more radical view, see Kristin Andrews,\textit{ Folk Psychology is not a Predictive Device} (unpublished manuscript, on file with author) (arguing that our capacity to detect mental states was not shaped, even primarily, by need for prediction).

all about what happens to our soldiers. All I care about is taking control of Thompson Hill.'

The squad was sent to the top of Thompson Hill. As expected, the soldiers were moved into the enemy's line of fire, and some of them were killed.13

Confronted with this story, most people say that the lieutenant intentionally put the soldiers into the line of fire.

But suppose that we make a small change in the story, changing the effect of the lieutenant’s behavior from something bad to something good. The story then becomes:

A lieutenant was talking with a sergeant. The lieutenant gave the order: ‘Send your squad to the top of Thompson Hill.’

The sergeant said: ‘If I send my squad to the top of Thompson Hill, we’ll be taking the men out of the enemy’s line of fire. They’ll be rescued!’

The lieutenant answered: ‘Look, I know that we’ll be taking them out of the line of fire, and I know that some of them would have been killed otherwise. But I don’t care at all about what happens to our soldiers. All I care about is taking control of Thompson Hill.’

The squad was sent to the top of Thompson Hill. As expected, the soldiers were taken out of the enemy’s line of fire, and they thereby escaped getting killed.14

Confronted with this revised version of the story, most subjects actually say that the lieutenant did not intentionally take the soldiers out of the line of fire.15 In fact, in a systematic experimental study, seventy-seven percent of subjects confronted with the first story said that the lieutenant intentionally put the soldiers into the line of fire, whereas only thirty percent of subjects confronted with the second story said that the lieutenant intentionally took the soldiers out of the line of fire.16

Results like these suggest that people actually use judgments about the goodness or badness of the outcome as part of the criteria by means of which they determine whether or not a given behavior was performed intentionally. But it seems unlikely that this aspect of the criteria serves primarily to facilitate some “scientific” purpose like the prediction and

---

13 Knobe, Intentional Action and Side Effects, supra note 12, at 192.
14 Id. at 192-93.
15 Id. at 193.
16 Id.
explanation of behavior. The most well-supported hypothesis (at least at this point in the evolving research on the topic) would be that the very criteria by means of which we distinguish between intentional and unintentional behaviors have been influenced in some way by a concern with issues of blame.

II. BLAME AND CAUSATION

Attributions of blame are influenced, not only by judgments about the agent's mental states, but also by judgments about causal relations. In general, we are unlikely to blame the agent for an outcome unless we believe that the agent caused that outcome. But as Solan emphasizes, people quite often try to figure out whether or not a particular agent caused a particular outcome even when they are not wondering whether or not the agent is to blame. After all, a proper understanding of causal relations is often helpful in predicting and explaining events.

This is quite a striking fact. It seems odd that the very same relation – the relation of causation – should be used both for assessing blame and for generating predictions and explanations. Why don't we use two different relations here – one relation for assessing blame and another, slightly different relation for prediction and explanation? Solan is careful not to engage in dogmatic evolutionary speculation. However, he does suggest an interesting possibility. Perhaps we already needed a capacity for detecting causal relations (because this capacity was useful in generating predictions and explanations), and we then came to use this capacity for assessing blame as well. But here again, there is another possibility. Perhaps our capacity for detecting causal relations was itself shaped in a fundamental way by our concern with questions of blame.

Note that we are not here entertaining the absurd hypothesis that people's whole capacity for detecting causal relations arose out of a need to make assessments of blame. The idea is simply that certain aspects of this capacity – a capacity that presumably arose chiefly out of a need for prediction and explanation – may also have been shaped by a

17 Solan, supra note 1, at 1004.
18 Id.
19 Id. at 1004, 1012.
concern with attributions of blame. To test this idea, we can look closely at the criteria by which people decide whether or not a given agent was the cause of a given outcome. The question is whether all aspects of these criteria can be understood as part of an attempt to arrive at accurate predictions and explanations or whether some aspects only make sense as part of an attempt to assess blame.

In this connection, let us consider the following story:

Lauren works in the maintenance department of a large factory. It is her responsibility to put oil in the K4 machine on the first day of each month. If she doesn’t put in the oil, the machine will break down.

On June first, Lauren forgot to put in the oil. The machine broke down a few days later.

Here it seems at least somewhat natural to say that Lauren caused the machine to break down. After all, if she had simply fulfilled her responsibility and put in the oil, the breakdown would never have occurred.

But now suppose that we add a new character to our story:

Jane also works in the factory, but she does not work in the maintenance department. She works in human resources, keeping track of all the details for the employee health insurance plan.

Jane also knew how to put oil in the K4 machine. But no one would have expected her to do so; it clearly wasn’t part of her job.

Although Jane is quite similar to Lauren in certain respects, it seems quite wrong to say that Jane caused the accident. Indeed, I conducted a simple experiment to show that people are more inclined to think that Lauren caused the accident than that Jane caused it.20

But why do we distinguish between Lauren and Jane in this way? Neither of them put oil into the machine, and if

---

20 The subjects of this study were thirty-five people spending time in a Manhattan public park. All of the subjects received the same questionnaire. First, they read the vignette about Lauren, followed by the question: “Did Lauren cause the machine to break down?” Then they were asked to read the vignette about Jane, followed by the question: “Did Jane cause the machine to break down?” Each question was answered on a scale from zero (“no, she didn’t”) to six (“yes, she did”). The mean rating for the Lauren vignette (M=3.7) was significantly lower than that for the Jane vignette (M=3.34), t(35)=7.2, p<.001. In other words, the degree to which people thought that Lauren was the cause was so much lower than the degree to which people thought that Jane was the cause that the difference is extremely unlikely to be due to chance alone.
either of them had put the oil in, the machine would not have broken down. Why then do we say that Lauren caused the breakdown but Jane did not? In cases like this one, it seems hard to deny that our judgments about causal relations are being influenced in some way by our beliefs about the rightness and wrongness of particular behaviors. Presumably, we are influenced by the thought that Lauren was doing something wrong, that she really shouldn’t have neglected to put oil in the machine.

What we see here, apparently, is a sense in which our capacity to detect causal relations is sensitive to moral considerations. But it seems unlikely that this sensitivity is somehow furthering our aim of generating accurate predictions and explanations. Thus, although these phenomena are not yet well-understood, it seems that the balance of evidence now points to the view that our capacity to detect causal relations has been shaped in certain respects by a concern with issues of blame.

III. CONCLUSION

Solan has directed our attention to an extremely important phenomenon: The surprising overlap between the cognitive capacities that we use when assessing blame and the capacities that we use for other, unrelated purposes. It appears that the vast majority of the capacities that we use when assessing blame are also used when we are simply trying to figure out why some given event has occurred.

Drawing upon this phenomenon, Solan is able to provide some enticing evidence for the conclusion that our concern with blame has had a relatively small impact on our underlying cognitive capacities. The essence of his argument lies in the claim that, since we already needed so many of the relevant capacities for other purposes, only a relatively small amount of additional structure would be necessary to make possible the ability that we now have to assess blame.

21 For similar views, see generally Judith Jarvis Thomson, Causation: Omissions, 66 PHIL. & PHENOMENOLOGICAL RES. 81 (2003); Sarah McGrath, Causation by Omission: A Dilemma, 123 PHIL. STUD. 125 (2005).

22 Solan, supra note 1, at 1004.

23 Id.

24 Id. at 1004, 1012.

25 Id. at 1004.
Although future research may vindicate Solan’s argument, it seems to me that the presently-available research actually points more strongly to the opposite conclusion. It is true that most of the capacities that we use when assessing blame are also used when we are simply trying to figure out why an event occurred. But we should not therefore assume that those capacities were already needed for some other purpose and then came to be used in blame assessment as well. Another possible conclusion – and one for which I have presented some tentative support – is that the capacities we normally use to explain and interpret events have been shaped in a fundamental way by our concern with blame.
Where Does Blaming Come From?

Lawrence M. Solan†

[Alvy and Annie are seeing their therapists at the same time on a split screen]

Alvy Singer’s Therapist: How often do you sleep together?

Annie Hall’s Therapist: Do you have sex often?

Alvy Singer: Hardly ever. Maybe three times a week.

Annie Hall: Constantly. I’d say three times a week.¹

In my earlier essay, “Cognitive Foundations of the Impulse to Blame,” I argued that blaming comes cheaply for people since the elements of the scenarios that most easily trigger blame are commonly used in cognitive processes that have little to do with moral attribution: causation, the recognition of bad outcomes, and sensitivity to the minds of others.² I relied in part on an ingenious experiment designed and run by Joshua Knobe, which demonstrates that people are highly sensitive to the differences between good and bad outcomes in their conceptualizations of the world.³ In his response to my essay, Knobe uses much of the same material, including his own experiments, to argue that I’ve gotten it wrong.⁴ He argues that people are primarily involved in the business of moral attribution, and the other cognitive processes are the derivative ones. Thus, the quote from Annie Hall. In this brief reply, I agree with Knobe that my analysis does little to explain asymmetries between our blaming, on the one hand, and giving credit, on the other, even though they both engage

---

† Don Forchelli Professor of Law and Director, Center for the Study of Law, Language and Cognition, Brooklyn Law School.


more or less the same conceptual primitives. However, Knobe’s perspective leaves questions unanswered as well.

My original argument is as follows: Blameworthiness occurs when an individual causes a bad result, and becomes amplified when the perpetrator should have known better. All elements of the prototypical blame scenario – causation, bad outcome, and state of mind – are computed frequently in daily life for a host of reasons having nothing to do with blame. For example, conceptual development in children depends crucially and robustly on their ability to hypothesize about the states of mind of those from whom they learn, a phenomenon called “theory of mind” in the developmental psychology literature. This makes moral attribution cognitively inexpensive. In fact, it is so inexpensive that we sometimes manipulate facts either to increase or decrease the likelihood and severity of the blame impulse. In particular, when various interpretations of the facts are available, we tend to focus on those facts that enable us to reach a conclusion that is consistent with a desired result.

Knobe argues that I’ve drawn the wrong conclusion. His claim is that “blame has had such a pervasive influence on our cognitive capacities that, even when we are not specifically interested in questions of blame, we often end up using cognitive processes that arose chiefly because of their role in making blame attributions.” Later, Knobe emphasizes that he intends a weak version of the hypothesis that moral attribution is cognitively prior to its elements:

Note that we are not here entertaining the absurd hypothesis that people’s whole capacity for detecting causal relations arose out of a need to make assessments of blame. The idea is simply that certain aspects of this capacity – a capacity that presumably arose chiefly out of a need for prediction and explanation – may also have been shaped by a concern with attributions of blame.

I have no problem with the weak version of Knobe’s hypothesis, other than its evolutionary bent. The question we are addressing is about how our psychology works today. To

---

5 See Solan, supra note 2, at 1020 nn. 66-68 (providing references to some of the underlying psychological literature).
6 For discussion of the affective aspects of blame, see Mark D. Alicke, Culpable Control and the Psychology of Blame, 126 PSYCHOL. BULL. 556, 566-68 (2000); Mark D. Alicke, Culpable Causation, 63 J. PERSONALITY & SOC. PSYCHOL. 368 (1992).
7 Knobe, supra note 4, at 930.
8 Id. at 934-35.
the extent that my earlier essay speaks in such historical terms, it is fairly subject to the same caution. Here, I will comment briefly on where I think the evidence now stands.

Knobe relies on the results of an experiment that he has designed and run that is both rich in its content and elegant in its simplicity. In the first experiment, a lieutenant orders a sergeant to send his squad to the top of a hill for strategic reasons. One version of the story has the sergeant responding that obeying this order will put the soldiers in the line of fire and at risk of losing their lives. The other version has the sergeant thanking the lieutenant for taking the soldiers out of the line of fire. In both versions, the lieutenant replies that he is not interested in the safety of the soldiers, but rather in the greater strategic decision. Subjects hearing this story blame the lieutenant for intentionally putting the soldiers at risk in the first version, but do not give the lieutenant credit for intentionally saving them in the second version.

In my earlier article, I argued from a similar experiment reported by Knobe that people are sensitive to the difference between good and bad outcomes. But as Knobe correctly points out, the experiment also shows that assignment of intent – one of the elements of the impulse to blame according to my account – itself depends upon whether the scenario is blameworthy in the first place. What other explanation can there be for the asymmetry between the two versions?

Knobe’s experiment surely shows that the blame impulse cannot be reduced to its cognitive elements. For if it could be, we would expect there to be a praise impulse as well. The individual who indifferently causes lives to be saved should be credited to the same extent as the individual who is indifferent to causing death is blamed. Clearly, he is not. Thus, it appears to be the case that our decisions to attribute

---

9 Knobe, supra note 3, at 192.
10 Id. at 192-93.
11 Id. at 193.
12 Solan, supra note 2, at 1017-18 (citing Joshua Knobe, International Action and Side Effects in Ordinary Language, 63 ANALYSIS 190 (2003)).
13 Knobe, supra note 4, at 933-34.
14 Psychologists generally agree that concepts cannot typically be reduced to knowledge of defining features. Knobe’s experiment shows that blame is a case in point. For discussion, see Gregory L. Murphy, The Big Book of Concepts (2002); for a contrary view, considering causation as one of a number of primitives into which meaning may be decomposed, see Ray Jackendoff, Foundations of Language: Brain, Meaning, Grammar, Evolution (2002).
intent to an individual are influenced by whether the outcome the individual has achieved is good or bad.

So far then, I agree with Knobe, and credit him with an important and subtle contribution to the psychology of intentionality. Nonetheless, there is a difference between the conclusion that particular attributions of intent are influenced by the outcome achieved (good or bad), and the conclusion that our concept of moral attribution exists in some way as a prerequisite to our internalized understanding of what intent means. I believe that the results of Knobe’s experiment support only the first of these conclusions. In fact, they illustrate the second order effects that I described in my original essay: Once a subject concludes that blame should be assigned based upon the fact that the blameworthy individual caused a bad outcome, affective considerations contribute more and more to the degree of causation and, thanks to Knobe’s contribution to learning in this area, apparently to the level of intent as well. That is, as the facts permit, we conceptualize situations to keep them consistent with theories we have formed, including theories of blame based upon an individual’s having caused the death of others, as in Knobe’s study.

The same holds true for causation, as already noted. Knobe describes in his response a second study in which he demonstrates that we are more likely to attribute causation when harm results from an omission by a person with responsibility to have performed an act than from the same omission by a person with no such responsibility. Here, however, there really is a symmetry with corresponding scenarios that result in good outcomes. We are much more likely to credit someone in a position of responsibility for improving things by not taking a harmful action than to similarly credit a passerby with no such responsibility. Thus, this study appears to say more about differences between direct and indirect causation than about moral attribution.

15 For discussion of how people’s judgment of causation can be influenced by their prior decision to attribute responsibility, see my earlier essay, Solan, supra note 2, at 1014-19 (discussing Lawrence M. Solan & John M. Darley, Causation, Contribution, and Legal Liability: An Empirical Study, 64 LAW & CONTEMP. PROBS. 265 (2001)).
16 Knobe, supra note 4, at 934-36.
17 Languages often differ in their handling of direct and indirect causation to a greater extent than does English. For discussion, see Solan and Darley, supra note 15, at 295-96.
Moreover, it would be difficult to believe that causation, which we have known since Pavlov to be understood by animals as well as humans, to be motivated by considerations of moral attribution. Yet, once again, our attribution in any particular situation may well be influenced by considerations including the prior assignment of blame.

In conclusion, Joshua Knobe has provided important evidence to the effect that attribution decisions differ depending on whether one is being accused of doing something bad or praised for doing something good. In doing so, he has focused attention on the fact that moral attribution is not reducible to the presence of the elements that trigger it. My earlier essay presents no reason why it should not be, making Knobe's contribution valuable. Yet Knobe's essay does not go so far as to demonstrate that the primitives of blaming are somehow derived from blaming itself. Our essays, perhaps happily enough, will by no means be the final word on these important issues.

---

18 For recent studies on the concept of causality in primates, see Michael Tomaseello & Josep Call, Primate Cognition 92-94 (1997) (describing causality in the cognition of apes).
Congress’ Preliminary Response to the Abu Ghraib Prison Abuses

ROOM FOR REFORM?

I. INTRODUCTION

On July 22, 2004, Representative Rush Holt (D-NJ) introduced a bill in response to the prisoner abuses photographed at the Abu Ghraib detention facility in Iraq.\(^1\) Divided into three parts, the bill directs the President to require: (1) the videotaping of interrogations and “other pertinent interactions” of detainees in the custody of the United States armed forces as well as intelligence operatives and contractors of the United States;\(^2\) (2) “unfettered access” to detainees in the custody of the United States by members of various international human rights organizations;\(^3\) and (3) the developing of guidelines by the Judge Advocate General to ensure that the required videotaping in “section 1 is


\(^2\) Specifically, the bill orders the President to act “in accordance with the Geneva Conventions of 1949, the International Covenant on Civil and Political Rights, the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment” and “the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States” when implementing a specific videotaping plan. Interrogation Bill, supra note 1, § 1(a). In addition, the bill also requires that “[v]ideotapes shall be made available . . . to both prosecution and defense to the extent they are material to any military or civilian criminal proceeding.” Id. § 1(b).

\(^3\) The human rights organizations mentioned in the bill are The International Federation of the International Committee of the Red Cross and the Red Crescent, The United Nations High Commissioner for Human Rights, and The United Nations Special Rapporteur on Torture. Id. § 2.
sufficiently expansive to prevent any abuse of detainees” that violates “law binding on the United States, including [international] treaties . . . .”

Three formal reports evaluate the allegations of abuse at Abu Ghraib. The Taguba Report, commissioned by the United States Army and written by Major General Antonio Taguba, has been available to the public since May 2, 2004, despite the fact that it was initially marked SECRET/NO FOREIGN DISSEMINATION. The Schlesinger Report, researched and written by an independent panel commissioned by the government, was released to the public on August 24, 2004. Finally, the Jones-Fay Army Report, commissioned by the United States Army and compiled by Lieutenant General Anthony R. Jones and Major General George R. Fay, was declassified and released to the public on August 25, 2004.

While the Taguba, Schlesinger, and Jones-Fay Reports evaluate allegations of prisoner abuse at the Abu Ghraib

\footnotesize
\begin{itemize}
  \item \textsuperscript{4} Id. § 3(a).
  \item \textsuperscript{5} Although a series of reports address the instances of abuse at Abu Ghraib, it appears that Representative Holt lends a tremendous amount of credence to three of them. See 151 CONG. REC. E15, supra note 1 (stating that “[l]ast year, three reports that were compiled by U.S. Army officers and the bipartisan investigative commission appointed by U.S. Defense Secretary Rumsfeld documented in horrifying detail the egregious human rights abuses that occurred at Abu Ghraib Prison . . . .”). From Representative Holt’s description of these reports, it can be inferred that he was referencing the Taguba Report, the Schlesinger Report and the Jones-Fay Report discussed in greater detail above. Accordingly, this paper will refrain from engaging in a lengthy discussion of additional released reports and instead rely on the aforementioned three reports’ findings. For a list of Abu Ghraib investigative reports completed or underway as of August 23 2004, see http://www.cbc.ca/news/background/iraq/prisonabuse_inquiries.html (last visited Nov. 5, 2005) (follow hyperlinks for specific reports).
  \item \textsuperscript{8} GEORGE R. FAY & ANTHONY R. JONES, AR 15-6 INVESTIGATION OF THE ABU GHRAIB PRISON AND 205TH MILITARY INTELLIGENCE BRIGADE [hereinafter JONES-FAY REPORT], available at http://www.cbc.ca/news/background/iraq/pdf/fay_report20040825.pdf. The Jones-Fay Report is actually a compilation of two separate reports. For clarification purposes, citations to the Jones-Fay Report will be followed by “Part I” or “Part II.” Part I refers to Jones’ report while Part II refers to Fay’s report.
\end{itemize}
detention facility, each report investigates the problem from a different angle. The Taguba Report explores the effectiveness of the 800th Military Police Brigade’s detention procedures at the prison. The Jones-Fay Report assesses whether members of the 205th Military Intelligence Brigade “requested, encouraged, condoned, or solicited [800th Military Police Brigade] personnel to abuse detainees” and whether Military Intelligence personnel “comported with established interrogation procedures and applicable laws and regulations.” Finally, the Schlesinger Report provides a general analysis of what factors resulted in detainee operational and interrogation difficulties at Abu Ghraib and what corrective measures can be taken to remedy the problem.

Each of the reports make two consistent findings. First, Military Police and Military Intelligence personnel stationed at Abu Ghraib lacked extensive training in the Geneva Conventions. Second, confusion existed among Military Police and Military Intelligence personnel as to how to apply the Geneva Conventions to the War in Iraq. The reports’ findings

---

9 The 800th Military Police Brigade, based in Uniondale, New York, was responsible for running the Abu Ghraib prison. Murphy, U.S. Abuse, supra note 6, at 593.

10 TAGUBA REPORT, supra note 6, at 6, para. 3. Specifically, the Taguba Report “[i]nvestigate[s] the training, standards, employment, command policies, internal procedures, and command climate in the 800th MP Brigade . . . .” Id. at 7, ¶ 3(c).

11 The 205th Military Intelligence Brigade screened and interrogated detainees at the Abu Ghraib prison. JONES-FAY REPORT, supra note 8, at 10 (Part I).

12 Id. at 4 (Part II).

13 SCHLESINGER REPORT, supra note 7, at 21.

14 See JONES-FAY REPORT, supra note 8, at 114 (Part II) (“Interrogator training in the Laws of Land Warfare and the Geneva Conventions is ineffective.”); SCHLESINGER REPORT, supra note 7, at 44 (Director of the Joint Interrogation and Debriefing Center at Abu Ghraib “failed to properly train and control his soldiers and failed to ensure prisoners were afforded the protections under the relevant Geneva Conventions.”); TAGUBA REPORT, supra note 6, at 19-20 (Military Police personnel received “very little instruction or training . . . on the . . . Geneva Convention[s]” and “few, if any, copies of the Geneva Conventions were ever made available to [Military Police] personnel or detainees.”).

15 See JONES-FAY REPORT, supra note 8, at 19 (Part II) (“Soldiers on the ground are confused about how they apply the Geneva Conventions and whether they have a duty to report violations of the conventions.”); SCHLESINGER REPORT, supra note 7, at 82 (While the senior leadership at Abu Ghraib understood that the Geneva Conventions applied “[t]he message in the field, or the assumptions made in the field, at times lost sight of this underpinning.”); TAGUBA REPORT, supra note 6, at 44 (The Commander of the 800th Military Police Brigade failed to ensure that her soldiers “knew, understood, and adhered to the protections afforded to detainees in the Geneva Convention Relative to the Treatment of Prisoners of War.”).
and recommendations suggest that while some of the Military Police and Military Intelligence personnel stationed at Abu Ghraib intentionally committed sexual abuses and caused bodily harm to prison detainees for sadistic purposes, a large number of the abuses resulted from “misinterpretations of law or policy or resulted from confusion about what interrogation techniques were permitted by law . . . .”\(^{16}\) The abuses at Abu Ghraib cannot be attributed solely to the actions “of a few bad[ ]apple[s]”\(^{17}\) who chose not to abide by standard military procedures. Rather, they must also be viewed as the product of numerous Executive Branch and military policy errors that Representative Holt’s Interrogation Bill fails to fully address.

After the September 11, 2001 terrorists attacks, the Bush administration “attempted to build on precedents established during past wars to support extraordinarily broad claims of executive power.”\(^{18}\) President Bush employed his Commander-in-Chief authority to suspend the application of the Geneva Conventions to suspected al Qaeda and Taliban members detained in Afghanistan and Guantanamo Bay, Cuba.\(^{19}\) In addition, the Bush administration authorized the use of coercive interrogation methods that arguably violated general humanitarian principles as well as specific Geneva Conventions provisions.\(^{20}\)

Unlike in Afghanistan and Guantanamo Bay, the Bush administration currently insists that most prisoners\(^{21}\) detained

\(^{16}\) Jones-Pay Report, supra note 8, at 16 (Part I). See also Schlesinger Report, supra note 7, at 68.


\(^{18}\) Derek Jinks & David Sloss, Is the President Bound by the Geneva Conventions?, 90 Cornell L. Rev. 97, 100 (2004).

\(^{19}\) See Seymour M. Hersh, Chain of Command: The Road from 9/11 to Abu Ghraib 17-18 (2004). See infra Part III.A.

\(^{20}\) See Mark A. Drumbl, Symposium, ‘Terrorism on Trial’: Lesser Evils in the War on Terrorism, 36 Case W. Res. J. Int’l L. 335, 337 (2004) (finding that “[m]any experts agree that the detentions, as well as interrogation methods deployed against the detainees [in Guantanamo Bay], run afoul of international humanitarian law and international human rights law.”); Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 Colum. J. Transnat’l L. 811, 824 (2005) (arguing that the Bush administration’s authorization of severe interrogation tactics in Afghanistan was illegal and violated “Geneva law and nonderogable human rights.”); See infra Part III.B.

in Iraq should be afforded full protection under the Geneva Conventions.\footnote{22 U.S. Department of Defense News Transcript, Secretary Rumsfeld Media Availability Enroute to Baghdad (May 13, 2004), http://www.defenselink.mil/transcripts/2004/tr20040513-secdef0749.html (quoting Secretary Rumsfeld as saying Geneva Conventions “III and IV apply for the Iraqi prisoners of war and apply to the civilian non-military detainees. That has been the case from the beginning.”). \textit{But cf.} REED BRODY, HUMAN RIGHTS WATCH, THE ROAD TO ABU GHRAIB 7 (June 2004), available at http://hrw.org/reports/2004/usa0604/usa0604.pdf (“On May 5, 2004, [Secretary Rumsfeld] told a television interviewer the Geneva Conventions ‘did not apply precisely’ in Iraq but were ‘basic rules’ for handling prisoners.”) (quoting United States Department of Defense News Transcript, Secretary Rumsfeld Interview with Matt Lauer, NBC “The Today Show,” (May 5, 2004), http://www.dod.gov/transcripts/2004/tr20040505-secdef1425.html).} Irrespective of the Executive Branch’s contention on this matter, President Bush’s failure to initially outline a clear Geneva Conventions policy in Iraq facilitated the prisoner abuses at Abu Ghraib.\footnote{23 See infra Part IV.B.i.a.} The Bush administration assumed that all military personnel understood that the Geneva Conventions applied in Iraq.\footnote{24 See HERSH, supra note 19, at 5 (quoting White House Counsel Alberto Gonzales as saying that “President [Bush] had ‘made no formal determination’ invoking the Geneva Conventions before the March 2003 invasion of Iraq . . . ‘because it was automatic that Geneva would apply’ and it was assumed that the military commanders in the field would ensure that their interrogation policies complied with the President’s stated view.”).} However, in light of the Executive Branch’s self-proclaimed “war on terror” and the suspension of the Geneva Conventions in Afghanistan and Guantanamo Bay, this assumption appears to be unfounded.\footnote{25 In fact, President Bush’s suspension of the Geneva Conventions in Afghanistan and Cuba led some military personnel stationed in Iraq to believe that their detainees need not be afforded treaty protections. Paust, supra note 20, at 849.}

As written, the Interrogation Bill serves as a superficial response to a complex problem. While it succeeds in establishing deterrent measures that will assist in reducing individual instances of abuse,\footnote{26 The Interrogation Bill’s videotape requirement and un fettered access requirement are examples of such deterrent measures. \textit{See generally} Interrogation Bill, supra note 1.} it misses the mark in addressing the Executive Branch’s policy errors that contributed to widespread detainee mistreatment. Instead of relying solely on reactive methods to prevent another Abu Ghraib atrocity, Congress must require the President to clearly articulate whether and how the Geneva Conventions apply at the onset of every military crisis. The Bush Administration’s decision to withhold Geneva Conventions protections to al Qaeda prisoners effectively eradicated the pre-9/11 presumption that the treaty’s provisions apply to all captured
detainees. Moreover, if the President seeks to violate the Geneva Conventions during a military campaign, he may only do so with the Legislative Branch’s express approval.

This Note challenges Congress’ proposed response to the Abu Ghraib prison atrocity. Part II begins with a general description of the Geneva Conventions and other laws and international treaties signed and ratified by the United States to protect individuals held in U.S. custody from inhumane treatment. Part III traces the evolution of United States Army interrogation techniques from the period immediately preceding September 11, 2001 to the present. Part IV discusses the specific types of torture endured by detainees housed at the Abu Ghraib detention facility and also analyzes the Executive Branch mistakes that caused these abuses. Part V argues that Representative Holt’s Interrogation Bill does not adequately address the underlying policy problems confronting the United States Army with regard to interrogation tactics and detention procedures in Iraq. Finally, this Note concludes by proposing and evaluating a substitute bill that will reduce the number of prisoner abuses at Abu Ghraib and other detention facilities by eradicating misinterpretations of law and policy within the military.

II. THE GENEVA CONVENTIONS AND INTERNATIONAL HUMANITARIAN LAW

A number of international laws and conventions seek to mitigate or prevent abuses during war by advancing the *jus in bello*, or “the rightful manner of war.” In general, international humanitarian law prohibits “unnecessary suffering” and “set[s] [specific] limits on how war may be waged.” Indeed, the United States is a party to the Geneva Conventions which, among other things, regulate the treatment of prisoners of war (“POWs”) by banning the practice

---

27 See infra IV.B.i.a.
28 See Jinks & Sloss, supra note 18, at 154 (arguing “that the Constitution is best interpreted to require the President to obtain congressional approval, in the form of legislation, if he wants to violate a treaty provision that is the law of the land.”).
of torture.

Although there are four different Geneva Conventions that the United States signed in 1949 and supplemented with two protocols in 1977, this Note will focus on Convention III Relative to the Treatment of Prisoners of War (“Convention III”). The international community’s prohibition on torture is more generally stated in the Convention Against Torture and the International Covenant on Civil and Political Rights, additional treaties to which the United States is also a party. However, two primary issues arising out of the Abu Ghraib prison scandal are whether all Military Police and Military Intelligence personnel knew that Convention III applied to soldiers captured and detained in Iraq and whether they fully understood the content of the treaty’s articles. Accordingly, this section explores the general

32 See Jinks & Sloss, supra note 18, at 108-10.
33 Erin Chlopak, Dealing with the Detainees at Guantanamo Bay: Humanitarian and Human Rights Obligations Under the Geneva Conventions, 9 HUM. RTS. BR. 6, 6 (2002). The other three conventions are Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and Convention IV Relative to the Protection of Civilian Persons in Time of War. Id.
34 Article 1 of the Convention Against Torture defines torture as:

[An]y act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec.10, 1984, art. 1, 23 I.L.M. 1027, 1465 U.N.T.S. 85.
35 The International Covenant on Civil and Political Rights states that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.” International Covenant on Civil and Political Rights, Mar. 23, 1976, art. 76, I.L.M. 368, 999 U.N.T.S. 171.
36 Domestically, the United States enacted a law that criminalizes the commission of torture by U.S. citizens on foreign soil. The United States Code defines torture as “an act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control.” 18 U.S.C. § 2340. The penalty for the commission or attempted commission of torture by a U.S. citizen on foreign soil is no more than twenty years’ imprisonment. However, if torture results in the death of one or more individuals, the crime is punishable by death or life imprisonment. See 18 U.S.C. § 2340A. The United States also enacted the War Crimes Act that criminalizes the violation of the Geneva Conventions and other treaties that govern the laws of war. See 18 U.S.C. § 2441.
provisions of Convention III rather than other international treaties that espouse similar principles.

A. Geneva Convention III Relative to the Treatment of Prisoners of War

Convention III confers POW status on captured individuals who are military personnel of a party involved in an armed conflict between one or more states. A “de facto state of armed conflict” as opposed to a formal declaration of war is enough to trigger Convention III protections. Both states remain bound to the Convention even if one of the warring states is not an official party to the treaty. In addition to armed conflict between states, Convention III also applies in non-international conflicts, including civil wars and other instances in which one or both of the warring parties are not official states.

Convention III delineates “modest but important humanitarian guarantees” for POWs, some of which pertain to interrogation tactics. Specifically, Convention III requires that all POWs “must . . . be humanely treated” and that they “are entitled . . . to respect for their persons and their honour.” “[O]utriges upon personal dignity,” including torture, mutilation or any other form of degrading treatment, are strictly prohibited. POWs must be afforded the right to attend religious services of their faith provided that they are not proven to have disciplinary problems. In addition, their housing conditions are to be “as favourable as those for the . . . Detaining Power who are billeted in the same area.”

In terms of interrogation tactics, the Convention explicitly

37 See Chlopak, supra note 33, at 8.
38 See Jinks & Sloss, supra note 18, at 109.
39 Id.
40 The Association of the Bar of the City of New York, Human Rights Standards Applicable to the United States’ Interrogation of Detainees, 59 THE RECORD 271, 275-76 (2004) [hereinafter Human Rights Standards]. Only article 3, as opposed to “the full protection of [Convention III], applies to non-international armed conflicts.” Id. See also Jinks & Sloss, supra note 18, at 110.
41 Jinks & Sloss, supra note 18, at 110.
43 Id. art. 14.
44 Id. art. 3.
45 Id. art. 34.
46 Id. art. 25.
prohibits “physical or mental torture, [and] any other form of coercion” for the purpose of procuring intelligence information. 47 POWs are only required to disclose their first names, rank, army serial number and date of birth to detaining officials. 48 Those prisoners who choose not to answer questions beyond that cannot be “threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.” 49

B. Implementation and Enforcement

The Geneva Conventions’ primary purpose is to make “human rights binding law.” 50 While Convention III clearly identifies what protections should be afforded to POWs who are taken into custody during an armed conflict, problems can arise in implementing and enforcing its provisions. 51 United Nations agencies or their subcommittees are primarily responsible for ensuring that signatories to a treaty uphold their promises to respect human rights. 52 However, enforcement can become burdensome because, among other reasons, United Nations agencies are not authorized to punish treaty violators. 53

Independent, nonpolitical institutions interested in preventing international humanitarian rights violations confront similar problems. For example, the International Committee of the Red Cross ("ICRC") inspections of the Abu Ghraib detention facility revealed inhumane prisoner abuses. 55 Instead of remedying the problems discovered, ICRC agents’ recourse was limited to submitting a report to the United

47 Id. art. 17.
48 Convention III, art. 17.
49 Id.
50 LEVI, supra note 30, at 311.
51 See id. at 183 (arguing that the implementation and enforcement of human rights protections in international treaties can be difficult).
52 See id.
53 See id. at 184.
54 The ICRC is "an independent, neutral organization" designed to ensure "humanitarian protection and assistance for victims of war and armed violence."
States government that explained their committee’s findings. The process of conducting the inspections, writing the report and waiting for the United States government to respond took almost a full year and enabled the cycle of abuse to continue at Abu Ghraib. In order to circumvent damaging bureaucratic delays, Congress must act preemptively and pass laws that identify and address the fundamental causes of prisoner abuse abroad. Although a solid attempt, the Interrogation Bill does not correct the underlying policy problems that existed at the Abu Ghraib detention facility; it merely restates a failed proposition. This Note recommends a more effective bill in Part V.

III. EVOLUTION OF INTERROGATION TECHNIQUES

The September 11, 2001 attacks on the United States drastically altered the Bush administration’s willingness to adhere to preexisting international law. Cofer Black, the former director of the Central Intelligence Agency’s counterterrorism unit, testified before Congress in early 2002 that “[t]here was a before-9/11 and an after-9/11” and that “[a]fter 9/11 the gloves came off.” Prior to the al Qaeda attacks, the United States Military applied the Geneva Conventions “broadly” and provided protection to all

56 See Murphy, U.S. Abuse, supra note 6, at 594 (explaining that “[f]rom the start of the occupation of Iraq, representatives of the [ICRC] were allowed access to Iraqi detainees . . . and . . . regularly submitted observations and recommendations to the coalition forces regarding the treatment of such detainees.”).

57 The ICRC conducted inspections between March and November 2003. ICRC REPORT, supra note 55, at 3. The United States government received a copy of the report in February 2004. Id. at 1.

58 The Interrogation Bill provides that various agencies be “immediately granted unfettered access to detainees or prisoners in the custody or under the effective control of the armed forces of the United States.” Interrogation Bill, supra note 1, § 2. As noted earlier, however, the ICRC’s “unfettered access” to the Abu Ghraib prison did not succeed in ending the cycle of abuse. See supra notes 50-57 and accompanying text.


60 Barry, supra note 17, at ¶ 3.
individuals captured in an international armed conflict. In accordance with the United States Constitution’s Supremacy Clause, the Geneva Conventions achieved the status of “supreme federal law” and could not be undermined or ignored unless one of two things occurred: (1) a particular Geneva Convention treaty provision “exceed[ed] the scope of the treaty-makers’ domestic lawmaking powers”; or (2) “a subsequent inconsistent treaty or statute supersede[d] the [Geneva Convention] treaty provision at issue.” Prior to the terrorist attacks, the government did not seek to undercut the United States’ obligations under the Geneva Conventions because, up until that point, the treaty did not interfere with any foreign engagement or military campaign.

In early 2002, however, President Bush concluded that terrorism could not be fought by strictly adhering to international rules of law. Officials from the White House, the Department of Defense, and the Department of Justice drafted a number of memoranda concerning the application of the Geneva Conventions to the War in Afghanistan and the implementation of interrogation policies for use on al Qaeda and Taliban detainees. According to White House Counsel Judge Alberto Gonzales, the documents “explore[d] the limits of the legal landscape as to what the Executive Branch can do within the law and the Constitution as an abstract matter.”

---

61 BRODY, supra note 22, at 5.
62 The Supremacy Clause states that “all Treaties made . . . under the Authority of the United States shall be the supreme Law of the Land.” U.S. CONST. art. 6.
63 Jinks & Sloss, supra note 18, at 123-24.
64 In fact, on October 1, 1997, the government codified the Geneva Conventions in an Army Regulation handbook [Army Regulation 190-8], which established policies and procedures “for the administration, treatment, employment, and compensation of enemy prisoners of war . . . .” Jinks & Sloss, supra note 18, at 125 (quoting U.S. ARMY, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINES §1-1(a) (1997)). This handbook cited the Geneva Conventions as “directly binding on all U.S. military forces as a matter of . . . law, even where they conflict with the military's own regulations.” Id.
65 David J. Gottlieb, How We Came to Torture, 14 KAN. J.L. & PUB. POL’Y 449, 453 (2005) (The Bush Administration “fairly quickly decided that the threat it was facing was entirely unprecedented. Existing treaties were seen as impediments to be overcome. Concerned with the need to acquire as much ‘actionable intelligence’ as possible, by whatever means, the Administration adopted a strategy to permit something close to unfettered power in dealing with terrorist suspects.”).
66 See BRODY, supra note 22, at 5-6. See also Neil MacMmaster, Torture: from Algiers to Abu Ghraib, 46 RACE & CLASS 1, 17-18 (2004).
After reviewing the parties’ arguments, President Bush determined that terrorists or suspected terrorists would be deemed “unlawful combatants” and denied protections under Convention III.  

President Bush provided leeway for the implementation of harsh interrogation policies by holding that unlawful combatants should be treated in a manner consistent with the Geneva Conventions but that “military necessity” ultimately dictates detainee treatment. The Bush administration’s unwillingness to offer full Convention III protections to terrorists coupled with its hesitancy to completely ignore established international law resulted in the breakdown of a clear Geneva Conventions policy in Iraq, including the Abu Ghraib detention facility.

A. Applicability of Geneva Convention III to the War in Afghanistan

Legal memoranda written by White House Counsel, the Department of Defense and the Department of Justice influenced President Bush's decision not to apply Convention III to Taliban and al Qaeda prisoners. In a document dated January 22, 2002, Assistant Attorney General Jay S. Bybee expressed the view that al Qaeda is “not a nation-State” or


68 See Barry, supra note 17, at ¶ 9.


70 See Drumbl, supra note 20, at 339-40 (Finding that “[t]here is cause to believe that [the] memoranda [pertaining to the War in Afghanistan], along with other deliberate decisions made at senior levels to circumscribe the role of law, had an impact upon the degree of respect for law in the Abu Ghraib prison . . . .”); see infra Parts III.B, IV.B.2.a; see also supra note 25 and accompanying text.

71 On June 22, 2004, both the White House and the Department of Defense released a total of twenty-eight documents regarding the Administration’s military interrogation policies since September 11, 2001. At least six additional documents, including the Taguba report, were leaked to the news media and are now available to the public as well. For a complete list of all available and unavailable documents pertaining to the applicability of the Geneva Conventions abroad as well as U.S. military interrogation procedures, see The Interrogation Documents: Debating U.S. Policy and Methods from the National Security Archive Website, http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164 (last visited Nov. 7, 2005). Because the content of many of the letters and memoranda is repetitive, only a limited number of the documents will be referenced in this Section.

72 Memorandum from Assistant Att’y Gen. Jay S. Bybee, from the Office of Legal Counsel at the U.S. Dep’t of Justice, to White House Counsel Judge Alberto
“High Contracting Party”\textsuperscript{73} as required under Convention III. Rather, he believed al Qaeda should be classified as a “non-governmental terrorist organization composed of members from many nations, with ongoing operations in dozens of nations.”\textsuperscript{74} According to Bybee’s interpretation of Convention III, non-governmental organizations cannot be recognized as parties to the treaty and therefore should not be provided the protection of its provisions.\textsuperscript{75} Bybee also concluded that President Bush reserved the right to suspend U.S. treaty obligations to Afghanistan because it was a non-functioning state and the Taliban militia was not a valid government.\textsuperscript{76} President Bush’s acceptance of Bybee’s determinations would effectively accomplish two tasks. First, the trials and long-term detentions of al Qaeda terrorists would not be subject to humanitarian protections under Convention III.\textsuperscript{77} Second, because Afghanistan constituted a “failed state,” Taliban military personnel would also not receive POW status under Convention III.\textsuperscript{78}

White House Counsel Judge Alberto Gonzales agreed with Bybee that Taliban and al Qaeda detainees should not be afforded POW status under Convention III. In a January 25, 2002 memorandum to President Bush, Gonzales argued that the conflict in Afghanistan did not “form[] the backdrop” for the Geneva Conventions.\textsuperscript{79} He believed that the war against terrorism constituted a new kind of war that demanded the procurement of valuable intelligence information from captured

\begin{footnotes}
\footnote{Bybee Memorandum 1/22/02, supra note 72, at 9.  Convention III applies to “all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties . . . .” Convention III, supra note 42, art. 2.  A “High Contracting Party is a country, or sovereign state, that has signed the Geneva Conventions.” Heather Alexander, Comment, Justice for Rwanda Toward a Universal Law of Armed Conflict, 34 GOLDEN GATE U. L. REV. 427, 434 n.55 (2004).}
\footnote{Bybee Memorandum 1/22/02, supra note 72, at 9.}
\footnote{Id. at 10.}
\footnote{Id. at 10-11.}
\footnote{Id. at 9-10.}
\footnote{Id. at 10-11.}
\end{footnotes}
Gonzales further argued that in order to preserve interrogation flexibility, the Geneva Conventions must be rendered obsolete. Irrespective of the inapplicability of Convention III, Gonzales concluded that the United States should still be “constrained” by “its commitment to treat the detainees humanely and, to the extent appropriate and consistent with military necessity, in a manner consistent with the principles of [Convention III].” Gonzales adopted from Secretary of Defense Donald Rumsfeld the argument that the Geneva Conventions do not apply to the conflict in Afghanistan but that Taliban and al Qaeda detainees should be treated in a humane manner. The negative effects resulting from the Executive Branch’s endorsement of these two seemingly irreconcilable viewpoints ultimately extended to the Abu Ghraib prison facility.

In response to Gonzales’ memorandum, an “outraged” Secretary of State Colin L. Powell expressed his concern that the United States had never before determined that Convention III did not apply to an armed conflict involving its military. Powell also disagreed with Gonzales’ memorandum insofar as it did “not squarely present to the President the options that [were] available to him. Nor [did] it identify the

80 Id.
81 Id.
82 Id.
83 On January 19, 2002, Secretary of Defense Donald Rumsfeld requested that the Chairman of the Joint Chiefs of Staff inform all combatant commanders in Afghanistan that “Al Qaida and Taliban individuals under the control of the Department of Defense are not entitled to prisoner of war status for purposes of the Geneva Conventions of 1949” but that they should be treated “in a manner consistent with the principles of the Geneva Conventions of 1949.” Memorandum from Sec’y of Def., Donald Rumsfeld to the Chairman for the Joint Chiefs of Staff (Jan. 19, 2002), http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164 (follow “Jan 19, 2002” hyperlink). Two days later, the Chairman for the Joint Chiefs of Staff transmitted Rumsfeld’s requested message to the military commanders in Afghanistan. See Message from the Chairman for the Joint Chiefs of Staff to Military Commanders in Afg. (Jan. 21, 2002), http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164 (follow “Jan 21, 2002” hyperlink); see also BRODY, supra note 22, at 5.
84 See infra Part IV.B.2.a. See also supra notes 25 and 70 and accompanying text.
85 Paust, supra note 20, at 826.
significant pros and cons of each option.” Despite his deep-seated conviction that Convention III should not be limited, Powell drafted his memorandum with the intent to clarify Gonzales’ propositions. In option one, Convention III would not apply to the conflict in Afghanistan because it is a failed state and cannot be regarded as a High Contracting Party. In option two, Convention III would apply to the conflict in Afghanistan, but al Qaeda and Taliban detainees would neither be afforded any protections nor be entitled to POW status. Powell preferred the latter option because option one would “reverse over a century of U.S. policy and practice in supporting the Geneva Conventions and undermine the protections of the law of war for our troops . . . .” Under both alternatives, however, Powell embraced the Gonzales/Rumsfeld view that all detainees should be treated in a manner consistent with Convention III principles.

On February 7, 2002, President Bush issued a formal memorandum regarding the applicability of Convention III to al Qaeda and Taliban detainees, in which he made five crucial determinations. First, Convention III does not apply to al Qaeda primarily because it is not a High Contracting Party. Second, Convention III applies to the conflict with the Taliban, but the President possesses the authority to suspend all protections in Afghanistan at any point. Third, Article 3 of Convention III does not apply to either al Qaeda or Taliban detainees because the “conflicts are international in scope and . . . Article 3 applies only to ‘armed conflict not of an

87 Powell Memorandum, supra note 86, at 1.
88 Id. at 1-4.
89 Id. at 1.
90 Id.
91 Id.
92 Id. at 2.
93 See Powell Memorandum, supra note 86, at 5.
94 See Bush Memorandum, supra note 69, at 1.
95 President Bush’s second determination is somewhat confusing. After reviewing all four of the President’s conclusions, it can be inferred that Convention III applies to the conflict in Afghanistan generally, but that al Qaeda and Taliban detainees do not qualify for POW status. Id. See Human Rights Standards, supra note 40, at 275 (finding that the “President accepted application of the Geneva Conventions in principle to the conflict with the Taliban, while asserting that Taliban personnel did not qualify under [Convention] III for status as prisoners of war. However, the Administration denied that the Geneva Conventions applied at all to Al Qaeda and to the broader War on Terror, although it announced that it would adhere to comparable humanitarian standards.”).
96 Bush Memorandum, supra note 69, at 1-2.
international character."\footnote{97} Fourth, Taliban detainees are unlawful combatants and do not qualify as POWs under Convention III. Finally, because al Qaeda is not protected under Convention III, al Qaeda detainees do not qualify for POW status either.\footnote{98} President Bush's determinations created an avenue by which Convention III did not need to be applied to the Taliban conflict thus, "preserv[ing] maximum flexibility with the least restraint by international law."\footnote{99} These same determinations led some military personnel stationed at Abu Ghraib to improperly conclude that they could deny Geneva law protections to a number of their detainees as well.\footnote{100}

B. Authorized Interrogation Tactics in Afghanistan and Guantanamo Bay

After President Bush determined that the Geneva Conventions do not protect al Qaeda and Taliban detainees, a series of memoranda\footnote{101} circulated throughout the White House, Department of Defense and Department of Justice regarding the implementation of interrogation procedures in Afghanistan and Guantanamo Bay.\footnote{102} A number of these documents addressed whether 18 U.S.C. §§ 2340-2340A,\footnote{103} the statutes that criminalize the commission of torture by U.S. citizens on foreign soil, could impede the military's ability to employ harsh interrogation methods abroad. Both the Department of Justice and the White House expressed the view that even if specific interrogation methods violated the United States Code, the President, as Commander-in-Chief, could still utilize "flexible" interrogation methods for the purpose of gaining intelligence information concerning the enemy's military plans.\footnote{104} In

\footnote{97} Id. at 2.
\footnote{98} Id.
\footnote{99} Human Rights Standards, \textit{supra} note 40, at 275.
\footnote{100} See \textit{supra} notes 25 and 70 and accompanying text.
\footnote{101} See \textit{supra} note 71 and accompanying text.
\footnote{102} In January 2002, the United States began sending individuals "picked up during the armed conflict in Afghanistan" to Guantanamo Bay, Cuba. The naval base located there ultimately housed over 700 detainees from forty-four countries. \textit{Brody}, \textit{supra} note 22, at 5.
\footnote{103} See \textit{supra} note 36 and accompanying text.
support of this proposition, the Department of Justice and the
White House argued that Congress lacks the authority “to set
the terms and conditions under which the President may
exercise his authority as Commander-in-Chief to control the
conduct of operations during a war.” The President alone is
vested with the “entire charge of hostile operations” and thus
far, Congress has not interfered with this authority.

The Department of Justice also concluded that the
definition of torture articulated in 18 U.S.C. §§ 2340-2340A
only covers “extreme acts” and that there exist a number of
interrogation methods that may be regarded as cruel,
inhumane or degrading but do not technically constitute
torture. Specifically, the Department of Justice concluded
that the infliction of severe mental and physical pain does not
constitute torture unless the pain is intended to have lasting
psychological effects or cause death or organ failure. Under
this definition, the beating of a prisoner into unconsciousness
or the breaking of his bones would not violate federal law.

The Government’s analysis of domestic laws reached
high-ranking military personnel stationed in Guantanamo Bay,
Cuba. Major General Michael B. Dunlavey responded to the
Department of Justice and the White House’s discourse
regarding the President’s responsibility to adhere to the United
States Code with a request for the authorization of more
aggressive interrogation techniques at the Guantanamo Bay
naval base. The Military Intelligence personnel stationed
abroad felt constrained by the procedures outlined in the Army

can no more regulate the President’s ability to detain and interrogate enemy
combatants than it may regulate his ability to direct troop movements on the
battlefield.”). This report was prepared for Secretary of Defense Donald Rumsfeld by a
group of executive branch attorneys. See Murphy, U.S. Abuse, supra note 6, at 592.

Bybee Memorandum 8/1/02, supra note 104, at 34-35. See Working Group
Report, supra note 104, at 21-22.

Bybee Memorandum 8/1/02, supra note 104, at 34 (quoting Hamilton v.
Dillin, 88 U.S. 73, 87 (1874)). See Working Group Report, supra note 104, at 20.

Bybee Memorandum 8/1/02, supra note 104, at 39.

Id. at 46.

Id.

Peter Irons, William Howard Taft Lecture: “The Constitution Is Just a

See Memorandum from Major Gen. Michael B. Dunlavey, Dept’ of Def.,
Joint Task Force 170, Guantanamo Bay, Cuba to Commander for the U.S. Southern
Command (Oct. 11, 2002), http://digitalarchive.oclc.org/dia/ViewObject.jsp?

Id.
FM 34-52 Intelligence Interrogation Manual. In light of President Bush’s February 7, 2002 directive that the Geneva Conventions do not apply to unlawful combatants, it can be argued that the aforementioned personnel desired a clear policy on permissible interrogation methods as well.

Secretary Rumsfeld subsequently approved a list of proposed interrogation techniques including, but not limited to, yelling, the use of stress positions for a maximum of four hours, deprivation of light and auditory stimuli, the use of twenty-hour interrogations, removal of clothing, forced grooming, using detainees’ individual phobias to induce stress and the use of “mild, non-injurious physical contact such as grabbing, poking in the chest with the finger, and light pushing.” Secretary Rumsfeld later rescinded his broad-based approval for the interrogation techniques, arguing that the methods could not be employed without “a thorough justification” and “a detailed plan for [their] use.” He concluded by reaffirming his position that detainees must be treated in a humane manner during interrogations. Following the submission of an Executive Branch report regarding permissible detainee interrogations in the war against terrorism, Secretary Rumsfeld again modified the

113 The Schlesinger Report indicates that Major General Michael B. Dunlavey’s request was a reaction “to tenacious resistance by some detainees to existing interrogation methods, which were essentially limited to those in Army Field Manual 34-52.” SCHLESINGER REPORT, supra note 7, at 35. The Army FM 34-52 Intelligence Interrogation Manual provides that the “use of force, mental torture, threats, insults, or exposure to unpleasant and inhumane treatment of any kind is prohibited by law and is neither authorized nor condoned by the US Government.” Murphy, U.S. Abuse, supra note 6, at 592 (quoting U.S. ARMY, INTELLIGENCE INTERROGATION 34-52 ch. 1 (1987)).

114 See Action Memorandum from White House General Counsel William J. Haynes II to Sec’y of Def. Donald Rumsfeld (Nov. 27, 2002), http://digitalarchive.oclc.org/da/ViewObject.jsp?objid=0000007678&reqid=3164 (follow “Dec 2, 2002” hyperlink). Secretary Rumsfeld officially approved the interrogation methods discussed in the memorandum on December 2, 2002. Id.

115 Underneath his signature approving interrogation techniques discussed in the November 27, 2002 Action Memorandum, Secretary Rumsfeld handwrote the following statement: “I stand for 8-10 hours a day. Why is standing [for interrogation purposes] limited to 4 hours?” Id.


118 Id.
approved list of unlawful combatant interrogation techniques.\textsuperscript{119} Although the new techniques did not expressly authorize the use of physical contact or other methods that might violate international treaties and United States domestic laws,\textsuperscript{120} subsequent investigations revealed that many of the same methods previously approved, but later rescinded by Secretary Rumsfeld were actually still being utilized at Guantanamo Bay.\textsuperscript{121}

The numerous policy changes authorized by Secretary Rumsfeld demonstrate the government’s hesitancy to implement a clear interrogation policy with regard to unlawful combatants. By determining that Convention III does not apply to unlawful combatants, yet arguing that these individuals should still be treated in a manner consistent with the treaty, the government created an amorphous set of guidelines that, in effect, authorized military personnel to haphazardly violate humanitarian standards.\textsuperscript{122} As a result, the long-standing assumption that the Geneva Conventions applied to all military campaigns was eradicated.\textsuperscript{123}

Secretary Rumsfeld’s authorization of coercive interrogation methods\textsuperscript{124} in conjunction with President Bush’s February 7, 2002 directive that unlawful combatants be treated in a manner consistent with Convention III caused confusion at the Abu Ghraib prison.\textsuperscript{125} The Taguba, Schlesinger, and Jones-

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{121} JONES-FAY REPORT, supra note 8, at 29 (Part II). Such techniques included the “use of stress positions, isolation for up to thirty days, removal of clothing, and the use of detainees’ phobias (such as the use of dogs).” Id.
\item \textsuperscript{122} Gottlieb, supra note 65, at 455 (finding that while “Secretary Rumsfeld may not have specifically authorized the use of the worst tortures . . . there should be no mistaking of how short the distance was between practices that the reservists were authorized to engage in or thought they were authorized to engage in and the tortures and humiliations that were in fact committed.”).
\item \textsuperscript{123} See supra note 24 and accompanying text.
\item \textsuperscript{124} See supra note 122 and accompanying text.
\item \textsuperscript{125} Paust, supra note 20, at 849 (noting that some military personnel stationed in Iraq believed that Convention III protections could be suspended and harsh interrogation tactics utilized based on President Bush’s reasoning from his February 7th memorandum); Gottlieb, supra note 65, at 449 (“The Government’s policies were a moral, legal, and political disaster. At worst, these rules were seen as winking at torture. At best, they sent confusing signals to American troops and contractors
\end{itemize}
\end{footnotesize}
Fay Reports conclude that the interrogation policies delineated by Secretary Rumsfeld and employed in Afghanistan and Guantanamo Bay were unlawfully used at Abu Ghraib. These errors could have been avoided had President Bush ensured that military personnel understood whether and how Convention III applied to the War in Iraq.

IV. ABUSES AND FUNDAMENTAL MISTAKES AT THE ABU GHRAIB DETENTION FACILITY

Neither President Bush nor the Department of Defense admitted to authorizing the incidents of abuse at Abu Ghraib. Nonetheless, a number of Military Police and Military Intelligence personnel working at the prison engaged in inhumane treatment and conducted unlawful interrogations of Iraqi detainees. An investigation into the policy errors at Abu Ghraib reveals a plethora of mistakes that could have been avoided had proper procedural safeguards been codified by Congress.

A. Specific Allegations and Instances of Abuse

The Taguba, Schlesinger, and Jones-Fay Reports reveal that Abu Ghraib detainees experienced “numerous incidents of sadistic, blatant, and wanton criminal abuses.” While the exact number of substantiated incidents of abuse varies in each report, it is generally agreed that between forty-four and fifty-five unlawful acts transpired at the prison. The abuses in . . . Iraq.”). See Michael Isikoff, Memos Reveal War Crimes Warning, NEWSWEEK ONLINE, May 17, 2004, at ¶ 9, at http://msnbc.msn.com/id/4999734/site/newsweek/ (“Administration critics have charged that key legal decisions . . . including the White House’s February 2002 declaration not to grant any Al Qaeda and Taliban fighters prisoners of war status under the Geneva Convention, laid the groundwork for the interrogation abuses . . . in the Abu Ghraib prison in Iraq.”). 126 See TAGUBA REPORT, supra note 6, at 8; SCHLESINGER REPORT, supra note 7, at 68; JONES-FAY REPORT, supra note 8, at 14-15 (Part I).

127 See infra Part IV.B.2.a.

128 MacMaster, supra note 66, at 14 (“Bush and Rumsfeld . . . claimed ignorance of malpractice . . . Implicit in such a discourse was the claim that there was no systematic deployment of torture interrogation techniques in the US army and that sadistic acts were isolated to degraded individuals and did not reach up through the chain of command.”).

129 See infra Part IV.A.

130 See TAGUBA REPORT supra note 6, at 16.

131 The Schlesinger Report indicates that “[o]f the 66 already substantiated cases of abuse, eight occurred at Guantanamo, three in Afghanistan and 55 in Iraq. Only about one-third were related to interrogation, and two-thirds to other causes.” SCHLESINGER REPORT, supra note 7, at 13. In contrast, the Jones-Fay Report indicates
occurred at the hands of individual soldiers as well as small military groups. While the Schlesinger Report does not provide specific examples of the abuses, the other two reports convey the details of each act.

The most severe forms of abuse occurred on the night shift of Tier 1 at Abu Ghraib and involved both physical attacks and sexual assaults. United States military personnel exclusively operated Tiers 1A and 1B, designated for military intelligence “holds,” while Iraqi prison guards supervised regular prisoners in Tiers 2 through 7. With regard to physical abuse, military personnel hit, punched, slapped and kicked detainees, sometimes until they were rendered unconscious. There are also reports of military personnel jumping on detainees’ feet and simulating electric torture by attaching wires to naked detainees’ extremities. Dogs were frequently used to frighten detainees and on at least one occasion, to bite and severely injure a prisoner. In addition, twenty detainees died suspiciously while in U.S. military custody, but these deaths are still under investigation.

The sexual abuses at Abu Ghraib spanned from the photographing and videotaping of naked detainees to rape. Other examples of abuse include forcing detainees to remain naked for days at a time as well as arranging naked male detainees into a pyramid formation and jumping on them. In that there were forty-four incidents of detainee abuse at Abu Ghraib. Jones-Fay Report, supra note 8, at 15 (Part I).

132 See Jones-Fay Report, supra note 8, at 9 (Part II).
135 See Jones-Fay Report, supra note 8, at 9 (Part II). See also Taguba Report, supra note 6, at 18-19.
136 See Schlesinger Report, supra note 7, at 74.
137 See Taguba Report, supra note 6, at 18.
138 See Jones-Fay Report, supra note 8, at 9 (Part II).
139 See Taguba Report, supra note 6, at 16-17.
140 Id. at 19.
141 See Schlesinger Report, supra note 7, at 13; MacMaster, supra note 66, at 15 (“In November 2003, one prisoner died under torture, but interrogators, it is alleged, were able to dispose of his body since the dead Iraqi was never entered into the inmate control system . . . .”).
142 See Taguba Report, supra note 6, at 16.
143 See Jones-Fay Report, supra note 8, at 9 (Part II).
144 See Taguba Report, supra note 6, at 16.
145 Id. at 17.
a few instances, Military Police personnel required male detainees to masturbate themselves\textsuperscript{146} and each other\textsuperscript{147} while being photographed and videotaped. At the instruction of a Military Police guard, one naked detainee wore a dog chain around his neck so that a female guard could pose with him for a photograph.\textsuperscript{148} And finally, the words “I am a Rapest” [sic] were written on the body of a detainee accused of raping another prisoner.\textsuperscript{149}

B. The Causes of Abuse at the Abu Ghraib Detention Facility

The Schlesinger and Jones-Fay Reports acknowledge that the Abu Ghraib abuses stemmed from two very different types of improper conduct. Some military personnel harmed detainees for sadistic and self-serving purposes.\textsuperscript{150} Others committed prisoner abuses either because they misinterpreted the law dictating what interrogation and detention methods could be employed, or because they did not know what interrogation methods were permissible.\textsuperscript{151} In the former instances, military personnel intentionally committed violent acts designed to inflict pain or embarrassment on to the detainees.\textsuperscript{152} In the latter instances, military personnel did not know, for a variety of reasons, that their actions violated Convention III.\textsuperscript{153}

1. Moral Corruption and Criminal Misconduct

Social psychologists argue that the combination of different psychological\textsuperscript{154} and environmental risk factors\textsuperscript{155} can

\textsuperscript{146} Id. at 16.

\textsuperscript{147} See JONES-FAY REPORT, supra note 8, at 9 (Part II).

\textsuperscript{148} See TAGUBA REPORT, supra note 6, at 17.

\textsuperscript{149} Id. The Taguba Report lists additional abuses that he “find[s] credible based on the clarity of [the detainees’] statements and supporting evidence provided by other witnesses.” Id. These abuses include, but are not limited to, pouring phosphoric liquid from chemical lights on detainees, beating detainees with a broom handle and sodomizing a detainee with a chemical light and a broom stick. Id.

\textsuperscript{150} See JONES-FAY REPORT, supra note 8, at 4 (Part I). See also SCHLESINGER REPORT, supra note 7, at 68.

\textsuperscript{151} See supra note 150.

\textsuperscript{152} See JONES-FAY REPORT, supra note 8, at 4 (Part I).

\textsuperscript{153} Id.

\textsuperscript{154} Some psychological factors to be considered include inherent personality traits, beliefs, attitudes, and values. Emotional factors like “[a]nger, fear, and
motivate individuals and groups to act inhumanely.\textsuperscript{156} With regard to environmental risk factors, Military Police personnel at Abu Ghraib lacked sufficient training and staff support and constantly feared attacks from enemy forces.\textsuperscript{157} The stress of protecting themselves from outside threats and from potentially volatile detainees heightened the likelihood that Military Police personnel would engage in prisoner abuses.\textsuperscript{158} In terms of psychological factors, the widespread practice of stripping detainees for interrogation purposes also contributed to the prevalence of abuse at the prison.\textsuperscript{159} Wearing clothes “is an inherently social practice, and therefore the stripping away of clothing may have had the unintended consequence of dehumanizing detainees in the eyes of those who interacted with them.”\textsuperscript{160} The “anti-social reactions” of the Military Police personnel demonstrate that pathological situations, like a prison environment, can modify the behavior of seemingly normal individuals.\textsuperscript{161}

Intentionally committed abuses can be prevented or curtailed through the use of reactive measures, some of which are articulated in the Interrogation Bill.\textsuperscript{162} Having said this, it

\begin{flushright}
emotional arousal can heighten the tendency to act out aggressively” as well. SCHLESINGER REPORT, supra note 7, at app. G, at 4.
\end{flushright}

\begin{flushright}
\textsuperscript{155} Environmental, or situational factors, such as the presence of weapons, verbal provocation, and physical discomfort can increase the likelihood that an individual will behave in an aggressive manner. Id.
\end{flushright}

\begin{flushright}
\textsuperscript{156} In a simulated prison experiment conducted at Stanford University in 1973, twenty-four male college students were divided into two groups, prisoners and guards. Id. at app. G, at 1. The psychologists conducting the experiment did not direct the “guards” to behave in any specific manner towards their “prisoners,” in hopes of determining how wartime psychological and environmental stresses can affect an individual’s behavior. Craig Haney & Philip Zimbardo, The Past and Future of U.S. Prison Policy: Twenty-five Years After the Stanford Prison Experiment, 53 AM. PSYCHOLOGIST 709, 710 (July 1998). The study revealed that several of the “guards” devised sadistically inventive ways to harass and degrade the prisoners, and none of the “less actively cruel mock-guards ever intervened or complained about the abuses they witnessed.” Id. at 709. See Ralph R. Reiland, Unlearned Prison Lessons, 64 THE HUMANIST 18, 20-21 (2004).
\end{flushright}

\begin{flushright}
\textsuperscript{157} See SCHLESINGER REPORT, supra note 7, at app. G, at 7.
\end{flushright}

\begin{flushright}
\textsuperscript{158} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{159} Id. According to the Schlesinger Report, stripping detainees remains a popular military practice because it succeeds in making “detainees feel more vulnerable and therefore more compliant with interrogations.” Id.
\end{flushright}

\begin{flushright}
\textsuperscript{160} Id.
\end{flushright}

\begin{flushright}
\textsuperscript{161} Craig Haney, Curtis Banks & Philip Zimbardo, Interpersonal Dynamics in a Simulated Prison, 1 INT’L J. CRIMINOLOGY & PENOLOGY 89, 90 (1973).
\end{flushright}

\begin{flushright}
\textsuperscript{162} The Interrogation Bill requires that all interrogations “and other pertinent interactions” between a detainee and military personnel be videotaped. Interrogation Bill, supra note 1, at 2; see supra note 2 and accompanying text. Arguably, the fear of
is important for the Legislature to understand that wartime operations “carry inherent risks for human mistreatment”\textsuperscript{163} and that laws dictating interrogation policies should perhaps include provisions that are not limited to the punishment of military personnel. Had all Abu Ghraib military personnel unequivocally understood how to apply the Geneva Conventions to the War in Iraq, then perhaps the abuses would have been limited to isolated instances of torture that the Interrogation Bill directly addresses and seeks to punish.\textsuperscript{164} This, however, is not the case. Evidence suggests that in light of the Bush administration’s suspension of the Geneva Conventions to al Qaeda and Taliban detainees, Abu Ghraib military personnel did not understand the extent to which Convention III protected their prisoners.\textsuperscript{165} For this reason, the Interrogation Bill must be revised to include sections that require a clear Geneva Conventions policy to be announced at the onset of every military campaign.

2. Misinterpretations of Law and Policy at Abu Ghraib

\hspace{1cm}a. Application of the Geneva Conventions in Iraq

A second factor contributing to the abuses at Abu Ghraib was general confusion among military personnel as to what detention and interrogation techniques could be practiced.\textsuperscript{166} Much of this confusion stemmed from President Bush’s failure to indicate, in light of his determinations with regard to the War in Afghanistan, how treatment in a manner consistent with the Geneva Conventions differs from strict adherence to the Geneva Conventions.\textsuperscript{167} Lacking a definitive prisoner treatment and detention policy, the junior military personnel who engaged in the abuses relied on their

\hspace{1cm}getting caught on videotape will deter military personnel from committing violent acts against detainees.

\textsuperscript{164} Interrogation Bill, \textit{supra} note 1, § 1.
\textsuperscript{165} See \textit{supra} note 125 and accompanying text.
\textsuperscript{166} \textit{Schlesinger Report}, \textit{supra} note 7, at 9-10; \textit{Jones-Fay Report}, \textit{supra} note 8, at 5 (Part 1).
\textsuperscript{167} Murphy, \textit{General International}, \textit{supra} note 120, at 830-31 (President Bush quoted as saying that the “authorization I issued was that anything we did would conform to U.S. law and would be consistent with international treaty obligations.”) (quoting The President’s News Conference in Savannah, Georgia, 40 \textit{Weekly Comp. Pres. Doc.} 1049, 1051 (June 10, 2004)).
supervisors’ orders at Abu Ghraib.\textsuperscript{168} The supervisors, in turn, based their instructions both on the authorized tactics used during the Afghanistan conflict\textsuperscript{169} as well as the reasoning advanced in President Bush’s February 7, 2002 directive and accompanying advisory memoranda.\textsuperscript{170} Thus, in order to fully understand the misinterpretation of law and policy at Abu Ghraib, it is important to closely examine President Bush’s directive regarding the application of the Geneva Conventions in Afghanistan.\textsuperscript{171} President Bush’s lack of a clear prisoner treatment and detention policy in Iraq, in conjunction with his failure to provide an extensive explanation for his decision to withhold Convention III protections to Taliban and al Qaeda detainees,\textsuperscript{172} contributed to Abu Ghraib military personnel utilizing unlawful interrogation and detention techniques.\textsuperscript{173}

\textsuperscript{168} MacMaster, supra note 66, at 14 (arguing that “senior military intelligence (MI) officers had directed or encouraged the MP guards to ‘set favourable conditions’ for interrogation by torturing and breaking down prisoners before questioning . . . . That this system derived from the highest level [has been] confirmed . . . .”). See also Timothy L. Burger, et al., \textit{The Scandal’s Growing Stain}, \textit{TIME}, May 17, 2004, at 31 (“The MPs told investigators they [committed the abuses] because officers in the military-intelligence unit . . . told them to ‘loosen up’ men for interrogation.”).

\textsuperscript{169} The Schlesinger Report indicates that “none of the senior leadership or command [in Iraq] considered any possibility other than that the Geneva Conventions applied.” \textit{Schlesinger Report}, supra note 7, at 82. Nonetheless, “[t]he message in the field, or the assumptions made in the field, at times lost sight of this underpinning. [Military] personnel familiar with the law of determinations for [Afghanistan] tended to factor those determinations into their decision-making for military actions in Iraq.” \textit{Id.} Thus, it can be argued that although some senior military personnel understood that the Geneva Conventions applied to military campaigns unless the President directed otherwise, not all lower-level military officials were privy to this “assumption.” The Taguba Report further supports this argument by finding that supervisors from the 800th Military Police Brigade “[n]ever attempted to remind . . . [s]oldiers of the requirements of the Geneva Conventions regarding detainee treatment or took any steps to ensure that such abuse was not repeated.” \textit{Taguba Report}, supra note 6, at 20.

\textsuperscript{170} Paust, supra note 20, at 849. While some senior military personnel understood that the Geneva Conventions applied to the War in Iraq, President Bush’s memoranda as well as additional documents issued by the Department of Justice led them to believe that protections could be suspended with regard to certain detainees. \textit{Id.}

\textsuperscript{171} See generally Bush Memorandum, supra note 69.

\textsuperscript{172} \textit{Id.}

\textsuperscript{173} \textit{Schlesinger Report}, supra note 7, at 14 (“[T]he changes in DoD interrogation policies between December 2, 2002 and April 16, 2003 [with regard to the War in Afghanistan] were an element contributing to uncertainties in the [Iraq] field as to which techniques were authorized . . . . Policies approved for use on al Qaeda and Taliban detainees, who were not afforded the protection of the Geneva Conventions, now applied to [Abu Ghraib] detainees who did fall under the Geneva Convention[s].”). As of yet, the Bush administration fails to acknowledge that it did not establish a clear Geneva Convention policy in Iraq. In fact, Condoleezza Rice argued that “[t]he problem . . . was not the President’s policies, which explicitly ruled out [detainee] abuse, but the ‘implementation of policy. There’s obvious confusion in the
In the February 7 memorandum, President Bush accepted the Department of Justice’s legal conclusion that Convention III “[did] not apply to either al Qaeda or Taliban detainees, because . . . the relevant conflicts are international in scope and common Article 3 applies only to ‘armed conflict not of an international character.’”174 Although President Bush did not specify which Department of Justice documents formed the basis for this conclusion, it is likely that he was referring to a January 22, 2002 memorandum written by Assistant Attorney General Jay S. Bybee.175 In the Bybee memorandum, the Department of Justice argued that Article 3 of Convention III refers only to civil wars that occur when the government of a state engages in conflict with non-international armed factions within its territory.176 Based on President Bush’s limited analysis of Article 3177 and his reliance on the Department of Justice’s legal reports, Convention III would not apply to the crisis in Iraq. American and British forces were sent to Iraq in March 2003 to locate and disarm weapons of mass destruction and to overthrow Saddam Hussein’s government.178 The conflict was thus international from the beginning and therefore outside the scope of Convention III’s Article 3.

With regard to the conflict in Afghanistan, President Bush also held that Taliban detainees are unlawful combatants and, therefore, should not receive protections under Convention

---

174 Bush Memorandum, supra note 69, at 2. Article 3 refers to a “case of armed conflict not of an international character” that “occur[s] in the territory of one of the High Contracting Parties.” See Convention III, supra note 42, at art. 3.

175 Immediately preceding the issuance of President Bush’s February 7, 2002 directive, Bybee submitted two memoranda to the White House and Department of Justice. See generally Bybee Memorandum 1/22/02, supra note 72; Memorandum from Assistant Atty Gen. Jay S. Bybee to White House Counsel Alberto R. Gonzales (Feb. 7, 2002), http://www.news.findlaw.com/wp/docs/torture/bybee20702mem.html (follow “Feb 7, 2002 - Department of Justice memo” hyperlink). However, only Bybee’s January 22, 2002 memoranda addressed Article 3 of Convention III. See Bybee Memorandum 1/22/2002, supra note 72, at 5-6.

176 See Bybee Memorandum 1/22/02, supra note 72, at 6. This legal conclusion is largely based on a commentary issued in 1987. See COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949 ¶ 4339 (Yves Sandoz et al. eds., 1987).

177 President Bush did not explain the Department of Justice’s Article 3 legal conclusions. Rather, he merely accepted them at face value. See Bush Memorandum, supra note 69, at 2.

III. Convention III provides that an individual captured during an armed conflict must ultimately be labeled a POW, an innocent, or an unprivileged belligerent. Unprivileged belligerents, such as terrorist groups, are individuals who do not qualify for POW status, and therefore are denied all Convention III protections. While unlawful combatants are not mentioned anywhere in Convention III, individuals who “act [] as . . . associate[s] of a terrorist organization” and who are not entitled to POW status are typically regarded as such. Thus, it can be argued that unprivileged belligerents, including terrorists, are unlawful combatants. Nonetheless, the current policy on unlawful combatants remains both “vague and lacking.” The terms “unlawful combatant” and “enemy
“combatant” are frequently used interchangeably.  

Although case precedent suggests that both of these designations mean the same thing, the government and the Supreme Court have not defined either of them. The Bush administration did state that enemy combatants are individuals who “‘support[] . . . and engag[e] in . . . armed conflict against the United States’” and who commit or plan to commit mass murder. However, a list of criteria used to classify individuals as enemy combatants or unlawful combatants does not appear to exist.

Because the Executive Branch characterized all individuals who do not qualify for POW status, including terrorists, as unlawful combatants, Convention III would not protect many Abu Ghraib detainees. In addition to searching for weapons of mass destruction and ending Saddam Hussein’s regime, Operation Iraqi Freedom military objectives also included dispelling terrorists from the country and gathering intelligence information regarding terrorist networks. President Bush subsequently affirmed these objectives by publicly referring to some Iraqis as terrorists. If the threat of terrorism served as one of the Government’s primary rationales in denying Taliban detainees protection under Convention III, then it is only logical to conclude that military personnel might assume that Iraqi detainees charged with offenses

187 See Addicott, supra note 180, at 871 (quoting Padilla, 233 F. Supp. 2d at 593).
188 See Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) ("There is some debate as to the proper scope of the term ‘enemy combatant’, and the Government has never provided any court with the full criteria that it uses in classifying individuals as such.").
189 Id. at 516 (quoting Brief for Respondents at 3).
191 See supra notes 182-90 and accompanying text.
192 See Operation Iraqi Freedom, Global Security Website, supra note 178.
193 See Transcript: President Bush Holds Post-G-8 Summit News Conference (June 10, 2004), at www.washingtonpost.com/wp-dyn/articles/A32143-2004June10.html (President Bush admitting to calling some individuals situated in Iraq “terrorists” and “killers.”).
194 Paust, supra note 20, at 812 ("A common plan to violate customary and treaty-based international law concerning the treatment and interrogation of so-called ‘terrorist’ and enemy combatant detainees and their supporters captured during the U.S. war in Afghanistan emerged within the Bush Administration in 2002.").
against the United States would not be protected under the same Convention either.\footnote{195}

The most confusing aspect of President Bush’s February 7, 2002 memorandum, however, is his espousal for the humane treatment of all detainees, including unlawful combatants.\footnote{196} President Bush acknowledged that while certain prisoners may not qualify for protection under the Geneva Conventions, they should still be treated in a manner consistent with the treaties’ principles.\footnote{197} Only in instances of “military necessity” could the torture or inhumane treatment of detainees be authorized.\footnote{198} Despite President Bush’s asserted commitment to upholding the Conventions’ provisions, the Department of Defense approved numerous coercive and arguably inhumane interrogation tactics for use in the war against terrorism.\footnote{199} Thus, while “[t]he President . . . spoke out against torture, . . . his equivocations on the terms of [Convention III] suggest that he perceive[d] wiggle room between ideal and practice.”\footnote{200} In essence, the Executive Branch authorized a new and unmanageable Geneva Conventions policy that instilled a tremendous amount of discretionary power to military personnel. In an effort to eradicate terrorism, President Bush created an outlet for unrestrained abuse that ultimately resurfaced at the Abu Ghraib prison one year later.\footnote{201}

The inclusion of the “military necessity” clause in President Bush’s directive served as an exception that “swallow[ed] the rule.”\footnote{202} According to government officials, military necessity suspends the application of Geneva Convention principles when “force protection,” or conduct necessary to protect U.S. troops, is required.\footnote{203} This definition of the exception appears to be mischaracterized. Government

\footnote{195}{Iraqi prisoners charged with offenses against their countrymen were under the supervision of Iraqi soldiers. From this fact, it can be inferred that those detainees under the supervision of US military personnel in Tiers 1A and 1B were charged with offenses against the United States. See SCHLESINGER REPORT, supra note 7, at 74.}

\footnote{196}{See Bush Memorandum, supra note 69, at 2.}

\footnote{197}{Id.}

\footnote{198}{Id.}

\footnote{199}{See supra note 20 and accompanying text.}

\footnote{200}{Mark Bowden, Lessons of Abu Ghraib, THE ATLANTIC, July 2004, at 40.}

\footnote{201}{See supra notes 25, 70 and 125 and accompanying text.}

\footnote{202}{See Press Briefing, supra note 67. Edward Greer argues that “[w]hat constitutes military necessity under this scheme is merely the unilateral decision of the Executive itself – a far cry from the specific legal constraints set forth in the Conventions.” Greer, supra note 190, at 379.}

\footnote{203}{See Press Briefing, supra note 67.}
interest in preventing another September 11-type attack against the United States prompted the White House and the Department of Justice to find valid reasons to suspend Convention III protections to Taliban and al Qaeda detainees.\textsuperscript{204} Although President Bush encouraged detainees to be treated in a manner consistent with the Geneva Conventions, he acknowledged an overwhelming need to provide military personnel with the means to successfully procure information from suspected terrorists regarding possible future attacks.\textsuperscript{205} The military necessity clause achieved this purpose by serving as a license to deviate from Convention III principles when the lives of innocent American civilians, not just U.S. troops, might be at stake. Thus, by discretely incorporating the necessity exception into the memorandum, President Bush arguably strived to accomplish two dichotomous tasks: to provide the United States military with the flexibility to conduct coercive interrogations abroad\textsuperscript{206} and to maintain an honorable reputation within the international humanitarian rights community.\textsuperscript{207}

\textsuperscript{204} See Gonzales Memorandum, supra note 79.

\textsuperscript{205} See supra note 204 and accompanying text.

\textsuperscript{206} Human Rights Standards, supra note 40, at 275 (“The purposes of this interpretation [of the Geneva Conventions with regard to the War in Afghanistan] were to preserve maximum flexibility with the least restraint by international law and to immunize government officials from prosecution under the War Crimes Act . . . .”); Gottlieb, supra note 65, at 453 (“Concerned with the need to acquire as much ‘actionable intelligence’ as possible, by whatever means, the [Bush] Administration adopted a strategy to permit something close to unfettered power in dealing with terrorist suspects.”).

\textsuperscript{207} See Richard B. Bilder & Detlev F. Vagts, Speaking Law to Power: Lawyers and Torture, 98 AM. J. INT’L L. 689, 695 (2004) (finding that “[a] nation’s reputation for decency and respect for law is a vital national asset that can strongly affect its influence and leadership.”).
The effect of President Bush’s military necessity exception in conjunction with his support for the humane treatment of all detainees created vast confusion at the Abu Ghraib detention facility.\textsuperscript{208} While it might be customary for military officials to assume that the Geneva Conventions apply to all international conflicts unless otherwise informed,\textsuperscript{209} President Bush apparently complicated this issue. The February 7, 2002 memorandum drew a distinction between behaving in a manner consistent with Convention III principles and strictly abiding by these principles. In light of this development in military policy, the President’s request that military personnel in Iraq treat their detainees humanely could no longer be viewed as a direct order to abide by the Geneva Conventions.

b. Difficulty Applying Convention III Principles: Inadequate Training and the Unlawful Migration of Interrogation Methods

Assuming that Abu Ghraib military personnel understood that the Geneva Conventions applied to Iraq, inadequate training and the migration of interrogation methods from Afghanistan and Guantanamo Bay contributed to the treaty’s failed application.\textsuperscript{210} The Jones-Fay Report indicates that “[d]espite the emphasis on the Geneva Conventions, it is clear from the results at Abu Ghraib . . . that Soldiers on the ground are confused about how they apply the Geneva Conventions . . . .”\textsuperscript{211} To demonstrate this fact, the report argues that Military Police and Military Intelligence personnel did not receive training on interrogation techniques such as sleep adjustment, isolation, segregation, environmental adjustment, dietary manipulation, the use of military dogs, and the removal of clothing.\textsuperscript{212} Furthermore, upon their arrival into Iraq, U.S. soldiers received a mere thirty-six minutes of general human rights training at the Joint Interrogation & Debriefing

\begin{itemize}
\item \textsuperscript{208} See supra notes 25, 70 and 125 and accompanying text.
\item \textsuperscript{209} Press Briefing, supra note 67 (White House Counsel Alberto Gonzales arguing that “soldiers are trained from day one in their service to apply [the] Geneva [Conventions] . . . . [T]hat’s . . . the default position . . . that Geneva is going to apply.”).
\item \textsuperscript{210} See TAGUBA REPORT, supra note 6, at 19-20, 22, 26, 43-45; SCHLESINGER REPORT, supra note 7, at 14, 44; JONES-FAY REPORT, supra note 8, at 14-16 (Part I); JONES-FAY REPORT, supra note 8, at 19, 114 (Part II).
\item \textsuperscript{211} See JONES-FAY REPORT, supra note 8, at 19 (Part II).
\item \textsuperscript{212} Id.
\end{itemize}
While insufficient training undoubtedly increased the frequency and severity of the abuses, none of the reports acknowledge the more fundamental problem that the implementation of the aforementioned interrogation techniques arguably violated Convention III principles. Accordingly, in addition to improper training, abuses occurred at Abu Ghraib because military personnel did not understand the basic principles of Convention III, including what constitutes “outrages upon personal dignity” and “humiliating and degrading treatment.” Without a comprehensive knowledge of the treaty's provisions, Abu Ghraib military personnel became more likely to commit unauthorized abuses.

The migration of interrogation techniques from Afghanistan and Guantanamo Bay to Abu Ghraib also contributed to military personnel's confusion regarding the breadth and content of Convention III principles. In September 2003, Major General Geoffrey D. Miller, Commander at Guantanamo Bay, conducted a review of the interrogation methods employed in Iraq. In his report, Miller concluded that “[i]t is essential that the guard force be actively engaged in setting the conditions for successful exploitation of the internees,” adding that the regime at Abu Ghraib would help create a “synergy between [Military Police] and [Military Intelligence] resources . . . .” Accordingly, Miller submitted

\[\begin{align*}
213 & \text{Steven H. Miles, Abu Ghraib: Its Legacy for Military Medicine, 364 LANCET 725, 726 (Aug. 21, 2004). Major General Taguba, however, found that 372nd Military Police Battalion and the 372nd Military Police Company received no training on detention procedures and that very little training was provided to Military Police personnel regarding Convention III. See TAGUBA REPORT, supra note 6, at 19-20.} \\
214 & \text{Gottlieb, supra note 65, at 455.} \\
215 & \text{[Although] Secretary Rumsfeld may not have specifically authorized the use of the worst tortures . . . there should be no mistaking of how short the distance was between practices that the reservists were authorized to engage in or thought they were authorized to engage in and the tortures and humiliations that were in fact committed. The administration authorized the use of dogs, the administration authorized the stripping naked of prisoners, the administration authorized exploiting Islamic concerns for modesty, the administration authorized the causing of physical pain. In Iraq, these procedures were ultimately used against a population that America claimed to be liberating.} \\
216 & \text{See supra note 15 and accompanying text.} \\
217 & \text{MacMaster, supra note 66, at 14.} \\
218 & \text{GEOFFREY MILLER, ASSESSMENT OF DoD COUNTERTERRORISM INTERROGATION AND DETENTION OPERATIONS IN IRAQ 6 (2003), available at http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB140/a20.pdf.}
\end{align*}\]
recommendations to Lieutenant General Ricardo Sanchez, the senior military commander in Iraq, regarding the possible implementation of interrogation techniques utilized in Afghanistan and Guantanamo Bay.\textsuperscript{219} Although conflicting reports exist as to whether Miller warned Sanchez that the suggested interrogation tactics violated Convention III, Sanchez accepted his recommendations and distributed a memo to Abu Ghraib Military Intelligence officers that ultimately formed the basis for a set of coercive interrogation guidelines.\textsuperscript{220}

In addition to Sanchez’s memorandum, unlawful questioning also became institutionalized through “word of mouth” techniques passed to Abu Ghraib military personnel from assistant teams in Guantanamo Bay.\textsuperscript{221} What little understanding of the Geneva Conventions Abu Ghraib soldiers possessed after their JIDC training diminished considerably following the migration of interrogation techniques from Afghanistan and Guantanamo Bay. The methods advanced by Miller and other military personnel stationed in Afghanistan and Cuba arguably violated Convention III principles.\textsuperscript{222} At the very least, introducing these techniques to soldiers stationed in Iraq created a misimpression as to what interrogation techniques satisfied Convention III’s humanitarian requirements.

The Jones-Fay Report suggests that “interrogation is an art . . . and knowing the limits of authority is crucial.”\textsuperscript{223} Abu Ghraib military personnel did not understand how to comply with Convention III principles, in large part, because of President Bush’s February 7, 2002 directive.\textsuperscript{224} America’s “war on terror” provided the Bush Administration with a justification to create an ambiguous Geneva Conventions


\textsuperscript{220} Paust, supra note 20, at 847-48. The guidelines allowed for “sleep deprivation, forcing prisoners into ‘stress’ positions for up to 45 minutes, and threatening them with guard dogs.” Mazzetti, supra note 219, at ¶ 9.

\textsuperscript{221} JONES-FAY REPORT, supra note 8, at 15 (Part I).

\textsuperscript{222} See Working Group Report supra note 104, at 2A-2B (stating that the interrogation techniques authorized by Secretary Rumsfeld raised “major issue[s] in [the] area of consideration that cannot be eliminated” with regard to international treaties and United States domestic laws). See also supra note 20 and accompanying text.

\textsuperscript{223} JONES-FAY REPORT, supra note 8, at 15 (Part I).

\textsuperscript{224} See supra notes 25 and 125 and accompanying text.
The directive’s “military necessity” exception enabled military personnel to circumvent the Geneva Conventions when national security might be at issue. By establishing an exception to the Geneva Conventions, the Bush Administration effectively ignored international humanitarian rights standards and formed an outlet for detainee abuse. With regard to the War in Iraq, President Bush never formally indicated that the Geneva Conventions did, in fact, apply. And even if Abu Ghraib military personnel correctly assumed that detainees qualified for full protection under Convention III, it still remained unclear whether the “military necessity” exception carried over from Afghanistan and Guantanamo Bay. Accordingly, Abu Ghraib military personnel followed their predecessors’ example and utilized interrogation methods unlawful under the Geneva Conventions.

After reviewing the facts and circumstances surrounding the Abu Ghraib prison atrocity, it becomes clear that the Bush Administration’s failure to implement a clear Convention III policy in Iraq ignited a chain of events that led to the abuse of numerous detainees. Accordingly, a strategy must be devised to prevent additional wartime human rights violations. Representative Holt’s Interrogation Bill attempts to achieve this goal by proposing a series of deterrent measures, designed to address individualized instances of abuse. A more effective bill, however, would focus on remediying the underlying policy problems that initially facilitated the prisoner abuse.

---

225 Greer, supra note 190, at 372 (“Since September 11, 2001 . . . torture has been the practice and de facto policy of the Bush administration . . . as a core means of conducting the so-called ‘war on terror.’”). “It’s not that the United States has any particular interest in egregious human rights violations. It’s just that it’s a natural corollary to what it is interested in, and to how you achieve goals like that.” NOAM CHOMSKY, POWER AND TERROR: POST-9/11 TALKS AND INTERVIEWS 48 (2003).

226 See supra notes 202-07 and accompanying text.

227 The February 7, 2002 memorandum “is potentially one of the broadest putative excuses for violations of Geneva law.” Paust, supra note 20, at 828. MacMaster, supra note 66, at 4 (stating that “international law makes it clear that protection from cruel, inhumane and degrading treatment by the state is not negotiable or open to derogation.”).

228 See supra notes 22 and 24 and accompanying text.

229 See supra notes 217-220 and accompanying text.

230 Equally troubling, the Bush Administration has not yet issued a new order directing compliance with the Geneva Conventions in Iraq. The order that “merely Geneva ‘principles’ should be applied and then only if ‘appropriate’ and if ‘consistent with military necessity’” still governs. Paust, supra note 20, at 864.

231 See generally Interrogation Bill, supra note 1.
Representative Holt’s Interrogation Bill serves as a strong preliminary response to a complicated controversy. Section One directs the President to order the videotaping of interrogations and “other pertinent interactions” of detainees in the custody of the United States armed forces as well as intelligence operatives and contractors of the United States.\textsuperscript{232} Section Two requires the President to “take such actions as are necessary” to ensure that human rights organizations are granted “unfettered access” to detainees in the custody of the United States.\textsuperscript{233} Finally, Section Three requires that the Judge Advocate General develop guidelines that are “sufficiently expansive to prevent any abuse of detainees” that violates “law binding on the United States, including [international] treaties.”\textsuperscript{234}

In general, the Interrogation Bill’s provisions are designed to prevent future abuses through the use of effective scare tactics. By requiring the videotaping of interrogations and “other pertinent actions”\textsuperscript{235} between a detainee and United States military personnel, it is expected that soldiers will refrain from committing inhumane acts for fear of getting caught. The same rationale applies with regard to granting the United Nations and other human rights organizations unfettered access to all detention facilities.\textsuperscript{236} Unannounced and spontaneous detention facility visits by human rights organizations increases the probability that more human rights abuses will be discovered, and as a consequence, disobedient military personnel will be punished.

The attractiveness of the bill’s simple logic, however, does not outweigh its many defects. For example, the Interrogation Bill’s videotape and unfettered access requirements do not address the problem that many Abu Ghraib military did not understand the applicability of Convention III to the crisis in Iraq, including its breadth and

\textsuperscript{232} Id. § 1.
\textsuperscript{233} Id. § 2.
\textsuperscript{234} Id. § 3.
\textsuperscript{235} Id. § 1.
\textsuperscript{236} Id. § 2.
scope. These problems emanated from the White House’s failure to establish a coherent Geneva Conventions policy during Operation Iraqi Freedom. The Executive Branch’s ambiguity in this respect led to the military’s reliance on detention operations and interrogation techniques utilized during the War in Afghanistan. The success of the bill’s videotape and unfettered access requirements largely depends upon military personnel’s understanding of what acts fail to comply with the Geneva Conventions. Although some U.S. soldiers stationed in Iraq knew that their behavior violated the Geneva Conventions, others employed coercive interrogation tactics because they believed the Executive Branch had sanctioned them. As written, the Interrogation Bill only addresses the former group of military personnel. Its deterrence measures are contingent upon soldiers’ awareness of the treaty’s applicability. And because one cannot be deterred from engaging in acts that he or she does not know violate Convention III, the Interrogation Bill fails to achieve its designated purpose.

Thus, in order to prevent another Abu Ghraib atrocity, Congress must focus on remedying the fundamental policy and interpretation of law errors that existed at the detention facility. Accordingly, a more effective bill proposal would direct the President, as Commander-in-Chief, to clearly indicate to military personnel at the onset of every international conflict to what extent detainees should be treated in accordance with the Geneva Conventions. In order to accomplish this task, the

237 See supra Part IV.
238 See supra Part IV.B.ii.a.
239 See supra Part IV.B.ii.a-b.
240 See supra Part IV.B.i.
241 See supra Part IV.B.ii.a-b.
242 Any congressional attempt to dictate military policy will always raise Separation of Power concerns. As Commander-in-Chief, the President enjoys the broad authority to exclusively control all war operations. See supra notes 104-07 and accompanying text. See also Hamilton v. Dillin, 88 U.S. 73, 87 (1874) (“the President alone . . . is constitutionally invested with the entire charge of hostile operations.”). However, some scholars have contended that the “power to regulate the treatment of wartime detainees is shared between the legislative and executive branches.” Jinks & Sloss, supra note 18, at 172. When “the United States ratifies a treaty that constrains the President’s operational discretion [i.e., Convention III], that treaty ratification empowers Congress to regulate in areas where it could not otherwise regulate.” Id. at 176. Specifically, under the Constitution’s Define and Punish and Necessary and Proper Clauses, Congress possesses the power to regulate “matters governed by [a] treaty, even if those matters would otherwise be subject to the President’s exclusive power.” Id. at 179. Moreover, the Government and Regulation Clause also grants Congress “the power to prescribe rules for the treatment of wartime detainees . . . .” Id.
bill must require the President to: (1) assess whether the warring state qualifies as a “High Contracting Party” under Article 4 of Convention III;243 (2) assess whether the armed conflict is “not of an international character occurring in the territory of one of the High Contracting Parties” under Article 3 of Convention III;244 (3) define “unlawful combatant” and assess whether the enemy force should not receive protection under Convention III because it qualifies as such; and (4) obtain congressional approval before attempting to violate any or all Convention III articles.245

The incorporation of the aforementioned provisions into the Interrogation Bill address the underlying policy problems that gave rise to the Abu Ghraib prison abuses. Sections One and Two prevent the President from assuming that military personnel understand that Convention III always applies to instances of armed conflict unless otherwise informed. This task is accomplished by requiring the President to discern the applicability of Convention III to military campaigns using the treaty's own language. In effect, a formal analysis process will compel the President to establish a clear Convention III policy, thus reducing the possibility of future confusion among low-level military personnel stationed abroad.

Section Three responds to the ambiguity arising from President Bush’s use of the term “unlawful combatant” in his February 7, 2002 directive.246 In order to prevent this term from being employed as a broad-based exception to the Geneva Conventions, a list of criteria defining unlawful or enemy combatant must be created. After formulating a definition, President Bush may use it as an additional tool to assist him in delineating a clear Geneva Conventions policy at the onset of every military campaign. Section Three, however, cannot be read in a vacuum. If the President determines that certain detainees are unlawful combatants, he cannot deny protection at 175. Under this clause, it can be argued that “the vast majority of the provisions embodied in the Geneva Conventions address matters that are well within the scope of Congress’s . . . [p]ower.” Id. at 175. Because this Note’s proposed modifications deal exclusively with the President’s compliance with Convention III, it can be argued that they do not exceed the scope of legislative supervision and do not infringe upon the Executive Branch’s Article II powers.

243 See Convention III, supra note 42, art. 4.
244 Id. art. 3.
245 See Jinks & Sloss, supra note 18, at 106.
246 Bush Memorandum, supra note 69, at 2.
under the Geneva Conventions without Congress’ express approval as articulated in Section Four.  

Section Four refutes the Bush Administration’s position that the President can unilaterally violate Convention III provisions to protect national security. Even if a presidential action can be justified on “national security grounds” (e.g., denying Geneva Conventions protections to suspected enemy combatants for the purposes of procuring important intelligence information), the action “may [still] impose significant constraints on personal liberty.” In order to prevent discretionary abuse and “conciliate the confidence of the [American] people,” Congress must be able to prescribe guidelines for the treatment of wartime detainees so long as they do not interfere with the President’s control over battlefield operations. Accordingly, Executive branch directives regarding the possible violation of Convention III protections are subject to legislative review. This rule does not undermine the Executive Branch’s Commander-in-Chief Power with regard to law-of-war treaties. On the contrary, the President may still suspend and terminate treaties so long as such actions are made in accordance with the treaties’ terms.

In effect, Section Four strengthens the government’s commitment to upholding humanitarian rights standards by requiring the Executive Branch to gain congressional authorization before breaching any of the United States’ treaty obligations. It places a check on the President’s ability to

---

247 Some scholars contend that even if a prisoner is deemed an unlawful combatant, thereby rendering Convention III inapplicable, the prisoner should still be afforded protection under Convention IV Relative to the Protection of Civilian Persons in Time of War. Jinks & Sloss, supra note 18, at 101. Accordingly, to deprive the prisoner any form of protection would be a violation of the treaty, which is impermissible without congressional approval. Id. at 102, 146-47.

248 It is important to note that there is a difference between “treaty termination” and “treaty suspension” or “violation.” International law principles enable “parties to a treaty [to] jointly terminate a treaty either by consent of all the parties or by concluding a later treaty. A state may unilaterally terminate or suspend the operation of a treaty in response to a material breach by another party.” Id. at 154. Furthermore, a state may also “invoke ‘the impossibility of performing a treaty,’ or ‘[a] fundamental change of circumstances’ as a ground for terminating . . . the operation of a treaty.” Id. (footnotes omitted).

249 Jinks & Sloss, supra note 18, at 102, 146-47.

250 Id. at 153.

251 Id. at 174 (quoting THE FEDERALIST No. 70, at 403 (Alexander Hamilton) (Isaac Kramnick ed., 1987)).

252 See id. at 175.

253 See id. at 164, 172-73.

254 See id. at 163.
violate Convention III protections when Congress questions his reasons for wanting to do so. In light of President Bush’s suspension of Convention III protections to al Qaeda and Taliban detainees and its repercussions in Iraq, this Section serves to prevent detainee abuses and to rehabilitate the government’s reputation within the international human rights community.

The incorporation of the aforementioned provisions into Representative Holt’s Interrogation Bill provides a comprehensive response to the Abu Ghraib prison abuses. Representative Holt proposes deterrent measures that can only prevent additional abuses if military personnel understand the applicability of the Geneva Conventions as well as the breadth and scope of the treaty’s protections. The four additional provisions introduced and analyzed in this Note, however, address the fundamental policy problems that originated in the Executive Branch during the War in Afghanistan and that existed during Operation Iraqi Freedom as well. Specifically, Sections One, Two, and Three ensure that soldiers will no longer be confused about the applicability of the Geneva Conventions during military campaigns in light of President Bush’s ambiguous February 7, 2002 directive. Section Four, on the other hand, prevents the President from violating the Geneva Conventions without congressional authorization. Compliance with Representative Holt’s Interrogation Bill might result in the apprehension of a handful of transgressors. Adherence to this Note’s proposals, however, ensures that the number of broad-based policy problems confronting military personnel at Abu Ghraib and other prison facilities will be minimized.

VI. CONCLUSION

Confusion regarding the applicability of Convention III at the Abu Ghraib prison can largely be attributed to the development of expansive military policies after the September 11, 2001 terrorist attacks. What began as an attempt by the Bush Administration to protect national security through the procurement of vital intelligence information during the Afghanistan conflict became a means to commit unsanctioned abuses in Iraq. By not clearly limiting his February 7, 2002 directive to the War in Afghanistan, President Bush left open

\[255\] See supra notes 237-241 and accompanying text.
for interpretation whether many Iraqi detainees should not be afforded Convention III protections. Moreover, those military personnel that did understand Convention III’s applicability in Iraq undoubtedly misinterpreted the treaty’s provisions after becoming privy to the coercive interrogation methods utilized in both Afghanistan and Guantanamo Bay.

In light of these fundamental problems, Congress must introduce a bill that not only seeks to apprehend and punish transgressors, but that prevents the Executive Branch from creating ambiguous detainee treatment policies. Representative Holt’s Interrogation Bill serves as a solid foundation. The bill’s videotape and unfettered access requirements arguably will prevent military personnel who understand Convention III’s applicability and protections from committing unauthorized abuses. Nonetheless, because a number of U.S. soldiers stationed in Iraq either did not understand Convention III’s applicability or did not understand the breadth and scope of the treaty’s protections, additional provisions are needed to prevent another Abu Ghraib atrocity. Accordingly, this Note’s proposed modifications require the Executive Branch to delineate clear Convention III guidelines at the onset of every military campaign and limit its ability to violate the treaty’s articles. The incorporation of such provisions will hopefully reduce the number and magnitude of future detainee abuses and assist in the rebuilding of our government’s reputation within the international humanitarian rights community. Moreover, such a law should still be passed even if it cannot take effect until after U.S. troops pull out of Iraq. In light of the government’s “war on terror,” it is conceivable that other countries might be invaded in the near future. Congress must not lose sight of this fact and continue to work towards preventing prisoner abuses, not just in Iraq, but in all subsequent military campaigns.

Alison Croessmann†

† B.A., Colgate University; J.D. Candidate 2006, Brooklyn Law School. The author extends her gratitude to the Brooklyn Law Review staff, and to her family, friends and Ben for their unwavering support.
Apples and Oranges and Olives? Oh my!

**FELLERS, THE SIXTH AMENDMENT, AND THE FRUIT OF THE POISONOUS TREE DOCTRINE**

I. **INTRODUCTION**

In the 2003-2004 term, the Supreme Court decided three cases involving the admissibility of derivative evidence obtained through the use of unwarned statements, thus making this period a unique and important one for criminal defendants and their rights against self-incrimination and to counsel, as protected by the Fifth and Sixth Amendments. This Comment focuses on the first of these decisions, *Fellers v.*

---


Two of the 2003-2004 decisions significantly impacted the Fifth Amendment derivative evidence rule. In *Patane*, 124 S. Ct. at 2630, the Court held that the failure to provide *Miranda* warnings does not require suppression of non-testimonial fruits where the initial incriminating statement was made voluntarily. The *Patane* decision reaffirmed the current Court's aversion to the Fifth Amendment fruits doctrine. See *Oregon v. Elstad*, 470 U.S. 298, 307-09 (1985); *Michigan v. Tucker*, 417 U.S. 433, 446, 451-52 (1974). In *Seibert*, 124 S. Ct. at 2613, the Court suppressed a confession obtained through the "question-first" interrogation technique, which involves questioning a suspect in successive unwarned and warned phases. The technique creates precisely the type of environment that the *Miranda* Court found likely to impede a defendant's ability to make a free and rational choice about whether to speak to the police. *Id.* at 2607. *Seibert* limited the reach of the Court's prior holding in *Oregon v. Elstad* thus resolving a split among the Courts of Appeal. *Id.* at 2607, 2611. In *Elstad*, discussed herein, the Court held that the Fifth Amendment does not require suppression of a confession made after proper *Miranda* warnings and a voluntary waiver of rights solely because the police had obtained an earlier but unwarned statement from the suspect. *Elstad*, 470 U.S. at 318. Some courts had read *Elstad* as essentially admitting all subsequent confessions while other courts suppressed statements if it was clear that the police had deliberately evaded *Miranda*. *Id.* at 2607. The *Seibert* decision reinforced the constitutional status of the procedural safeguards established in *Miranda*. *Id.* at 2605.
United States. 3 There, the Court reversed the Eighth Circuit’s decision and held that the absence of an interrogation does not foreclose a petitioner’s claim that his jailhouse statements should be suppressed as the fruits of a statement improperly taken from him at his home.4 Specifically, the Court found that the officers, who went to the accused’s home after he had been indicted for conspiracy to distribute methamphetamine, violated the defendant’s Sixth Amendment right to counsel when they deliberately elicited information from him about his role in the crime in the absence of counsel or a valid waiver of counsel.5 Since the Eighth Circuit held that the petitioner’s Sixth Amendment rights had not been violated, it applied Fifth Amendment standards to determine whether the accused’s inculpatory statements made at the jailhouse should be suppressed as the products of prior, illegally obtained statements.6 Typically, evidence obtained through a violation of a defendant’s constitutional rights cannot be admitted at trial.7 An established exception to the traditional exclusionary rule, known as the “Elstad exception,” allows derivative evidence8 obtained after unwarned,9 yet uncoercive

4 Id. at 521.
5 Fellers, 540 U.S. at 524-25.
6 Id. at 525.
7 The Court stated in Mapp v. Ohio:

[A] conviction . . . the foundation of which is evidence obtained in disregard of liberties deemed fundamental by the Constitution, cannot stand . . . . And this Court has on Constitutional grounds, set aside convictions, both in the federal and state courts, which were based upon confessions 'secured by protracted and repeated questioning of ignorant and untutored persons in whose minds the power of officers was greatly magnified' . . . or 'who have been lawfully held incommunicado without advice of friends or counsel' . . . .


8 Derivative evidence or, more commonly, “fruits,” refers to evidence one step removed from illegally obtained evidence, as opposed to the evidence that resulted directly from a constitutional violation. The exclusionary rule prohibits the use of either form of evidence. Nardone v. United States, 308 U.S. 338, 340-41 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920). So, for example, imagine that an individual is illegally arrested and confesses. The confession leads police to uncover other evidence, like a weapon, witness, or dead body. The confession is primary evidence, but the subsequently discovered evidence (i.e. the weapon or the body) is considered derivative evidence. As a tool to determine whether a particular piece of evidence derived from an initial illegality, the Court coined the metaphor “fruit of the poisonous tree.” See Nardone, 308 U.S. at 341. A prime illustration of the derivative evidence rule at work can be found in Wong Sun v. United States, 371 U.S. 471 (1963).
questioning to be used in the prosecution’s case in chief as long as the suspect was later advised of and waived his Miranda rights. Relying on the Elstad exception, the Eighth Circuit affirmed the district court’s decision to admit Fellers’ second statement.

In its review of the Fellers case, the Supreme Court determined that the police officers’ conduct had in fact violated the petitioner’s Sixth Amendment rights, but the Court did not decide whether the exception announced in Elstad would apply under the circumstances—where a suspect makes incriminating statements after validly waiving his right to counsel despite earlier police questioning in violation of the Sixth Amendment. The Court remanded the case so that the Eighth Circuit could conduct its exclusionary analysis based on the Sixth Amendment right to counsel violation. On February 15, 2005, the Eighth Circuit, still relying on the Elstad exception, affirmed Fellers’ conviction once again.

The Eighth Circuit’s decision to introduce and apply an exclusionary rule exception specifically created to deal with violations of the Fifth Amendment to a Sixth Amendment violation has significant and controversial implications for the future of Sixth Amendment jurisprudence and ultimately for

---

9 Once in police custody, a suspect must be informed that he has the right to remain silent, that anything said can be used against him at trial, and that he has a right to counsel. Miranda v. Arizona, 384 U.S. 436, 444 (1966). The aforementioned rights are commonly referred to as “Miranda rights” and any statement made by a suspect prior to being given these warnings is considered “unwarned.” See Id. at 468.

10 Non-coercive means that the suspect made the statement knowingly and voluntarily. Id. at 461-62.

11 Oregon v. Elstad, 470 U.S. 298, 308-09 (1985). In this case, Elstad gave a Miranda-defective confession in his home, then received warnings at the jailhouse, signed a waiver, and made a formal confession. Id. at 300-02. His second confession, which would traditionally have been excluded under the fruits of the poisonous tree doctrine, was admitted because the Court found that the officer remedied his initial failure to provide Elstad with his Miranda warnings. Id. at 308-09. Thus the only remaining inquiry was whether Elstad had made a valid waiver and given an uncoerced confession. See id. The Court found that he did. Id. at 315.


13 Id.

14 Id.

15 United States v. Fellers, 397 F.3d 1090, 1092 (8th Cir. 2005) (“Fellers argues that Elstad does not apply to violations of the Sixth Amendment because the Elstad rule was never designed to deal with actual violations of the Constitution. In addition, Fellers argues that Elstad—which was crafted to serve the Fifth Amendment—is inapplicable because it is ill-suited to serve the distinct concerns raised by the Sixth Amendment and because violations of the Miranda rule are fundamentally different from the Sixth Amendment violation at issue in this case. We disagree.”).
the rights of criminal defendants. By analogizing the Fifth and Sixth Amendment rights to counsel, instead of distinguishing them, the Eighth Circuit has rejected the view of most legal scholars and lower courts that the right to counsel under the Sixth Amendment is a more protected right. Equating the Sixth Amendment right to counsel with the lesser-protected and narrower Fifth Amendment right leaves the Sixth Amendment right to counsel susceptible to further weakening.

The most controversial aspect of the *Fellers* decision is the exclusionary remedy that must be applied if the Sixth Amendment violation at issue falls outside of the *Elstad* exception. The exclusionary rule, a long-settled yet oft-debated rule, requires evidence obtained in violation of a defendant’s constitutional rights to be excluded at trial. Since first announcing the rule, however, the Court has significantly narrowed the rule’s scope, citing the debatable merits of excluding probative evidence. The main way the Court has softened the rule’s impact is by recognizing exceptions that allow illegally obtained evidence and its fruits to be used at trial. The exception established in *Elstad* severely limits the fruits of the poisonous tree doctrine in the Fifth Amendment context and the Eighth Circuit decision validating *Elstad*’s applicability in the Sixth Amendment context will have the same effect. So, the issue remains: did cutting down the fruit of the poisonous tree growing in the Sixth Amendment orchard go too far? Can the administration of *Miranda* warnings truly

---

16 See infra notes 16, 17.


18 One of the rule’s most venerable critics is Justice Cardozo, who is oft quoted as deriding the exclusionary doctrine because it allows “[t]he criminal . . . to go free because the constable has blundered.” People v. Dafore, 150 N.E. 585, 587 (N.Y. 1926). Opponents are quick to point out that the exclusionary rule is wholly court made, i.e. there is no Constitutional language mandating exclusion. Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 785 (1994). Furthermore, the exclusionary rule differs from other rules of evidence, which are designed to exclude only unreliable and overly prejudicial evidence. In contrast, the Fourth Amendment exclusionary rule purposely excludes reliable evidence. See Barnett, *supra* note 17, at 941. Finally, opponents argue that the remedy lacks proportionality—whether the police infraction is egregious or minor, there is the same result. See Sharon L. Davies, *The Penalty of Exclusion—A Price or Sanction?*, 73 S. CAL. L. REV. 1275, 1318 (2000).
sanitize the fruits of a Sixth Amendment violation or is equating *Miranda* to the Sixth Amendment like comparing apples to oranges?

This Comment argues that the Eighth Circuit erred in applying the *Elstad* exception to the *Fellers* case because a *Miranda* warning simply is not enough to remedy a Sixth Amendment violation even if it is sufficient to protect the Fifth Amendment entitlement to counsel. The Sixth Amendment right to counsel’s genesis, purpose, and Supreme Court jurisprudence have accorded it a higher degree of protection than its Fifth Amendment counterpart. Moreover, the Sixth Amendment exclusionary rule, as opposed to the Fifth Amendment exclusionary rule, is a personal right that is inextricably tied to the promise of counsel. As such, the rule serves a purpose other than deterrence; it is meant to underscore and reinforce the right. Given the nature of the Sixth Amendment right, application of fruits principles requires suppression of any evidence that is derived from a violation of that right. This Comment also asserts that, in general, the *Elstad* exception is not one that should be extended into the Sixth Amendment realm, but rather limited to the Fifth Amendment context. Allowing the government to use evidence derived from an inculpatory statement, voluntary or not, made in violation of the Sixth Amendment right to counsel, substantially undermines the Amendment’s protections. Any weakening of the right to assistance of counsel essentially renders a defendant’s right to a fair trial an empty one. Yet it is the ability to ensure a fair trial for all defendants that is the foundation of our entire criminal justice system and that without which our system loses all integrity. As the facts of *Fellers* demonstrate, this slippery slope argument is not merely theoretical hypothesizing, but an unsettling reality.

Part II of this Comment explains the backgrounds of *Oregon v. Elstad* and *United States v. Fellers*. Part III explores the differences between the Fifth and Sixth Amendment rights to counsel, including their purposes, waiver requirements, and violations. Part IV sketches a history of the exclusionary rule and its application in the Fourth, Fifth, and Sixth Amendment contexts and traces the development of the derivative-evidence rule. Part V examines the Court’s decision in *Fellers v. United States* and distinguishes it from the facts and reasoning of *Oregon v. Elstad*. Finally, Part VI concludes that the *Elstad* exception is inapplicable in a Sixth Amendment context and
asserts that while the Fifth and Sixth Amendment rights to counsel sometimes overlap, they have fundamentally different functions that are important to distinguish, and therefore, the rights cannot and should not be equated as a per se rule.

II. BACKGROUND

A. The Facts of Elstad

After a home was burglarized in Polk County, Oregon, the police received a tip implicating Michael Elstad, the next door neighbor.\(^{19}\) Two officers went to Elstad’s home with a warrant for his arrest.\(^{20}\) Elstad’s mother answered the door, let the officers in and brought them to her son’s room where he was lying on his bed listening to the radio.\(^{21}\) The officers asked Elstad to go into the living room with them.\(^{22}\) Thereafter, one officer took Mrs. Elstad into the kitchen to explain the state of affairs while the other officer remained in the living room with Michael Elstad.\(^{23}\) The officer asked him if he knew why the officers were there. Elstad responded, “no.”\(^{24}\) The officer then asked if he knew a person named Gross.\(^{25}\) Elstad replied that he knew Gross and that he had heard there was a burglary at the Gross home.\(^{26}\) The officer then told Elstad that he believed Elstad was involved in that burglary.\(^{27}\) Elstad responded, “Yes, I was there.”\(^{28}\) The officers then arrested Elstad and took him to the police station.\(^{29}\) Approximately one hour later, while at the police station, the police informed Elstad of his Miranda rights.\(^{30}\) Elstad indicated that he understood those rights and wanted to speak with the officers.\(^{31}\) He then proceeded to give a full statement, typed and signed by Elstad and both officers, explaining his role in the robbery.\(^{32}\)

\(^{20}\) Id.  
\(^{21}\) Id.  
\(^{22}\) Id. at 300-01.  
\(^{23}\) Id. at 301.  
\(^{24}\) Elstad, 470 U.S. at 301.  
\(^{25}\) Id.  
\(^{26}\) Id.  
\(^{27}\) Id.  
\(^{28}\) Id.  
\(^{29}\) Id.  
\(^{30}\) Id.  
\(^{31}\) Id.  
\(^{32}\) Id.
Elstad was charged with first-degree burglary and tried by a Circuit Court judge. He moved to suppress his oral statement and signed confession, arguing that the statement he had made in response to questioning at his house tainted his subsequent confession because it “let the cat out of the bag.” The lower court refused to suppress the second written statement, however, because Elstad had made it freely, voluntarily, and knowingly and after a valid waiver of his *Miranda* rights. Elstad was found guilty. He appealed his conviction, but the Supreme Court ultimately affirmed it.

B. **The Facts of Fellers**

On February 24, 2000, a grand jury indicted Fellers for conspiracy to distribute methamphetamine. Two officers, Sergeant Michael Garnett and Sheriff Jeff Bliemeister, went to the defendant’s home in Lincoln, Nebraska to arrest him. When Fellers answered the door, the two officers identified themselves and asked if they could come in. Fellers invited the officers into his home, and they advised him that they had come to discuss his involvement in methamphetamine distribution. They also informed Fellers that he had been indicted and that the indictment referred to his involvement with four individuals, whom they then named. Fellers told the officers that he knew those individuals and had used drugs with them. After approximately fifteen minutes, the officers took the defendant to the county jail. At the jailhouse, the officers informed Fellers of his *Miranda* rights for the first time. Fellers waived his rights, signed a waiver form, and proceeded to reiterate the inculpatory statements he had made in his home.

---

33 *Id.* at 302.
34 *Id.*
35 *Id.*
36 *Id.* at 300.
38 *Id.*
39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Fellers*, 540 U.S. at 521.
44 *Id.*
45 *Id.* at 521-22.
Before trial, Fellers moved to suppress the inculpatory statements he made in his home and at the jail.46 A magistrate judge recommended that the statements be suppressed because the officers had failed to read the defendant his Miranda rights in the home, thus making the jailhouse statements fruits of this prior violation.47 The District Court, however, suppressed the unwarned statements Fellers made at his house, but admitted the jailhouse statements made later pursuant to the Elstad exception. The court reasoned that Fellers had knowingly and voluntarily waived his Miranda rights before making the statements.48 Fellers was convicted at trial.

On appeal, Fellers argued that the jailhouse statements should have been suppressed as fruits of the statements obtained in his home in violation of his Sixth Amendment rights.49 The Court of Appeals affirmed his conviction, concluding that the officers did not violate Fellers’ Sixth Amendment rights because the officers’ questions at his home did not amount to an interrogation, and therefore, the district court properly admitted the jailhouse statements under Elstad.50

III. FIFTH VERSUS SIXTH AMENDMENT RIGHTS TO COUNSEL

The issue the Supreme Court left open in Fellers is whether the Elstad exception, which the Eighth Circuit applied to a procedural Miranda violation, also applies in the context of a Sixth Amendment violation. In order to analyze this question, it is essential to understand the main differences between the Fifth and Sixth Amendment rights to counsel and their respective exclusionary rules. The following section discusses the sources of, rationales behind, and requisites for compliance with each Amendment.

46 Id. at 522.
47 Id.
48 Id.
49 Fellers, 540 U.S. at 522.
50 Id. at 522-23.
A. The Fifth Amendment Right to Counsel

1. Purpose

The Fifth Amendment right to counsel furthers the goal of assuring trustworthy evidence by ensuring that a suspect is guarded from the pressures of self-incrimination during police questioning. Notably, though, the Fifth Amendment does not specifically refer to the entitlement to legal counsel. However, in *Miranda v. Arizona*, the Court found an independent source for the right to counsel within the Fifth Amendment privilege against self-incrimination. Concerned with ensuring reliable—meaning uncoerced—jailhouse confessions, the Court held that prior to any custodial questioning, a suspect must be warned of his right to counsel, among others. The Court believed that this warning was necessary to combat the “inherently compelling pressures” present at an in-custody interrogation—pressures that inevitably heighten the risk that an individual will feel compelled to incriminate himself. The Court described the primary ways that the presence of counsel at an interrogation helps the accused: an attorney can (i) mitigate the dangers of untrustworthiness, (ii) reduce police coercion, and (iii) guarantee the accuracy of the accused’s statement. Thus, the core protection of the Fifth Amendment is the right against self-incrimination, not the right to assistance of counsel. Assistance of counsel in this context is an ancillary measure designed to protect the broader right by providing a buffer between the accused and the often coercive

---

52 Rather, the Fifth Amendment states that no person “shall be compelled in any criminal case to be a witness against himself.” U.S. CONST. amend. V.
53 384 U.S. 436 (1966). *Miranda* was a group of consolidated cases in which the Court determined the admissibility of self-incriminating statements obtained from defendants questioned while in custody, but without an effective warning of their rights at the outset of the interrogation process. The Court held that the prosecution may not use statements, exculpatory or inculpatory, obtained from custodial interrogation of the defendant “unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.” *Id.* at 444.
54 See *id.* at 469.
55 *Id.* at 476.
56 *Id.* at 467.
57 *Id.* at 470.
58 The right to have counsel present at the interrogation, the Court wrote, is “indispensable to the protection of the Fifth Amendment privilege.” *Id.* at 469.
forces of an interrogation by government officials that might force a suspect to confess his guilt.\textsuperscript{59}

2. When the Right Attaches

The right applies in a very limited setting. In order to invoke the Fifth Amendment right to counsel, a suspect must be in custody\textsuperscript{60} and under interrogation.\textsuperscript{61} As the \textit{Miranda} court stressed, it is the confluence of these two factors that makes counsel’s compulsion-dispelling presence, or at least the right to ask for it, essential.\textsuperscript{62}

3. Waiver

A defendant may waive his \textit{Miranda} rights, as long as he does so “voluntarily, knowingly, and intelligently.”\textsuperscript{63} Once a suspect invokes his right to counsel, however, the interrogation, no matter what point it is at, must cease until the suspect has had an opportunity to confer with an attorney.\textsuperscript{64} Any statement taken after a suspect requests counsel is presumed to be coerced and is inadmissible at trial.\textsuperscript{65} In order to rebut the presumption of coercion, the \textit{Miranda} Court stated that the government has the “heavy burden” of demonstrating


\textsuperscript{60} A suspect is in custody when his freedom of action is curtailed in any significant way. \textit{Miranda}, 384 U.S. at 467. See also Berkemer v. McCarty, 468 U.S. 420, 441 (1984) (admitting inculpatory statements made after the defendant’s car was pulled over because the initial stop of the car did not place the defendant in custody).

\textsuperscript{61} See \textit{Miranda}, 384 U.S. at 444 (defining interrogation as initiated questioning by the police after a person has been taken into custody or otherwise deprived of their freedom in some significant way); Rhode Island v. Innis, 446 U.S. 291, 299-301 (1980) (broadening definition of interrogation set forth in \textit{Miranda} to include situations where there is no express questioning, but psychological persuasion that results in a suspect making inculpatory statements).

\textsuperscript{62} \textit{Miranda}, 384 U.S. at 467. It is important to note that being questioned at a police station does not necessarily mean that someone is in custody. Oregon v. Mathiason, 429 U.S. 492, 495 (1977). Likewise, answering questions in a police station while in custody does not necessarily constitute interrogation. Arizona v. Mauro, 481 U.S. 520, 527 (1987). Both are fact specific inquiries.

\textsuperscript{63} \textit{Miranda}, 384 U.S. at 444. Here, the Court imported the Sixth Amendment waiver standard announced in Johnson v. Zerbst, 304 U.S. 458, 464 (1938), which established a high threshold for demonstrating a waiver of constitutional rights.


\textsuperscript{65} Id. at 474 (explaining that once a defendant has indicated his desire to exercise his Fifth Amendment privilege, any subsequent statement “cannot be other than an act of compulsion, subtle or otherwise”).
that a suspect knowingly and intelligently waived his privilege against self-incrimination and his right to counsel.66

While ostensibly applying this exacting standard, in practice the Court has actually employed a low standard for waiver of the Fifth Amendment right to counsel.67 In general, the Court’s jurisprudence has indicated that providing suspects with Miranda warnings and obtaining a waiver is a “virtual ticket of admissibility.”68 The Court has even noted that cases in which a defendant can legitimately argue that his statement was compelled despite receiving Miranda warnings are rare.69 This is because the Court equates “knowing and intelligent” with simple “awareness” and not necessarily true “informedness.”70 A suspect is considered aware of his rights as soon as the warning is read.71 Additionally, while the burden rests with the state to prove a voluntary and knowing waiver, the Court has held that it can do so without evidence of express relinquishment.72

4. Violations

When considering whether the government has violated a suspect’s Fifth Amendment right to counsel, the inquiry focuses on whether the suspect felt coerced, not whether the police acted in an intentionally coercive manner.73 Thus, in

---

66 Id. at 475 (citing Escobedo v. Illinois, 378 U.S. 478, 490 & n.14 (1964); Johnson, 304 U.S. at 464 (1938)).
70 The Court does not require states to provide a suspect with all the information that may be useful in making his decision. Moran v. Burbine, 475 U.S. 412, 422-23 (1985) (holding that a defendant’s Fifth Amendment right to counsel was not violated when police failed to inform him that a lawyer was calling the station trying to contact him). Police are not required to “supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.” Id. at 422. See Oregon v. Elstad, 470 U.S. 298, 316 (1985); United States v. Washington, 431 U.S. 181, 188 (1977).
71 Halama, supra note 67, at 1217.
72 North Carolina v. Butler, 441 U.S. 369, 372-73 (1979) (holding that “express written or oral statement of waiver . . . is usually strong proof of the validity of that waiver, but is not inevitably either necessary or sufficient to establish waiver,” at least in some cases waiver can be inferred from the actions and words of the person interrogated).
Miranda, the Court found the “salient characteristics” of a coercive atmosphere to be the incommunicado interrogation of individuals in a police-dominated atmosphere resulting in self-incriminating statements without full warnings of constitutional rights. In such a situation, suspects are subject to many psychological pressures that could overcome their desire not to speak with the police.

While the Miranda doctrine appears to protect a defendant in any situation in which the police exert pressure on him, in actuality the Court has narrowed this construction significantly. In Rhode Island v. Innis, the police, while transporting Innis to prison after he had invoked his right to counsel, engaged in a supplicant conversation about the case in front of him. Specifically, the officers said that they hoped a handicapped child from a nearby school would not find Innis’ discarded weapon and get hurt. After hearing this conversation, Innis asked the officers to return to the scene of the crime so that he could show them the weapon because he too feared that a child would get hurt. Despite the presence of the exact type of psychological ploy that the Miranda Court had cautioned against, the Court held that the incriminating evidence was properly admitted at trial. The Court explained that the conversation between the two officers was not an interrogation because it was not directed at Innis, and they could not reasonably have known that Innis would have been susceptible to such an appeal of conscience. Despite its

recently, in Missouri v. Seibert, 124 S. Ct. at 2611, the Court, struck down the question-first method of interrogation, i.e. purposely questioning a suspect in successive unwarned and warned phases, because

a suspect would hardly think he had a genuine right to remain silent, let alone persist in so believing once the police began to lead him over the same ground [of his earlier, unwarned confession] again. A more likely reaction on a suspect’s part would be perplexity about the reason for discussing rights at that point, bewilderment being an unpromising frame of mind for knowledgeable decision.

Id. at *25.

74 Miranda, 384 U.S. at 445.
75 Id. at 448-49.
76 446 U.S. 291, 294 (1980).
77 Id. at 294-95.
78 Id. at 295.
79 Id. at 302.
80 Id. The Court clarified the definition of interrogation as any police action that the police should know is reasonably likely to elicit an incriminating response. Id. at 298-302.
constrictive holding in Innis, the Court in Edwards v. Arizona made clear that once a suspect has invoked his Fifth Amendment right to counsel, all questioning must cease unless initiated by the suspect himself. A suspect’s responses to further questioning after an invocation of the right to counsel cannot be used to cast doubt on that request.

The most distinctive attribute of a Miranda violation, however, is that the Court has held that the unintentional failure to read Miranda is not a direct violation of the Fifth Amendment right against self-incrimination. Rather, this failure merely creates a rebuttable presumption of coercion. The Miranda Court itself explained that the warning was not a “constitutional straightjacket” and invited the legislature to develop equally effective ways to protect the Fifth Amendment privilege. The Court’s initial characterization of Miranda provided the opportunity for more conservative courts to cut back significantly on Miranda’s protections by creating multiple exceptions to when the rule actually applies. Each time the Court found a way around Miranda, it justified the

---

82 Id. at 484-85.
83 Id. at 484; Smith v. Illinois, 469 U.S. 91, 100 (1984) (stating that “an accused’s postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself”).
84 See United States v. Patane, 124 S. Ct. 2620, 2628 (2004); Missouri v. Seibert, 124 S. Ct. 2601, 2603 (2004); Chavez v. Martinez, 538 U.S. 760, 772 (2003); Dickerson v. United States, 530 U.S. 428, 440 n.6 (2000). See also Miranda v. Arizona, 384 U.S. 436, 478-79 (1966) (“When an individual is taken into custody . . . and is subjected to questioning . . . procedural safeguards must be employed to protect the privilege [against self-incrimination] and unless other fully effective means are adopted to notify the person of his right[s] . . . [reading Miranda is required.”).
86 Miranda, 384 U.S. at 467. The legislature took up the Court’s offer shortly thereafter and enacted 18 U.S.C. § 3501, discussed herein, but the Court overruled the Act in 2000. See Dickerson, 530 U.S. at 444.
87 See e.g., Patane, 124 S. Ct. at 2626 (failing to provide a suspect with Miranda warnings does not require suppression of physical fruits of the suspect’s unwarned by voluntary statements); Davis v. United States, 512 U.S. 452, 458-59 (1994) (holding that police officers are free to interrogate a Mirandized suspect until that suspect makes an explicit request for counsel); Elstad, 470 U.S. at 308 (refusing to employ derivative-evidence rule for a procedural violation of Miranda); New York v. Quarles, 467 U.S. 649, 655-56 (1984) (establishing the public safety exception); Oregon v. Hass, 420 U.S. 714, 722-23 (1980) (expanding impeachment exception to include voluntary responses made after assistance of counsel had been requested); Michigan v. Tucker, 417 U.S. 433, 436, 444-45 (1974) (holding that the failure to inform defendant that counsel will be appointed is not a sufficient enough departure to establish compulsion); Harris v. New York, 401 U.S. 222, 224-25 (1971) (establishing the impeachment exception).
decision by categorizing *Miranda* as merely a “prophylactic” rule.88

The Court’s continuous pairing down of *Miranda* protections came to a head in 2000, when a long-ignored federal law enacted shortly after the *Miranda* decision came down was finally challenged.89 18 U.S.C. § 3501 provided a statutory circumvention of *Miranda* by reinstating the voluntariness standard, which was used prior to *Miranda*, as the test for admissibility of confessions.90 In *Dickerson v. United States*, the Court seemed to have only two apparent choices: hold that in fact the *Miranda* safeguards are not constitutionally guaranteed or reject all of the exceptions that had been established on the basis that the *Miranda* safeguards are simply prophylactic. In a surprising and somewhat circular opinion, the Rehnquist Court threw *Miranda* a life-vest of sorts. The Court held that *Miranda* is a “constitutional decision” that cannot be overruled by legislative activity.91 At the same time, however, the Court upheld all of the previously established exceptions to the exclusionary rule.92 In so doing, the Court did not reject previous articulations that *Miranda*’s protections reach broader than the Fifth Amendment right itself.93 Therefore any further extensions of its protections

88 *Elstad*, 470 U.S. at 305 (quoting *Tucker*, 417 U.S. at 444); *Quarles*, 467 U.S. at 657. *See also* *Hass*, 420 U.S. at 721 (noting that “the shield provided by *Miranda* cannot be perverted into a license to use perjury” (quoting *Harris*, 401 U.S. at 226) (internal quotation marks omitted)).

89 *See Dickerson*, 530 U.S. 428.

90 18 U.S.C. § 3501. Under section (b)(3) of the statute, the reading of *Miranda* warnings was considered only one factor in the voluntariness determination. *Id.*

91 *Dickerson*, 530 U.S. at 432.

92 *See id.* at 441 (explaining that subsequent “decisions illustrate the principle—not that *Miranda* is not a constitutional rule—but that no constitutional rule is immutable”).

93 *See id.* at 446 (Scalia, J., dissenting) (pointing out that the majority did not go as far as to say that the Fifth Amendment is violated when a statement obtained in violation of *Miranda* is admitted against the accused, but rather ambiguously referred to *Miranda* as “constitutionally based,” having “constitutional underpinnings,” and a “constitutional decision”). *See also* United States v. Patane, 124 S. Ct. 2620, 2627 (2004) (citing *Chavez v. Martinez*, 538 U.S. 760, 778 (2003) (stating that “[b]ut because these prophylactic rules (including the *Miranda* rule) necessarily sweep beyond the actual protections of the Self-Incarnation Clause . . . any further extension of these rules must be justified by its necessity for the protection of the actual right against compelled self-incrimination . . .”)); *Elstad*, 470 U.S. at 306 (stating that “[t]he *Miranda* exclusionary rule . . . sweeps more broadly than the Fifth Amendment itself”).
must be tied closely to the underlying Fifth Amendment privilege.94

B. The Sixth Amendment Right to Counsel

1. Purpose

The right to counsel in the Sixth Amendment context serves two main purposes: (i) to minimize the imbalance created in an adversarial system where laymen are prosecuted by a government trained and committed to doing so and (ii) to maintain the fairness and integrity of criminal trials.95 In contrast to the Fifth Amendment, the Sixth Amendment explicitly provides for the right to counsel. The Sixth Amendment states in part, that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”96 The main principles underlying the entire Amendment are “the protection of innocence and the pursuit of truth,” which has led many legal scholars to describe the Sixth Amendment as “the heartland of constitutional criminal procedure.”97 In Powell v. Alabama, the Court elaborated on the undeniably important role that the right to counsel plays in the American criminal adversarial system.98 The Court held that the right to counsel is a fundamental right, explaining that the right to be heard—essentially the right to a fair trial—is an empty one without the right to assistance of counsel.99 Thus, the Sixth Amendment serves a different,
arguably more important, function than its Fifth Amendment counterpart.\textsuperscript{100} Here, the right serves as a remedy for the imbalance created when ill-equipped defendants must face an organized prosecutorial machine.\textsuperscript{101} Counsel equalizes the field by providing legal knowledge, skills, and training and by committing himself to putting the accused's best interests first.\textsuperscript{102}

2. \textit{When the Right Attaches}

The right to counsel under the Sixth Amendment is broad.\textsuperscript{103} Two threshold requirements must be met before the Sixth Amendment right to counsel attaches: (i) initiation of adversarial proceedings\textsuperscript{104} and (ii) deliberate governmental elicitation of statements.\textsuperscript{105} A suspect need not be in custody or feel coerced to trigger the right.\textsuperscript{106} It is enough that the individual has been indicted and that government officials attempt to obtain information from him.\textsuperscript{107} While a literal

\textit{every step} in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.

\textit{Id.} at 69 (emphasis added).

\textsuperscript{100} Thomas Echikson, \textit{Sixth Amendment–Waiver After Request for Counsel}, \textit{77 J. CRIM. L. & CRIMINOLOGY} 775, 783 (1986). Despite the \textit{Powell} Court's clear endorsement of the indispensable nature of the right to assistance of counsel, such a requirement did not apply to the states until nearly thirty years later when \textit{Gideon v. Wainwright}, 372 U.S. 335 (1963), extended the Sixth Amendment right to state courts through the Fourteenth Amendment.


\textsuperscript{102} See Tomkovicz, \textit{supra} note 66, at 981.

\textsuperscript{103} While this section asserts that the Sixth Amendment right is broader than that of the Fifth, it is also important to note the two ways in which the Court has narrowed the Sixth Amendment right. First, in \textit{McNeil v. Wisconsin}, 501 U.S. 171 (1991), the Court held that a defendant who invoked the right to counsel at a bail hearing did not simultaneously invoke his Fifth Amendment right to counsel. Then, in \textit{Texas v. Cobb}, 532 U.S. 162 (2001), the Court held that the Sixth Amendment right to counsel is offense specific and cannot be invoked once for all future prosecutions, meaning that the police can question represented defendants about other uncharged crimes outside the presence of counsel.


\textsuperscript{106} \textit{Massiah}, 377 U.S. at 206.

\textsuperscript{107} While the Court has held that using wired informants, \textit{Massiah}, 377 U.S. at 201, 204, or orchestrated jailhouse situations, \textit{Henry}, 447 U.S. at 123-24, designed to elicit information from the defendant triggers the Sixth Amendment right to counsel, neither of these situations would meet the definition of custodial interrogation and thus not trigger the attachment of the Fifth Amendment right. \textit{See supra} notes 61, 78.
reading of the Amendment’s text suggests that defendants are only guaranteed counsel at their actual trial, the Powell Court expanded the protection’s scope,108 it now attaches at the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment—when a defendant needs the aid of counsel most.109

In United States v. Wade,110 the Court explained that a broad application of the right to counsel was necessary because (i) the Framers of the Bill of Rights had envisioned a broader role for counsel then what had been the prevailing practice in England and (ii) since then, criminal prosecutions have evolved significantly.111 The Court also considered how trials have evolved. Whereas at one time evidence against the accused was accumulated at the trial itself, currently, the bulk of the evidence against the defendant is gathered in pretrial proceedings. This significant change allows the results of pretrial proceedings to potentially “settle the accused’s fate . . . reducing the trial itself to a mere formality.”112 The Wade Court made clear that despite the plain wording of the Sixth Amendment, the basic meaning of the Amendment

108 The Powell Court justified its expansion of the right by explaining that the right to counsel at trial is effectively meaningless if its protections can be undone by events that occur before trial. Powell v. Alabama, 287 U.S. 45, 69 (1932).

109 Kirby v. Illinois, 406 U.S. 682, 689 (1972) (explaining that the point at which the system changes from investigatory to accusatorial is “far from a mere formalism,” it is rather the point at which the adverse positions of the government and defendant have solidified); Spano v. New York, 360 U.S. 315, 325 (1959) (pointing out that depriving a formally charged defendant “of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself”); Powell, 287 U.S. at 57 (noting that the defendants had been deprived of the right to counsel during the most critical period of the proceedings: “from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation [are] vitally important”).

110 388 U.S. 218 (1967) (holding that a post-indictment line-up was a critical confrontation by the prosecution for which the defendant was entitled to the assistance of counsel).

111 Id. at 224.

When the Bill of Rights was adopted, there were no organized police forces as we know them today. The accused confronted the prosecutor and the witnesses against him, and the evidence was marshaled, largely at the trial itself. In contrast, today’s law enforcement machinery involves critical confrontations of the accused by the prosecution at [crucial] pretrial proceedings . . . .

Id. 112 Id.
guarantees the right to assistance of counsel whenever it is necessary to ensure a meaningful defense.113

The right to counsel, as defined, applies to all critical stages114 of a prosecution,115 and the Court presumes that a defendant requests counsel at all of these stages.116 Once the right to counsel has attached, the government must honor it, which means that the government must do more than simply not prevent an accused from obtaining assistance of counsel.117 Rather, the State has an affirmative obligation to “respect and preserve” the accused’s choice to seek counsel’s assistance.118 Building on this principle, the Court has held that once the right to assistance of counsel attaches, it is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been completely proper at an earlier stage of investigation.119

3. Waiver

As previously noted, the Court places a high premium on waivers of Constitutional rights.120 In Johnson v. Zerbst, the

---

113 Id. at 225.
114 An event is defined as critical if the presence of counsel is “necessary to preserve the defendant’s basic right to a fair trial as affected by his right . . . to have effective assistance of counsel at the trial itself.” Id. at 227. Post-indictment line-ups and post-indictment questioning have both been held to be “critical stages” of a prosecution because of the irreversible potential for prejudice that could result to the defendant without having his counsel present. Wade, 388 U.S. at 232; Massiah v. United States, 377 U.S. 201, 204 (1964) (citing Spano, 360 U.S. at 326). On the other hand, a post-indictment photographic line-up has been held not to be a critical stage of the prosecution. United States v. Ash, 413 U.S. 300, 321 (1973).
115 Wade, 388 U.S. at 224. See also Powell, 287 U.S. at 57 (citing People ex rel. Burgess v. Riseley, 66 How. Pr. 67 (N.Y. Sup. Ct. 1883); Batchelor v. State, 125 N.E. 773 (Ind. 1920)).
118 Id. The Court went on to say that this means “at the very least, the prosecutor and police have an affirmative obligation not to act in a manner that circumvents . . . the protection afforded by the right to counsel.” Id. at 171.
119 Jackson, 475 U.S. at 626, 631 (considering the question of whether the police can question a defendant further after he requested counsel at arraignment, but has not yet had the opportunity to consult with counsel, and noting that the reasons for prohibiting interrogation of an uncounseled prisoner who asked for help are even stronger after he has been formally charged).
Court laid out an exacting standard for waiver of Sixth Amendment rights—the “knowing, intelligent, and voluntary” standard, which depends on a case-by-case analysis of the surrounding facts and circumstances of the case, including “the background, experience, and conduct of the accused.” Following Zerbst, some lower courts, and even two Supreme Court Justices—albeit in dissents—held that waiver of the Sixth Amendment right to counsel required a higher threshold than waiver of the Fifth Amendment right, despite the fact that the Court used the same standard to describe both.

The Court has never directly answered this question, but appeared to somewhat strike down the idea of different standards when it held that the Miranda warning is sufficient to advise indicted defendants, who have not invoked their right to counsel, of the right and the consequences of relinquishing it. The Court based its decision on the fact that an attorney plays essentially the same role in post-indictment questioning as an attorney at a custodial interrogation; therefore, it should not be more difficult to waive one right than the other. The majority stressed, however, that there are limited situations in which a valid waiver might be found under Miranda but not under the Sixth Amendment, such as where an attorney was attempting to contact his client or a surreptitious conversation.

121 Id. at 464.

122 Patterson v. Illinois, 487 U.S. 285, 307 (1988) (Stevens, J., dissenting) (describing majority’s opinion that the Miranda warning makes clear to the accused how counsel could advise him as a “gross understatement of the disadvantage of proceeding without a lawyer” and therefore insufficient basis upon which to make a knowing and intelligent waiver of the Sixth Amendment right to counsel); Wyrick v. Fields, 459 U.S. 42, 55 (1982) (Marshall, J., dissenting), reh’g denied, 464 U.S. 1020 (1984) (advocating a higher standard for Sixth Amendment waiver); Felder v. McCotter, 765 F.2d 1245, 1250 (5th Cir. 1985) (holding that “a waiver of the Sixth Amendment right to counsel requires more than a recital of Miranda rights . . .”), abrogated by Patterson, 487 U.S. 285; United States v. Shaw, 701 F.2d 367, 380 (5th Cir. 1983) cert. denied, 465 U.S. 1067 (1984) (stating that because the policies underlying the Fifth and Sixth Amendment rights to counsel are quite distinct, so too are the waiver requirements); United States v. Brown, 699 F.2d 585, 589 (2d Cir. 1983) (holding that the Miranda warning is not sufficient to waive the Sixth Amendment right to counsel); United States v. Mohabir, 624 F.2d 1140, 1147 (2d Cir. 1980) (finding that there is “a higher standard with respect to waiver of the right to counsel that applies when the Sixth Amendment attaches”); United States v. Satterfield, 588 F.2d 655, 657 (2d Cir. 1978) (stating that there is a higher waiver standard that applies to the Sixth Amendment right to counsel); United States v. Callabress, 458 F. Supp. 964, 967 (S.D.N.Y. 1978) (following the Satterfield holding that more than Miranda warnings are needed to inform an indicted defendant about his right to counsel); United States v. Miller, 432 F. Supp. 382, 388 (E.D.N.Y. 1977) (noting that statements “which are voluntary under the Fifth Amendment are not necessarily valid when viewed against the higher standard of waiver implicit in the Sixth Amendment”).

123 Patterson, 487 U.S. at 292-93.
between an undercover officer and an indicted defendant.footnote124 Once a defendant invokes his right to counsel, however, any secret interrogation of the defendant without counsel present contravenes the fundamental rights of a person charged with a crime and any subsequent waiver during police-initiated questioning is invalid.footnote125

4. Violations

When considering violations of the Sixth Amendment right to counsel, the Court focuses on the actions of the police as opposed to the perceptions of the accused.footnote126 The current approach to Sixth Amendment right to counsel violations came down in Massiah v. United States,footnote127 in which the Court emphasized the difference between the “deliberate elicitation standard”footnote128 and the “functional equivalent of interrogation”footnote129 concept.footnote130 Massiah was indicted for violating federal narcotics laws.footnote131 He retained a lawyer, pleaded not guilty, and was released on bail.footnote132 While out on bail, federal agents obtained incriminating statements from Massiah by installing a recording device in his co-defendant’s car.footnote133 The Supreme Court reversed Massiah’s conviction, holding that the

footnote124 In contrast, under a Fifth Amendment analysis there would be a valid waiver in both situations. Id. at 296 n.9.
footnote125 Here the Court imports the reasoning of Edwards v. Arizona, 451 U.S. 477 (1981), concluding that the “reasons for prohibiting the interrogation of an uncounseled prisoner are even stronger after he has been formally charged with an offense than before.” Michigan v. Jackson, 475 U.S. 625, 631 (1986).
footnote126 Fellers v. United States, 540 U.S. 519, 524 (2004) (questioning an indicted defendant in his home about the crime in question is deliberate elicitation); Maine v. Moulton, 474 U.S. 159, 176 (1985) (excluding statements obtained through a wired co-defendant); United States v. Henry, 447 U.S. 264, 270, 274-75 (1980) (incriminating statements suppressed where defendant made them to a jailhouse plant because the government’s specific mention of defendant to the undercover informant, who was paid on a contingency fee basis, constituted the prohibited type of affirmative steps to secure incriminating information from a defendant outside the presence of counsel); Brewer v. Williams, 430 U.S. 387, 402-04 (1977) (appealing to a particular defendant’s proclivities or weaknesses constitutes deliberate elicitation); Massiah v. United States, 377 U.S. 201, 206 (1964) (excluding statements obtained unbeknownst to the defendant through his wired co-defendant).
footnote128 This is the Sixth Amendment right to counsel trigger. See id. at 204.
footnote130 377 U.S. at 206.
footnote131 Id. at 202.
footnote132 Id.
footnote133 Id. at 202-03.
government could not constitutionally use the defendant's own incriminating words that were deliberately and unknowingly elicited in the absence of counsel against him. The Massiah doctrine laid essentially dormant until nearly thirteen years later in Brewer v. Williams. Williams was suspected of abducting a little girl. He retained counsel, who advised him that the officers would transport him to another city and that no interrogation would take place, but that if it did, he should not respond until he consulted with an attorney. While being transported, an officer, knowing that the defendant was schizophrenic and highly religious, began to discuss how a snowstorm was on the way, which would make it nearly impossible to recover the body and allow her parents to give her a proper Christian burial. Williams then led police to the body. The Court excluded Williams' incriminating statements because the police officer had deliberately elicited the statements from the defendant in absence of counsel or a waiver of counsel.

C. Two Very Different Rights—Comparing Apples to Oranges

As the previous discussion intimates, the Fifth and Sixth Amendment rights to counsel are truly two different rights. The rights have different histories, bases, rationales, and purposes. Such differences cannot be ignored. “Analysis of issues and development of workable doctrine concerning the two entitlements must heed the differences in origin, character, and purpose.” The Sixth Amendment right to counsel was

---

134 Id. at 206. In reaching its decision, the Court relied heavily on a concurring opinion in Spano v. New York, 360 U.S. 315 (1959). In Spano, the Court reversed a state criminal conviction because a confession had been wrongly admitted into evidence against the defendant at his trial. Id. at 321. The Court decided the case under the Fourteenth Amendment because of the circumstances under which the confession had been obtained. Massiah, 377 U.S. at 321. But, four Justices agreed that the conviction should be reversed solely because the defendant had been indicted and his confession deliberately elicited by police in absence of counsel, thereby violating the Sixth Amendment. See id. at 324-25 (Douglas, J., concurring); Id. at 326 (Stewart, J., concurring).


136 Id. at 390.

137 Id. at 391.

138 Id. at 392-93.

139 Id. at 393.

140 Id. at 397-99.

141 Tomkovicz, supra note 66, at 993.
included in the Bill of Rights and has been part of our justice system for over 200 years.\textsuperscript{142} The purpose of the Amendment is to preserve the adversarial nature of the criminal justice system by ensuring fairness for the defendant and does so by providing attorneys as zealous advocates of the defendant’s best interests. In contrast, the Court created the Fifth Amendment right to counsel thirty years ago. Its purpose is to preserve the accusatorial nature of the criminal justice system, and it does so by allowing counsel to act as a medium between the government and the defendant in a very limited context.

It is not just legal scholars that acknowledge these differences or find them important; the Court has recognized these critical differences as well.\textsuperscript{143} While the Court has at times appeared to blend the two doctrines, such a conclusion is the result of a superficial reading of the overlap in relevant case law.\textsuperscript{144} The Court has imported rationales from one context to the other, but before applying such rationales, the Court carefully considers the distinct purpose and objective of each right to counsel to assure that the line of thinking is applicable.\textsuperscript{145} In so doing, the Court has demonstrated that the

\textsuperscript{142} See U.S. CONST. amend. VI.

\textsuperscript{143} See Rhode Island v. Innis, 446 U.S. 291, 300 n.4 (1980) (clarifying that the definitions of interrogation under the Fifth and Sixth Amendments are not necessarily interchangeable since the policies underlying the two constitutional protections are “quite distinct”); United States v. Henry, 447 U.S. 264, 282 n.6 (Blackmun, J, dissenting) (justifying his rejection of an objective standard for determining deliberate elicitation under Massiah by noting the “quite distinct” policies underlying the Fifth and Sixth Amendments (quoting Innis, 446 U.S. at 300 n.4)); McNeil v. Wisconsin, 501 U.S. 171, 178 (1991) (stating that the guarantees of right to counsel protect “quite different” interests); United States v. Wade, 388 U.S. 218, 226-27 (explaining that the Sixth Amendment provides a right to counsel in a broader sense—when there is no interrogation and no Fifth Amendment applicability). See also Kirby v. Illinois, 406 U.S. 682, 688 (1972) (finding that Miranda and Massiah exclusionary rules stem from “quite different” constitutional guarantees).

\textsuperscript{144} See Miranda v. Arizona, 384 U.S. 436, 444 (1966) (importing the Sixth Amendment waiver standard); Michigan v. Jackson, 475 U.S. 625, 636 (1986) (importing bright line rule established in Fifth Amendment context that once a suspect invokes the right to counsel, the interrogation must cease and cannot begin again unless the suspect initiates conversation); Patterson v. Illinois, 487 U.S. 285, 296 (1988) (finding that the Miranda warning is sufficient to provide the accused with enough information to waive his Fifth or Sixth Amendment right to counsel knowingly and intelligently).

\textsuperscript{145} See Jackson, 475 U.S. at 631 (rejecting the government’s argument that the underlying legal principles of the Fifth and Sixth Amendments make the rule announced in Edwards inapplicable in this case and noting that the average person does not appreciate the differences between the two rights to counsel and that the importance of the right to counsel makes the reasoning of Edwards even more applicable in the Sixth Amendment context); Patterson, 487 U.S. at 293-94 & n.6 (announcing that the Miranda warning serves to sufficiently advise defendant of his Sixth Amendment right to counsel, but the Court limited its decision solely to the post-
two counsel entitlements can in no way be equated as a per se rule. In fact, the Court’s analysis in the Miranda-line of cases has illustrated that the two rights are anything but equal. In announcing the Fifth Amendment right to counsel as a “mere prophylactic rule,” the Court has left the right particularly susceptible to judicial weakening.\textsuperscript{146} The exceptions already carved out of the rule have caused many scholars to argue that Miranda has essentially become a hollow right.\textsuperscript{147} In reaffirming Miranda’s counsel entitlement as prophylactic and validating all its current exceptions in 2004, the Court has demonstrated its support for treating Miranda as a lesser-protected right.\textsuperscript{148} In contrast, the Sixth Amendment right to counsel has been expounded as a fundamental right.\textsuperscript{149} Instead of contracting its protections, the Court has expanded them from its original context at trial\textsuperscript{150} to preliminary hearings,\textsuperscript{151} sentencings,\textsuperscript{152} identification sessions,\textsuperscript{153} initial appearances,\textsuperscript{154} arraignments,\textsuperscript{155} and post-indictment questioning.\textsuperscript{156}

IV. FRUIT OF THE POISONOUS TREE DOCTRINE

underlying rationale for exclusion. The rationales for exclusion stem from the constitutional rights they protect. A majority of exclusionary rule jurisprudence has occurred in the Fourth Amendment context, where its roots mainly lie. Since it was first announced, the rule has been extended as a general remedy for police misconduct that violates a defendant’s constitutional rights. The rule requires suppression at trial of evidence obtained directly or indirectly through government violations of the Fourth, Fifth, or Sixth Amendments. Exceptions have developed to the rule in each context. To determine whether the Elstad exception should apply in the Sixth Amendment context, it is necessary to understand the rationales behind suppressing evidence in this realm.

A. Development

In Mapp v. Ohio, the Court applied the exclusionary rule to state authorities in state courts. In so doing, the

158 United States v. Calandra, 414 U.S. 338, 348 (1974) (stating that “[a]s with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served”). See generally Tomkovicz, supra note 154.
160 Barnett, supra note 16, at 938 n.2.
162 Weeks v. United States, 232 U.S. 383, 398 (1914) (applying the exclusionary rule in federal court to evidence obtained through a Fourth Amendment violation), overruled by Mapp v. Ohio, 367 U.S. 643; Elkins v. United States, 364 U.S. 206, 223-24 (1960) (extending the exclusionary doctrine to state officials in federal trials); Mapp, 367 U.S. at 655 (applying the exclusionary rule in state court to evidence obtained through a Fourth Amendment violation).
166 Id. at 655. The Court first suggested the need for a remedy like exclusion in Boyd v. United States, 116 U.S. 616 (1886), a case decided on Fourth and Fifth Amendment grounds. The Court stated in Boyd that:

Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man’s own testimony, or of his private papers to be used as evidence to convict him of crime, or to forfeit his goods, is within the condemnation [of the Fourth and Fifth Amendments] . . . .
Court gave three main justifications for implementing the exclusionary rule: (i) protection of the defendant’s rights, (ii) deterrence of police misconduct, and (iii) judicial integrity.167 Almost immediately after Mapp, critics launched an assault against the rule arguing that excluding relevant evidence is fundamentally unfair and too costly.168 These drawbacks, critics argue, far outweigh the minimal deterrence and judicial integrity actually achieved by exclusion.169

Arguably in response to this harsh criticism, the Court, in the late 1960s and into the 1970s, also began an attack on the rule. This resulted in a significant narrowing of the rule’s scope170 as well as the formation of multiple exceptions that allow the admission of illegally obtained evidence at trial. To create exceptions to the exclusionary rule, the Court abandoned most of the approach it set forth in Mapp. Instead of relying on the three main rationales for exclusion, the Court limited its focus to whether exclusion of the evidence in the case at hand would prevent law enforcement misconduct in the future.171 The Court has identified four main situations in which the exclusionary remedy is not required despite a

... constitutional provisions for the security of person and property should be liberally construed.

Id. at 630, 635. It was not until Weeks, however, that the Court implemented the rule by excluding letters unreasonably seized from the defendant’s home. The Weeks holding limited application of the rule to actions of federal officials for use in federal trials. Id. at 398. Finally, in Mapp, the Court applied the rule to state authorities in state courts. Mapp, 367 U.S. at 655.

167 Mapp, 367 U.S. at 659-60.
168 See sources cited supra note 17.
169 See sources cited supra note 17.
170 In Rakas v. Illinois, 439 U.S. 128, 134 (1978), the Court announced a standing requirement that only the victim of the constitutional violation can move for suppression and limited the rule to criminal trials. The exclusionary rule also does not apply in tax actions by the IRS, United States v. Janis, 428 U.S. 433, 447, 454 (1976); deportation administrative hearings, INS v. Lopez-Mendoza, 468 U.S. 1032, 1049 (1984); or parole revocation hearings, Board of Probation v. Scott, 524 U.S. 357, 364 (1998).
171 Interestingly enough, the two places where a defendant’s right to exclusion still remains part of the rationale is in violations of the Sixth Amendment context and the Fifth Amendment due process context. See Arizona v. Mauro, 481 U.S. 520, 525-26 (1987); Nix v. Williams, 467 U.S. 431, 446-47 (1984) (disagreeing on the merits but certainly not rejecting the theory behind defendant’s argument that the Sixth Amendment exclusionary rule is designed to protect the right to a fair trial and the integrity of the fact-finding process). See generally United States v. Wade, 388 U.S. 218 (extending exclusionary rule to identifications made in absence of counsel because of great unfairness that can occur if accused is put in line-up without a lawyer present).
constitutional violation: (i) when police act in good faith, 172 (ii) when the connection between the illegal conduct and the acquisition of the challenged evidence is so attenuated that it dissipates the taint of the unlawful act, 173 (iii) when the evidence was obtained through a source independent of the illegality, 174 and (iv) when the evidence inevitably would have been discovered by independent, lawful means. 175 Additionally, the Court has established an emergency exception to admit physical evidence derived from Miranda-defective confessions. 176 The Court justified these exceptions by reasoning that the goal of deterrence is not always adequately served by excluding relevant evidence. 177

As mentioned in the Introduction, the exclusionary rule is not limited to evidence obtained directly from a constitutional violation. 178 Rather, it excludes all evidence derived from a Constitutional violation as long as there is a sufficient connection between the proffered evidence and the illegality. 179 The Court articulated this concept in the landmark case of Wong Sun v. United States. 180 In that case, the police performed an illegal search of an individual's apartment. 181 In so doing, they learned of that individual's participation in the sale of narcotics, which led agents to question another person who actually possessed the narcotics. 182 After arresting this second individual for possession of narcotics, he implicated the

172 United States v. Leon, 468 U.S. 897 (1984) (establishing a limited good faith exception for searches conducted pursuant to a warrant that is later found to be invalid).
175 Nix, 467 United States at 448 (1984). These exceptions come into play when the prosecution seeks to offer illegally obtained evidence in its case in chief. Separate rules and exceptions apply when the prosecution seeks to introduce such evidence for impeachment purposes. See United States v. Havens, 446 U.S. 620, 627-28 (1980); Walder v. United States, 347 U.S. 62, 65 (1954).
177 Brown v. Illinois, 422 U.S. 590, 610 (Powell, J., concurring) (focusing on the deterrent purpose of the exclusionary rule); United States v. Leon, 468 U.S. 897, 916 (1984) (reasoning that there is "no basis . . . for believing that exclusion of evidence seized pursuant to a warrant will have a significant deterrent effect").
178 See supra note 8.
179 See supra note 8.
181 Id. at 486.
182 Id. at 487.
defendant Wong Sun.\textsuperscript{183} Officers went to Wong Sun’s dwelling, gained admittance, and arrested Wong Sun.\textsuperscript{184} Wong Sun was subsequently released, but returned to the police station voluntarily three days later and signed a statement.\textsuperscript{185} The Court suppressed the statement from the first individual and the narcotics found on the second individual, but admitted Wong Sun’s statement.\textsuperscript{186} Although the Court considered the excluded evidence fruits of the primary illegal arrest, it concluded that Wong Sun’s statement was not an illegal fruit because there was an intervening independent act of free will—i.e., Sun’s returning to the police station voluntarily. The Court found this sufficient to purge the taint of the primary illegality.\textsuperscript{187}

The derivative evidence doctrine also developed originally in the Fourth Amendment context,\textsuperscript{188} but has been used on a limited basis in the Fifth\textsuperscript{189} and Sixth Amendment contexts as well. As Wong Sun illustrates, the test for admissibility is whether the secondary evidence was obtained through exploitation of the initial illegality or by means sufficiently attenuated to remove the taint.\textsuperscript{191} The burden is on the government to show that the case falls into one of these exceptions.\textsuperscript{192}

\textsuperscript{183} Id. at 475.  
\textsuperscript{184} Id.  
\textsuperscript{185} Id. at 475-77, 476 n.3, 491.  
\textsuperscript{186} Wong Sun, 371 U.S. at 487-91.  
\textsuperscript{187} Id. at 491.  
\textsuperscript{188} See id. at 484-85; Nardone v. United States, 308 U.S. 338, 340 (1939); Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391-92 (1920).  
\textsuperscript{192} Kaupp, 538 U.S. at 633.
B. Justifications for the Exclusionary Rule: Mapp and Miranda versus Massiah

The current conception of the Fourth Amendment exclusionary rule is that exclusion is neither a personal right, a remedy for a past wrong, nor even tied to the preservation of the adversarial system.\(^{193}\) The exclusionary rule is employed in the Fourth Amendment context solely to deter future unreasonable searches and seizures by police.\(^{194}\) The Miranda exclusionary rule is similarly premised only on deterrence.\(^{195}\) In both contexts, exclusion is a court-created remedy that is not grounded in the language of the Constitution. As a result, admitting evidence obtained in violation of the Fourth Amendment or Miranda does not directly violate the Constitution, which makes carving out exceptions to these rules easier for the Court to justify.

In contrast, the Sixth Amendment exclusionary rule is a different species all together—one more akin to the Fifth Amendment due process exclusionary rule\(^{196}\) than the Miranda exclusionary rule.\(^{197}\) When first announced, the Massiah Court determined that a violation of the defendant’s Sixth Amendment right to counsel occurred only at the time that the

---


\(^{194}\) Oregon v. Elstad, 470 U.S. 298, 306 (1985) (“The purpose of the Fourth Amendment exclusionary rule is to deter unreasonable searches, no matter how probative their fruits.”) (citing Dunaway v. New York, 442 U.S. 200, 216-17 (1979); Brown, 422 U.S. at 600-02; Elkins, 364 U.S. at 217 (“The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”).

\(^{195}\) It is important to note the difference between the Fifth Amendment exclusionary rule and the Miranda exclusionary rule. The Fifth Amendment has a built-in exclusionary remedy. The text itself states that no defendant can be compelled to give incriminating testimony about himself. U.S. CONST. amend. V. Thus, where police obtain compelled statements or confessions they are automatically excluded from trial. Elstad, 470 U.S. at 304-05. The Miranda exclusionary rule, on the other hand, is a court-created remedy that comes into play when government officials violate the strictures of Miranda. See Id. See generally Miranda v. Arizona, 384 U.S. 436 (1966). The distinction between a constitutionally based rule and a court created one cannot be overemphasized.

\(^{196}\) See infra note 188; Mincey v. Arizona, 437 U.S. 385, 397-98 (1978) (distinguishing, for the purposes of exclusion, between a procedural Miranda violation and true coercion; use of any involuntary statement should never be admitted in any way against a defendant).

wrongfully obtained evidence was admitted at trial. Linking the violation to the admission of evidence demonstrates the Court’s belief that exclusion is a personal right inextricably tied to the Sixth Amendment right itself. In *Nix v. Williams*, the Court justified its decision to admit fruits of illegally obtained evidence based on a cost-benefit analysis of the deterrence theory. At the same time, the Court accepted the defendant’s argument that exclusion is a present protection of the right to a fair trial. Thus, the current conception of the Sixth Amendment exclusionary remedy is that it serves two important functions: (i) maintaining the integrity of the adversary system by remedying the Constitutional violation and (ii) deterring future violations.

C. *Fruits of the Poisonous Tree Doctrine and Miranda*

The Court has severely limited the exclusionary impact of *Miranda* on the fruits of confessions by relying on two main propositions: (i) that exclusion of the fruit of a poisonous tree is justified only if a constitutional right is violated and (ii) that a violation of *Miranda* is not, by itself, a violation of the Fifth Amendment.

In *Michigan v. Tucker*, the police arrested the defendant for rape and advised him of his right to remain silent and to an attorney. However, the officer did not inform Tucker that he could have an attorney present if he was indigent. The defendant gave an alibi for the time of the crime: that he was with his friend Henderson. When the police spoke to Henderson, he made incriminating statements implicating Tucker. Tucker moved to suppress Henderson’s

---

199 *Nix v. Williams*, 467 U.S. 431, 446-48 (1984) (acknowledging that the Sixth Amendment right to counsel ensures the reliability of proffered evidence, but finding that the admission of physical evidence that would be inevitably discovered does not infringe on the integrity or fairness of a trial).
200 *See* United States v. Henry, 447 U.S. 264, 282 n.6 (1980) (Blackmun, J., dissenting) (writing that “Massiah imposes the exclusionary sanction on that conduct that is most culpable, most likely to frustrate the purpose of having counsel, and most susceptible to being checked by a deterrent”).
203 *Id.* at 436.
204 *Id.*
205 *Id.*
206 *Id.* at 436-37.
statement due to the deficiency in his own *Miranda* warnings. 207 The Court rejected his argument, however, and admitted the evidence. 208 The Court concluded that the exclusionary rule does not require suppression of reliable evidence when a procedural oversight in the administration of *Miranda* warnings occurs because such an error does not necessarily render a suspect’s statements involuntary. 209 The Court extended the reasoning of *Tucker* to second confessions obtained after a *Miranda*-defective confession in *Elstad*. The Court admitted Elstad’s second confession finding suppression inappropriate “[s]ince there was no actual infringement of the suspect’s constitutional rights,” and therefore “the doctrine expressed in *Wong Sun* that fruits of a constitutional violation must be suppressed” did not control in this case. 210

V. **Analysis**

A. **The Derivative Evidence Rule Applies to Sixth Amendment Violations**

While originally articulated and developed in the Fourth Amendment context, the Court’s subsequent jurisprudence has made clear that the derivative evidence rule also applies to the Sixth Amendment. 211 The most straightforward application of the rule occurred in *Wade*. 212 There, the Court held that a defendant is entitled to the assistance of counsel at pre-trial line-ups determining that the admissibility of in-court identifications must be governed by the *Wong Sun* exclusion rule. 213 Then in *Nix*, 214 the Court admitted the body of a murder victim that the police discovered after deliberately eliciting its whereabouts from the defendant in the absence of counsel. 215 While the defendant’s actual statements were excluded, the Court held that the condition of the body could be admitted at

---

207 *Id.* at 437.
208 *Tucker*, 417 U.S. at 437.
209 *See id.* at 444-45.
212 388 U.S. 218 (1967).
216 *Id.* at 437.
trial even though it was a fruit of the Sixth Amendment violation.\textsuperscript{217} The Court found that since the police had already formed a search party to look for the victim, they would have “inevitably” discovered the body.\textsuperscript{218} \textit{Nix}, albeit convolutedly, also demonstrates the Court’s application of the derivative evidence rule in the Sixth Amendment context. The \textit{Nix} inevitable discovery exception only makes sense if in fact the derivative evidence rule bears on Sixth Amendment violations. Indeed, if there was no Sixth Amendment derivative evidence rule, then the Court would not have been compelled to create the exception that it did in \textit{Nix}.

What distinguishes the derivative evidence rule in the Sixth Amendment context from its Fourth Amendment counterpart, however, is its justification. When invoking either the Fourth Amendment exclusionary rule—direct or derivative—the Court has come to focus solely on the deterrence rationale: “[both rules are] calculated to prevent, not to repair. . . . [Their] purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.”\textsuperscript{219} Indeed, such a justification makes sense. If the police officers know that the fruits of their labors will be disregarded unless they follow proper procedures, then they are less likely to conduct illegal searches and seizures in the first place. This rationale is also a workable concept in the Sixth Amendment context. If police and prosecutors know that incriminating evidence will be excluded at trial if a defendant’s Sixth Amendment rights are violated, then they will be less likely to interfere with an indicted defendant’s right to counsel.

Beyond this, however, the Court’s opinions make known that the Sixth Amendment exclusionary rules serve a purpose in addition to deterrence.\textsuperscript{220} The Sixth Amendment, in conjunction with the Fourteenth Amendment, guarantees the right to counsel at every critical stage of a prosecution.\textsuperscript{221} The right has been described as “indispensable,”\textsuperscript{222} in fact “vital.”\textsuperscript{223}

\begin{footnotesize}
\begin{enumerate}
\item[217] \textit{Id.} at 446-47.
\item[218] \textit{Id.} at 448-50.
\end{enumerate}
\end{footnotesize}
to the fair administration of our adversary system of criminal justice. The entire line of Massiah cases has been decided on the premise that admitting statements deliberately elicited from a defendant in the absence of counsel denies the defendant the basic protections of the right.224 If this is so, then the use of the fruits of such a violation likewise exploits the defendant’s uncounseled status to his subsequent disadvantage at trial. It follows then, that the Sixth Amendment exclusionary rule and derivative evidence rule, in addition to deterrence, function to preserve the fair trial rights of defendants, and as such, the integrity of the entire criminal system.

Here again, Nix is instructive in a roundabout way. There, the petitioner argued that the Sixth Amendment exclusionary rule’s additional purpose made the “societal costs”—the competing interest of effective law enforcement—of excluding evidence irrelevant.225 The Court disagreed with the petitioner’s argument, but only because the evidence that he sought to exclude was (i) physical and (ii) would have been discovered anyway.226 The Court stated that the police conduct “did nothing to impugn the reliability of the evidence in question . . . . [Therefore] suppression, in these circumstances, would do nothing whatever to promote the integrity of the trial process . . . [or] ensure fairness.”227 The Court did not reject outright the petitioner’s assertion that the Sixth Amendment exclusionary rule serves a purpose other than deterrence. Rather, the Court acknowledged and accepted such a justification, but found that exclusion of the evidence did not further this interest under the circumstances.228 In fact, excluding evidence that the police would have discovered anyway actually places them in a worse position than they would have been.229 The Court’s consistent use of the deterrence rationale—or rather the lack-of-deterrence rationale—to admit evidence that would otherwise be excluded, suggests that this added justification sets a higher bar of

225 Nix, 467 U.S. at 446.
226 Id. at 446-47.
227 Id.
228 Id.
229 Id. at 447.
admission for evidence obtained in violation of the Sixth Amendment.

B. The Elstad Exception is not Applicable in the Sixth Amendment Context

While the foregoing discussion certainly bolsters the assertion that the Elstad exception does not and could not apply in the Sixth Amendment context, the Eighth Circuit disagreed, finding that violations of the Miranda rule and the Sixth Amendment are not fundamentally different. Yet a close examination of the text of the Elstad decision itself reveals the Eighth Circuit’s egregious error. To reiterate, the Elstad majority held that the defendant’s second statement, made after he had given a first, unwarned statement, was admissible in the prosecution’s case in chief, because it was the product of a voluntary, knowing, and intelligent waiver. Relying on the reasoning of Tucker, the Court held that a procedural violation of Miranda does not create a presumption of coercion and that the subsequent reading of Miranda remedies any taint resulting from such a procedural failure. The Elstad decision thus establishes two criteria that must be met in order to trigger the exception: (i) the primary illegality must not be of constitutional magnitude and (ii) there must be no deliberate coercion or improper police practice in obtaining the initial statement. As will be shown below, the facts of Fellers fail both of these prongs.

The Elstad Court began hewing the “fruit of the poisonous tree” doctrine early on in the opinion. Writing for the majority, Justice O’Connor stated that the fruits metaphor is “misleading” when taken out of context, as the majority found it was in this case. The only appropriate situation in which to apply the fruits doctrine is in cases involving a constitutional violation. Again, the Court’s analysis hinges on the characterization of Miranda as a mere prophylactic rule. The Court went on to say that the lower court incorrectly assumed “that a failure to administer Miranda warnings necessarily breeds the same consequences as police

---

230 United States v. Fellers, 397 F.3d 1090, 1093 (8th Cir. 2005).
232 Id. at 314.
233 See id. at 309.
234 Id. at 303-04.
infringement of a constitutional right, so that evidence uncovered following an unwarned statement must be suppressed as ‘fruit of the poisonous tree.’”

Equating these two wrongs, the Court explains, fails to recognize the nature of the *Miranda* protections. In essence, the failure of police to advise suspects of their *Miranda* rights does not directly violate the Fifth Amendment.

O’Connor also cautioned the lower courts to distinguish between the role of the Fourth Amendment exclusionary rule—to deter unreasonable searches no matter how probative their fruits—and the function of *Miranda*—to protect the right against self-incrimination. In *Taylor v. Alabama*, the Court held that “[a]ny confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession so that the confession is ‘sufficiently an act of free will to purge the primary taint.’”

But because *Elstad* does not involve a constitutional violation, the Court refused to apply the fruits doctrine. Instead, it turned to its reasoning in *New York v. Quarles* and *Tucker*: that a procedural *Miranda* violation differs significantly from violations of the Fourth Amendment.

Specifically, the Court noted that violations of the Fourth Amendment mandate broad application of the fruits doctrine because it serves “interests and policies that are distinct from those it serves under the Fifth.” Whereas the Fourth Amendment exclusionary rule is aimed directly at preventing illegal searches, the *Miranda* exclusionary rule has broader implications than the Amendment it is meant to uphold. To illustrate, the failure to read *Miranda* automatically creates a presumption of compulsion. Therefore, statements made without a warning are suppressed without question. As a result, voluntary statements could be suppressed just because they are unwarned even though they

---

235 Id. at 304.
236 *Elstad*, 470 U.S. at 304.
237 As discussed earlier, the Court’s decision in *Dickerson* has invalidated this analysis. See supra notes 87-90 and accompanying text. But, more recently in *Patane*, the Court upheld the *Elstad* exception. The effect of the *Dickerson* and *Patane* decisions will be addressed later in this section. See infra p. 34.
238 *Elstad*, 470 U.S. at 304.
240 *Elstad*, 470 U.S. at 306.
were not actually compelled. But, the Fifth Amendment only protects against the use of compelled statements.

The Court went on to state that absent any showing of deliberately coercive or improper tactics in obtaining the initial statement,

the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion . . . . [and] subsequent administration of Miranda warnings to a suspect who has given a voluntary but unwarned statement ordinarily should suffice to remove the conditions that precluded admission of the earlier statement.

Thus, the failure to provide Miranda warnings creates a rebuttable presumption of compulsion. It does not infringe upon a suspect’s constitutional rights, unless there is an actual showing of coercion. And, where there is no evidence of coercion in obtaining the first statement, the Court sees little concern that coercion provoked the second statement. As a result, the Court concluded that the Miranda exclusionary rule can not require that statements and their fruits be discarded automatically as inherently tainted. Errors in administering prophylactic Miranda procedures should not have the same “irremediable consequences” as police infringement on the Fifth Amendment itself.

When the police read Elstad his Miranda rights at the station, it remedied any taint present in the first unwarned statement because it was uncoerced. After being so advised, he voluntarily waived his right to remain silent and his right to counsel. Elstad proceeded to speak with law enforcement officials during which time he made incriminating statements. While a fruit of the first confession, this second and uncoerced statement exacts a high cost from law enforcement while doing little to protect the defendant against self-incrimination. Thus the cost is high and deterrent effect low—an equation that has consistently added up to admission in the Court’s exclusionary jurisprudence.

241 Id. at 306-07.
242 Id.
243 Id. at 314.
244 See id. at 306-07.
245 Id. at 309.
Contrary to the Eighth Circuit’s holding, applying the analysis laid out in *Elstad* to the facts of *Fellers* does not yield the same result. The *Elstad* Court began by imploring the lower courts not to obscure the differences between the Fourth Amendment exclusionary rule and *Miranda*. But the differences acknowledged by the Court are not of the same magnitude when comparing the Fourth and the Sixth Amendment exclusionary rules. Firstly, the Sixth Amendment exclusionary rule is a personal right tied directly to the enforcement of the Amendment's protection itself. Allowing evidence that was obtained as a result of a violation of the defendant's right to counsel to be admitted at trial, or used to uncover other evidence that is then used at trial, renders the right essentially meaningless. Secondly, the Sixth Amendment exclusionary rule does not present the same dilemma that the *Miranda* exclusionary rule does, namely overbreadth. The Sixth Amendment exclusionary rule does not reach broader than the Sixth Amendment itself. Rather, the exclusionary rule ensures that all rights guaranteed under the Sixth Amendment, which together ensure the right to a fair trial, are protected. Finally, there is nothing merely procedural about violating the Sixth Amendment right to counsel. Since it is specifically accorded in the text of the Constitution, failing to honor that right directly violates the Constitution. Based on this alone, *Fellers* would seem to fall outside the bounds of the *Elstad* exception.

*Elstad* clearly states that to trigger the fruits doctrine—as opposed to the *Elstad* exception to the fruits doctrine—the primary illegality must be of constitutional magnitude and there must be no intentional misconduct. In addition to the violation at issue in *Fellers* being a constitutional one, the police officers obtained Fellers’ initial statement through deliberate and improper tactics. Remember, the main rationale behind the exclusionary rule is deterrence. In cases involving the timing of the *Miranda* warning, the Court has tended to be forgiving.247 Indeed, police officers are not lawyers. There have been situations in which the Court has found a

suspect to be in custody or under interrogation, thus triggering the application of *Miranda*, but where an average police officer would not have known as much.\textsuperscript{248} A similar situation occurred in *Elstad*. The officers, while admitting retrospectively that Elstad was in custody, testified that they went to Elstad’s home solely to inform his mother about what was happening, not to interrogate Elstad. The Court took stringent notice of surrounding factors, like the time of day and the comforting environment of his own home, to bolster the notion that the arresting officers were acting in good faith when Elstad made the first unwarned and incriminating admission.\textsuperscript{249}

In contrast, officers violate the Sixth Amendment right to counsel when they “deliberately elicit” information from an indicted defendant in the absence of counsel. The Court has held that deliberate elicitation differs significantly from the functional equivalent of interrogation concept.\textsuperscript{250} One such difference is the standard’s focus on the officer’s actions. As the Court has already held, the officers in *Fellers* went to Fellers’ home with the sole intention of deliberately eliciting information from him. Thus, the police used improper tactics in obtaining Fellers’ initial incriminating statements. The Eighth Circuit found that suppressing the statement Fellers made in his home sufficiently deterred the Sixth Amendment violations because

\begin{quote}
the officers acknowledged that they used Fellers’ initial jailhouse statements (obtained after securing a *Miranda* waiver) in order to extract further admissions from him, . . . [but did not make] reference to Fellers’ prior uncounseled statements in order to prompt him into making new incriminating statements.\textsuperscript{251}
\end{quote}

This reasoning completely ignores the logic underlying the *Elstad* exception, that while the deterrent effect of the exclusionary rule is arguably lacking when the police are acting in good faith, there is no question that the exclusionary rule serves its purpose when the police blatantly act in bad

\begin{footnotes}
\footnotetext[248]{See Stansbury v. California, 511 U.S. 318, 323 (1994) (holding that “the initial determination of custody depends on the objective circumstances of the interrogation, not on the subjective views harbored by either the interrogating officers or the person being questioned”); Pennsylvania v. Muniz, 496 U.S. 582, 592-93 (1990) (holding that when the physical nature of tests begin to elicit communicative responses, it constitutes interrogation for *Miranda* purposes).}
\footnotetext[249]{*Elstad*, 470 U.S. at 315.}
\footnotetext[250]{See supra notes 125-27.}
\footnotetext[251]{United States v. Fellers, 397 F.3d 1090, 1095-96 (8th Cir. 2005).}
\end{footnotes}
faith, as they did in *Fellers*. Allowing the police to remedy their blatant disregard for the Constitution by *Mirandizing* *Fellers* defies common sense and misinterprets precedent.

In *Elstad*, the Court rejected Elstad’s argument that he had confessed the second time out of psychological compulsion. Elstad’s argument was based on the “cat-out-of-the-bag” theory announced in *United States v. Bayer*. The theory is that

>[once a suspect confesses,] no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as the fruit of the first.

The *Elstad* Court reasoned, however, that the psychological pressure that exists after making a voluntary statement is neither the type of coercion that *Bayer* referred to nor that the Fifth Amendment protects against. Since Elstad’s first statement was not coerced, but rather given voluntarily, receiving the *Miranda* warning at the police station was enough to remedy the initial wrong. When considered in light of the Sixth Amendment, however, the cat-out-of-the-bag theory is not so easily disposed.

Furthermore, the fact that the Court has, as the Eighth Circuit points out, on one occasion, applied similar waiver analysis to Fifth and Sixth Amendment rights to counsel does not suggest that the rights are similar for purposes of the fruits doctrine. The reading of *Miranda* in the *Fellers* case does not remove the taint from the prior Sixth Amendment violation and thus does not justify the same result. The Court, hearkening back to *Powell*, has consistently held that defendants need the “guiding hand of counsel” to restore the imbalance between them and the government. The reading of *Miranda* can do neither. While the Eighth Circuit certainly downplays the role of counsel at post-indictment questioning, its own acknowledgment that “the scope of the right to counsel varies depending upon the usefulness of counsel to the accused

---

252 331 U.S. 532 (1947).
253 *Id.* at 540.
254 *Elstad*, 470 U.S. at 314.
255 *Patterson v. Illinois*, 487 U.S. 285, 296-97 (1988) (holding that where an indicted defendant has not requested to speak with counsel, the reading of the *Miranda* warning is sufficient to inform him of the right so that he can make a knowing and intelligent waiver).
at a particular proceeding and the dangers to the accused of proceeding without counsel" belies this assertion.\footnote{257}{United States v. Fellers, 397 F.3d 1090, 1096 (8th Cir. 2005) (citing Patterson, 487 U.S. at 298).} If Fellers had an opportunity to consult with counsel, then his lawyer could have told him not to answer the questions put to him by police in his home or his lawyer could have advised him that the statements he made at his home, in the absence of his attorney, could not be used against him at his trial. Either scenario illustrates the important role that counsel could have played in Fellers.

Finally, the Eighth Circuit’s reliance on Patterson v. Illinois is misplaced; Patterson does not govern Fellers. In Patterson, police arrested the defendant as a suspect in a murder and a grand jury indicted him soon after.\footnote{258}{Patterson, 487 U.S. at 288.} At this point, Patterson was entitled to his right to counsel under the Sixth Amendment. Before questioning him, the police read Patterson his Miranda rights, and he waived them.\footnote{259}{Id.} At trial, Patterson argued that Miranda was not sufficient to warn him of his Sixth Amendment right to counsel, so therefore he could not have knowingly and intelligently waived that right.\footnote{260}{Id. at 289.} However, since Patterson had never even asked to speak with an attorney, the Court rejected this argument.\footnote{261}{Id. at 290-91.} The Court held, instead, that receiving the Miranda warning sufficiently informed him of his right to counsel under the Sixth Amendment.\footnote{262}{Id. at 294.} But, in Patterson there was no primary illegality before the defendant made incriminating statements, which renders Patterson virtually meaningless in evaluating Fellers. Absent the primary illegality, the Court did not consider whether Patterson’s waiver of his right to counsel was made voluntarily, only if it was made knowingly and intelligently. While Fellers did not request to speak with an attorney either, the facts of Fellers have not foreclosed the voluntariness question. As the aforementioned analysis demonstrates, the primary illegality created a degree of coercion that would render his subsequent waiver of the right involuntary as well as unknowing and unintelligent.
While some have asserted that the Court’s decision in *Patterson* reflects an attitude of diminished protection for the Sixth Amendment right to counsel, the Court carefully limited its holding and even left open a loophole in footnote nine.263 The Court reassured readers that the similar waiver standard was limited to the post-indictment questioning context. Justice White wrote that, in general, where a suspect has been advised of his *Miranda* rights, he will be presumed to have been “knowing and intelligent” in his waiver, but “[not] all Sixth Amendment challenges to the conduct of postindictment questioning will fail whenever the challenged practice would pass constitutional muster under *Miranda.*”264 Furthermore, the majority did not reject the idea that courts require extra warnings to be given about waiving the Sixth Amendment right to counsel. Rather, it stated that as of then, the Court had not been presented with convincing enough language. Both of these facts demonstrate the Court’s continued emphasis on the paramount importance of the Sixth Amendment right.

Based on the Court’s own reasoning, the *Elstad* exception is inapplicable to *Fellers* in particular and the Sixth Amendment in general. But that is not where this analysis ends. In a post-*Dickerson* world—where the Court has overruled the notion of *Miranda* as a mere prophylactic rule—the Court’s reasoning in *Elstad* appears invalid. The Court, while not going as far as to say that a *Miranda* violation is a constitutional violation, has held that *Miranda* is a “constitutional decision.”265 Initially, one might conclude that *Miranda*’s newly declared constitutional status subjects its prior exceptions, including the applicability of the fruits doctrine, to review. But despite its characterization of *Miranda* the Court has reaffirmed the *Elstad* exception.266 The Court’s affirmation can only lead to one conclusion: that the Court is now relying on a cost-benefit analysis to justify its holding.

Yet even when employing this rationale—whether the cost of exclusion outweighs the protection of the individual’s interest—in the Sixth Amendment context, the *Elstad* exception is still inapplicable. The purpose of the Sixth

263 *Id.* at 296-97 n.9.
264 *Patterson*, 487 U.S. at 296 n.9.
Amendment exclusionary rule is more than just deterrence. The exclusionary rule is a necessary component of the right to counsel, which the Court has recognized as a fundamental right. Therefore, while the cost of exclusion may still be high, the cost of inclusion is even higher. Admitting evidence obtained directly or indirectly in violation of the Sixth Amendment would allow the right to counsel to be too easily circumvented. This would infringe on a defendant’s right to a fair trial; a cost that always tips the scale in favor of exclusion. Certainly, ensuring accurate outcomes and fair processes are interests superior to the goal of securing convictions.

C. The Admissibility of Fellers’ Second Confession Should Turn on a Traditional Fruit of the Poisonous Tree Analysis

Since the Elstad exception is inapplicable in the Sixth Amendment context, the Fellers case must be analyzed using the traditional derivative-evidence rule. Thus, the critical question is “whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.” In Brown v. Illinois, the Court set forth several factors to consider when determining whether a confession is the product of free will under Wong Sun: (i) whether Miranda warnings were administered before the confession, (ii) the temporal proximity between the arrest and confession, (iii) the presence of intervening circumstances, and (iv) particularly, the flagrancy of the official misconduct.

Fellers’ second confession was clearly a derivative of the first. While Fellers did receive a Miranda warning before making his second confession, all of the other Brown factors suggest insufficient attenuation. Fifteen minutes after Fellers made the first incriminating statement, the police transported him to the jailhouse where he made the second statement. There were no other intervening circumstances. In fact, the same officers obtained both statements from Fellers and both

statements referenced the same issues. Finally, the misconduct of the police officers in this situation is obvious. They went to an indicted defendant’s house to arrest him, but before doing so attempted to get any bits of information out of him that they could. The officers knew that if Fellers had a lawyer present, he would have been advised not to speak with them. It is precisely this sort of disregard for constitutional principles that the Court has continuously invoked the exclusionary rule to prevent. Therefore, Fellers’ second statement must be suppressed, unless the government can prove that it falls into another already established exception.

VI. CONCLUSION

In conclusion, the Fifth and Sixth Amendment rights to counsel are indeed like apples and oranges. By importing the Court’s reasoning in *Elstad* to the Sixth Amendment context and admitting the fruits of a Sixth Amendment violation in *Fellers*, the Eighth Circuit has significantly curtailed the protection of the Sixth Amendment right to counsel, despite the fact that history, Supreme Court jurisprudence, and common sense dictate that this should not be the case. The *Elstad* exclusionary rule should be limited to the Fifth Amendment context and cannot be applied to Sixth Amendment violations for three main reasons. First, as illustrated above, the Sixth Amendment right to counsel is a greater, more protected right. Its violation is unquestionably a direct violation of the Constitution. Second, the Sixth Amendment exclusionary rule serves a purpose beyond deterrence. Namely, maintaining the integrity of the trial system itself. It is a constitutionally required remedy. Finally, the Court’s reasoning clearly reflects its intention to limit the exception to the Fifth Amendment context. The purpose of the right to counsel is to protect a defendant from being convicted by his own ignorance of legal and constitutional rights. Extending the *Elstad* exception into the Sixth Amendment context does just the opposite.

In 1988, when the Court announced its decision in *Patterson*, some legal scholars viewed the decision as an onslaught of an assault against the Sixth Amendment right to counsel protection, which had always received favor from the
Two subsequent decisions—McNeil v. Wisconsin\textsuperscript{271} and Texas v. Cobb\textsuperscript{272}—did little to assuage these fears. Some feared that Massiah was headed down the same path as Miranda.\textsuperscript{273} Nonetheless, other scholars have not read these decisions as an attack, but rather as necessary fine-tuning.\textsuperscript{274} In a piece entitled Texas v. Cobb: A Narrow Road Ahead for the Sixth Amendment, the author noted that the only question remaining is how far the Court will go in narrowing the Sixth Amendment right and concluded, “Hopefully, it has gone far enough.”\textsuperscript{275} Regardless of one’s take on Patterson, McNeil, or Cobb, one issue is not debatable: extending the Elstad exception into the Sixth Amendment realm is going too far; it essentially cuts down the fruit of the poisonous tree doctrine at its roots. As every gardener knows, however, plants, even overgrown ones, flourish with careful pruning. Therefore, before other courts chop, they should consider the purpose of the Sixth Amendment. Once they do, they will realize that the fruit of the poisonous tree doctrine must be given a chance to grow. And so, this author respectfully urges courts to make peace with—indeed extend an olive branch to—the fruits of the poisonous tree doctrine by excluding any fruits that result from a violation of a defendant’s Sixth Amendment rights.

Jennifer Diana\textsuperscript{†}


\textsuperscript{272} 532 U.S. 162 (2001).


\textsuperscript{274} See, e.g., Michael E. Crowder, Texas v. Cobb, Note, The United States Supreme Court Limits the Sixth Amendment to Exonerate Innocent Suspects—Police Officers Acting in Good Faith, 8 TEX. WESLEYAN L. REV. 79, 81 (2001); Michael J. Howe, Note, Tomorrow’s Massiah: Towards a “Prosecution Specific” Understanding of the Sixth Amendment Right to Counsel, 104 COLUM. L. REV. 134, 147-50 (2004).

\textsuperscript{275} Beth G. Hungate-Noland, Texas v. Cobb: A Narrow Road Ahead for the Sixth Amendment Right to Counsel, 35 U. RICH. L. REV. 1191, 1223 (2002).

\textsuperscript{†} B.A. 2001, Barnard College, Columbia University. This Comment was written in loving memory of my grandfather, Charles J. Cloidt, who, expectantly, gave me my first Black’s Law Dictionary when I was 11 years old. I owe many thanks to Professor William H. Hellerstein for his superior guidance and acute insightfulness into the confusing world of Criminal Procedure. I am especially grateful to my parents—Bonnie and Michael Diana, my best friends—Michael, Melissa, and Carl, and my “Buddy”—Matt, for their unending love and support—without them none of this would have been possible.
The TEACH Act’s Eligibility Requirements

GOOD POLICY OR A BAD COMPROMISE?

I. INTRODUCTION

Imagine that you are a thirty-four year-old adult. Imagine that you work full time while raising two kids. Finally, imagine that in order to get promoted at your job, you are required to pursue a Masters in Business Administration (MBA). How could you possibly find the time to manage all of these responsibilities? The answer for a growing number of adults in this situation is to pursue a degree online. This is the essence of digital distance education: freeing students from the confines of the classroom to pursue “anytime, anyplace, any pace” learning over the Internet.

Now imagine that you have begun an online MBA program through an accredited university. The university advertised the program as being the same as the institution’s traditional in-class, face-to-face MBA program. However, you learn after a few weeks that the instructor for one of your classes is not able to secure a license to display a chart online because the copyright owner charges too much for online dissemination. Finally, you learn that the same chart was shown in the traditional MBA course, because under federal copyright law, no license was needed for face-to-face display in a traditional classroom. You come to realize that the distance education course is not “the same” as the traditional course.


2 Distance education is loosely defined as a form of learning where “students are separated from their instructors by time and/or space.” U.S. Copyright Office, Report on Copyright and Digital Distance Education 10 (1999), available at http://www.copyright.gov/reports/de_rprt.pdf [hereinafter COPYRIGHT OFFICE REPORT]. See also infra Section II.
This example demonstrates the pressing need for legislation known as the Technology, Education, and Copyright Harmonization Act of 2002, appropriately called the TEACH Act. The Act extends the distance education copyright exemption, which was first enacted in the Copyright Act of 1976, to protect online educators from infringement liability for the unauthorized use of copyrighted works in distance education courses. During the legislative process that led to the passage of the TEACH Act, two groups emerged at the forefront of the debate on the scope of the Act—educators, who generally favored a broad grant of user rights for distance education purposes, and copyright owners, who advocated for a narrow distance education exemption. Thus, the goal of the TEACH Act was to provide legislation that took the interests of both sides into account. On the side of educators, Congress sought to promote the burgeoning field of distance education by granting distance educators free access to the use of copyrighted works in online courses. On the side of copyright

---


4 Copyright Act of 1976, Pub. L. No. 94-553 § 110(1), 90 Stat. 2541, 2549 (codified at 17 U.S.C. 110(2) (2000), amended by TEACH Act § 13301(b)) [hereinafter Copyright Act of 1976]. The Copyright Act of 1976 enacted two distinct education exemptions: § 110(1) embodies the exemption for traditional in-class face-to-face teaching, while § 110(2) is the distance education exemption. Id. at § 110. Taken together, the two provisions were meant to exempt all bona fide educational uses of copyrighted works from infringement liability. COPYRIGHT OFFICE REPORT, supra note 2, at 144. Thus, educators who display or perform copyrighted works in the course of normal teaching activities do not need to obtain licenses for that specific use. Id.

5 Under the 1976 Copyright Act, traditional face-to-face educators were exempt from infringement liability for the use of pre-existing copyrighted works in class. Copyright Act of 1976 § 110(1); 17 U.S.C. 110(1) (2000). However, the use of copyrighted works in distance education over the Internet was not covered by the 1976 Act. See infra Section III.A.

6 See, e.g., Comments from the University of Maryland University College to the Copyright Office, Library of Congress 6 (Feb. 5, 1999), http://www.copyright.gov/disted/comments/init028.pdf (“[T]here must be a broad exemption for the use of copyrighted works in digital distance education.”) [hereinafter UM Comment].

7 See, e.g., Comments from the Association of American Publishers to the Copyright Office, Library of Congress 5 (Feb. 5, 1999), http://www.copyright.gov/disted/comments/init004.pdf (arguing that if the distance education exemption can be justified at all, it must be restricted to bona fide educational institutions that demonstrate need) [hereinafter AAP Comment].

8 See Promoting Technology and Education; Turbo-Charging the School Buses on the Information Highway: Hearing on S. 487 Before the S. Comm. on the Judiciary, 107th Cong. 5 (2001) (statement of Sen. Patrick J. Leahy, Member, S. Comm. on the Judiciary) [hereinafter Hearing on S. 487].
owners, Congress strived to limit the scope of the exemption to bona fide educational purposes.\(^9\)

When Congress first enacted the copyright education exemptions in 1976, it made a policy determination that educators should have free use of copyrighted works for normal teaching activities.\(^{10}\) This free use, of course, had to be balanced against copyright owners’ exclusive right to exploit their works.\(^{11}\) Thus, the education exemptions were crafted narrowly to ensure that they were only used for bona fide educational purposes.\(^{12}\) One of the ways Congress narrowed the education exemptions was to limit eligibility to “nonprofit educational institution[s].”\(^{13}\) More than twenty-five years later, Congress strived to maintain the same balance with the passage of the TEACH Act.\(^{14}\) However, while the exemption for traditional face-to-face educators remained unchanged under the TEACH Act,\(^{15}\) the bar for eligibility for distance educators was raised: only “accredited nonprofit educational institution[s]” now qualify for the distance education exemption under federal copyright law.\(^{16}\)

The fact that Congress narrowed the exemption for distance educators raises the question of whether doing so properly maintains the balance between educators’ needs and copyright owners’ interests that was struck in the 1976 Act, or whether the additional “accredited” requirement upsets the balance unfairly in favor of copyright owners. During the legislative process that led to the passage of the TEACH Act, both educators and copyright owners agreed that accreditation was necessary to ensure that the newly crafted distance education exemption be limited to bona fide educational purposes.\(^{17}\) Both sides also agreed that the nonprofit


\(^{11}\) Id. at 5.

\(^{12}\) See Register of Copyrights, 89th Cong., Copyright Law Revision Part 6, at xviii-xix (Comm. Print 1965) [hereinafter Supplementary Report of the Register of Copyrights].


\(^{17}\) See infra notes 221-24 and accompanying text.
requirement was meaningless as a dividing line between institutions that qualified for the exemption, and those that did not. Despite this broad based agreement, Congress simply added the “accredited” requirement to the nonprofit limitation without fully examining the policy implications of its decision. The result was to limit the reach and impact of the TEACH Act.

This note will advocate that the TEACH Act failed in its primary goal “to promote digital distance learning” because the Act unjustifiably defers to the interests of copyright owners by adding “accredited” to the nonprofit requirement. In order to successfully promote distance education, Congress should have removed the “nonprofit” requirement for eligibility, while maintaining only the “accredited” requirement – thus, all accredited educational institutions would be eligible for the exemption, whether they are for-profit or not-for-profit.

Section II of this note will provide an overview of digital distance education and its relationship to United States copyright law. Section III will provide crucial background about the distance education exemption and the need for the TEACH Act. Section IV will focus on the legislative process that led to the passage of the TEACH Act, including details of the Report on Copyright and Digital Distance Education (“Copyright Office Report”). Section V will examine the debate surrounding the eligibility requirements of the TEACH Act. This note will conclude by arguing that the distance

---

18 Id. See also supra notes 47-49, 139-44 and accompanying text.
19 See Kristine H. Hutchinson, Note, The TEACH Act: Copyright Law and Online Education, 78 N.Y.U. L. Rev. 2204, 2206, 2225-27 (2003). By maintaining the nonprofit requirement, the TEACH Act failed to extend the distance education exemption to for-profit institutions that have proven to be more successful in offering distance education courses that meet the needs of underserved populations. See infra note 46.
20 As stated above, “nonprofit” is meaningless as an eligibility criterion because the primary providers of distance education are for-profit educational institutions. Further, many prestigious nonprofit institutions have launched for-profit subsidiaries (though many have failed). See infra note 46.
21 See infra Section II.
22 See infra Section III.
23 COPYRIGHT OFFICE REPORT, supra note 2. This report was submitted to Congress in 1999 in response to a previous act passed by Congress. See Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) [hereinafter DMCA]. The DMCA required the Register of Copyrights to examine the field of digital distance education and report back to Congress with recommendations about how to change the distance education exemption to better affect educational policy goals. Id. at § 403(a), 112 Stat. at 2889.
24 See infra Section V.B.
education exemption should be amended to include all “accredited” educational institutions because public policy favors broad-based support for all distance education programs, the process of accreditation is rigorous enough to protect the economic interests of copyright owners, and the TEACH Act already includes safeguards to protect the interests of copyright owners.

II. AN OVERVIEW OF DISTANCE EDUCATION

The most fundamental definition of distance education is that it is a form of learning in which “students are separated from their instructors by time and/or space.” This definition is amorphous, covering both asynchronous distance education, where the teaching and learning does not take place in real time, and synchronous distance learning, where technology generally facilitates a live interaction between educators and students. A common characteristic of all distance education courses is that a teacher or mediator is central to the delivery of course content. Increasingly, individual courses include both a traditional face-to-face teaching component and a distance learning component. This is generally called “hybrid” or “blended” learning.

25 See infra Section II.C.
26 See infra Section V.A.
27 See infra Section IV.B.
28 COPYRIGHT OFFICE REPORT, supra note 2, at ii. For the purpose of accreditation review, distance education is defined as “a formal educational process in which the majority of the instruction occurs when student and instructor are not in the same place. Instruction may be synchronous or asynchronous. Distance education may employ correspondence study, or audio, video, or computer technologies.” NAT’L RESEARCH CTR. FOR CAREER AND TECHNICAL EDUC., DISTANCE LEARNING IN POSTSECONDARY CAREER AND TECHNICAL EDUCATION 1 (2003), available at http://www.nccte.org/publications/infosynthesis/r&dreport/Distance_Learning_Post_CTE/Distance_Learning_Post_CTE.html (quoting the North Central Association Commission on Institutions of Higher Education, one of six regional accrediting bodies in the United States).
29 See COPYRIGHT OFFICE REPORT, supra note 2, at 15-16. Traditionally, asynchronous distance education courses were conducted via mail correspondence and videotape. Today, asynchronous distance education usually refers to the use of technologies such as email, threaded discussion boards, and online web courses, while synchronous distance education usually refers to the use of applications such as instant messaging and streaming audio and video. Id. at 16.
30 Id. at 10. In its report, the Copyright Office distinguished teacher-centered learning modules from unstructured or self-paced learning modules. Thus, the term “distance education” specifically excludes self-paced modules. See id.
31 H.R. REP. No. 107-687, at 2 (2002); S. REP. No. 107-31, at 4 (2001) (explaining that “hybrid” distance learning courses are those in which students meet both in a traditional classroom and online in a virtual classroom).
A. Distance Education Over the Internet

This note will focus on the delivery of distance education courses over the Internet.32 The Internet has quickly become the most widely used distance education tool because it enables institutions to provide the most cost-effective delivery of distance education courses to the widest possible audience.33 Additionally, by creating “anywhere, anytime” virtual classrooms, online education offers students flexible and convenient options for pursuing advanced degrees.34 This has led policymakers to conclude that “online learning has revolutionized the world of ‘distance learning.’”35

32 For the purposes of this note, distance learning over the Internet will be referred to as either “online learning” or, more technically, “digital distance education.” While there is no “typical” online course, a wide range of applications have been developed to connect students to institutions via the Internet. At the simplest level, instructors communicate with their students asynchronously, using email, threaded discussion boards, interactive CD-ROMs, and course management systems, such as Blackboard and WebCT. At the more sophisticated level, instructors use synchronous or real-time methods of instruction, such as instant messaging, audio and video streaming (also known as webcasting), application sharing, and even two-way videoconferencing. See COPYRIGHT OFFICE REPORT, supra note 2, at 53-57.


34 See Hutchinson, supra note 19, at 2208. For example, OnlineLearning.net provides teachers with online professional development courses that can lead to a master’s degree. Courses are generally targeted to working adults who may not have the time to attend traditional face-to-face classes.

Come to class whenever it’s convenient for you by choosing when and where you participate in class. Your course is conducted according to a schedule, but there are no “live” classes to attend. Instead, lectures, coursework, and discussions all take place at your convenience. You choose the place — at home, at school — wherever you have access to a computer, modem, and an Internet Service Provider (ISP).


35 147 CONG. REC. S2006, S2007 (daily ed. March 7, 2001) (statement of Sen. Hatch). In the future, increased access to broadband Internet services will continue to stimulate innovation in online learning technologies. Advanced online learning technologies, such as webcasting and application sharing require high-speed Internet connections. As more Americans go online with broadband access, more distance learners will be able to take advantage of these technologies. See U.S. DEPT OF COMMERCE, A NATION ONLINE: ENTERING THE BROADBAND AGE 4 (2004), http://www.ntia.doc.gov/reports/anob/NationOnlineBroadband04.pdf [hereinafter A NATION ONLINE] (showing that while only 4.4% of U.S. households had broadband access in 2000, this number had grown to 19.9% by 2003).
Distance education programs are vital to the communities they serve. This is because online learning targets underserved populations and non-traditional students, such as working adults, students in rural areas, students with physical disabilities, and students for whom traditional liberal arts education is ill-suited. In other words, “distance education helps students overcome such barriers as full-time work commitments, geographic inaccessibility, the difficulty of obtaining child or elder-care, and physical disabilities.”

The importance of distance education to its target recipients cannot be understated. This is because for many people who strive for “lifelong learning,” distance learning is the only means of achieving their goal. Precisely because of the niche that distance education courses serve, the number of students participating in various programs nationwide continues to grow. During the 1999-2000 academic year, fully eight percent of undergraduate and ten percent of graduate students...

36 For instance, the mission of the University of Phoenix, the largest provider of online education, is to “provide high quality education to working adult students . . . regardless of their geographical location.” University of Phoenix, Mission, http://online.phoenix.edu/mission.asp (last visited Oct. 25, 2005). See also Dan Carnevale, Distance Education Attracts Older Women Who Have Families and Jobs, Study Finds, CHRON. OF HIGHER EDUC., Nov. 8, 2002, at 33 (reporting that online courses are advertised as being ideal for single working mothers). Recent studies have revealed that adult learners are the fastest growing segment of students in higher education. WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 4 (noting that “just 16% of college students fit the traditional 18-22 year old profile”).

37 For example, due to the rise in online courses, “[s]tudents in the remote areas of [Utah] are now able to link up to resources previously only available to those in cities or at prestigious educational institutions.” 147 CONG. REC. S2006, S2007 (daily ed. March 7, 2001) (statement of Sen. Hatch).

38 According to Rep. Peter Hoekstra (R-MI), “The flexibility and access facilitated through distance education and electronic delivery methods also holds tremendous promise for eliminating barriers and expanding access to higher education for students with disabilities – a population whose access to higher education may be somewhat limited by restraints on their hearing, sight, or mobility.” Dan Carnevale, Congress May Boost Online Programs That Aid Students Who Have Disabilities, CHRON. OF HIGHER EDUC., Nov. 28, 2003, at 34. See also Sheryl Burgstahler, Bridging the Digital Divide in Postsecondary Education: Technology Access for Youth with Disabilities, INFORMATION BRIEF (Nat’l Ctr. on Secondary Educ. and Transition, Minneapolis, Minn.), Dec. 2002, at 1, http://www.ncset.org/publications/info/NCSETInfoBrief_1.2.pdf (the benefits of technology are even greater for those with disabilities).

39 S. REP. NO. 107-31, at 4 (2001); 147 CONG. REC. S5988 (daily ed. June 7, 2001) (statement of Sen. Leahy). Shy students, who may be unwilling to participate in traditional face-to-face courses, may be more willing to participate in online discussions “because the format diminishes the intimidation that they feel speaking in front of a large group of their peers.” Hutchinson, supra note 19, at 2210.

40 COPYRIGHT OFFICE REPORT, supra note 2, at 19.

reported that they had participated in some type of distance education course.\textsuperscript{42}

The increased demand for distance education courses has triggered a reciprocal growth in the number of distance education providers.\textsuperscript{43} Not surprisingly, this growth has tracked the rise of Americans' access to the Internet.\textsuperscript{44} In other words, as more Americans have gone online, more people have begun taking online classes, and more institutions have started offering distance education courses.\textsuperscript{45} Because of its continued growth, online education is now perceived as a potentially lucrative market for both nonprofit and for-profit institutions.\textsuperscript{46} While nonprofit two and four-year institutions may have once dominated the education market, online courses are now offered by “both nonprofit and for-profit entities, on both a nonprofit and for-profit basis, and through varieties of

\textsuperscript{42} Sikora, supra note 33, at 9, 14.


\textsuperscript{44} In 1998, only 26.2\% of U.S. households had Internet access. By 2003, over fifty percent of U.S. households were online. A Nation Online, supra note 35, at 4.

\textsuperscript{45} See TABS, supra note 43, at 4.

\textsuperscript{46} In fact, growing evidence suggests that for-profit institutions are even more successful at providing distance education courses than their nonprofit counterparts. Today, the largest provider of distance education is the for-profit University of Phoenix, which saw enrollments rise to over 200,000 in 2002. Goldie Blumenstyk, For-Profit Colleges: Growth at Home and Abroad, Chron. of Higher Educ., Dec. 19, 2003, at 12 (“According to analysts, enrollment growth at the seven biggest for-profit companies has outpaced overall enrollment growth in higher education for at least the last half-dozen years.” The result is that many for-profit institutions are “flourishing,” even though “cuts in state aid and philanthropy have put the squeeze on community colleges, state universities, and traditional private institutions.”). In the late 1990s and early 2000s, many prestigious traditional institutions, such as New York University, Columbia University, the University of Maryland, and Temple University, established for-profit subsidiaries that offered distance education courses. “The notion was that there were prospective students out there, far beyond the university’s walls, for whom distance education was the answer.” Katie Hafner, Lessons Learned At Dot-Com U., N.Y. Times, May 2, 2002, at G1. These institutions believed that if they offered courses over the Internet, students would come – and be willing to pay their high tuition costs. Id. Unfortunately for many of these schools, the reality was that most students who enroll in distance education courses are not looking for an “Ivy League” experience, but rather low-cost, accessible education. Today, many of these for-profit subsidiaries have ceased operations. The ones that are left tend to offer free courses that are meant to entice customers to enroll at the institution. Id.
partnerships involving both educational institutions and corporations.” 47 Thus, the line between nonprofit and for-profit distance educators has blurred because both types of institutions now offer accredited, online courses. 48 This is precisely why “nonprofit” is no longer a meaningful dividing line between those institutions that qualify for the distance education exemption, and those that do not. 49 Since both types of institutions are providing valuable distance learning services and courses, public policy should be shaped to incentivize both types of institutions to offer rich course content. This is just one of the reasons that Congress erred by retaining the nonprofit requirement for the distance education exemption.

B. Distance Education and Copyright Law

Congress has long recognized that educational uses of copyrighted works should be exempt from infringement liability. 50 Copyright laws strike a balance between an author’s exclusive right to exploit his or her work, and the public’s need to have access to that work. 51 Thus, Congress has provided for an education exemption because the public’s interest in free access to copyrighted works for educational purposes (such as displaying maps in a geography class, or playing music clips in a music appreciation class) outweighs the author’s right to exploit that work. 52 For traditional classroom courses, the

47 COPYRIGHT OFFICE REPORT, supra note 2, at 20-21.
48 Id.; see AAP Comment, supra note 7, at 5.
49 See infra notes 141-44, 221-24 and accompanying text.
50 For example, under the 1909 Copyright Act, the unauthorized public performance of a musical or nondramatic literary work was exempt from copyright infringement liability, unless it was for-profit. This exemption was justified, at least in part, because “it was thought that to prohibit unlicensed nonprofit performances of musical and nondramatic literary works in such public places as schools and churches would constitute undue restriction on the benefits that should be available to the public.” MELVILLE B. NIMMER, 2 NIMMER ON COPYRIGHT § 8.15 (2004) [hereinafter NIMMER ON COPYRIGHT]. Under the 1976 Copyright Act, the for-profit distinction was discarded. Instead, the public performance and display rights were broadly granted to copyright owners, while the education exemption was narrowly drafted. See SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS, supra note 12, at xviii, 31-37; see also 17 U.S.C. §§106, 110(1) (2000).
51 See, e.g., DMCA, supra note 23 (Register of Copyrights “shall submit to Congress recommendations on how to promote distance education through digital technologies . . . while maintaining an appropriate balance between the rights of copyright owners and the needs of users of copyrighted works.”); S. Rep. No. 107-31, at 5 (2001).
52 SUPPLEMENTARY REPORT OF THE REGISTER OF COPYRIGHTS, supra note 12, at 35; COPYRIGHT OFFICE REPORT, supra note 2, at 144 (“The exemptions in sections 110(1) and (2) embody a policy determination that certain uses of copyrighted works in
display” or “performance” of all types of copyrighted works during the course of “face-to-face teaching activities” is exempt from liability. For distance education courses prior to the passage of the TEACH Act, only the “performance” or “display” of a “nondramatic literary or musical work” during an educational broadcast was exempt from liability, subject to a number of other eligibility requirements.

The distance education exemption has always been more limited than the face-to-face exemption because the dissemination and transmission of copyrighted works (as opposed to the mere “display” of such works) poses a substantially greater risk of copyright piracy. The threat of copyright piracy is especially acute after the passage of the TEACH Act because now copyright owners must be concerned with the nearly unlimited ability of students to disseminate copyrighted works over the Internet. Nonetheless, with the passage of the TEACH Act, Congress determined that the need of distance educators and students taking online classes to secure free access to copyrighted works outweighed the heightened risks to copyright owners.

The legislative goal of the TEACH Act was simple: to promote the burgeoning field of online education through favorable copyright policies without running afoul of the rights of copyright owners. The passage of the TEACH Act was the result of a variety of legislative forces that came together in the early 2000s. In 1999, the Copyright Office published its report calling for reform to the distance education copyright exemption. Then, in 2000, the Web-Based Commission to the

connection with instruction should be permitted without the need to obtain a license or rely on fair use.

55 “When works are distributed in digital form, once a student obtains access, it is easy to further distribute multiple copies to friends and acquaintances around the world.” COPYRIGHT OFFICE REPORT, supra note 2, at 132. See also Hearing on S. 487, supra note 8, at 11 (statement of Marybeth Peters, Register of Copyrights).
57 However, in the TEACH Act, Congress implemented a number of safeguards to protect the interests of copyright owners. These safeguards will be discussed in detail, notes infra 156-68 and the accompanying text.
60 See COPYRIGHT OFFICE REPORT, supra note 2, at 145.
President and the Congress issued a “call to action” for policymakers to aggressively enact legislation that would promote distance learning in America. As part of its findings, the Commission identified that the distance education copyright exemption had fallen out-of-step with modern advances in technology and acted as an impediment to the development of online education. Thus, the TEACH Act, which brought the distance education exemption up to date with modern technology, was a direct response to the Commission’s call to action. However, the TEACH Act did not go far enough to meet the needs of distance educators. Because the TEACH Act does not exempt accredited for-profit universities, it fails to reach the most successful providers of distance education courses. Further, because of six additional eligibility requirements within the Act, some accredited nonprofit institutions have also elected not to take advantage of the exemption.

C. Strong Public Policy Supporting Distance Education

Distance education is valuable to American society because this country’s ability to compete in an increasingly global marketplace is directly related to the quality and availability of higher education.

Education is the means by which we develop our nation’s human resources. In this information age, marked by both cooperation and

---

61 The mission of the Commission was to “discover how the Internet is being used to enhance learning opportunity, and to identify ways that Congress and the President can help local schools, state education agencies, and postsecondary institutions overcome barriers.” WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 2.

62 Id. at iii. Among other things, the Commission called for Congress to “revise outdated regulations that impede[d] innovation and replace them with approaches that embrace anytime, anywhere, any pace learning.” Id. at iv. The Commission believed that the time was ripe for a national mobilization in support of distance education that was on par with other great American efforts, such as the race to the moon, and finding a cure for polio. Id. at 127.

63 Id. at 95-96.

64 See 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch) (“[I]n its recent report, the Web-Based Commission, established by Congress to develop policies to ensure that new technologies will enhance learning, concluded that United States copyright practice presents significant impediments to online education.”).

65 See supra note 46.

66 See infra notes 156-68 and accompanying text.

competition on a global scale, the ability of the United States to meet its domestic and international challenges and responsibilities is directly dependent on its educational capacity. That capacity in turn will be determined by the quality of our educational programs and their reach to all sectors of the public. For our nation to maintain its competitive edge, it will need to extend education beyond children and young adults to lifelong learning for working adults, and to reach all students of all income levels, in cities and rural settings, in schools and on campuses, in the workplace, at home, and at times selected by students to meet their needs.68

In other words, for America to raise the standard of living domestically, and to compete globally, policies promoting online education must be enacted to ensure that underserved populations have access to higher education.69

The development of distance education is also crucial to bridging the “digital divide” in America70 because online courses successfully target underserved populations.71 Recent evidence has linked the rise in the number of distance education courses being offered to increased enrollment in postsecondary institutions overall.72 Further evidence suggests that many students enrolling in distance education programs would not otherwise be able to pursue a postsecondary degree if not for the convenience of online programs.73 Taken together, this evidence reveals that distance education is working to

---


69 For example, recent legislation has been introduced to eliminate rules that prevent for-profit institutions from offering financial aid to students who choose to pursue an online degree. See College Access and Opportunity Act of 2005, H.R. 609, 109th Cong. § 482(a) (2005). See also EUNICE N. ASKOV ET AL., NAT'L CTR. FOR THE STUDY OF ADULT LEARNING AND LITERACY, EXPANDING ACCESS TO ADULT LITERACY WITH ONLINE DISTANCE EDUCATION 1 (2003), available at http://ncsall.gse.harvard.edu/research/op_askov.pdf (“In the U.S. economy, education and training are keys to economic survival.”).


71 See supra notes 36-41 and accompanying text.

72 NAT'L POSTSECONDARY EDUC. COOP., supra note 70, at 5. For example, a study of recent efforts to increase enrollment in distance education courses in Virginia revealed that enrollment in public postsecondary institutions increased by 3.3% overall during the studied period. Id.

73 Id. at 5, 35.
improve access to higher education.74 This evidence also suggests that those who enroll in online programs are not those who may have otherwise attended traditional universities. Instead, students taking online courses are increasingly those who never before had the opportunity to pursue advanced degrees.75 For purposes of this note, the relevant part of this discussion is that both nonprofit and for-profit distance educators offer similar benefits to their underserved target audiences. Thus, there is no reason why the distance education copyright exemption should distinguish between the two.

III. THE TEACH ACT: THE NEED FOR A CHANGE IN THE LAW

In its report, the Web-Based Commission concluded that copyright law prior to the passage of TEACH Act acted as an impediment to the development of online education.76 This assessment was partially based on the Commission’s findings that institutions face enormous start-up costs when they establish distance education programs.77 These costs include building the technological infrastructure to handle courses delivered over the Internet, supporting professors teaching online, and licensing copyrighted works to use in online courses.78 All of these costs act as a barrier to entry for institutions that seek to establish online programs.79 In one well-known example, New York University was prepared to spend $600,000 in an effort to bring its highly ranked cinema program online. A significant portion of the funds was allocated to license film clips, from five to thirty seconds in

74 See Blumenstyk, supra note 46, at 12.
75 Id. ("For the most part, say analysts, the growth of the for-profit sector has not come at the expense of traditional colleges. The reason is two-fold. First, the number of high-school graduates is growing. Second, many for-profit institutions have fueled their growth by serving nontraditional students.") (emphasis added).
76 WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 95-96.
77 See id. at 76 (explaining that creating an online course can take anywhere from 66-500% longer than creating a traditional face-to-face course); Hafner, supra note 46, at G1 ("It costs hundreds of thousands of dollars to build a [distance education] course well.”).
78 Hutchinson, supra note 19, at 2211-12. “In fact, securing the rights to use copyrighted materials has proven to be one of the highest costs of providing high quality online education.” Id.
79 Hearing on S. 487, supra note 8, at 19 (statement of Gerald A. Heeger, President, University of Maryland University College). “Although digital distance education may in the future produce genuine economies, in the short run the start-up and delivery costs are very expensive, so that all institutions are limited by cost in what they can do, and some institutions are simply kept out of significant digital education activities because of its steep costs.” Id.
length. Unfortunately, negotiations for the clips went on indefinitely, and the program never got off the ground.80

This example illustrates two stark realities confronting digital distance education. First, it is very expensive. . . . The second reality . . . is that even if we find the resources to build the necessary infrastructure, digital education will be threatened with second-class status unless and until local and remote educational content are brought into closer accord. The inescapable fact is that for digital distance education to achieve its full potential, instructors must be able to conduct remotely all educational activities permitted in a physical classroom.81

Thus, the TEACH Act was needed not only to bring the distance education exemption into the modern age,82 but also to grant distance educators similar rights to use copyrighted works as their face-to-face teaching counterparts.83 While face-to-face educators could rely on a statutory exemption to display and perform copyrighted works in class, prior to the TEACH Act, online educators had to rely on expensive licenses that copyright owners were generally unwilling to grant.84

A. The Pre-TEACH Distance Education Did Not Exempt Online Courses from Copyright Infringement Liability

The pre-TEACH distance education exemption drafted for the 1976 Copyright Act contemplated distance education over open and closed-circuit educational networks, which generally referred to televisions in classrooms that received instructional broadcasts.85 Under the 1976 Act, the distance education exemption was limited to the “display” of any work86

---

80 Id.
81 Id.
82 See WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 95-96; 147 CONG. REC. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch); see also infra note 91 and accompanying text.
84 See id. at 19-20 (statement of Gerald A. Heeger, President, University of Maryland University College); Hutchinson, supra note 19, at 2212-13 (“Whereas teachers in the context of face-to-face instruction can perform or display all types of copyrighted works under § 110(1) of the Copyright Act, under § 110(2),” teachers of online courses must secure expensive licenses to display or perform such works.).
86 The “display” right, one of the author’s exclusive rights under federal copyright law, is limited to the types of creative works one might ordinarily want to show to others, such as “literary, musical, dramatic, and choreographic works,
or the “performance” of a “nondramatic literary or musical work”\(^{87}\) in the course of a “transmission” to a nonprofit educational institution.\(^{88}\) In other words, under the old law, distance educators could not “perform” dramatic works, motion pictures, or other audiovisual works, whereas their face-to-face teaching counterparts could.\(^{89}\) Additionally, only a “transmission” directed at classrooms or to individual students with disabilities or special needs was exempt under the 1976 Act.\(^{90}\)

By the late 1990s, distance educators could not seek shelter under the 1976 distance education exemption because the old law had fallen out of step with new technology.\(^{91}\) First, the dissemination of copyrighted works over the Internet invokes both the “reproduction”\(^{92}\) and “distribution”\(^{93}\) rights of the copyright owner, which were not exempt under the 1976

---

\(^{87}\) The author’s exclusive right to “perform” his or her work is more limited than the author’s other exclusive rights and extends only to “literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works.” 17 U.S.C. § 106(4) (2000). Notably, the exclusive right to perform a creative work only extends to sound recordings that are performed via digital audio transmission. This language is broad enough to exclude the unauthorized use of music recordings in online courses. See 17 U.S.C. § 106(6) (2000).


\(^{89}\) Nimmer on Copyright, supra note 50, at § 8.15(C)(1)(b). Professor Nimmer also points out that “although a straight reading of a nondramatic literary work, such as a novel, would be subject to the exemption [under the 1976 Act], an acting out of the novel in dramatic form would not be exempt.” Id.


\(^{91}\) See 147 Cong. Rec. S2006 (daily ed. Mar. 7, 2001) (statement of Sen. Hatch) (“Currently, United States copyright law contains a number of exemptions to copyright owners’ rights relating to face-to-face teaching and instructional broadcasts. While these exemptions embody the policy that certain uses of copyrighted works for instructional purposes should be exempt from copyright control, the current exemptions were not drafted with online, interactive digital technologies in mind.”); Hutchinson, supra note 19, at 2212-13 (“Prior to the passage of the TEACH Act, there was no specific statutory exception that covered uses of copyrighted works for online education.”).

\(^{92}\) The reproduction right is invoked any time a copy is made of copyrighted work. 17 U.S.C. § 106(1) (2000).

\(^{93}\) 17 U.S.C. § 106(3) (2000). An author has the exclusive right to control “publication” or “distribution” of copies of a copyrighted work. However, “a public performance or display of the work does not itself constitute a publication.” 17 U.S.C. § 101 (2000).
Act. Second, while the 1976 exemption contemplated educational transmissions directed at classrooms and students with special needs, online education targets all students regardless of geographic location or need. Thus, the old law was too narrowly crafted to be useful to online educators.

B. Fair Use and Licensing Were Not Viable Alternatives to a Specific Statutory Exemption

Prior to the passage of the TEACH Act, distance educators who wished to transmit copyrighted works via the Internet would have had to rely on fair use or licenses to protect themselves from infringement liability. However, neither of these options were acceptable alternatives to a specific statutory exemption for online educators. Fair use is an equitable defense that is inexact by definition. Thus, to determine whether the use of a copyrighted work is “fair,” courts must weigh that use in light of four statutory factors.

94 COPYRIGHT OFFICE REPORT, supra note 2, at 83. Digital transmissions implicate the distribution right because the work is actually transmitted to the end-user. The reproduction right is implicated when copies of transmitted works are cached in the temporary memory of a computer or web-server. See Hearing on S. 497, supra note 8, at 11-12 (statement of Marybeth Peters, Register of Copyrights).

95 See supra notes 34-41 and accompanying text.

96 17 U.S.C. § 107 (2000). Fair use is one of the exemptions intended to benefit educational uses of copyrighted works, though fair use is broad enough to cover all types of uses, whether for educational purposes or not. COPYRIGHT OFFICE REPORT, supra note 2, at 85.

97 “The essential principle of ‘licensing’ rights, which is critical to the practical exercise of copyright ownership . . . works well for producers and users . . . and has been contemporaneously reaffirmed by the courts as a legitimate exercise of copyright.” AAP Comment, supra note 7, at 2.


100 The four statutory factors are:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
(2) the nature of the copyrighted work;
(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
(4) the effect of the use upon the potential market for or value of the copyrighted work.

While at least one of the factors, “the purpose and character of the use,” weighs strongly in favor of nonprofit educational uses, at least one other factor, “the effect of the use upon the potential market,” may weigh against the dissemination of copyrighted works over digital networks, even for nonprofit institutions. Further, fair use probably does not protect the unauthorized use of copyrighted works by for-profit providers of distance education, who represent a significant portion of the distance education market. Thus, because of the inexact and undefined nature of fair use, it is not a viable alternative to a specific statutory exemption for distance educators.

Reliance on licenses is also not an acceptable option for educators who want to provide rich content for their online programs. The first problem with licensing is that copyright owners are reluctant to license their works for dissemination over the Internet and usually require excessive fees for doing

---

101 17 U.S.C. § 107(1) (2000). However, this factor weighs against for-profit providers who may have the exact same need as nonprofit educators to use the copyrighted work. Even for nonprofit educators, this factor is not dispositive because it is only one factor that courts must weigh.

102 17 U.S.C. § 107(4) (2000). The Supreme Court has ruled that this is the most important of the four factors. Harper & Row Publishers v. Nation Enters., 471 U.S. 539, 566-67 (1985) (the fourth factor is “undoubtedly the single most important element of fair use”). The concern here is the perceived unfairness of allowing a work to be disseminated over a digital network, which “could alter a court’s evaluation of this factor” in relation to online educational uses. COPYRIGHT OFFICE REPORT, supra note 2, at 90.

103 See supra note 46.

104 See COPYRIGHT OFFICE REPORT, supra note 2, at 130; UM Comment, supra note 6, at 6-7 (“the ‘fair use’ guidelines cannot substitute for the current exemption”); ALA Reply Comment, supra note 98, at 4 (“a fair use dependent regulatory regime would . . . produce the chilling effect of substantial contingent liability for all distance education endeavors”).

105 For a poignant critique of the problems with licensing copyrighted works for online courses, see the comments made by Gerald Heeger, President, University of Maryland, to the Senate Committee on the Judiciary during the TEACH Act hearings:

Licensing is not the solution to copyright barriers. Licensing the use of content is slow, costly, and does not permit the instructor freedom in the selection of materials for transmission in the digital classroom. Further, there is a misperception that an online course is developed in advance, so getting permissions is reasonable and possible. However, in reality, that is not the case. Faculty members frequently supplement the “core” course materials "on the fly" and need flexibility to do so. Requiring licenses will limit the freedom for distance education faculty to use materials essential to the learning process. Provided that there are proper safeguards, the online environment should not be more restricted than the face-to-face teaching environment.

Hearing on S. 487, supra note 8, at 20.
so. 106 Second, educators often have a difficult time tracking down copyright owners. 107 This leads to lengthy delays in the licensing process. 108 In some cases, online educators must forego their plans to use copyrighted content altogether. 109 Thus, the overall effect is that for the exact same class, online educators are not able to provide the same rich content as their face-to-face counterparts, who are not required to license works for “performance” or “display.” 110 This disparity, prior to the passage of the TEACH Act, led many commentators and critics to assert that online educators were treated like second-class citizens. 111

IV. THE TEACH ACT: HOW THE ACT ADDRESSED THE NEED FOR CHANGE

Congress first addressed the shortcomings of the distance education exemption as part of the sweeping Digital Millennium Copyright Act of 1998 (“DMCA”). 112 While the time
was not ripe in 1998 to amend the distance education exemption. Congress did order the Register of Copyrights to study the field of digital distance education and report back to it with recommendations. The broad question for the Register to answer was whether the current law should be changed, freeing distance educators to use unauthorized copyrighted works in online courses. A secondary issue was for the Register to recommend which parties should benefit from a change in the law.

A. The Copyright Office Report on Digital Distance Education

The Register of Copyrights conducted an extensive series of hearings during the course of its study. Throughout the process, the Register strived to give voice to all the parties that would be affected by the potential legislation. These parties included copyright owners, educators, digital rights
organizations,\textsuperscript{121} education and technology companies,\textsuperscript{122} and trade associations.\textsuperscript{123} From the onset, however, two main sides clearly emerged from the discussions – educators and copyright owners. Both sides argued vigorously in defense of their respective positions.

Copyright owners argued that the pre-TEACH distance education exemption should not be amended.\textsuperscript{124} They pointed to the fact that the distance education market was growing by “leaps and bounds” without an expanded exemption.\textsuperscript{125} Further, copyright owners asserted that the fair use exception was adequate to allow distance educators to migrate course content online.\textsuperscript{126} Additionally, owners were concerned that expanding the education exemption would hurt their markets by “interfering with licensing opportunities” and by increasing the risk of rampant dissemination of copyrighted works over the Internet.\textsuperscript{127} Finally, copyright owners urged that licensing expenses should be seen simply as part of the cost of online education.\textsuperscript{128}

\begin{itemize}
  \item For example, Broadcast Music, Inc. and the Copyright Clearance Center, Inc. \textit{See id.}
  \item For example, the Education Management Corporation and InfoNetworks, Inc. \textit{See id.}
  \item For example, the Visual Resources Association, the College Art Association, the Association of Test Publishers, the American Association of University Professors, the University Continuing Education Association, and the Software and Information Industry Association. \textit{See id.}
  \item \textit{COPYRIGHT OFFICE REPORT, supra note 2, at 128, 131. See AAP Comment, supra note 7, at 3 (“Nothing in the hearings or written comments supplied by proponents of an exemption demonstrates any need for that exemption.”); Motion Picture Association of America Comment to the Copyright Office 2 (Feb. 5, 1999), available at http://www.copyright.gov/disted/comments/init022.pdf (“The mere fact that technological advances have occurred . . . is not evidence that changes in the copyright law are necessary.”); Recording Industry Association of America, Inc. Comment to the Copyright Office 2 (Feb. 5, 1999), available at http://www.copyright.gov/disted/comments/init023.pdf (“[N]o substantive changes to the Copyright Act are necessary to promote distance education through digital technologies . . . .”); Broadcast Music, Inc. Comment to the Copyright Office 7 (Jan. 26, 1999), available at http://www.copyright.gov/disted/comments/init003.pdf [hereinafter BMI Comment] (“To the extent that any exemption for educational uses of digital technologies is required, BMI believes that the current law is more than adequate.”).}
  \item \textit{COPYRIGHT OFFICE REPORT, supra note 2, at 128-29. See BMI Comment, supra note 124, at 7 (“[T]he rapid and continuing growth of distance education programs seems to suggest that no further protective legislation is necessary.”).}
  \item \textit{COPYRIGHT OFFICE REPORT, supra note 2, at 129; AAP Comment, supra note 7, at 2; see BMI Comment, supra note 124, at 7.}
  \item \textit{COPYRIGHT OFFICE REPORT, supra note 2, at 129, 132. (“When works are distributed in digital form, once a student obtains access, it is easy to further distribute multiple copies to friends and acquaintances around the world.”)}
  \item \textit{Id. at 129.}
\end{itemize}
Distance educators, on the other hand, argued for a wholesale change to the existing law. They believed that the pre-TEACH distance education exemption impeded the growth and development of online courses. Thus, they argued that the exemption should be broadened to include the “display” and “performance” of all types of works in the course of online classes. Educators also felt that fair use and licensing were not viable alternatives to a specific copyright exemption in terms of promoting distance education courses. Additionally, they asserted that licensing fees on top of the substantial start-up and maintenance costs for online education programs created unreasonable barriers to entry for institutions wishing to offer online courses.

The Register ultimately concluded that the time was right for a change in the law. Thus, the Copyright Office Report recommended that the distance education exemption be rewritten to grant distance educators substantially the same freedom to use unauthorized copyrighted works as their face-

---

129 Id. at 132.
130 See id. at 128; Association of American Universities et al Comment to the Copyright Office 2 (Feb. 5, 1999), available at http://www.copyright.gov/disted/comments/init031.pdf (noting that the pre-TEACH distance education exemption was based on technologies developed in the 1970s and that the exemption needed to be “updated to accommodate the expanded educational opportunities supported by new technologies”).
131 In general, educators sought the following changes to the distance education exemption:
   1) elimination of the concept of the physical classroom as a limitation on the availability of the exemption;
   2) coverage of rights in addition to performance and display, at least to the extent necessary to permit digital transmissions; and
   3) expansion of the categories of works covered, by broadening the performance right exemption to apply to works other than nondramatic literary and musical works.
COPYRIGHT OFFICE REPORT, supra note 2, at 133.
132 Id. at 128; UM Comment, supra note 6, at 8; American Library Association et al Reply Comment to the Copyright Office 4, available at http://www.copyright.gov/disted/reply/reply017.pdf (last visited Feb. 21, 2006). For a more detailed discussion of why licensing and fair use are not viable alternatives to a specific statutory distance education exemption, see supra Section III.B.
133 COPYRIGHT OFFICE REPORT, supra note 2, at 128; see supra Section III.B.
134 COPYRIGHT OFFICE REPORT, supra note 2, at 144 (“Where a statutory provision that was intended to implement a particular policy is written in such a way that it becomes obsolete due to changes in technology, the provision may require updating if that policy is to continue . . . . In the view of the Copyright Office, section 110(2) represents an example of this phenomenon.”).
to-face teaching counterparts. The Report noted that both the face-to-face teaching exemption and the distance education exemption were based on a “policy determination that certain uses of copyrighted works in connection with instruction should be permitted without the need to obtain a license or rely on fair use.” The Report further found that by 1999 the distance education exemption had fallen out of step with modern technology. Therefore, the Report concluded, the distance education exemption must be updated to “continue the basic policy balance struck in 1976.”

One of the specific recommendations that the Report made was to maintain existing standards of eligibility for the distance education exemption. However, the Report made this specific recommendation hesitantly. This is because there was considerable debate in the course of the study as to whether “nonprofit” was the appropriate dividing line for eligibility for the exemption. Some parties argued that all accredited educational institutions should be eligible for the exemption, whether nonprofit or for-profit. Others argued that only accredited nonprofit institutions should be eligible.

The Copyright Office Report observed:

---

135 See id. (noting that under the 1976 Copyright Act, Congress intended 17 U.S.C. § 110(1) & (2) to cover “all of the various methods by which performances or displays in the course of systemic instruction take place”) (quotations omitted).

136 Id.

137 Id. at 144-45 (”[T]he technological characteristics of digital transmissions have rendered the language of section 110(2) inapplicable to the most advanced delivery methods of systemic instruction.”).

138 Id. at 145.

139 Thus, the Register recommended that only “nonprofit educational institutions” be eligible for the amended distance education exemption. COPYRIGHT OFFICE REPORT, supra note 2, at 153-54.

140 See id.

141 See id. at 153; Education Management Corporation Comment to the Copyright Office 3 (Feb. 5, 1999), available at http://www.copyright.gov/disted/comments/init002.pdf (advocating that the eligibility requirement should be student-centered, and thus nonprofit and for-profit institutions would be eligible for the exemption); The University of Texas System Comment to the Copyright Office 9, available at http://www.copyright.gov/disted/comments/init020.pdf (last visited Feb. 21, 2006) (“Accredited and nonprofit institutions have the strongest claim to such an exemption.”).

142 See, e.g., American Association of University Professors Comment to the Copyright Office 6 (Jan. 26, 1999), available at http://www.copyright.gov/disted/comments/init038.pdf [hereinafter AAUP Comment] (“AAUP recommends that the Copyright Office limit any exemption to accredited educational offerings.”).

143 See, e.g., American Society of Journalists and Authors Comment to the Copyright Office 4 (Feb. 4, 1999), available at http://www.copyright.gov/disted/comments/init007.pdf (arguing that the exemption should only apply to “accredited nonprofit institutions”).
During the course of this study, there was extensive debate over the appropriateness of retaining the “nonprofit” element in the context of today’s digital distance education. While mainstream education in 1976 was the province of nonprofit institutions, today the lines have blurred. Profit-making institutions are offering distance education; nonprofits are seeking to make a profit from their distance education programs; commercial entities are forming partnerships with nonprofits; and nonprofits and commercial ventures are increasingly offering competitive products.  

Despite these observations, the Office ultimately decided that a change in the eligibility requirements was not appropriate at that time, and thus recommended to Congress that only “nonprofit education institutions” qualify for the distance education exemption. Presumably, the Office made this recommendation because “nonprofit” had always been the dividing line, and it had not been convinced that a change was warranted. However, the Copyright Office Report also left the door open for future discussion on this question. Specifically, it stated that the issue of eligibility is an “important and evolving issue that deserves further attention in the future.”

B. The Passage of the TEACH Act

The Technology, Education, and Copyright Harmonization Act of 2002 enacted most of the Copyright Office’s recommendations into law. The Act essentially rewrote section 110(2) of the 1976 Copyright Act. Directly addressing the shortcomings of the old distance education exemption, the newly enacted section 110(2) allows for the “performance of a nondramatic literary or musical work or reasonable and limited portions of any other work, or display of a work in an amount comparable to that which is typically displayed in the course of a live classroom session, by or in the course of transmission.” In other words, the TEACH Act freed distance educators to “display” and “perform” reasonable

144 Copyright Office Report, supra note 2, at 153.
145 Id. Therefore, the Copyright Office recommended that the eligibility requirements for distance educators be the same as for face-to-face educators. Id.
146 Id. at 154.
147 See Hutchinson, supra note 19, at 2219; see also Nimmer on Copyright, supra note 50, at § 8.15(C).
149 See Section III.A.
portions of all types of copyrighted works in the course of online classes. However, while the TEACH Act expanded the distance education exemption to include all types of copyrighted works, it was still more restrictive than the face-to-face teaching exemption. One of the crucial differences between section 110(1) and section 110(2) is that while all “nonprofit education institution[s]” qualify for the face-to-face teaching exemption, only those that are “accredited” qualify for the distance education exemption. As will be argued here, the accredited requirement alone is sufficient to protect the interests of copyright owners, particularly since the TEACH Act also included other significant limitations to protect the interests of copyright owners.

The first of these limitations is that only a “display” or “performance” of a copyrighted work that is “a regular part of the systemic mediated instructional activities” of the institution are exempt. This language is intended to clarify that the unauthorized use of a copyrighted work in a distance education class is only exempt from infringement liability when

151 By granting distance educators significantly expanded user rights, the TEACH Act brought the distance education exemption more in line with the face-to-face teaching exemption. Hutchinson, supra note 19, at 2220 (“By expanding the categories of works covered under § 110(2), the TEACH Act allows online educators to make use of copyrighted works in their courses in ways comparable to what copyright law permits educators to do in traditional classrooms. This expansion is necessary to prevent students who choose to take online courses from receiving educational experiences inferior to their on-campus counterparts.”).

152 Except that the statute specifically excludes works that are “produced or marketed primarily” for use in distance education courses. See 17 U.S.C.A. § 110(2) (2005). While it may seem odd to specifically exclude distance education materials from the distance education exemption, the legislative history reveals that Congress was careful to protect the primary market for these types of works. S. Rep. No. 107-31, at 8 (2001).


154 This is the face-to-face teaching exemption, which grants broader user rights than the distance education exemption. The relevant portion of the statute sets forth that the following uses are not an infringement of copyright: the “performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction.” 17 U.S.C. § 110(1) (2000).


156 As was discussed supra Section II.B, the distance education exemption has always been more limited than the face-to-face exemption. This is due to the heightened concern of copyright piracy with digital transmission. See S. Rep. No. 107-31, at 11-12 (2001).

157 17 U.S.C.A. § 110(2)(A) (2005). This section of the statute also specifies that the performance or display must be “made by, at the direction of, or under the actual supervision of an instructor as an integral part of the class session.” Id.
it is part of normal teacher-centered instruction.\textsuperscript{158} Second, the unauthorized display or performance of a copyrighted work in an online class must be “directly related and of material assistance to the teaching content of the transmission.”\textsuperscript{159} One commentator explains that this limitation is meant to prevent “entertainment uses of copyrighted material in the classroom without permission.”\textsuperscript{160} Third, the copyrighted work may only be transmitted, to the extent technologically feasible, to “students officially enrolled in the course for which the transmission is made.”\textsuperscript{161} This provision broadens the requirement under the old distance education exemption that the transmission be directed at classrooms or students with disabilities.\textsuperscript{162}

Fourth, an educational institution, as the “transmitting body,” must institute policies promoting institutional compliance with federal copyright law.\textsuperscript{163} This limitation directly addresses the concerns of copyright owners that the digital transmission of copyrighted works (as opposed to the mere “display” of such works in a traditional classroom) poses a substantially greater risk of illegal dissemination over the Internet, and is intended to promote “an environment of compliance” at educational institutions.\textsuperscript{164} Fifth, in relation to the dissemination of copyrighted works over the Internet, institutions must apply “technological measures that reasonably prevent” students from further distributing copyrighted works over the Internet.\textsuperscript{165} The House Report makes clear that this provision is not intended to impose a duty on educators to guarantee that further dissemination of copyrighted works by students will never occur. Instead, “the obligation to reasonably prevent contemplates an objectively reasonable standard regarding the ability of a technological

\textsuperscript{160} Lipinski, supra note 111, at 107.
\textsuperscript{161} 17 U.S.C.A. § 110(2)(C) (2005). The statute also allows for the transmission to be directed to “officers or employees of governmental bodies as a part of their official duties,” but this is not relevant to the present inquiry. \textit{Id}.
\textsuperscript{162} S. Rep. No. 107-31, at 11 (noting that “one of the great potential benefits of digital distance education is its ability to reach beyond the physical classroom, to provide quality educational experiences to all students”).
protection measure to achieve its purpose.” 166 Finally, institutions that qualify for the distance education exemption must also promise not to engage in conduct that could “reasonably be expected to interfere with technological measures used by copyright owners to prevent such retention or unauthorized further dissemination.” 167 The legislative history of the TEACH Act reveals that these last several limitations were a direct response to the concerns of copyright owners that allowing the transmission of copyright works over the Internet would give rise to rampant copyright piracy. 168

This is why it is curious that in addition to these hurdles, institutions must also be both accredited and nonprofit to qualify for the exemption. These criteria are especially striking since accredited for-profit institutions far outpace their nonprofit counterparts in offering and delivering online courses catered to adults, rural students, working parents, and students with disabilities. 169

V. ACCREDITED V. NONPROFIT ACCREDITED: WHAT SHOULD HAVE BEEN THE ELIGIBILITY REQUIREMENTS FOR THE DISTANCE EDUCATION EXEMPTION?

When the TEACH Act was first proposed by Congress, the legislative goal was to promote digital distance education by expanding section 110(2) to exempt dissemination of copyrighted works over the Internet in the course of online classes. 170 This, of course, was to be accomplished without running afoul of the rights of copyright owners. 171 The idea was

166 H.R. REP. NO. 107-687, at 13 (2002). See NUMMER ON COPYRIGHT, supra note 50, at § 8.15(C)(2)(e) (pointing out that, in this context, “strict liability is not intended”). However, at least one institution, wary of copyright infringement liability, has foregone relying on the TEACH Act due to this provision. Carnevale, supra note 67, at 28.

167 17 U.S.C.A. § 110(2)(D)(ii)(II) (2005). At least one commentator has noted that the TEACH Act continues a trend in copyright law – in return for use rights, Congress increasingly places an affirmative duty on institutions to monitor compliance with the law. See Lipinski, supra note 111, at 133.

168 See S. REP. NO. 107-31, at 5. (“[T]he ability of digital transmission technologies to disseminate rapidly and without control virtually infinite numbers of high quality copies creates new risks for the owners of copyrighted works used in distance education”); Hutchinson, supra note 19, at 2221 (“[T]he majority of the debate throughout the legislative process centered around the issue of how to protect copyright owners’ markets . . .”).

169 See supra note 46.

170 See SEN. REP. NO. 107-31, at 3.

171 See id.
that distance educators should have access to the same resources and content as their face-to-face teaching counterparts.\textsuperscript{172} However, Congress crafted an additional hurdle for educators to cross in order to take advantage of the TEACH Act. While all “nonprofit educational institution[s]” qualify for the face-to-face teaching exemption, only “accredited nonprofit educational institution[s]” are eligible for the distance education exemption.\textsuperscript{173} Further narrowing the distance education exemption in comparison to the face-to-face exemption are the six other limitations, discussed above,\textsuperscript{174} which also address the concerns of copyright owners.\textsuperscript{175} The central question posed by this note, then, is whether it was sound public policy to require significantly more restrictive eligibility requirements for the distance education exemption, or simply a bad compromise to the interests of copyright owners.\textsuperscript{176}

In order to answer this question, this section will first analyze the process of accreditation to determine whether or not it is rigorous enough to address copyright owners’ legitimate concern that the distance education exemption only be used for bona fide educational purposes.\textsuperscript{177} Second, this section will explore the debate that took place between educators and copyright owners about the eligibility requirements.\textsuperscript{178} Finally, this section will conclude by arguing that the distance education exemption should be available to all “accredited” educational institutions, whether they are for-profit or not-for-profit.\textsuperscript{179}

A. What it Means To Be an Accredited Educational Institution

The accreditation process in higher education is rigorous, particularly for for-profit online distance education
With respect to two and four-year postsecondary educational institutions, accreditation is determined by a “regional or national accrediting agency recognized by the Council [for] Higher Education Accreditation or the United States Department of Education.” The Council for Higher Education reported in August 2003 that there were 6,421 accredited educational institutions in the United States. While 2,804 (or 43.6%) of them were for-profit, this number only represents about ten percent of the total number of for-profit degree-granting institutions in the United States. As of 2002, more than one-third of the nation’s accredited institutions (including both for-profit and nonprofit schools) offered distance education courses, many of which could lead towards a degree.

“Accreditation is a process of external quality review used by higher education to scrutinize colleges, universities and educational programs for quality assurance and quality improvement. In the U.S., accreditation is carried out by private, nonprofit organizations designed for this specific purpose.” There are many essential benefits to being an accredited educational institution. First, employers and other professionals recognize that graduates of accredited schools have bona fide degrees. Second, students who attend both nonprofit and for-profit accredited institutions generally have

---

180 The Distance Education and Training Council report that, of the total number of schools seeking accreditation, only about twenty-five percent receive it. United States Distance Learning Association, *The Value of Accreditation*, http://www.usdla.org/html/resources/certification.htm (last visited Feb. 21, 2006) [hereinafter USDLA website].


183 See Kathleen F. Kelly, Educ. Comm’n of the States, Meeting Needs and Making Profits: The Rise of For-Profit Degree-Granting Institutions 9 (2001), available at http://www.ecs.org/clearinghouse/2733/2733.htm (last visited Feb. 21, 2006). Thus, if the exemption applied to accredited schools, most for-profit institutions would not be eligible, further assuring that the exemption would be used only for bona fide educational purposes.


185 Profile of Accreditation, supra note 182, at 2 (quotations omitted).

186 See id.
access to federal funds.\textsuperscript{187} Third, accredited institutions usually accept transfer credits from other accredited universities.\textsuperscript{188}

The process of accreditation ensures that accredited institutions are committed to their educational missions.\textsuperscript{189} According to the United States Distance Learning Association, “To gain recognized accreditation, an institution must have a certain number of years of operating experience and undergo an intensive review process. The process usually includes an evaluation and review of all the courses offered, as well as student and graduate surveys, and an on-site inspection.”\textsuperscript{190} Further, once an institution has been accredited, it must continue to submit annual reports and be re-examined on a periodic basis.\textsuperscript{191}

Specific to the accreditation of distance education programs, the key concern for educators and accreditors is whether online courses maintain the same level of quality as traditional face-to-face courses.\textsuperscript{192} To address this concern, the Council for Higher Education has adapted its accrediting procedures to account for the pedagogical differences between distance education courses and traditional face-to-face courses.\textsuperscript{193} Specifically, the Council reviews seven key areas of an institution when examining the quality of its distance education courses: institutional mission,\textsuperscript{194} institutional organizational structure,\textsuperscript{195} institutional resources,\textsuperscript{196} curriculum and instruction,\textsuperscript{197} faculty support,\textsuperscript{198} student

\begin{flushleft}
\textsuperscript{187} Id. Of the 6,421 accredited institutions, 6,134 of them qualify for federal grants and loans. Id. at 1.
\textsuperscript{188} Id. at 2.
\textsuperscript{190} USDLA website, supra note 180.
\textsuperscript{191} Id.
\textsuperscript{192} See AAUP Comment, supra note 142, at 2-3 (noting that the Association is concerned with the quality of education being provided in distance education courses); ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, supra note 184, at 7.
\textsuperscript{193} ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, supra note 184, at 7.
\textsuperscript{194} “Does offering distance learning make sense in this institution?” Id.
\textsuperscript{195} “Is the institution suitably structured to offer quality distance learning?” Id.
\textsuperscript{196} “Does the institution sustain adequate financing to offer quality distance learning?” Id.
\textsuperscript{197} “Does the institution have appropriate curricula and design of instruction to offer quality distance learning?” Id.
\textsuperscript{198} “Are faculty competent[ly] engaged in offering distance learning and do they have adequate resources, facilities, and equipment?” Id.
\end{flushleft}
support, and student learning outcomes. Thus, because of these additional review criteria, the process of accreditation for both nonprofit and for-profit institutions offering distance education courses is even more rigorous than the process for institutions not offering such courses.

In addition to accreditation, for-profit educational institutions face regulatory hurdles that their nonprofit counterparts do not share. Since for-profit institutions often operate in many states simultaneously, they face myriad regulations, which are often times inconsistent from state to state. In some states, for-profit institutions are regulated like any other business, and therefore must register with the state, as well as “pay taxes and file corporate documents annually.” In other states, the laws focus on consumer issues, which “provide recourse for students who believe they have been misled or defrauded.” Despite the difficulty in operating in many states at the same time, for-profit schools have generally welcomed extensive regulation. This is because compliance with these laws helps demonstrate the integrity of the institution.

199 “Do students have needed counseling, advising, equipment, facilities, and instructional materials to pursue distance learning?” ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, supra note 184, at 7.
200 “Does the institution routinely evaluate the quality of distance learning based on evidence of student achievement?” Id.
201 See WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 89.
202 See KELLY, supra note 183, at 8. “In many states, there are different regulatory processes for public and private institutions and for for-profit and not-for-profit institutions. Established in-state not-for-profit institutions may be exempt [from state regulations], while new for-profit and out-of-state institutions are subject to regulation.” Id.
203 Id. at 8-9. For example, in Texas, for-profit educational institutions are regulated by the Texas Workforce Commission, while in California they are regulated by the Department of Consumer Affairs. See WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 89.
204 KELLY, supra note 183, at 8.
205 Id. at 9.
206 Id. (“Once state approval has been achieved, however, institutions tend to support continued regulation.”). However, the Web-based Education Commission reported that there are negative effects on distance educators resulting from the myriad of state regulations. WEB-BASED EDUC. COMM’N REPORT, supra note 1, at 90. Since “[s]ome state requirements are mutually exclusive,” institutions offering distance education classes may be “forced to meet the lowest common denominator” in order to comply. Id.
207 KELLY, supra note 183, at 9 (“Approved institutions strive to be considered part of the higher education community and recognized for their contribution to statewide goals for higher education.”).
Finally, accredited for-profit education institutions must also overcome the stigma that their mission is incompatible with traditional academic values. Specifically, critics have charged that for-profit institutions have “substandard admission criteria, superficial curricula and low expectations for student performance.” This criticism, however, is not altogether fair. This is because the process of accreditation is the same for both nonprofit and for-profit educational institutions. In other words, when nonprofit and for-profit institutions apply for accreditation, they are measured by the exact same standards with respect to the quality of the education they provide. Additionally, for-profit institutions that offer distance education courses must also demonstrate that their online teaching methods meet the Council’s heightened guidelines for distance education accreditation. The fact that for-profit and nonprofit schools are judged by the same standards for accreditation is evidence that they should also be judged by the same standards for the copyright exemption, particularly since both accreditation and the policy supporting the exemption are both related to pedagogy and best practices in the classroom.

B. Accredited v. Nonprofit Accredited – The Debate

The initial version of the TEACH Act introduced by Senators Hatch (R–UT) and Leahy (D–VT) in March 2001 was more favorable to educators than the bill that was eventually signed into law. Specifically, the Hatch/Leahy bill incorporated the Copyright Office Report recommendation that “nonprofit educational institution[s]” be eligible for the

---

208 See id. at 3.
209 Id.
210 For example, the New England Association Schools and Colleges, one of eight regional accrediting organizations that are part of the Council for Higher Education Accreditation, does not distinguish between nonprofit and for-profit institutions in its accreditation process. See NEW ENGLAND ASSOCIATION OF SCHOOLS AND COLLEGES, STANDARDS FOR ACCREDITATION (2005), available at http://www.neasc.org/cihe/accreditation_overview.htm.
211 See id.
212 See ACCREDITATION AND ASSURING QUALITY IN DISTANCE LEARNING, supra note 184, at 7.
213 See Hutchinson, supra note 19, at 2218 (“While the initial version of the TEACH Act introduced in the Senate was relatively educator-friendly,” the amended bill that was enacted into law was the result of concessions made by educators to the copyright owners.).
exemption.214 The bill was amended, however, several months after it was introduced, raising the bar for eligibility.215

Prior to its amendment, the Senate Judiciary Committee held a hearing on the TEACH Act.216 In attendance were educators,217 legal experts,218 and copyright owners.219 For-profit accredited universities were not represented at the hearing. All parties that were represented agreed that it was imperative for the TEACH Act to maintain the policy balance struck in the 1976 Copyright Act between the exclusive right of copyright owners to exploit their works, and the need of educators to have free access to those works.220 Further, all agreed that the nonprofit eligibility requirement was insufficient to protect copyrighted works from the unauthorized use by fly-by-night221 educational institutions.222 Finally, all parties agreed223 that accreditation was a more meaningful dividing line between those educators who should qualify for the exemption and those who should not.224 This is why it is

214 TEACH Act, supra note 3.


216 Hearing on S. 487, supra note 8, at 1.

217 Gerald A. Heeger, President of the University of Maryland University College, Paul LeBlanc, President, Marlboro College, and Richard M. Siddoway, Principal, Utah Electronic High School. Id. at ii.

218 Marybeth Peters, Register of Copyrights, and Gary Carpentier, Adjunct Professor of Law at the Washington College of Law, American University. Id.

219 Allan R. Adler, Vice President for Legal and Governmental Affairs for the Association of American Publishers. Id.

220 In general, they also all agreed that it was necessary to amend the distance education exemption, and that it was necessary to enact safeguards to protect the interests of copyright owners. See id. at 9, 11 (statement of Marybeth Peters, Register of Copyrights); Hearing on S. 487, supra note 8, at 37 (statement of Gary Carpentier, Adjunct Professor of Law, Washington College of Law, American University).


222 See Hearing on S. 487, supra note 8, at 14 (statement of Marybeth Peters, Register of Copyrights) (“Content owners have expressed to the Copyright Office their concern that ‘nonprofit educational institution’ may not be the appropriate dividing line between institutions that may and may not use the exemption.”); id. at 52 (response of Gary Carpentier, Adjunct Professor of Law, Washington College of Law, American University) (“By retaining the ‘non-profit requirement’ in current law, innovation is stymied.”).

223 While the Register agreed that “nonprofit” alone was insufficient to protect copyright owners, she recommended that “accredited” be added to the “nonprofit” requirement.” Id. at 14 (statement of Marybeth Peters, Register of Copyrights).

224 Id. at 51-52 (response of Gary Carpentier, Adjunct Professor of Law, Washington College of Law, American University) (“The concept of accreditation, seems to me, to be a more valid and appropriate qualifier . . . .  Accreditation is an
somewhat mysterious that the bill was amended on June 5, 2001 adding the “accredited” requirement to “nonprofit” instead of replacing it.\textsuperscript{225}

The Senate Report justified the amended bill in several ways. First, it cited the Copyright Office Report, which set forth that “nonprofit educational institutions are no longer a closed and familiar group.”\textsuperscript{226} Second, the Senate Report pointed to the fact that the Internet facilitates rampant dissemination of copyrighted works to unauthorized recipients.\textsuperscript{227} Finally, the Senate Report stated that “accredited” was added to the eligibility requirement specifically to “provide further assurances that the [transmitting] organization is a bona fide educational institution.”\textsuperscript{228}

C. All Accredited Educational Institutions Should Be Eligible for the Distance Education Copyright Exemption

If the original Hatch/Leahy bill had been enacted without amendment, the legislation would have clearly met one of its intended goals, which was to promote distance education by changing the law to give online educators comparable access to copyrighted works as face-to-face educators.\textsuperscript{229} However, the fact that the bill was amended, substantially changing the eligibility requirements between the face-to-face teaching exemption and the distance education exemption, raises the question of whether “accredited nonprofit educational institution”\textsuperscript{230} is the appropriate dividing line between those educators who are eligible for the distance education exemption and those who are not. By significantly altering the eligibility requirements, Congress left us to question whether it set the easier, more useful criterion that can be implemented to make this legislation work.”).\textsuperscript{231}

\textsuperscript{225} See 147 CONG. REC. S5988 (daily ed. June 7, 2001).
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} See Hearing on S. 487, supra note 8, at 5 (statement of Sen. Leahy, member of Senate Judiciary Comm.) (“This legislation will help clarify the law and allow educators to use the same rich material in distance learning over the Internet that they are now able to use in face-to-face classroom instruction.”).
dividing line at the appropriate place to achieve the larger goal of the legislation, which was to promote distance education by expanding the copyright exemption to allow for free online use of copyrighted works.

The question now posed is simple. By enacting amended legislation that offered greater protection to the rights of copyright owners than even the Copyright Office Report recommended, did Congress meet its stated policy goal more effectively than if it had enacted amended legislation that granted greater rights to educators? By enacting the vast majority of the Office’s recommendations, while conspicuously raising the eligibility requirement, it is now fair to question whether this was good national policy or an unreasonable compromise. It is set forth here that because distance education is vitally important to the growing communities it serves,231 because the process of accreditation is sufficiently rigorous to ensure that the distance education exemption is not abused,232 and because the TEACH Act already included safeguards to protect the economic interests of copyright owners,233 the TEACH Act would have been more effective policy if the distance education exemption applied to all accredited educational institutions. This is particularly true since the institutions that are succeeding in distance education are those that are doing so on a for-profit basis.234

Distance education serves non-traditional students such as working mothers, students with disabilities, and students in rural areas.235 Further, distance education is working to bridge the “digital divide” in America by attracting students who would not otherwise be able to attend college.236 Educators and policymakers agree that distance education is vital to America’s ability to compete in an increasingly global marketplace.237 Thus, Congress has consciously enacted legislation in recent years to promote distance education over the Internet.238

231 See supra notes 36-42 and accompanying text.
232 See supra Section V.A.
233 See supra notes 156-68 and accompanying text.
234 See supra note 46.
235 See supra notes 36-42 and accompanying text.
236 See supra notes 70-75 and accompanying text.
237 See supra notes 68-69 and accompanying text.
238 See supra notes 59-64, 69 and accompanying text.
The TEACH Act is a prominent example of this type of legislation. However, the TEACH Act was unnecessarily targeted at nonprofit institutions, even though for-profit institutions have proven to be more successful providers of distance education courses.\textsuperscript{239} Thus, the TEACH Act failed in its primary goal to promote digital distance education because the restrictive eligibility requirements have severely limited its impact. The TEACH Act simply does not reach many of the institutions who are in the best position to take advantage of its safe harbor – accredited for-profit universities who now dominate the distance education field.\textsuperscript{240} However, it is not too late for Congress to fix its mistake.

Congress should once again address the distance education copyright exemption. In order to maximize the impact of the exemption, and to more successfully promote digital distance education, Congress should remove the "nonprofit" eligibility requirement. Though copyright owners would resist such a change, they should feel safe knowing that accreditation alone is a sufficiently rigorous process to ensure that the distance education exemption only be used for bona fide educational purposes.\textsuperscript{241} Additionally, the TEACH Act’s six additional eligibility requirements ensure that an amended distance education exemption would not be abused.\textsuperscript{242} Thus, removing the "nonprofit" requirement would promote digital distance education without running afoul of the exclusive rights of copyright owners.

\textit{Brendan T. Kehoe}\textsuperscript{†}

\footnotesize{\begin{itemize}
\item[239] See supra note 46 and accompanying text.
\item[240] See supra note 46.
\item[241] See supra Section V.A.
\item[242] See supra notes 156-68 and accompanying text.
\item[†] Brendan Kehoe will graduate from Brooklyn Law School in 2006 and is an Executive Articles Editor of the \textit{Brooklyn Law Review}. Prior to law school, Brendan worked for a private company implementing distance education courses for companies and universities, both in the U.S. and abroad. He has trained over 1,000 educators on best practices for teaching online. Brendan would like to thank Helen Chen for her devoted support in helping complete this article. He would also to thank his former colleagues and clients who introduced him to the world of distance education over the Internet.
\end{itemize}}
EPA’s Category 3 Marine Emissions Standards

MIMICKING MARPOL ANNEX VI OR MOCKING THE CLEAN AIR ACT?

I. INTRODUCTION

With all the emphasis that the media places on automobile emissions,¹ many citizens would be shocked to know that on a typical day, container ships² docking at the Port of Los Angeles release more smog-forming pollutants than one million cars.³ In fact, ships produce almost as much pollution in the Los Angeles/Long Beach area as the 350 largest industrial polluters in Southern California combined.⁴ While great strides have been made by the Environmental Protection Agency (EPA) and state legislators⁵ to reduce emissions from automobiles⁶ and stationary point sources,⁷ little attention has

¹ See, e.g., Tim Molloy, L.A. Air Quality Better, But Still Bad, MONTEREY COUNTY HERALD, Nov. 5, 2004; Tony Manolatos, Drivers may pay for clean air, DETROIT NEWS, Apr. 6, 2005, at 1.

² “Container ships are cargo ships that carry all of their load in truck-size containers.” Wikipedia, Container ship, http://en.wikipedia.org/wiki/container_ship (last visited January 24, 2005). Container ships are some of the largest vessels to sail the ocean, only outsized by crude oil carriers or tankers. Id. The majority of container ships have diesel engines. Id.


⁵ State legislatures are involved in developing environmental legislation through the creation of state implementation plans or SIPs, which specify emissions limitations, control measures, and the methods to be used in that state to satisfy the Clean Air Act requirements. The CLEAN AIR ACT HANDBOOK 45 (Robert J. Martineau, Jr. & David P. Novello eds., 2d ed. 2004). States are generally given deference by the EPA in developing their own SIPs, as well as in interpreting and implementing their SIP programs. Id. at 46.

⁶ E.g., Control of Emissions of Air Pollution from Highway Heavy-Duty Engines, 62 Fed. Reg. 54,693 (Oct. 21, 1997) (to be codified at 40 C.F.R. pts. 9, 86) (reducing NOx emissions from highway diesel engines by 50% in 2004); Control of Air Pollution from New Motor Vehicles: Heavy-Duty Engine and Vehicle Standards and Highway Diesel Fuel Sulfur Control Requirements, 66 Fed. Reg. 5002 (Jan. 18, 2001) (to be codified at 40 C.F.R. pts. 69, 80, 96) [hereinafter 66 Fed. Reg. 5002] (decreasing NOx and particulate matter emissions from heavy duty trucks and buses by 90 to 95%
been given to the emissions from large marine vessels, which utilize some of the dirtiest engines in the world.\textsuperscript{8} Given the negative impact these huge vessels have on air quality, it is imperative to question why the EPA has not implemented regulations greatly reducing their emissions.

This Note will analyze the rules promulgated by the EPA in 2003 to regulate the environmental emissions from large cargo and cruise ships.\textsuperscript{9} Part II begins by examining the EPA's Category 3 emissions\textsuperscript{10} regulations. This section discusses the underlying Executive Branch bias that affected the EPA's decision-making process in promulgating its final rule. Due to political pressure, the EPA limited the scope of

beginning in 2007); Control of Air Pollution from New Motor Vehicles: Tier 2 Motor Vehicle Emission Standards and Gasoline Sulfur Control Requirements, 65 Fed. Reg. 6698, 6724 (Feb. 20, 2000) (reducing total NO\textsubscript{x} by 4.5% in 2007 and 14.5% in 2030 by controlling emissions from new passenger cars and light trucks). Many states have also mandated the use of special reformulated gasoline that reduces air pollution by producing fewer emissions. See, e.g., Approval of Promulgation and Implementation Plans, 64 Fed. Reg. 59,706, 59,710 (Nov. 3, 1999) (to be codified at 40 C.F.R. pt. 52) [hereinafter 64 Fed. Reg. 59,706] (proposing the use of reformulated gas in New York); Max Jarman, Reformulation, Demand Drive Valley Gas Costs Up, ARIZ. REPUBLIC, Nov. 4, 2004, at D1 (discussing the use of reformulated gasoline in Arizona). Meanwhile, other states directly invite citizens to file complaints about the emissions from other automobiles. See, e.g., Texas Commission on Environmental Quality, Smoking Vehicle Program, http://www.tceq.state.tx.us/implementation/air/mobilesource/vetech/smokingvehicles.html (last visited Mar. 6, 2006). For example, in Texas, citizens may log onto the Texas Commission on Environmental Quality's (TCEQ) website and report a car, truck, or bus that was producing fumes. \textit{Id}. After an online report has been filed with the TCEQ, the owner of the offending vehicle will be notified that the automobile may be excessively contributing to air pollution. \textit{Id}. The purpose of the TCEQ's online reporting system is to inform vehicle owners that car maintenance can improve air quality and vehicle performance. \textit{Id}.

A stationary source is “any building, structure, facility, or installation which emits or may emit any air pollutant.” 42 U.S.C. § 7411(a)(3) (2000). Under this definition, both a power plant and an individual boiler are stationary sources. THE CLEAN AIR ACT HANDBOOK, supra note 5, at 177. \textit{E.g.}, 64 Fed. Reg. 59,706, supra note 6, at 59,712 (proposing NO\textsubscript{x} and volatile organic compound (VOC) reductions from stationary sources in New York, which were later approved by the EPA without a detailed discussion in Approval and Promulgation of Implementation Plans, 66 Fed. Reg. 23,849 (May 10, 2001)) (to be codified at 40 C.F.R. pt. 52); Prevention of Significant Deterioration (PSD) and Non-Attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement, 68 Fed. Reg. 61,248, 61,249 (Oct. 27, 2003) (to be codified at 40 C.F.R. pts. 51 & 52) (detailing the New Source Review process which mandates that new stationary sources or existing sources that undergo modifications obtain permits limiting emissions. Existing sources need only obtain permits under the New Source Review program if the modifications change the method of operation or increase the amount of pollutants emitted).

Gary Polakovic, supra note 3.

Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 68 Fed. Reg. 9746 (Feb. 28, 2003) (to be codified at 40 C.F.R. pts. 9, 94) [hereinafter 68 Fed. Reg. 9746].

\textit{See infra} note 20 (defining Category 3 vessels).
Category 3 emissions regulations to only U.S.-flagged vessels even though the agency had jurisdiction to reach all vessels entering U.S. ports.\textsuperscript{11} As a result, the regulations fail to meet the mandate of Section 213(a)(3) of the Clean Air Act of 2000 (CAA)\textsuperscript{12} and will not regulate the emissions from the majority of the vessels polluting U.S. air.\textsuperscript{13} Part III describes the international standards that regulate Category 3 emissions.\textsuperscript{14} This section explains why the United States is obligated to abide by these international regulations\textsuperscript{15} and how the EPA’s standards place U.S.-flagged vessels at a disadvantage compared to foreign-flagged vessels. Finally, Part IV examines the latest legal challenge to the EPA’s regulations, which were upheld by the D.C. Circuit Court under arbitrary and capricious review.\textsuperscript{16} This section asserts that the D.C. Circuit Court had a duty to require the EPA to take a “hard look”\textsuperscript{17} at the alternatives and evidence; however, the court failed to do so even though Congress has recently taken steps to try to ensure future EPA decisions are based on science rather than politics.\textsuperscript{18} The Note concludes with a plea to the judiciary and the legislature to take action to prevent the Executive Branch from using political pressure to make a mockery of the goals of the CAA.

\textsuperscript{11} See infra Part II.D (discussing how the EPA has jurisdiction over Category 3 vessels, including those that are foreign-flagged).


\textsuperscript{13} Control of Emissions from New Marine Compression-Ignition Engines at or Above 30 Liters per Cylinder, 67 Fed. Reg. 37,548, 37,563 (May 29, 2002) (to be codified at 40 C.F.R. pt. 94) [hereinafter 67 Fed. Reg. 37,548] (noting that approximately 94% of the vessels that call to U.S. ports are foreign-flagged vessels).

\textsuperscript{14} See infra Part III (discussing MARPOL Annex VI, the international treaty regulating Category 3 vessel emissions).

\textsuperscript{15} International Convention for the Prevention of Pollution of Ships 1973, Article 5(4). See infra Part III.B.


II. WHY THE EPA'S CATEGORY 3 EMISSIONS RULEMAKING IS INADEQUATE

A. Political Bias Affected the EPA's Category 3 Emissions Rulemaking

As the result of a settlement,19 the EPA proposed regulations limiting air pollution produced by large marine vessels with an engine displacement at or above 30 liters per cylinder (hereinafter referred to as either Category 3 vessels or engines).20

The EPA's final rule regulating Category 3 vessel emissions directly conflicts with the agency's original position on the subject.21 Upon reading the EPA's final Category 3 rulemaking notice, one might initially accept the agency's explanation that it is best for the U.S. to refrain from regulating foreign-flagged Category 3 vessels until more stringent international regulations are adopted because uniform standards are needed to improve air quality domestically and internationally.22 However, one becomes skeptical of the agency's explanation upon learning that a 2002

---

19 Settlement Agreement at 2, Earth Island Inst. v. EPA, No. 00-1065 (D.C. Cir. Oct. 26, 2000), available at http://www.epa.gov/otaq/regs/nonroad/largesi/setlemnt.pdf [hereinafter Earth Island Settlement]. This settlement was a product of a suit brought by Earth Island Institute and Bluewater Network against the EPA. Id. The petitioners sought review of a final rule promulgated by the EPA in 1999 to regulate emissions from new marine compression-ignition engines at or above 37 kW. Id. The environmental groups alleged that the EPA's 1999 rule violated the Clean Air Act because it failed to establish emission standards for certain marine engines. Teri Shore, Environmental Perspective Marine Emissions and Air Quality Impacts 6 (2004), http://www.bluewaternetwork.org/reports/rep_cv_shipping.pdf. The case settled with the EPA agreeing to issue a proposed rule to regulate nitrogen oxide (NOx) emissions from Category 3 marine compression-ignition engines prior to April 30, 2002. Earth Island Settlement, supra, at 2.

20 68 Fed. Reg. 9746, supra note 9. Category 3 marine vessels are typically large seagoing vessels such as "container ships, tankers, bulk carriers, and cruise ships." Id. However, some of these vessels do navigate on the Great Lakes. 67 Fed. Reg. 37,548, supra note 13, at 37,564. In contrast, Category 1 marine diesel engines are similar to land-based engines utilized in construction and farm equipment. Id. Category 1 engines have a specific engine displacement of less than 5.0 liters per cylinder. Id. Category 2 engines are similar to locomotive engines. Id. The specific engine displacement of Category 2 engines is between 5.0 and 30 liters per cylinder. Id.


22 68 Fed. Reg. 9746, supra note 9, at 9750.
draft of the EPA's proposal to regulate Category 3 vessel emissions under the CAA stated that foreign-flagged vessels should be regulated. The EPA expressed this initial opinion in a memorandum written to the Office of Management and Budget (OMB), explaining that “it may be appropriate and within EPA’s authority to treat engines on foreign vessels that enter U.S. ports as new engines and subject to regulation under section 213 [of the CAA] based on their significant emissions contribution to air quality problems in the United States.” Further, the document noted that not only would the engine upgrades required to meet the proposed standards be relatively inexpensive, but pollution would be significantly reduced as a result of this new rulemaking. The agency’s memorandum also explained that emissions from foreign vessels should be regulated in order to be consistent with the intent of the CAA, as well as from a pure policy perspective. However, the agency’s emission policy abruptly changed after the EPA and the OMB began discussing the EPA’s proposed Category 3 regulations. After the OMB gave its input to the EPA and “aligned” the EPA’s plan with the President’s policies, the EPA’s May 2002 Federal Register notice merely invited comments from interested parties regarding whether the agency had the authority to regulate emissions from foreign vessels and whether a lower limit than the international standard should be placed on the sulfur content of the fuel used

---

23 LETTER TO OMB, supra note 21, at 2.
24 The Office of Management and Budget reviews agency rulemaking through in-depth regulatory reviews. OMB in Perspective, Office of Management and Budget, http://www.whitehouse.gov/omb/organization/omb_overview_slides.pdf (last visited January 3, 2005). The agency is responsible for aligning the “actions, policies, and statements and proposals to reflect the President’s policies.” Id.
25 LETTER TO OMB, supra note 21, at 58.
26 Id. at 12 (noting that if the agency instituted tougher Tier 2 regulations, which would reduce pollution by 11% by 2030, total vessel costs would only increase by 0.1%).
27 Id. at 59. See infra Part II.E.1 (discussing the EPA’s initial arguments to the OMB).
29 See supra note 24.
30 67 Fed. Reg. 37,548, supra note 13, at 37,551.
by Category 3 vessels in U.S. waters. Essentially, the OMB pressured the EPA to propose emissions standards that went no further than the current performance from ships.

**B. The EPA’s Final Category 3 Rule**

The final Category 3 emissions rule, published on February 28, 2003, provided an exemption to all foreign-flagged vessels, placed a limit on nitrogen oxide (NOx) and failed to set any standards regulating the sulfur content of marine fuel. The regulation mentions two tiers of NOx emission controls. Tier 1 controls were instituted in 2004 and are intended to be equivalent to internationally negotiated NOx standards. The standards only apply to new U.S.-flagged vessels with engines built on or after January 1, 2004. The EPA also reserved the option of adopting Tier 2 regulations to further reduce NOx limits in the future. The agency additionally noted that when it reconsiders the standards in 2007, it will investigate placing a limit on the sulfur content of

31 Id. at 37,548. Marine fuel currently has an international maximum sulfur content of 50,000 ppm or 5%. EU Reaches Accord on Ship Emission Sulfur Limits, LLOYD’S LIST, June 29, 2004, at 12. The sulfur content of fuel is regulated because sulfur oxide or SOx is formed when fuels containing sulfur are burned. SOx: What Is It? Where Does It Come From?, Environmental Protection Agency, http://www.epa.gov/air/urbanair/so2/what1.html. SOx is a regulated pollutant that causes respiratory problems, aggravates heart and lung diseases, contributes to acid rain, and causes visibility impairment through the formation of fine particles in the air. Chief Causes For Concern, Environmental Protection Agency, http://www.epa.gov/air/urbanair/so2/chf1.html.

32 Welch, supra note 4; see also 68 Fed. Reg. 9746, supra note 9, at 9769.

33 68 Fed. Reg. 9746, supra note 9, at 9759.

34 Id. at 9761. Nitrogen oxide is an ingredient of ground-level ozone. Id. at 9751. Ground-level ozone is the primary component in smog, which causes respiratory problems, decreases lung function, and aggravates asthma. Id.

35 Id. at 9751.

36 Id.

37 Id. at 9749-50. Although the EPA’s standards are primarily equivalent to those in the international standard set by MARPOL Annex VI, there are a few differences between the regulations. Id. at 9769. The major differences between the international standards and those stipulated in the EPA’s Tier 1 lie within witness testing, durability requirements, and testing procedures. Id. See also infra Part III (discussing the international MARPOL Annex VI standards).

38 68 Fed. Reg. 9746, supra note 9, at 9746. However, the EPA adopted a separate definition of “new vessel” which will also regulate those older U.S.-flagged vessels that have undergone a “major conversion.” Id. at 9760. This change to the definition of new vessels is necessary because the average Category 3 vessel is used for 25 years, but a substantial percentage of U.S.-flagged ships are over 30 years old. 40 C.F.R. Part 94, Notice of Proposed Rulemaking (April 30, 2002) at 30-31, RIN 2060-AJ98 [hereinafter Notice of Proposed Rulemaking].

39 68 Fed. Reg. 9746, supra note 9, at 9762.
marine fuel and will reconsider whether to impose the new Tier 2 standards upon foreign-flagged vessels.40

The EPA promulgated these regulations limiting the emissions from Category 3 vessels to fulfill the agency’s obligations under Section 213 of the CAA.41 Under the CAA, the EPA must promulgate National Ambient Air Quality Standards (NAAQS) for criteria pollutants,42 including lead, sulfur dioxide (SO₂), nitrogen dioxide (NO₂), carbon monoxide (CO), particulate matter (PM),43 and ozone.44 These standards are intended to protect human health and to limit maximum air quality concentrations.45 Areas with poorer air quality than permitted under the NAAQS requirements are designated “nonattainment” areas.46 Section 213(a)(1) of the CAA orders the EPA Administrator to determine whether nonroad engines “cause, or significantly contribute to, air pollution that may reasonably be anticipated to endanger public health or welfare.”47 If the Administrator determines that nonroad engine emissions of CO, volatile organic compounds (VOCs),48 and NOₓ significantly contribute to ozone or CO emissions in

---

40 Id. Final Tier 2 standards for Category 3 engines will be provided by the EPA on or before April 27, 2007. Id. at 9763. The EPA also noted that future Tier 2 regulations may contain HC (hydrocarbon) and CO (carbon monoxide) emissions standards to ensure that these emissions do not increase on an engine-specific basis. Id.
41 Id. at 9748.
43 Particulate matter (PM) is a term used to describe fine particles in the air, such as dust, dirt, soot, or smoke. Particulate Matter – What Is It? Where Does It Come From?, Environmental Protection Agency, http://www.epa.gov/air/urbanair/pm/what1.html. PM has been linked to causing premature mortality, decreasing lung function, and aggravating respiratory and cardiovascular disease, as well as asthma. 68 Fed. Reg. 9746, supra note 9, at 9752.
46 Hawkins & Ternes, supra note 44, at 132.
multiple non-attainment areas, the EPA is then required to set
emission standards for the different classes of engines that
contribute to this problem. In 1994, the EPA determined that
nonroad engines do significantly contribute to NO\textsubscript{x}
nonattainment and marine engines should be regulated. Thus, the EPA initiated the rulemaking procedures to propose
new regulations for nonroad engines.

C. The Need For More Stringent Category 3 Regulations

While the EPA has taken progressive steps to severely
tighten emission standards for highway vehicles and other
types of nonroad diesel engines, the diesel engines on
Category 3 vessels continue to emit pollutants virtually free of
regulation. The lack of regulation on large marine vessels is
surprising since most Category 3 vessels burn “bunker fuel,” a
low quality petroleum that is capable of producing
approximately “fifty times more haze-forming pollutants than
the dirtiest diesel trucks on U.S. highways.” Marine vessels
release hazardous emissions while they are moving in and out
of ports, as well as when they are loading and unloading cargo
while docked. Since diesel emissions are likely human

\footnote{49 42 U.S.C. § 7547(a)(3) (2000).}
\footnote{50 Control of Air Pollution; Determination of Significance for Nonroad Sources and Emission Standards for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts, 59 Fed. Reg. 31,306, 31,307 (June 17, 1994) (to be codified at 40 C.F.R. pts. 9 & 89).}
\footnote{51 Id. at 31,336.}
\footnote{52 The EPA promulgated rules limiting PM and NO\textsubscript{x} emissions from heavy duty engines by 90% and 95%, respectively. 66 Fed. Reg. 5002, supra note 6, at 5002. Furthermore, the regulations on heavy duty engines also reduce diesel sulfur content by 97%, slashing sulfur content to 15 ppm beginning June 1, 2006. Id. at 5002, 5006. As a result, the fuel sulfur content standard for heavy duty engines will match that of highway diesel engines. Compare id. with Control of Emissions of Air Pollution from Nonroad Diesel Engines and Fuel, 69 Fed. Reg. 38,958, 38,960 (June 29, 2004) (to be codified at 40 C.F.R. pts. 9, 69, et al.) [hereinafter 69 Fed. Reg. 38,958].}
\footnote{53 New regulations will reduce PM and NO\textsubscript{x} emissions from nonroad diesel engines used in the construction, agricultural, industrial, and mining industries by 95% and 90%, respectively. 69 Fed. Reg. 38,958, supra note 52, at 38,960. The EPA has also dramatically reduced the sulfur content used in these nonroad engines by 99% so that the standard will match the 15 ppm highway diesel engine standard. Id.}
\footnote{54 Polakovic, supra note 3. James J. Corbett, a professor of marine policy at the University of Delaware noted that current controls on ship emissions are approximately equivalent to where the emissions controls were on cars in 1965. Id.}
\footnote{55 Id.}
\footnote{56 67 Fed. Reg. 37,548, supra note 13, at 37,571 (explaining that many ships produce “hotelling” emissions when they run one or several engines to produce electricity while in port loading or unloading the vessel).}
cancer.

Due to the emissions produced by Category 3 vessels, many commercial ports and coastal cities are out of attainment with respect to the NAAQS for ozone, PM, and CO. By 2020, emissions from marine diesel engines will account for approximately three to twenty-eight percent of mobile source NOx emissions in certain port cities. Moreover, the problem of air pollution caused by marine vessels is not isolated to port cities. Marine emissions also affect the air quality in areas located near heavy shipping channels. Because marine vessels move from port to port, and from country to country, the problem of marine vessel air pollution is global.

---

57 Michael J. Horowitz, Regulation of Mobile Sources: Motor Vehicles, Nonroad Engines, and Aircraft, in THE CLEAN AIR ACT HANDBOOK, supra note 9, at 323.
58 67 Fed. Reg. 37,548, supra note 13, at 37,552 & n.3.
60 Id. at 4.
61 67 Fed. Reg. 37,548, supra note 13, at 37,562. The EPA’s own data estimates that Category 3 emissions accounted for 7.4% of the NOx emissions in the non-attainment area of Baton Rouge/New Orleans in 1996, a contribution that is expected to increase to 15.8% by 2020. Notice of Proposed Rulemaking, supra note 38, at 36. This increase is due not only to anticipated increases in shipping traffic, but also the decreasing contribution of highway vehicles, as the EPA tightens motor vehicle pollution regulations. Id. at 35.
63 Reports conducted by the Department of Defense show that emissions released within 60 nautical miles of the coastline make it back to land. Id. at 37,560. A report from the Ozone Transport Assessment Group estimates that emissions within the continental U.S. can affect air quality in locations up to 500 miles from the source. Id. at 37,560. Therefore, marine emissions can greatly decrease the air quality even in areas without large ports simply because the area is near the shoreline. Id. at 37,563. For example, marine vessels contribute to approximately 37% of the total NOx in Santa Barbara. Id. As the amount of NOx pollution created by motor vehicles decreases, marine emissions are anticipated to increase to 62% of the NOx production in Santa Barbara by 2015. Id. at 37,562-63.
64 Id.
D. Jurisdiction to Regulate Foreign-Flagged Vessels

Despite the EPA’s failure to extend its Category 3 rulemaking to foreign-flagged vessels, the U.S. is not preempted from regulating the emissions from foreign vessels or even from creating stricter standards than the internationally agreed upon marine pollution standards. In fact, the EPA has jurisdiction to control the emissions from foreign-flagged vessels based on international law.

In EEOC v. Arabian American Oil Co. (hereinafter Aramco), the Supreme Court held that legislation does not apply extraterritorially unless there is a clearly expressed intention that Congress meant for the legislation to apply outside the U.S. This principle is founded upon the policy that limiting the scope of legislation to U.S. territories prevents international clashes of law and international discord. However, the presumption against extraterritoriality does not apply in three specific situations. First, the presumption is not applicable if Congress expressed an affirmative intent for the legislation to apply to activities in other countries. Second, the presumption does not apply when failure to extend the statute to a foreign country would adversely affect the U.S. Finally, the presumption against extraterritoriality is
not valid when the conduct being regulated occurs within the United States. Here, the third exception clearly applies to emissions created by foreign-flagged ships sailing in U.S. waters or those that are docked at U.S. ports. Adverse effects such as poor air quality and the related health problems caused by air pollution will result in the U.S. if emissions from foreign-flagged vessels are not regulated, so the second exception could also arguably apply; however, the second exception is generally limited to cases involving anti-trust, securities, or trademark law. Regardless, since the third exception applies here, the presumption against extraterritoriality did not bar the EPA from imposing regulations upon the emissions from Category 3 foreign-flagged vessels.

Another presumption against extending U.S. law to foreign-flagged vessels exists if doing so would interfere with relations between the crew and the ship’s owner. However, regulating emissions from foreign-flagged vessels does not present any “internal affairs” or management issues that would otherwise preclude exercising control over the vessel while in U.S. waters. Therefore, as with the presumption against extraterritoriality, the EPA was also not prevented from promulgating Category 3 emissions based upon this second presumption.

With regard to applying laws to foreign entities, “a nation having some ‘basis’ for jurisdiction to prescribe law

Bulova Watch Co., 344 U.S. 280, 286-87 (1952) (Lanham Trade-Mark Act applies extraterritorially); Schoenbaum v. Firstbrook, 405 F.2d 200, 206 (2d Cir. 1968) (securities laws apply extraterritorially); United States v. Aluminum Co. of Am., 148 F.2d 416, 443-45 (2d Cir. 1945) (U.S. antitrust laws apply extraterritorially).

74 Massey, 986 F.2d at 531. The “presumption against the extraterritorial application of statutes described in Aramco does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States. . . .” Id. at 529. See also Laker Airways Ltd. v. Sabena, Belgian World Airlines, 731 F.2d 909, 921 (D.C. Cir. 1984) (explaining that “[t]erritoriality-based jurisdiction thus allows states to regulate the conduct or status of individuals or property physically situated within the territory”).

75 See Hartford Fire Ins. Co. v. California, 509 U.S. 764, 815 (Scalia, J., dissenting) (citing Romero v. Int’l Terminal Operating Co., 358 U.S. 354, 383 (1959)) (noting that the presumption did not apply when the harm occurred while the vessel was in U.S. waters).

76 See supra notes 31, 34, 43, 44 for discussion of adverse effects.

77 See Notice of Proposed Rulemaking, supra note 38, at 12, 21-38.

78 See supra note 73.

79 Dowd v. Int’l Longshoreman’s Ass’n, 975 F.2d 779, 788-89 (11th Cir. 1992).

should nonetheless refrain from exercising that jurisdiction "with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."81 Whether it is reasonable to extend jurisdiction over the actions of other nations depends upon many factors, including "the extent to which the activity takes place within the territory [of the regulating state]"82 and "the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted."83 Here, the regulations upon emissions from Category 3 emissions would affect vessels located within U.S. territory.84 Further, improving ambient air quality is of great importance to the U.S., as evidenced by the expansive scope of the CAA.85 Moreover, other countries have taken unilateral action to try to reduce marine emissions.86 Hence, extending the U.S.'s jurisdiction over foreign-flagged vessels is reasonable.87

Merely falling outside the presumptions against extraterritoriality does not establish U.S. authority to regulate foreign Category 3 vessels. However, a broad interpretation of Article 33 of the international UNCLOS88 treaty may be...
sufficient to allow the United States to extend its jurisdiction over foreign-flagged vessels.\textsuperscript{89} Article 33 of UNCLOS addresses the contiguous zone, which extends twenty-four miles from the coast baseline of all shoreline countries that choose to assert such authority.\textsuperscript{90} In order to prevent infringement upon sanitary laws and regulations, countries may exert control over the actions of foreign vessels that are in the contiguous zone in order to protect their territories and seas.\textsuperscript{91} The CAA falls within the ambit of Article 33, which permits states to enforce environmental laws in the contiguous zone if the law exists to protect people from direct health threats.\textsuperscript{92} Furthermore, the

\textsuperscript{89} Lickel, supra note 66, at 160-62. Lickel's article also analyzes whether the U.S. could have authority under Article 21(2) of UNCLOS 1982 to extend the reach of the CAA to foreign-flagged vessels. \textit{Id.} at 156. While coastal states generally have full legislative jurisdiction over foreign vessels within their waters, laws of coastal states must not "apply to the design, construction, manning or equipment of foreign ships unless they are given effect to generally accepted international rules or standards." G.P. Pamborides, \textsc{International Shipping Law: Legislation and Enforcement} 43 (1999) (quoting Article 21(2) of UNCLOS 1982). However, under Article 21(2), if a coastal state suspects that a vessel is in violation of its anti-pollution legislation, the state "may inspect the vessel and institute legal proceedings should they conclude that the conduct of the vessel was not in compliance." \textit{Id.} at 44. Furthermore, coastal states have full jurisdiction over foreign vessels that have willfully and seriously violated pollution regulations. \textit{Id.} Although the jurisdictional reach of coastal states is rather broad, the enforcement powers of the states are limited to merely arresting vessels that have violated legislation if there has been "major damage or threat of major damage to the coastline or related interests of the coastal state or to any resources of its territorial sea." \textit{Id.} at 44-45. Even though any future EPA Tier 2 regulations would probably require changes to the construction or design of the vessels, 68 Fed. Reg. 9746, supra note 9, at 9749, it is unlikely that a court would uphold the EPA's authority as extending CAA regulations over foreign vessels under Article 21(2) of UNCLOS because the pollution regulations imposed are more akin to discharge standards than actual design or construction standards. Lickel, supra note 66, at 158-59. In fact, the European Union (EU) rejected using Article 21(2) as the basis to apply NO\textsubscript{x} regulations to foreign-flagged vessels prior to the enactment of MARPOL Annex VI, declaring the regulations to be more like discharge standards than design standards. \textit{Id.} Hence, Article 21(2) of UNCLOS is likely insufficient to support jurisdiction over foreign-flagged vessels. \textit{Id.} at 159.

\textsuperscript{90} UNCLOS 1982, supra note 88, art. 33(2), 1833 U.N.T.S. at 409. The coastal baseline is the low-water mark along the coast, which is measured at low tide. Environmental Defender's Office of Western Australia, Coastal Law Maps, http://www.edowa.org.au/publications/books/coastlawmaps.html (last visited January 2, 2005). Most countries at least choose to assert control over their own territorial waters, which extend twelve miles outward from a coastal nation. Tara Magna, \textit{A Less Than 'Pacific' Solution for Asylum Seekers in Australia}, 16 INT'L J. OF REFUGEE L. 53, 74 (2004). UNCLOS 1982 was intended to reflect customary international law, so the principles contained within it apply to all countries regardless of whether they have ratified the treaty or not. See Lickel, supra note 66, at 154.

\textsuperscript{91} UNCLOS 1982, supra note 88, art. 33(1), 1833 U.N.T.S. at 409.

\textsuperscript{92} 42 U.S.C. § 7401(b)(1) (2000) (stating that one of the purposes of the subchapter is "to protect and enhance the quality of the Nation's air resources so as to
United States has already recognized that Article 33 may be utilized to assert prescriptive jurisdiction in the contiguous zone.\textsuperscript{93} In fact, the Clean Water Act (CWA) explicitly prohibits discharges of oil or hazardous substances into the contiguous zone.\textsuperscript{94} Therefore, some environmentalists have compared regulating emissions from all marine vessels entering U.S. waters to the authority the United States exercised under the CWA following the Exxon Valdez oil spill.\textsuperscript{95} After this disaster, Congress instituted tougher safety requirements on ships entering U.S. waters.\textsuperscript{96} Environmentalists argue that the EPA should now exercise similar jurisdiction over marine emissions regardless of flagship by instituting tougher air regulations on Category 3 vessels.\textsuperscript{97}

Case law further supports the proposition that the EPA has the authority to promulgate regulations that reach foreign-flagged vessels. In Department of Transportation v. Public Citizen,\textsuperscript{98} the respondents filed suit against the Federal Motor Carrier Safety Administration (FMCSA), an agency within the Department of Transportation,\textsuperscript{99} for failure to promulgate regulations in compliance with National Environmental Policy Act (NEPA)\textsuperscript{100} and the CAA.\textsuperscript{101} The Supreme Court ruled that
FMCSA was not statutorily required under NEPA to consider the environmental effects caused by Mexican-domiciled motor carriers crossing into the United States.\(^{102}\) The Court’s decision hinged on the role that FMSCA occupied in regulating these vehicles.\(^{103}\) Since FMCSA merely grants registration to vehicles, the Court determined that the administration did not need to address the environmental emissions from foreign automobiles since FMCSA itself lacks statutory authority to create or enforce emission controls.\(^{104}\) Nowhere in its decision did the Court state that an agency with direct authority to promulgate regulations on emission controls, such as the EPA,\(^{105}\) would be unable to reach these vehicles.\(^{106}\) In fact, the EPA has noted that the scope of its authority to regulate motor vehicles crossing the U.S. border is broad and covers “virtually any, if not all” motor vehicles.\(^{107}\)

Just as the EPA has broad authority to regulate motor vehicles within and crossing into the United States,\(^{108}\) the agency commented in its 2002 memo to the OMB that it should have similarly broad authority under the CAA to regulate new nonroad engines.\(^{109}\) The EPA’s argument is supported by the Supreme Court’s decision in *Cunard S.S. Co. v. Mellon*.\(^{110}\) In *Cunard*, the Court determined that the National Prohibition Act was so broad that it applied to foreign-flagged passenger ships, banning them from storing liquor onboard while the vessels were in U.S. ports.\(^{111}\) In assessing the reach of the Prohibition Act, the *Cunard* Court noted that the Prohibition legislation made no distinction between domestic and foreign-flagged vessels.\(^{112}\) Therefore, the Court refused to infer that Congress intended to provide an exemption to foreign-flagged vessels.\(^{113}\) The *Cunard* Court emphasized that providing such an exception to foreign-flagged vessels would actually

---

\(^{101}\) *Public Citizen*, 541 U.S. at 756.

\(^{102}\) *Id.* at 773.

\(^{103}\) *Id.* at 772.

\(^{104}\) *Id.*


\(^{106}\) See generally *Public Citizen*, 541 U.S. 752.

\(^{107}\) LETTER TO OMB, supra note 21, at 59.

\(^{108}\) *Id.*

\(^{109}\) *Id.*

\(^{110}\) 262 U.S. 100 (1923).

\(^{111}\) *Id.* at 125-26.

\(^{112}\) *Id.* at 126.

\(^{113}\) *Id.*
“embarrass” enforcement of Prohibition, while defeating the purpose of the Act. More recently, the 11th Circuit affirmed the Cunard Court’s conclusion by declaring in Stevens v. Premier Cruises, Inc. that Title III of the Americans with Disabilities Act (ADA) is not inapplicable, as a matter of law, to foreign-flagged cruise ships sailing in U.S. waters. As in Cunard, the Stevens court determined that it would be “strange” if Congress only intended Title III of the ADA to apply to domestic cruise ships, despite the breadth of the Act. Here, with regard to regulating Category 3 vessel emissions, even the EPA admits that Section 213 of the CAA has a broad purpose and reach. Given the scope of the CAA, it definitely would be “strange” if Congress only intended Section 213 to apply to domestic ships in U.S. waters because such an exemption would defeat the purpose of the Act, which is to control emissions that “cause, or contribute to significant air pollution problems.” Since the EPA has already determined that Category 3 vessels cause or contribute to significant air pollution problems, all vessels entering U.S. ports should be regulated by the CAA.

In sum, the U.S. has previously extended its jurisdiction over foreign-flagged vessels located in U.S. waters if the act at issue is sufficiently broad. This precedent provides a sound basis for the EPA to exercise authority over foreign-flagged vessels within the agency’s Category 3 regulations in order to further the CAA’s goal of providing clean ambient air.

114 Id.
115 215 F.3d 1237 (11th Cir. 2000).
116 Id. at 1243. Furthermore, even when an act takes place outside U.S. territory, the Court has recognized that statutes can still be interpreted as applying abroad if the act has a “broad jurisdictional grant,” Steele v. Bulova Watch Co., 344 U.S. 280, 286 (1952), and “sweeping reach.” Id. at 287.
117 Stevens, 215 F.3d at 1243.
118 LETTER TO OMB, supra note 21, at 58-59.
119 Cf. Stevens, 215 F.3d at 1243.
122 See supra notes 50 and 51, and accompanying text.
123 Cf. Cunard, 262 U.S. at 126; Stevens, 215 F.3d at 1243.
124 See, e.g., Cunard, 262 U.S. at 126; Stevens, 215 F.3d at 1243.
E. Category 3 Rulemaking is Not Consistent with the CAA or the EPA’s Past Rulemaking

The EPA’s Category 3 rulemaking is questionable for several reasons. First, the regulation misinterprets the Clean Air Act and significant terms within the Act. Second, this final regulation fails to press for advancement in emissions technology, as required by the CAA and as that section of the Act is interpreted by the courts. Lastly, allowing foreign-flagged vessels to escape regulation is inconsistent with the agency’s recent crackdown on emissions from other mobile sources.

1. EPA’s Final Category 3 Rule Misinterprets the Clean Air Act

Maritime vessels are not explicitly mentioned anywhere in the CAA. However, Congress introduced the expansive category of nonroad engines and vehicles to the CAA through the 1990 Amendments to the Act. These amendments placed all marine vessels into the broad category of nonroad engines, which are regulated by Section 213 of the CAA.

The Category 3 final rulemaking notice explains that the EPA did not make the engines on foreign-flagged vessels subject to the CAA since they are temporarily within the country, as opposed to items that have been imported into the United States. However, the agency’s 2002 memorandum to the OMB argued that foreign-flagged vessels should be regulated because the meaning of “import” in the CAA is “ambiguous.” In its memo, the EPA explained that “legislative history does not suggest that Title II’s use of ‘import’ can only be given its meaning under the customs laws of the United States.”

129 68 Fed. Reg. 9746, supra note 9, at 9759.
130 LETTER TO OMB, supra note 21, at 60.
customs meaning of “import” may not be appropriate in interpreting Section 213 since the CAA and customs laws have very different purposes. The agency further cautioned that interpreting the term “import” as having the same meaning in the CAA as under customs laws may “frustrate section 213’s goals” because this interpretation would leave foreign-flagged vessels unregulated. Supporting the agency’s argument is precedent from the Supreme Court noting that the word “import” should be construed in the ordinary sense. As a result, “import” should be interpreted as meaning “bringing an article into a country from the outside,” which includes the country’s ports and harbors. The item need not be brought into the country through a customs house or even taken off of the ship itself. Thus, by simply entering the waters or ports of the United States, a foreign-flagged vessel is subject to the jurisdiction and laws of the U.S. because it has imported everything on the vessel.

The EPA’s explanation in its 2003 final rulemaking that foreign vessels are outside the scope of the CAA is also undercut by the agency’s arguments in 2002 to the OMB regarding interpretation of the terms “nonroad engines” and “nonroad vehicles.” In its memorandum to the OMB, the EPA described the CAA’s use of the term new nonroad engine as:

132 LETTER TO OMB, supra note 21, at 60.
133 Id.
134 Cunard S.S. Co. v. Mellon, 262 U.S. 100, 121 (1923). The Cunard Court faced the issue of whether the alcohol contained on foreign-flagged passenger ships for the use of the crew and passengers violated the Prohibition Act. Id. at 119. Although the forbidden spirits stayed onboard the ships, the Court determined that by construing the term “import” in its ordinary sense, the alcohol had been brought within U.S. territory, which extends to include ports and harbors. Id. at 122.
135 Id. at 122.
136 Id.
137 Id.
138 Id.
139 68 Fed. Reg. 9746, supra note 9, at 9759.
140 42 U.S.C. § 7550(10) (2000), defining nonroad engine as follows:

an internal combustion engine (including the fuel system) that is not used in a motor vehicle or a vehicle used solely for competition, or that is not subject to standards promulgated under section 7411 of this title [Standards of performance for new stationary sources] or section 7521 of this title [Emission standards for new motor vehicles or new motor vehicle engines].

141 42 U.S.C. § 7550(11) (2000), defining nonroad vehicle as “a vehicle that is powered by a nonroad engine and that is not a motor vehicle or a vehicle used solely for competition.”
as “ambiguous.” 142 However, the agency noted that the definitions of nonroad engines and nonroad vehicles were modeled after the statutory definition “new motor vehicle engine,” which includes those engines that have been imported.143 In fact, neither the term nonroad engine nor nonroad vehicle discusses the origin of the equipment.144 Because the Senate expressly instructed the EPA to define nonroad engines on the basis of function or design,145 the agency’s position in the OMB memorandum is reasonable.146 Critics of the foreign-flag exemption maintain that the EPA should not be permitted to include other exceptions or limitations upon the terms nonroad engines and nonroad vehicles since Congress provided the agency with instructions on how to properly classify the terms.147 However, even the EPA noted in its 2002 OMB memorandum that regulating foreign-flagged vessels is reasonable because Congress failed to provide an exemption here, while other types of mobile sources were given exemptions elsewhere in the CAA.148 For example, the Act does not cover new nonroad vehicles and engines used solely for competition149 or those used for “research, investigations, studies, demonstrations, or training or for reasons of national security.”150 Therefore, because Congress provided explicit limiting language in other sections of the Act to exempt foreign-flagged vessels from the reach of the CAA,151 there is good reason to believe that Congress did not intend to provide an exemption here for foreign-flagged vessels. Hence, it can be argued that there is no basis for the agency’s removal of foreign-flagged vessels from the category of nonroad engines.152

142 LETTER TO OMB, supra note 21, at 58.
143 Id. (citing 42 U.S.C. § 7550 (2000)).
146 See Lickel, supra note 66, at 169 (stating that “Congress effectively enjoined the EPA from classifying marine vessels by flag for the purpose of adopting regulations”).
147 Id.
148 LETTER TO OMB, supra note 21, at 59.
149 Id. at 60 (citing 42 U.S.C. § 7552(10)-(11) (2000)).
150 Id. (citing 42 U.S.C. § 7522(b)(1) (2000)).
151 Id. See also Lickel, supra note 66, at 169-70 (explaining that Section 183(f) of the CAA contains an implicit exception for foreign-flagged vessels by referring to “different ports,” which can only be interpreted to mean foreign ports since the CAA clearly reaches all domestic ports).
152 Lickel, supra note 66, at 169. Extending the CAA to reach foreign-flagged vessels is also reasonable given the past actions and statements of the Executive
2. The EPA's Final Rule Fails to Press for Advanced Technology

Rather than comply with the actual language of Section 213 of the CAA, the OMB convinced the EPA to promulgate Category 3 emissions regulations\textsuperscript{153} that fail to reflect the mandate of Congress.\textsuperscript{154} The EPA's regulations do not fulfill the purpose of the CAA because the final rule does not impose emissions standards that reflect the capabilities of the latest technology,\textsuperscript{155} as required by Section 213.\textsuperscript{156}

Section 213 of the CAA regulates the emissions standards for nonroad engines and vehicles.\textsuperscript{157} Under this section, the EPA Administrator is required to promulgate regulations for new nonroad engines that contribute to air pollution.\textsuperscript{158} Further, the Administrator must set standards that “achieve the greatest degree of emission reduction achievable through the application of technology which the Administrator determines will be available.”\textsuperscript{159} Therefore, Section 213 of the CAA is “a technology-forcing standard”\textsuperscript{160} with an overriding goal of air quality.\textsuperscript{161} Although considerations such as cost, noise, energy, and safety are significant, these factors are intended to be subordinate to the primary goal of improving air quality whenever a standard is technology-forcing.\textsuperscript{162} In fact, when Section 213 of the CAA was enacted, the EPA “was expected to press for development and

\footnotesize{Branch. For example, President Clinton stated that the CAA can be used to reduce air pollution within the territorial sea. S. TREATY DOC. NO. 103-39, at 36 (1994) (referring to nonroad engine sections of the CAA).}

\textsuperscript{153} Welch, supra note 4. See Part II.E.1, supra.

\textsuperscript{154} See Part II.E.1, supra.

\textsuperscript{155} Notice of Proposed Rulemaking, supra note 38, at 14 (noting that “[i]mprovements in fuel systems and engine cooling can reduce Category 3 engine emissions even more than the Annex VI NO, limits would require.”). See also 67 Fed. Reg. 37,548, supra note 13, at 37,571.


\textsuperscript{158} Id. at § 7547(a)(3).

\textsuperscript{159} Id.


\textsuperscript{161} Husqvarna, 254 F.3d at 200.

\textsuperscript{162} Id.
application of improved technology rather than be limited by
that which exists today."163

Based upon the language Congress used in this
technology-forcing section regulating nonroad engines and
vehicles,164 one would expect the EPA to set the emissions
standards that would reflect the newest technological
advancements within the emissions control industry. However,
the EPA’s proposed regulations are based upon information
and studies conducted between the years of 1992 and 1997.165
The EPA itself acknowledged that in the interim there have
been advancements in NOx control, which would permit further
emission reductions beyond the standards instituted by the
final rule.166 Specifically, the agency noted that by using in-
cylinder controls, an additional reduction of thirty percent in
NOx levels beyond Tier 1 can be achieved, while reductions fifty
percent beyond Tier 1 NOx levels can be “achieved by
introducing water into the combustion process.”167

Furthermore, the EPA explained that selective catalytic
reduction (SCR) could reduce NOx emissions by more than
ninety percent.168 At the time the EPA promulgated these
rules, the agency was fully aware that “these [emission
reduction] systems are . . . being used on ferries and cruise
ships,”169 and that “four slow-speed Category 3 marine engines . . . have been successfully equipped with SCR units.”170

Unfortunately, the EPA did not mandate the use of any of
these technologies on Category 3 vessels.171

While commenting on the capabilities of technology, the
EPA also explained that the technology that will reduce
emissions from Category 3 engines is similar to that already in

---

   (quoting S. REP. NO. 91-1196, 2d Sess. 24 (1970), reprinted in 1 LEGISLATIVE HISTORY
   OF THE CLEAN AIR ACT AMENDMENTS 424 (1974)). See also H.R. REP. NO. 95-294, at
165 Notice of Proposed Rulemaking, supra note 38, at 14.
166 67 Fed. Reg. 37,548, supra note 13, at 37,571. The EPA also noted that
   some countries, such as Sweden, are unilaterally pushing for stricter emissions
   reductions from marine vessels. Id. at 37,556. By differentiating fairway and port
dues based upon NOx emissions levels and fuel sulfur content, Sweden reduced NOx
   and sulfur emissions by 75% within five years. Id.
167 Id. at 37,588.
168 Id. at 37,589.
169 Id. at 37,590.
170 Id. at 37,591.
use on other engines.\textsuperscript{172} Although the agency asserted that Category 3 engines are similar to the engines used at municipal power plants to generate electricity,\textsuperscript{173} the EPA made no further mention in the Category 3 rulemaking of the regulations imposed upon or the technologies used at power plants to control emissions.\textsuperscript{174} The agency merely went on to point out that Category 3 engines are not similar to any land-based mobile engines.\textsuperscript{175} However, despite the differences between Category 3 engines and land-based mobile engines, the EPA commented that the engineering principles utilized to control emissions from Category 3 engines and land-based engines are primarily the same.\textsuperscript{176} Therefore, many of the techniques used to control emissions created by smaller nonroad and highway diesel engines can be used on Category 3 engines.\textsuperscript{177} Considering that there are comparable engines to the Category 3 engines and these comparable engines are subject to environmental regulations,\textsuperscript{178} the EPA should have discussed in its rulemaking notice why those available technologies used to control the emissions from power plants and smaller nonroad and highway diesel engines are not mandatory for Category 3 engines. Instead, the EPA refrained from pressing for development in marine emission controls due to “outstanding technical issues” and the lack of current application of existing technology to marine diesel engines.\textsuperscript{179} By failing to promulgate regulations that require the use of technology that is already capable of achieving the stringent emissions limits placed upon land-based engines, the EPA’s action appears arbitrary and unsupported by the agency’s own internal findings.

In sum, the agency’s explanation that it needed additional time to evaluate the capabilities of technology,\textsuperscript{180} is at odds with the basic premise of technology-forcing

\textsuperscript{172} 67 Fed. Reg. 37,548, supra note 13, at 37,564.
\textsuperscript{173} Id.
\textsuperscript{174} See generally id.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 37,567.
\textsuperscript{177} Id.
\textsuperscript{179} 68 Fed. Reg. 9746, supra note 9, at 9750.
\textsuperscript{180} Id. at 9748.
When Congress established technology-forcing standards, the EPA was not expected to be able to make predictions about future advances in technology. Rather, the EPA merely needs to identify the primary steps necessary to develop emission controls and to explain why the agency believes that industry can find a solution before the phase-in period concludes. Since the EPA is required to “press for development,” and is not supposed to be limited by existing technology in setting technology-forcing standards, the agency should not be allowed to promulgate Category 3 emission regulations that reflect standards that are over a decade old.

3. The EPA’s Rulemaking Is Inconsistent With the Agency’s Past Acts

The EPA’s rulemaking is also inconsistent with the more stringent standards it promulgated for smaller marine engines. For example, regulations imposing a nine year phase-in period from 1998 to 2006 upon spark-ignition marine engines, including outboard engines, personal watercraft engines, and jet boat engines, will reduce hydrocarbon emissions by seventy-five percent in 2025. While the agency

---

181 See Stanfield, supra note 160, at 573 (2004) (noting that technology-forcing statutes force industry to improve existing methods and develop new strategies to reduce pollution, rather than rely upon the excuse that better methods do not exist).


183 Phase-in periods are often established to delay when a new regulation will be enforced in order to allow the affected parties to become familiar with the regulation and to develop compliance procedures. Sweet v. Sheahan, 235 F.3d 80, 85-86 (2d Cir. 2000).

184 Natural Res. Def. Council, 655 F.2d at 332.


188 See, e.g., Control of Air Pollution; Final Rule for New Gasoline Spark-Ignition Marine Engines; Exemptions for New Nonroad Compression-Ignition Engines at or Above 37 Kilowatts and New Nonroad Spark-Ignition Engines at or Below 19 Kilowatts, 61 Fed. Reg. 52,088, 52,089 (1996) (to be codified at 40 C.F.R. pts. 89, 90, and 91).

189 Id. at 52,089-90. See also Control of Emissions From Nonroad Large Spark-Ignition Engines, and Recreational Engines (Marine and Land-Based), 67 Fed. Reg. 68,242, 68,244-45 (Nov. 8, 2002) (to be codified at 40 C.F.R. pts. 89, 90, 91, 94, 1048, 1051, 1065, and 1068) (implementing a final rule for control of emissions from
has been pressing for uniformity in land-based emission regulations,\footnote{For example, the EPA set the fuel sulfur content standard for nonroad diesel engines in the construction, agricultural, industrial, and mining industries to match the 15 ppm highway diesel engine standard. 69 Fed. Reg. 38,958, \textit{supra} note 52, at 38,960.} it is odd that larger marine vessels would not be subject to environmental regulations similar to those imposed upon their smaller counterparts.

Ironically, although the EPA recently defended the Category 3 emissions regulations in court as complying with the CAA,\footnote{Bluewater Network v. EPA, 372 F.3d 404, 408 (D.C. Cir. 2004). \textit{See infra} Part IV (discussing the Bluewater case).} the U.S. has been lobbying internationally for years to impose stricter NO\textsubscript{x} limits upon Category 3 vessels.\footnote{Notice of Proposed Rulemaking, \textit{supra} note 38, at 16-18.} Several years prior to issuing the EPA’s final rule, the U.S. submitted a proposal to the United Nations’ Marine Environment Protection Committee (MEPC)\footnote{MEPC 44/11/7, Prevention of Pollution from Ships, Revision of the NO\textsubscript{x} Technical Code, Tier 2 Emission Limits for Marine Diesel Engines at or Above 130 kW, submitted by the United States (May 2002), available at Docket A-2001-11, Document No. II-A-16. The Marine Environment Protection Committee (MEPC) is a committee within the International Maritime Organization (IMO). PAMBORIDES, \textit{supra} note 89, at 81. The IMO is a United Nations agency, which was established in 1958 following an international convention in Geneva. \textit{Kenneth R. Simmonds, The International Maritime Organization} 4 (1994). \textit{See infra} Part III.A (discussing the IMO).} suggesting reductions in the proposed international NO\textsubscript{x} limits by twenty-five to thirty percent beginning in 2007.\footnote{MEPC 44/11/7, Prevention of Pollution from Ships, Revision of the NO\textsubscript{x} Technical Code, Tier 2 Emission Limits for Marine Diesel Engines at or Above 130 kW, submitted by the United States (May 2002), available at Docket A-2001-11, Document No. II-A-16. \textit{See infra} Part III.A (discussing MARPOL Annex VI and its standards).} While the U.S. felt comfortable requesting a lower NO\textsubscript{x} standard internationally in 2001, the EPA claimed in 2003 that more time was necessary to evaluate the capabilities of technology before tougher standards should be imposed in the U.S. upon Category 3 vessel emissions.\footnote{68 Fed. Reg. 9746, \textit{supra} note 9, at 9748.} The inconsistency between these actions is startling.
F. Most Vessels Entering U. S. Ports Will Be Unregulated Under EPA’s Rule

One of the purposes of the Clean Air Act is to “protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” However, the EPA’s Category 3 regulations will not achieve the CAA’s goal of improving air quality for the benefit of the public welfare because the rules do not apply to international vessels.

Studies have shown that there are approximately 88,660 marine vessels registered internationally that are over 100 gross tonnes. In the 1950s, international shippers began registering under “flags of convenience” to avoid the high costs of trading under the U.S. flag. In order to obtain such a designation, a shipper merely needs to establish a shipping company or representative legal entity in a particular country. Despite attempts to establish a “genuine link” between a ship and its flag, this criteria does not reflect actual shipping practices throughout the international community. Therefore, many “flags of convenience” are held by American owned interests. Approximately 94 percent of the vessels

197 68 Fed. Reg. 9746, supra note 9, at 9747.
199 BRUCE FARTHING & MARK BROWN RIGG, FARTHING ON INTERNATIONAL SHIPPING 186-87 (3d ed. 1997). See also PAMBORIDES, supra note 89, at 9 (explaining that shippers often use flags of convenience to pay lower taxes or crew salaries and social security). There are approximately twenty countries that now offer flags of convenience, including Panama, Liberia, Cyprus, Bahamas, and Malta, which are among the largest fleets in the world. FART HING & BROWN RIGG, supra, at 188.
200 FARTHING & BROWN RIGG, supra note 199, at 187. Given the latest technology, flagship status can actually be changed instantaneously without much effort. ADEMUN-ODEKE, SHIPPING IN INTERNATIONAL TRADE RELATIONS 68 (1988).
201 PAMBORIDES, supra note 89, at 4. Many countries began operating Open Registries or “flags of convenience,” which ignored the ship owner’s nationality. Id. at 9. Access to the Open Registries is often very easy and can even be obtained abroad. Id. at 10. Open Registries are usually run by countries with little power and even less desire to consult shipping companies about the registry, id., or interest in requiring more than mere incorporation in the country where the company desires flagship. Id. at 11 n.27.
202 Id. at 12. Often the registries themselves are run out of locations other than those signified by the flag. WILLIAM LANGEWIESCHE, THE OUTLAW SEA 5 (2004) (explaining that ‘Liberia’ is run out of Virginia, ‘Cambodia’ is operated out of South Korea, and a group in London operates ‘Bahamas’).
that call to U.S. ports are foreign-flagged vessels.\textsuperscript{203} As a result of the expanding use of flags of convenience, the overwhelming majority of Category 3 vessels entering U.S. ports will be unregulated by the EPA.\textsuperscript{204}

To briefly summarize Part II, the EPA bowed to political pressure by changing its original position regarding Category 3 regulation and agreeing to issue a weak rule at the urging of the Executive Branch. The EPA’s final regulations fail to uphold the purpose and spirit of the CAA by improperly interpreting and applying Congress’ mandate, thereby allowing the majority of vessels entering U.S. ports to pollute the air without regulation. Extending this sovereignty to foreign-flagged ships frustrates the purpose of the CAA and negatively impacts the health and well-being of Americans.

III. INTERNATIONAL EMISSION STANDARDS

A. The MARPOL Convention

The United Nations (U.N.) developed the International Maritime Organization (IMO) to deal with global maritime problems and to provide guidance to the international community.\textsuperscript{205} The intent of the IMO was to promulgate

\textsuperscript{203} 67 Fed. Reg. 37,548, supra note 13, at 37,563.

\textsuperscript{204} See LANGEWIESCHE, supra note 202, at 7. See also 68 Fed. Reg. 9746, supra note 9, at 9758 (limiting Category 3 emissions standards to new U.S.-flagged marine vessels). Due to the increase in the use of flags of convenience to save money, some critics claim that there are no new U.S.-flagged Category 3 vessels that will fall under the EPA’s emissions regulation. Press Release, Bluewater Network, EPA Lawsuit Decision Allows Shipping Pollution to Grow, (June 28, 2004), http://www.bluewaternetwork.org/press_releases/pr2004june28_cv_ship.pdf. But see 67 Fed. Reg. 37,548, supra note 13, at 37,563 (indicating that increases in U.S. maritime trade will require the manufacture of seven to nine new U.S.-flagged vessels per year).

\textsuperscript{205} The IMO is a United Nations agency, which was established in 1958 following an international convention in Geneva. KENNETH R. SIMMONDS, THE INTERNATIONAL MARITIME ORGANIZATION 4 (1994). The purpose of the agency is to promulgate standards and regulations to govern the shipping industry. Id. at 6-7. Members of the IMO “include not only the traditional maritime countries but also those which rely largely on the shipping services of other countries.” SAMIR MANKABADY, THE INTERNATIONAL MARITIME ORGANIZATION, VOLUME 1: INTERNATIONAL SHIPPING RULES 2 (1984). Currently, there are 166 member states in the IMO. International Maritime Organization, Introduction to IMO, http://www.imo.org/home.asp?topic_id=3 (last visited Nov. 12, 2005). The organization is primarily comprised of an Assembly, a Council, the Maritime Safety Committee (MSC), the Marine Environment Protection Committee (MEPC), the Legal Committee, the Technical Co-operation Committee, and the Facilitation Committee. PAMBORIDES, supra note 89, at 81.
international standards through the passage of Conventions.\footnote{PAMBORIDES, supra note 89, at 83. “Convention” is merely another word for a treaty. LAKSHMAN D. GURUSWAMY ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND WORLD ORDER 73 (2d ed. 1999).} Therefore, before any Convention goes into effect and becomes binding, a sufficient number of countries must ratify it, thereby ensuring that the standard is, in fact, international.\footnote{PAMBORIDES, supra note 89, at 83.}

In the 1970s, the IMO developed the MARPOL Convention,\footnote{MARPOL 73/78 is officially referred to as the International Convention for the Prevention of Marine Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), Nov. 2, 1973, 12 ILM 1319 (1973), as amended Feb. 17, 1978, 1340 U.N.T.S. 184 [hereinafter MARPOL 73/78]. International Maritime Organization, Marine Environment Introduction, available at http://www.imo.org/home.asp (last visited January 8, 2005).} of which the United States is a signatory.\footnote{The United States became a member of the MARPOL 73/78 Convention on August 17, 1950. MANKABADY, supra note 205, at 416.} The MARPOL Convention is a combination of two treaties adopted in 1973 and 1978, covering prevention of pollution of the marine environment by ships.\footnote{MARPOL 73/78, supra note 208.} This treaty regulates oil, chemicals, garbage, sewage, and air emissions through six different Annexes.\footnote{Id. After rules on decision-making, information sharing, and substantive obligations have been established by a framework convention, annexes or protocols are often introduced to create more stringent obligations. Suh-Yong Chung, Is the Convention-Protocol Approach Appropriate for Addressing Regional Marine Pollution?: The Barcelona Convention System Revisited, 13 P A. ST. ENVTL. L. REV. 85, 85 (2004). Annex I of the MARPOL Convention prevents pollution by oil, while Annex II controls pollution caused by noxious liquid substances. IMO, International Convention for the Prevention of Pollution from Ships, 1973, as modified by the Protocol of 1978 relating thereto (MARPOL 73/78), http://www.imo.org/Conventions/contents.asp?doc_id=678&topic_id=258#7. Annex III prevents pollution by harmful substances in packaged form. Id. Pollution by sewage from ships is regulated by Annex IV, and Annex V prevents pollution by garbage from ships. Id. Annex VI sets limits on air pollution from ships and prohibits the intentional discharge of emissions of ozone depleting substances. See generally MARPOL Annex VI, supra note 66. All parties must accept Annexes I and II, but Annexes III-VI are voluntary. London Convention, The International Convention for the Prevention of Pollution from Ships, 1973, MARPOL 73/78, available at http://www.londonconvention.org/marpol_73.htm.} In 1997, the IMO proposed MARPOL Annex VI to set limits on NO\textsubscript{x} emissions from ship exhausts\footnote{MARPOL Annex VI, supra note 66, Regulation 13.} and fuel sulfur content.\footnote{MARPOL Annex VI, supra note 66, Regulation 14(1).} Annex VI regulates the NO\textsubscript{x} emissions from diesel engines installed on ships constructed on or after January 1, 2000 and diesel engines that have undergone a major
conversion on or after that date. The Annex also limits the sulfur content of the fuel used by Category 3 engines to a maximum amount of 45,000 ppm.

Recognizing that the treaty would have to be adopted by a majority of the international community before it would have any effect upon international vessels, the IMO required Annex VI to be ratified by a minimum of fifteen countries with at least fifty percent of world merchant shipping tonnage before it would become active. After seven years, the Annex was

214 MARPOL Annex VI, supra note 66, Regulation 13(1)(a). Once the Annex has gone into effect, it can be applied retroactively to any ship constructed or converted on or after January 1, 2000. Letter from the International Association of Independent Tanker Owners to the U.S. Environmental Protection Agency (July 16, 2002), http://www.intertanko.com/pdf/weeklynews/IntertankoSubmission.pdf. A mandatory NOx Technical Code defines which types of engine conversions fall under the regulation of the Annex, as well as other details such as testing procedures, measurement methods, approved exhaust gas cleaning systems, and the effect of using fuel composed of blends. MARPOL Annex VI, supra note 66, Regulation 13. The Convention set NOx emission limits according to engine speed. MARPOL Annex VI, supra note 66, Regulation 13(3)(a).

215 MARPOL Annex VI, supra note 66, Regulation 14(1). Marine fuel currently has an international maximum sulfur content of 50,000 ppm or 5%. EU Reaches Accord on Ship Emission Sulfur Limits, LLOYD’S LIST, June 29, 2004, available at http://lloydslist.com. However, a country may request that the sulfur limit be lowered even further by submitting a petition to the Organization to designate a location as a SOx Emission Control Area (SECA). MARPOL Annex VI, supra note 66, Appendix III. In a SECA, the sulfur content of fuel used by Category 3 marine engines is limited to a maximum of 15,000 ppm. MARPOL Annex VI, supra note 66, Regulation 14(4)(a). Currently, two SECAs have been designated: the Baltic Sea area and the North East Atlantic, which is comprised of the English Channel, the North Sea, and the Irish Sea. EPA, Final Regulatory Support Document: Control of Emissions from New Marine Compression-Ignition Engines At or Above 30 Liters per Cylinder (January 2003), at 1-9, available at http://www.epa.gov/otaq/regs/nonroad/marine/ci/r03004.pdf. While in a SECA, a ship may either utilize fuel that complies with this lower sulfur limitation, or the vessel may alternatively limit SOx emissions through exhaust gas cleaning systems or other technological methods. MARPOL Annex VI, supra note 66, Regulation 14(4)(b) & (c).

216 MARPOL Annex VI, supra note 66, Article 6(1).
finally ratified in May 2004. It went into effect in May 2005.

Although the U.S. has joined other sections of the MARPOL Convention, Congress has yet to ratify MARPOL Annex VI. Even if the U.S. elects not to ratify Annex VI, which is optional, as a member to the MARPOL Convention, the U.S. must still give effect to the treaty provisions and abide by its mandate.

B. The MARPOL “No More Favorable Treatment Clause”

To prevent states from avoiding compliance by failing to ratify the treaty, the IMO created a “no more favorable
treatment” clause in the MARPOL Convention.222 This clause was intended to ensure that non-signatory states would not be better off than parties who ratified the agreement.223 Thus, the clause removes the motivation for countries to avoid complying with MARPOL provisions and the international standards of the convention by simply refusing to ratify the treaty.224 As a result, the MARPOL Convention creates a true international standard because all member States and even non-members to the convention must comply with ratified conventions.225

The EPA’s Category 3 emissions rule ignores the import of the “no more favorable treatment” clause. Unlike MARPOL Annex VI, which regulates all diesel engines installed after January 1, 2000 or those undergoing a major conversion on or after that date,226 the EPA’s rule is limited to new U.S.-flagged engines.227 The EPA’s regulations simply will not reach the vessel if it is foreign-flagged.228 Therefore, the United States will be obligated to change the EPA’s regulations to ensure that all foreign vessels are complying with MARPOL Annex VI if the U.S. ever opts to join the treaty.229

The shipping industry itself has argued that even the minor discrepancies between the EPA’s rulemaking and MARPOL Annex VI will put U.S.-flagged vessels at a disadvantage.230 According to Intertanko, an international trade association that represents most of the tanker owners and operators throughout the world,231 because the certification procedures, verification requirements, and record keeping requirements vary between the EPA’s final rulemaking and MARPOL Annex VI, U.S.-flagged vessels will be forced to

222 Article 5(4) of MARPOL 73 states: “With respect to the ship of non-Parties to the Convention, Parties shall apply the requirements of the present Convention as may be necessary to ensure that no more favourable treatment is given to such ships.” Id.

223 PAMBORIDES, supra note 89, at 106-07.

224 Id.

225 Id. at 110.

226 MARPOL Annex VI, supra note 66, Regulation 13(1).

227 68 Fed. Reg. 9746, supra note 9, at 9747. However, the EPA adopted a separate definition of “new vessel” which will also regulate those older U.S.-flagged vessels that have undergone a “major conversion.” Id. at 9760.

228 See id. at 9746.

229 See MARPOL 73, supra note 221, Article 5(4).


231 Id. at 1.
obtain dual certification while on foreign routes.\textsuperscript{232} Therefore, U.S.-flagged vessels will be hampered with additional paperwork and procedural requirements due to the EPA's rulemaking,\textsuperscript{233} while foreign-flagged vessels will not be subject to these inconveniences.\textsuperscript{234} Hence, American vessels will be disadvantaged, while other countries will receive more favorable treatment.

The EPA has acknowledged that in order to reduce marine air emissions effectively, a collaborative effort is needed within the international community.\textsuperscript{235} While claiming that it instituted regulations that mimic the international standard, the EPA has in fact acted unilaterally by promulgating regulations that disregard the enforcement of the MARPOL Annex VI regulations upon foreign-flagged vessels.\textsuperscript{236} Because the CAA and international law provide the EPA with the authority to regulate all maritime vessels within U.S. waters,\textsuperscript{237} the U.S. could avoid giving favorable treatment to foreign-flagged vessels if it chose to regulate all vessels entering U.S. waters. Therefore, although the EPA's final regulation doesn't technically set a different emissions standard, by exempting nearly 94 percent of the marine traffic into U.S. ports,\textsuperscript{238} the EPA's rule is not only ineffective, but it also violates the spirit of MARPOL by placing additional restrictions on US-flagged vessels.\textsuperscript{239}

IV. EPA CATEGORY 3 EMISSIONS REGULATIONS UPHELD

A. The D.C. Circuit Gave Deference to EPA's Category 3 Regulations

The EPA’s rules covering the emissions from Category 3 vessels were recently challenged in Bluewater Network v. Environmental Protection Agency.\textsuperscript{240} Bluewater Network (hereinafter Bluewater) is an organization dedicated to

\textsuperscript{232} Id. at 8.
\textsuperscript{233} Id.
\textsuperscript{234} 68 Fed. Reg. 9746, supra note 9, at 9747-48.
\textsuperscript{235} 67 Fed. Reg. 37,548, supra note 13, at 37,550.
\textsuperscript{236} 68 Fed. Reg. 9746, supra note 9, at 9747-48.
\textsuperscript{237} Lickel, supra note 66, at 160-65. See also Part II.E.1, supra.
\textsuperscript{238} 67 Fed. Reg. 37,548, supra note 13, at 37,563.
\textsuperscript{239} See MARPOL 73, supra note 221, Article 5(4).
\textsuperscript{240} 372 F.3d 404 (D.C. Cir. 2004).
reducing air and water pollution and global warming.241 The environmental organization filed a petition for review with the D.C. Circuit Court, challenging the EPA’s two-tiered Category 3 marine diesel engine emission standards.242 In this petition, Bluewater alleged that the Category 3 regulations violated Section 213(a)(3) of the CAA because the rulemaking failed to reduce emissions from these vessels and disregarded the emissions from foreign-flagged ships.243 However, the D.C. Circuit determined that the EPA “reasonably interpreted and implemented the CAA,” thereby denying Bluewater’s petition for review.244 While evaluating Bluewater’s petition, the D.C. Circuit court applied the two-pronged test of Chevron, Inc. v. Natural Resources Defense Council.245 The Chevron test dictates that when a court decides whether an agency’s interpretation of a statute is permissible, the court must first determine whether Congress has spoken on the issue.246 If Congress has clearly expressed its intent on the issue, then both the agency and the court must give effect to the congressional intent.247 However, if Congress has not spoken directly on the issue, then the court must determine whether the agency’s decision is permissible.

241 About Bluewater Network, Bluewater Network, http://www.bluewaternetwork.org/aboutus.shtml (last visited Nov. 12, 2005). Bluewater is particularly dedicated to reducing pollution from boats and watercraft since that was the organization’s primary purpose upon its foundation. Id.

242 Bluewater, 372 F.3d at 406. See also note 19, supra (explaining that Bluewater was a party to the original lawsuit challenging the EPA’s 1999 marine vessel regulations).

243 Id.

244 Id.

245 467 U.S. 837, 842-43 (1984). Chevron involved an action brought by the Natural Resources Defense Council (NRDC) challenging the EPA’s decision to allow industrial sites to view their emissions as if they are contained in a “bubble.” Id. at 840. Under this bubble concept, as long as the net amount of emissions at the facility do not increase, the EPA allows the company to increase emissions from a single source as long as an equivalent decrease in emissions is made somewhere else within the plant. Id. The NRDC alleged that this bubble concept was not a reasonable interpretation of the term “stationary source.” Id. Chevron U.S.A., Inc. was allowed to intervene and argue in favor of the EPA’s regulation. Id. at 841 n.4. The Court upheld the EPA’s regulation, id. at 866, after applying the two-fold test described above.

246 Id. at 842.

247 Id. at 842-43. With regard to Congressional intent, the judiciary ordinarily presumes that Congress does not intend to override treaties, so courts will try to interpret federal statutes and treaties dealing with the same subject (such as the CAA and MARPOL Annex VI here) as being compatible. Treaty Power, supra note 220, at 216. Therefore, if MARPOL Annex VI had been ratified prior to the regulation of nonroad vehicles in the 1990s, the Bluewater court might have struck down the exemption to foreign-flagged Category 3 vessels. Cf. id.
given the construction of the statute. Under this precedent, the Bluewater court had to give Chevron deference to the EPA’s regulations unless the court determined that the decision was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”

Reviewing the EPA’s interpretation under the arbitrary and capricious standard of review, the Bluewater court was satisfied that the EPA had interpreted and implemented the CAA in a reasonable fashion. The court stated that the agency was not required to “adopt the most stringent standards,” but rather had to develop regulations that “reduce emissions to the greatest degree possible after considering the spectrum of available technologies and the costs and benefits associated with those technologies.” The court also noted that the agency had committed itself to implementing new technologies into tighter emissions standards when the EPA revisits the issue in 2007. Although the regulations did not reflect the current capabilities of technology, the court was satisfied that the agency took action “akin to the anti-backsliding provision” that the D.C. Circuit had previously upheld in Sierra Club v. EPA. Finally, the Bluewater court explained that Sierra Club states that the EPA must consider

\[248\text{ Chevron, 467 U.S. at 843.}\]
\[250\text{ Id. at 411.}\]
\[251\text{ Id. at 408.}\]
\[252\text{ Id. at 412. In promulgating its final rule, the EPA opted to wait until 2007 to revisit the issue of instituting Tier 2 emissions standards, which would be lower than the international MARPOL Annex VI levels. 68 Fed. Reg. 9746, supra note 9, at 9749. The agency explained that there were “several outstanding technical issues concerning the widespread commercial use of these technologies” that mandated waiting before declaring Tier 2 emissions standards. Id. at 9748. By deferring the declaration of Tier 2 standards, the EPA would have time to “obtain important additional information on the use of the these [sic] advanced technologies.” Id. According to the EPA, this new information may include (1) new developments as manufacturers continue to make various improvements to the technology and address any remaining concerns, (2) data or experience from recently initiated in-use installations using the advanced technologies, and (3) information from longer-term in-use experience with the advanced technologies that will be especially helpful for evaluating the long-term durability of emission controls.}\]
\[253\text{ Id. See also Part II.E.2, supra.}\]
\[254\text{ 325 F.3d 374, 379-80 (D.C. Cir. 2003). Sierra Club involved a challenge to an EPA regulation that instituted an anti-backsliding provision for motor fuel regarding anti-toxic regulations. Id. at 378. The anti-backsliding rule in Sierra Club would prevent refiners or importers from increasing the toxicity of the emissions from their fuels beyond the baseline levels determined by emissions performance in 1998-2000. Id.}\]
other factors aside from technology in its decision making process, including safety, cost, lead time, noise, and energy.\footnote{Bluewater, 372 F.3d at 411-12.} The D.C. Circuit noted that when it previously interpreted statutes similar to Section 213 of the CAA, these other statutes did not dictate how the agency must weigh all the possible factors during its rulemaking.\footnote{Id.} Therefore, the court determined that a hierarchy among the factors should not be implied when interpreting Section 213.\footnote{Id.  But see Husqvarna AB v. EPA, 254 F.3d 195, 200 (D.C. Cir. 2001) ("The overriding goal of [Section 213(a)(3) of the CAA] is air quality and the other listed considerations, while significant, are subordinate to that goal.").}

Regarding Bluewater’s concerns about the rule’s foreign vessel exemption, the court declared this claim premature since Bluewater failed to respond to the EPA’s defense that waiting to resolve the issue until the 2007 Tier 2 rulemaking would not “lead to any significant loss in emissions reductions.”\footnote{Bluewater, 372 F.3d at 413.} The EPA and the court both determined that this delay would not cause losses in emissions reductions because foreign-flagged ships would still be required to comply with the MARPOL Annex VI standards.\footnote{Id.  Bluewater addressed this argument in its brief by arguing that the EPA is misconstruing its mandate, which is actually to “set standards for emissions from new nonroad engines ‘which in the Administrator’s judgment cause, or contribute to, [ozone] pollution.’” Brief of Petitioner at 22, Bluewater Network v. EPA, 372 F.3d 404 (D.C. Cir. 2004) (No. 03-1120) (citing 42 U.S.C. §7547(a)(3)). South Coast Air Quality Management District submitted a separate brief noting that the argument that there would be no loss in emission reductions was contradicted by the agency’s own calculations showing that Category 3 emissions were expected to rise between 2000 and 2030. Brief for South Coast Air Quality Management District as Amici Curiae Supporting Petitioner, Bluewater Network v. EPA, 372 F.3d 404 (D.C. Cir. 2004) (No. 03-1120).}

\section*{B. EPA Failed to Take a “Hard Look” at the Environmental Consequences}

Although arbitrary and capricious review of the EPA’s decision is typically mandated by \textit{Chevron v. NRDC},\footnote{467 U.S. 837, 842-43 (1984).  See notes 246-50 supra and accompanying text, discussing the \textit{Chevron} two-step analysis.  See also 42 U.S.C. § 7607(b) (2000).} in \textit{Bluewater}, the EPA was still required to take a “hard look”\footnote{See note 16, supra.} at the environmental consequences of the Category 3 regulations. In cases involving review of agency decisions, appellate courts are typically very deferential towards the actions of agencies if
the issue requires technical expertise. 261 But, since the court’s role is to ensure that the agency is publicly accountable, 262 the public will suffer 263 if, as here, the court merely gives deference to an agency action that fails to push technology to reduce emissions to the lowest level achievable. 264 While it is clear that courts must not substitute their own judgments for those of the agency, a “court must make a careful and searching inquiry into the facts.” 265 If the court determines that there is an air of bias in the agency’s decision, less deference may be appropriate even though the agency is a source of expertise on the matter. 266 In situations where bias exists, the court must apply substantial evidence review, which requires the court to examine policy considerations, as well as factual evidence. 267 Furthermore, the Supreme Court has even endorsed a careful review of the record in cases where closer scrutiny will prevent judicial review from being “meaningless.” 268 Therefore, agencies should substantiate their decisions with factual evidence and sound policy decisions to ensure proper judicial review, as well as to inspire public confidence. 269

Closer scrutiny may also be justified in CAA cases since Congress is wary of the EPA’s actions with regard to implementing the Act. 270 Specifically, Congress has taken a


262 United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980).

263 Angus MacBeth, et al., Cartoon Science: The Struggle Between Politics and Science at the Environmental Protection Agency, 6 NATIONAL LEGAL CENTER FOR THE PUBLIC INTEREST 5, 24-25 (May 2002).

264 See Part II.E.2, supra (discussing technology-forcing regulations and the EPA’s admission that technology is capable of further emissions reductions below the standards set by the final Category 3 emissions rule).


266 Chem. Mfrs. Ass’n v. EPA, 28 F.3d 1259, 1265 (D.C. Cir. 1994) (explaining that if the EPA applies a model rigidly, then the court will be forced to use a more searching inquiry).


269 Am. Fed’n of Labor, 617 F.2d at 651-52. See also United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980) (stating that the court’s task is ensure public accountability “by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument”).

270 THE CLEAN AIR ACT HANDBOOK, supra note 5, at 8.
critical look at the EPA’s failure to clean up the ambient air,271 declaring that “the EPA needs to change its current structure to allow science to play a more significant role in decisions.”272 As a result, both the House and the Senate have proposed legislation to create a Deputy Administrator for Science and Technology to oversee EPA decisions.273 This Deputy Administrator would be entrusted with the duty of ensuring that the EPA is using appropriate and relevant research to support its rulemaking.274 Furthermore, the Senate noted that in order to remove political bias from decision making within the EPA, the Assistant Administrator for Research and Development, who occupies the highest science job in the agency, should be appointed to a term of six rather than four years.275 By politically insulating the EPA’s highest ranking science position, the Senate hopes that the agency will focus more on science and will be able to achieve continuity across administrations.276

Even the EPA has noted that over the last decade, concerns have been growing about its ability to assess risks to human health and the ecosystems.277 Confidence in the agency’s expertise is lagging for two primary reasons: research and development only comprise about seven percent of the agency’s total budget,278 and policymakers are typically attorneys lacking formal scientific training.279

271 Id.
276 Id.
277 Id. at 6.
278 Id. at 5. Even when the EPA is aware of environmental risks, the agency can be placed under pressure from the Executive Branch to refrain from taking action to enforce existing regulations. Welch, supra note 4. Former EPA Administrator Christie Todd Whitman wrote to Vice President Dick Cheney in 2001 expressing concern about the EPA’s lack of action to force power companies to upgrade their emissions controls. Id. Whitman warned Cheney, “We will pay a terrible political price if we undercut or walk away from enforcement cases. It will be hard [for the EPA] to refute the charge that we are deciding not to enforce the Clean Air Act.” Id. Later, Whitman remarked that “improv[ing] the role of science in decision-making” was one of the agency’s top priorities. Alan Charles Raul & Julie Zampa Dwyer, “Regulatory Daubert”: A Proposal To Enhance Judicial Review Of Agency Science By Incorporating Daubert Principles Into Administrative Law, 66 LAW & CONTEMP. PROBS. 7, 9 (2003), available at http://www.law.duke.edu/journals/lcp/articles/lcp66dAutumn2003p7.htm.
Due to the lack of resources and technology within the EPA, as well as Congressional concerns of political bias, the Bluewater court should have been less deferential to the EPA with regard to Category 3 emissions -- a situation that also involves international ramifications\textsuperscript{280} and interpretation of Congressional intent.\textsuperscript{281} Here, the Bluewater court had a duty to use less deference in its review of the evidence, regardless of the EPA’s supposed expertise, due to the indications of bias on the record.\textsuperscript{282} For example, while the EPA claims that the MARPOL Annex VI provisions are sufficient domestic standards, the United States has been actively pushing the IMO for stricter international NO\textsubscript{x} regulations for several years.\textsuperscript{283} Moreover, the EPA has directly acknowledged that technological advancements are capable of further reducing emissions.\textsuperscript{284} In fact, the EPA notes that much of the same technology that will be used to control Category 3 marine emissions is similar to the technology that is used to control emissions from highway diesel engines.\textsuperscript{285} If the EPA has imposed steep reductions in emissions from land-based engines that use the same technology,\textsuperscript{286} it is unclear why the EPA would treat marine emissions regulations differently. Furthermore, the EPA was originally considering implementing emissions controls on \textit{all} vessels in U.S. waters, including foreign-flagged vessels, and explicitly setting Tier 2 NO\textsubscript{x} reductions at thirty percent beyond the MARPOL Annex VI standards prior to discussions with the OMB.\textsuperscript{287} Given this background, it is hard to believe the agency’s explanation that it has chosen to mimic the MARPOL Annex VI standards for now, while planning to assess the capabilities of technology to...

\textsuperscript{280} \textit{See} Part III, \textit{supra}.

\textsuperscript{281} \textit{See} Part II.E.1, \textit{supra}.

\textsuperscript{282} \textit{See} Chem. Mfrs. Ass’n v. EPA, 28 F.3d 1259, 1265 (1994) (explaining that if the agency applies a model rigidly, then the court will be forced to use a more searching inquiry).

\textsuperscript{283} 67 Fed. Reg. 37,548, \textit{supra} note 13, at 37,554 (“At the same time, the United States government supports a revision of the Annex VI standards for NO\textsubscript{x} emissions, taking into account the emission reduction potential of new control technologies.”). \textit{See supra} Part II.E.2.


\textsuperscript{285} 67 Fed. Reg. 37,548, \textit{supra} note 13, at 37,567.

\textsuperscript{286} \textit{E.g.}, the EPA set the fuel sulfur content standard for nonroad diesel engines in the construction, agricultural, industrial, and mining industries to match the 15 ppm highway diesel engine standard. 69 Fed. Reg. 38,958, \textit{supra} note 52, at 38,960.

\textsuperscript{287} \textit{LETTER TO OMB, supra} note 21, at 58, 72.
meet lower emission standards in the future. 288 By ignoring the bias on the record and merely pushing the EPA’s decision through under the loose arbitrary and capricious standard, the Bluewater court, rather than actual scientific experts, ultimately ended up deciding that the agency’s regulations were adequate. 289

The Bluewater court also failed to address whether the EPA considered the most relevant data when establishing its rulemaking. 290 Since 1970, nonroad engine and vehicle NOx and SOx emissions have continued to climb. 291 The picture becomes even more bleak when one considers that researchers determined in 2003 that Category 3 vessels might actually be responsible for producing more than twice as much NOx as previously calculated. 292 However, the EPA based its proposal and new regulations upon NOx and PM data collected in 1996 and then relied upon models to estimate the emissions for the years after 1996. 293 In one of its rulemaking notices, the EPA claimed that by applying the Tier 2 standards to just U.S.-flagged vessels, NOx emissions would be reduced by approximately eleven percent by 2030. 294 Since the EPA utilized outmoded data as the baseline from which to formulate its decision, the actual improvements to the environment as a result of the new regulations could be less than the EPA determined. If this new NOx data collected in 2003 was not utilized by the agency, the rulemaking may have been arbitrary and capricious for failure to use accurate scientific methods.

Finally, the agency’s decision mandated less deference by the court because the regulation touched on an international issue. Courts should extend less deference whenever a situation involves an ambiguous statute that may conflict with international law. 295 The Supreme Court determined in

---

288 See 68 Fed. Reg. 9746, supra note 9, at 9748.
289 See MacBeth et al., supra note 263, at 25.
293 Notice of Proposed Rulemaking, supra note 38, at 29-30.
294 Id. at 86.
295 Murray v. Schooner Charming Betsy, 6 U.S. (1 Cranch) 64, 118 (1804).
Murray v. Schooner Charming Betsy that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” Therefore, it was inappropriate for the Bluewater court to apply deference to the EPA’s decision because Category 3 emissions regulation involves international vessels and will affect the U.S.’s obligation to uphold the spirit of the no more favorable treatment clause of the MARPOL Convention.

From a policy perspective, the Bluewater court should have been skeptical of the agency’s decision to automatically exempt 94 percent of the vessels entering U.S. ports from its pollution regulations. As discussed supra, the EPA founded its interpretation of CAA upon improper definitions of the terms nonroad engine and nonroad vessel. Further, the EPA declared in its final rule that the U.S. lacked jurisdiction because these vessels are only temporarily within the country. However, these rationales directly conflict with legal precedent and the EPA’s own arguments in 2002 to the OMB regarding interpretation of the CAA and proper environmental policy. Hence, the Bluewater court should have considered the policy implications of allowing the EPA to create a loophole for foreign-flagged vessels, while regulating emissions from U.S.-flagged Category 3 vessels.

C. The D.C. Circuit Places Burden on Bluewater

Despite the numerous reasons for which the court should have been skeptical of at the agency’s decision, the Bluewater court still chose to be deferential to the EPA. In supporting its deference, the court declared that Bluewater needed to show that instituting the EPA’s regulations would cause a loss in emissions reductions. The court also assumed that regardless of whether the EPA instituted a blanket

296 Id. See also Lauritzen v. Larsen, 345 U.S. 571, 578 (1953) (quoting Murray, 6 U.S. at 118).
297 See supra Part III.B.
298 67 Fed. Reg. 37,548, supra note 13, at 37,563.
299 See supra Part II.E.1.
300 68 Fed. Reg. 9746, supra note 9, at 9759.
301 See supra notes 108-15 and accompanying text.
302 See supra Part II.E.1 (discussing the EPA’s original interpretation of the terms nonroad vehicle, nonroad engine, and import).
304 Id. at 413.
exemption to foreign-flagged vessels, these ships would comply with MARPOL Annex VI regulations while in U.S. ports.\textsuperscript{305} Both of these assumptions were in error.

The \textit{Bluewater} court stated that deference to the agency’s decision was appropriate because Bluewater Network failed to show that by instituting the Category 3 regulations, there would be a loss in emissions reductions.\textsuperscript{306} Here, the court seems to say that by maintaining the status quo or making minor improvements to air quality, the EPA fulfilled the mandate of Section 213 of the CAA.\textsuperscript{307} However, by putting this burden on the petitioner to show that there will not be a reduction in emissions by instituting weak regulations, the court misinterpreted the purpose of Section 213.\textsuperscript{308} When Congress drafted this section of the CAA, the section was written to be technology-forcing.\textsuperscript{309} As discussed in Part II.F infra, technology-forcing regulations are intended to provide the greatest protection to the public health and welfare, while the costs of implementation are secondary. Ironically, the D.C. Circuit itself stated in 2001 that “[t]he overriding goal of [Section 213(a)(3) of the CAA] is air quality and the other listed considerations, while significant, are subordinate to that goal.”\textsuperscript{310} Therefore, one must question how the \textit{Bluewater} court can be satisfied that the agency has promulgated regulations that adequately protect the public health and welfare if the agency is not pressing for the development of new technology. As a result, the effects of these lax regulations will not be measurable within the next twenty to thirty years.\textsuperscript{311} In fact, it may take longer than twenty or thirty years before a positive impact on the environment is noticeable since the MARPOL Annex VI standards are not going to be adopted and applied to all vessels under the EPA’s new regulations.\textsuperscript{312} Here, the \textit{Bluewater} court had a duty to question why the agency failed to institute regulations that would provide greater protection to

\textsuperscript{305} Id.
\textsuperscript{306} Id.
\textsuperscript{307} See id. at 411.
\textsuperscript{308} Husqvarna AB v. EPA, 254 F.3d 195, 201 (2001) (“CAA section 213 is a technology-forcing standard.”).
\textsuperscript{309} Id. See also 42 U.S.C. § 7547(a)(3) (2000).
\textsuperscript{310} Husqvarna, 254 F.3d at 200.
\textsuperscript{311} Lickel, supra note 66, at 150.
\textsuperscript{312} Id.
the public health and welfare.\textsuperscript{313} Hence, the court should have interpreted Section 213 literally and should have mandated that the emissions regulations press for improved technology, as Congress intended,\textsuperscript{314} so that the improvements in air quality could be felt sooner.

The Bluewater court also upheld the agency’s action based upon the assumption that regardless of the EPA’s foreign-flagged vessel exemption, foreign-flagged ships would still comply with the MARPOL Annex VI standards.\textsuperscript{315} However, Annex VI leaves the issue of compliance to port states.\textsuperscript{316} Therefore, the compliance of foreign-flagged vessels with the international standards can only be verified through parameter checks, which in the United States are typically conducted by the U.S. Coast Guard.\textsuperscript{317} The EPA’s Category 3 regulations do not order the Coast Guard to conduct parameter checks to ensure compliance with the international standards.\textsuperscript{318} If the Coast Guard is not going to conduct inspections or parameter checks upon foreign-flagged vessels, there is no reason to assume that all foreign-flagged vessels will automatically comply with the MARPOL Annex VI standards while in U.S. ports.\textsuperscript{319} Since the U.S. has yet to

\textsuperscript{313} Am. Fed’n of Labor v. Marshall, 617 F.2d 636, 651-52 (1979). \textit{See also} United Steelworkers of Am. v. Marshall, 647 F.2d 1189, 1207 (D.C. Cir. 1980) (stating that the court’s task is ensure public accountability “by requiring the agency to identify relevant factual evidence, to explain the logic and the policies underlying any legislative choice, to state candidly any assumptions on which it relies, and to present its reasons for rejecting significant contrary evidence and argument”).


\textsuperscript{315} Bluewater Network v. EPA, 372 F.3d 404, 413 (2004).

\textsuperscript{316} MARPOL Annex VI, supra note 66, Regulation 11.

\textsuperscript{317} 67 Fed. Reg. 37,548, \textit{supra} note 13, at 37,552. The U.S. Coast Guard has diverse responsibilities, including maritime security, mobility, and safety, national defense, and protection of natural resources. U.S. Coast Guard (USCG) Publication 1, U.S. Coast Guard: America’s Maritime Guardian, at 5 (Jan. 1, 2002), \textit{available at} http://www.uscg.mil/overview/Pub/5/201/contents.html. Within its responsibilities of protecting natural resources, the USCG protects marine habitats, marine mammals, and endangered marine species, as well as enforces laws regarding the discharge of oil and other hazardous substances into the nations waters. \textit{Id.} at 10. Furthermore, the USCG inspects foreign vessels and is the first to respond to environmental disasters. \textit{Id.}

\textsuperscript{318} \textit{See generally} 68 Fed. Reg. 9746, \textit{supra} note 9.

\textsuperscript{319} Flag states are primarily responsible for implementing MARPOL Annex VI and issuing the requisite certificates. \textit{PAMBORIDES, supra} note 89, at 58. However, the number of vessels operating under “flags of convenience” has rapidly been growing. \textit{Id.} at 12. Because “flags of convenience” are obtained from countries that have no means to enforce international standards, \textit{id.} at 10, it is reasonable to anticipate that
ratify this treaty, and there is no legislation in place to implement the Annex, the Bluewater court erred in stating that compliance with the Annex standards would be assured because there simply will be no one enforcing the MARPOL Annex VI standards on foreign-flagged vessels.

V. CONCLUSION

Although the United States conducts more sea-trading than any other nation, the EPA caved under political pressure from the OMB to provide a foreign-flag exemption to Category 3 marine vessels in its emissions regulations. By failing to monitor emissions from foreign-flagged vessels, the United States continues its pattern of exhibiting “disregard for what is considered acceptable by the rest of the world,” while mocking the goals of the CAA.

sometimes Annex VI standards will not be complied with in U.S. ports without U.S. Coast Guard enforcement. See Geoffrey Palmer, New Ways to Make International Environmental Law, 86 Am. J. Int’l L. 259, 263 (1992) (noting that even ratification by a country does not mean that the agreed upon standards are being observed or monitored).


See 68 Fed. Reg. 9746, supra note 9, at 9757.

322 372 F.3d 404 at 412-13.

323 A representative with the US Coast Guard who is responsible for conveying such guidance to the field offices confirmed that “since the US has not yet ratified Annex VI, [the Coast Guard has taken the position that it] can’t enforce it.” E-mail from Wayne Lundy, US Coast Guard, to Sandra Snyder (Dec. 8, 2005, 8:47 am EST) (on file with author). See also ALEXANDRE KISS & DINAH SHELTON, INTERNATIONAL ENVIRONMENTAL LAW 587-600 (2d ed. 2000) (arguing that mechanisms must be in place to supervise application of standards and rules because merely creating the standard itself does not ensure that the problem will be resolved).

324 LANGEWIESCHE, supra note 202, at 63.


326 68 Fed. Reg. 9746, supra note 9, at 9746.

327 PAMBORIDES, supra note 89, at 127 (1999).

328 42 U.S.C. § 7401(b) (2000) (declaring a purpose of the CAA to be “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare and the productive capacity of its population”).
Regardless, the EPA might find itself subject to further litigation due to the insufficiencies of the Category 3 emissions standards since Bluewater Network cautioned the EPA that it might face another lawsuit if MARPOL Annex VI were ever ratified in the U.S. However, due to the amount of deference that courts typically give to expert agencies on technical matters, it is unlikely that further litigation will overturn the D.C. Circuit’s decision. Hence, if courts are unwilling to stop providing deference to EPA rulemaking despite evident political bias, it is essential for Congress to pass proposed legislation creating the position of Deputy Administrator for Science and Technology within the EPA and changing the duration of term of the Assistant Administrator for Research and Development, so that the agency is capable of focusing more on science and less on politics. If one of these steps is not taken, the Executive Branch will continue to have the power to make a mockery out of the CAA by requesting that the EPA does not take all the available actions to improve air quality.

Sandra Y. Snyder†

---

† B.S., chemical engineering, University of Oklahoma; J.D. candidate 2006, Brooklyn Law School. Special thanks to Janea Scott for introducing me to the subject and to the staff of the Brooklyn Law Review, particularly Managing Editor Ryan Micallef and Executive Articles Editor Brendan Kehoe. Dedicated in memory of Patricia D. Snyder.